

**NON-JUDICIAL MODELS OF PROTECTION: THE
ADMINISTRATIVE APPEALS**

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1. ADMINISTRATIVE APPEALS AND PUBLIC ADMINISTRATION “JUSTICE FUNCTION”

The category of the administrative appeals¹ in Italy is composed of: the opposition appeal, the hierarchical appeal, the hierarchical improper appeal and the extraordinary appeal to the Italian President. Administrative appeals are instruments of protection through which citizens have the chance to challenge the activity of a public administration, not before a Judge, but rather before an administrative body. This phenomenon was born as an expression of the absolute State and of the related pardoning power of the monarch, wielded by his public servants. In this political context, the citizen was essentially devoid of the possibility of challenging administrative activity before a judge; consequently administrative appeals represented the only way of protection offered by the law, or, better, represented a further way to re-mark the one-sidedness and incontestability of public power. In that historical period, in fact, these remedies were not really able to protect citizen's interests: the characteristics of the absolute State and the identification of the general interest with the interest of the State (Hegel) required that none, outside the same administration, could judge the s.c. “administrative affairs”. The broad autonomy and discretion of public administration were considered direct consequence of its entitlement of the duty and responsibility of pursuing public interest protection. So, citizen appeal ended up representing a simple contribution to the public activity legality, whereas individual interest found its protection only if and when it coincided with the administration interest.

Even after the institution of the IV Section of the State Council and the related identification of a Court in condition to judge the legitimacy of public administration

¹ Administrative appeals discipline A. TRAVI, *Ricorsi amministrativi*, (voce) in *Dig. disc. pubbl.*, XII, Torino, 1997, 381 ss.; G. FERRARI, *I ricorsi amministrativi*, in *Trattato di diritto amministrativo*, a cura di S. CASSESE, 2003, 4147 ss.; A. TRAVI, *Lezioni di giustizia amministrativa*, Torino, 2013, 143 ss.; M. IMMORDINO, *I ricorsi amministrativi*, in *Giustizia amministrativa*, a cura di F.G. COCA, Torino, 2013, 609 ss.

activity, administrative appeals continued to have a fundamental role: to sue a public body, in fact, was necessary to gain the finality of the administrative measure², achievable through the use of administrative appeals. Even in this context, hence, the “defensive” value of administrative appeals was rather restricted: it was sufficient for public administration to remain inactive for avoiding the finality of the contested measure, consequently precluding the judicial protection. Hereafter, the Italian Constitution recognized a clear preference towards judicial remedies and, subsequently, the finality of the administrative measures was no longer considered as an admissibility requirement for the trial (l.n. 1034/1971). Nevertheless, administrative appeals had not been totally abandoned: although during this period the decline began (still current). Some years later, the state legislator issued a reform containing a systematic and homogeneous discipline of the administrative appeals (d.P.R. 24 November 1971, n. 1199³), which still represent the fundamental regulatory framework today.

The complex evolution of administrative appeals discipline is strictly linked to the passage from the absolute State to the liberal (or subject to the rule of law) State and, after, to the administrative jurisdiction achievement, concurrent with the arise of the welfare State. The previous system – based on the finality of the administrative measure – justified doubts as to the legitimation of ascribing a specific protective function to administrative appeals, enabling them to fulfill more public administration internal needs rather than

² Finality of administrative measure and administrative appeals L. RAGNISCO, M. ROSSANO, *I ricorsi amministrativi*, Roma, 1954; F. BENVENUTI, *Giustizia amministrativa*, (voce) in *Enc. dir.*, XIX, Milano, 1962, 589 ss.; G. BERTI, *La definitività degli atti amministrativi*, in *Arch. giur.*, 1965, 80 ss.; G. MIELE, *Passato e presente della giustizia amministrativa in Italia*, in *Riv. dir. proc.*, 1966, 1 ss.; L. MAZZAROLLI, *L'atto definitivo, la teoria dell'assorbimento e la riforma delle leggi sulla giustizia amministrativa*, in *Studi in memoria di E. Guicciardi*, Padova, 1975, 701 ss.; F.G. COCA, *Linee evolutive della giustizia amministrativa*, in *Ann. Perugia*, 1977, 375 ss.; L. MIGLIORINI, *Ricorsi amministrativi*, (voce) in *Enc. dir.*, XL, Milano, 1989, 684 ss.

³ D.P.R. 24 novembre 1971, n. 1199 P. VIRGA, *I ricorsi amministrativi*, Milano, 1972; G. PALEOLOGO, *La riforma dei ricorsi amministrativi*, Milano, 1975; A. QUARANTA, G. GRASSO, *I ricorsi amministrativi*, Milano, 1981; A. DE ROBERTO, P.M. TONINI, *I ricorsi amministrativi*, Milano, 1984

citizens' interests. This is the reason why, according to the traditional concept of the administrative appeals⁴, these institutes were initially considered not properly contentious instruments, but rather a (possible) procedural stage, through which the citizen had the discretion of participating in the definitive measure formation. In light of the fact that the judicial conditioned system was abolished, nowadays this concept is considered outdated: the circumstance that the citizen can freely choose to use or not to use the administrative claims under consideration, renders it incontrovertible to place administrative appeals into the sole area of the citizen protection remedies.

This process seems coherently framed in the wider evolution of the public interest conception. As we said, administrative protection institutes arose in an historical context where the State was considered the only one subject legitimate to individuate and pursue public interest, through the exercise of authoritative activity. At the time, the intervention of the executive power was limited to those fields essential to guarantee "external" protection to private liberties and ownerships, as public order, justice, finances. So, it was taken for granted that the role of the citizen was "passive" in front of administrative choices: the law (direct expression of popular sovereignty) – circumscribing the field of administrative activity – prevented the State from overtake these borders, but, at the same time, ascribed to it a broad liberty of action. With the rise of the multi-class social State and the consequential expansion of the fields of intervention of public administration, a slow but inescapable process of administrative authority reduction began: from the need of a strong executive power – able to protect the middle class in the exercise of its liberties – we moved to the demand of a complex society interested in its rights and expectations guarantee, even through a deeper judgment of public activity.

⁴ Traditional conception of the administrative appeals V. BACHELET, *La giustizia amministrativa nella Costituzione italiana*, Milano, 1966, 78; A.M. SANDULLI, *Ricorso amministrativo*, voce in *Nss. dig. it.*, XV, Torino, 1968, 975 ss.; M. NIGRO, *Giustizia amministrativa*, Bologna, 1979, 155.

Analyzing this process through the authority/liberty couple perspective, it is possible to observe that the post-liberal State registered an increase of the contact (and conflict) moment between public bodies and civil society. In the course of time, it led to a substantial reconsideration of the relationship between public administration and citizen, as it emerges from the general administrative procedure law (l. n. 241/1990). There, we can find a new conception of public interest, as the synthesis of the several (public and private) interests involved in each specific activity, synthesis to whom citizen not only can, but has the right to, participate. Public administration (and its authoritative activity) does not find anymore its legitimacy in the (sole) law, but rather in the possibility of taking part to the final decision procedure by the recipients of the activity, in a procedure moment and through legal instruments adequate to the purpose. Connecting these considerations to the administrative protection remedies specific context, it is possible to stress that public administration authority reduction and the consequent change of public interest conception led also to a complete reconsideration (often only in theory) of the administrative appeals: these legal instruments were finally considered as remedies able to give citizen an effective protection. In other words, today public administration has the duty (and not the discretion) to examine the appeal, using justice criterions; citizen demand finds a further basis in the good administration right, established by the art. 41 of the European Union Charter of Fundamental Rights. Only this new *ratio* of administrative appeals allows their current presence in our legal order.

Coherently, administrative appeals are usually placed within the public administration “justice function”⁵, meant as public administration activity aimed at solving

⁵ Public administration justice function F. TRIMARCHI BANFI, *Modalità giurisdizionali e funzione giurisdizionale nei ricorsi amministrativi*, in *Le Regioni*, 1985, 897 ss.; E. BALBONI, *Amministrazione giurisdizionale*, Padova, 1986; T. ANCORA, *L'amministrazione giurisdizionale*, in *Cons. St.*, 1988, II, 1687 ss.; V. CAPUTI JAMBRENGHI, *La funzione giurisdizionale nell'ordinamento amministrativo*, Milano, 1991; M.P. CHITI, *L'effettività della tutela avverso la pubblica amministrazione nel procedimento e nell'amministrazione giurisdizionale*, in *Scritti in onore di Pietro Virga*, Milano, 1994, 543 ss.; A. PAJNO, *Amministrazione giurisdizionale*, (voce) in *Enc. giur. Treccani*, Roma, 2000; M. GIOVANNINI, *Il ricorso amministrativo nello spazio giurisdizionale*, in *Foro amm.-TAR*, 2009, 597 ss.; A. ALBANESE, *L'amministrazione giurisdizionale in Austria*, in *Dir. amm.*, 2010, 457 ss.; M. CALABRÒ, *La funzione giurisdizionale nella*

– impartially and objectively – a controversy with the citizen, without bringing it before a court. In reality, not all the administrative appeals completely fulfill the requirements of the public administration judicial function: the main purpose – consisting in offering citizen additional remedies of protection – is often sought in an improper way, partially, without adequate guarantees for the citizen; this entails lack of effectiveness and confidence of the citizens, which has put the appeals under consideration in a situation of crisis. Furthermore, as Italian Constitutional Court has already clarified the applicability of the due procedure rules to the general administrative activity (Corte Cost., 23 March 2007, n. 103, in *Foro amm. CDS*, 2007, 1353; Corte Cost., 14 December 1995, n. 505, in *Giust. civ.*, 1995, I, 651), even more it is possible to affirm that the respect of the same procedure guarantees has to be assured in the justice function specific context.

One of the fundamental elements of the public administration judicial function is represented by self-protection power⁶, specifically in the area of self-protection of a contentious nature. This particular expression of the administration gives the capacity to decide on recourses presented by citizens to reform or annul a previous decision. The fact that it is administrative and not judicial activity, has in the past, encouraged doctrine to underline how the final decision was unable to only fulfill private interests, but rather – indirectly – those of good administration; this justified a reduced protection of the citizens position. In this sense, the question of justice would be examined also through the

pubblica amministrazione, Torino, 2012; M.R. SPASIANO, *La funzione giustiziale nell'amministrazione pubblica*, in M.R. Spasiano, D. Corletto, M. Gola, D.U. Galetta, A. Police, C. Cacciavillani (a cura di), *La pubblica amministrazione e il suo diritto*, Bologna, 2012, 393 ss.

⁶ Self-protection power F. BENVENUTI, *Autotutela (dir. amm.)*, (voce) in *Enc dir.*, IV, Milano, 1959, 537 ss.; G. GHETTI, *Autotutela della Pubblica Amministrazione*, in *Dig. disc. pubbl.*, Torino, 1987, 80 ss.; G. CORAGGIO, *Autotutela*, (voce) in *Enc. giur.*, IV, Roma, 1988; M.S. GIANNINI, *Diritto amministrativo*, Milano, 1993, 830 ss.; G. LIGUGNANA, *Profili evolutivi dell'autotutela amministrativa*, Padova, 2004; D.U. GALETTA, *Autotutela decisoria e diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2005, 35 ss.; B.G. MATTARELLA, *Autotutela amministrativa e principio di legalità*, in *Riv. it. dir. pubbl. comunitario*, 2007, 1223 ss.

evaluation of the public interest which was considered basic in the original procedure. The contemporary concept of (contentious) self-protection power, adapted to the recent process of the public authority sphere reduction and has a direct (not mediated) nature of justice; the possibility to solve its own conflicts does not represent a privilege, but a duty, for the public administration. In this sense, recent judgments clarified that the nature of the justice of the administrative appeals entails that the final decision – though maintaining an administrative legal status – is not subjected to revocation nor *ex officio* annulment (Cons. Stato, Sez. VI, 16 July 2012, n. 4150, in *Foro amm. CDS*, 2012, 2059; Cons. Stato, Sez. IV, 25 May 2005, n. 2675, in *Foro amm. CDS*, 2005, 1399).

An additional fundamental element of the public administration judicial function is that the administrative bodies in charge of the decision have a level of impartiality such that the general interest in the justice is fulfilled. In this context, the requirement of impartiality⁷ is interpreted in its organizational (statical) meaning; it is considered, in other words, not as a procedural rule aimed at obliging administration to examine the several (legally relevant) interests involved (active meaning), but rather as independence. It is undeniable that a function directed to solve a litigation has to be conferred to an independent public body, different from that one to whom the responsibility of the contested action is ascribed. In the case of an administrative, and not judicial, public body, we can talk of independence when,

⁷ The impartiality of public administration P. BARILE, *Il dovere di imparzialità della Pubblica Amministrazione*, in *Scritti giuridici in memoria di Piero Calamandrei*, IV, Padova, 1958, 25 ss.; U. ALLEGRETTI, *L'imparzialità amministrativa*, Padova, 1965; S. CASSESE, *Imparzialità amministrativa e sindacato giurisdizionale*, Milano, 1973; A. CERRI, *Imparzialità ed indirizzo politico nella pubblica amministrazione*, Padova, 1973; F. SATTA, *Imparzialità della pubblica amministrazione*, (voce) in *Enc. giur.*, XV, Roma, 1989, 1 ss.; R. MARRAMA, *I principi regolatori della funzione di organizzazione pubblica*, in AA.VV. *Diritto amministrativo*, (a cura di) Mazarroli, Pericu, Romano, Roversi Monaco, Scoca, Bologna, 1998, 411 ss.; G. GARDINI, *L'imparzialità amministrativa tra indirizzo e gestione*, Milano 2003; S. LARICCIA, *Origini storiche e fondamento costituzionale del principio di imparzialità delle pubbliche amministrazioni*, in *Studi in onore di G. Berti*, Napoli, 2005, 1377 ss.; A. ORSI BATTAGLINI, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"*, Milano, 2005; M.R. SPASIANO, *I principi di pubblicità, trasparenza e imparzialità*, in *Codice dell'azione amministrativa*, a cura di M.A. Sandulli, Milano, 2011, 83 ss.

on the one hand, the body is not involved in the litigation, and on the other hand, the same legal subject is free of interferences from the Government or the authority who has nominated it. It is not just chance if a part of the doctrine does not speak of impartial administration, but rather of neutral administration⁸, when it is possible to register the respect of some criteria, as the designation procedure, the mandate length, the guarantees against external interferences, the organizational and financial independence (CEDU, Sez. IV, 25 August 2005, n. 23695, in *Giorn. dir. amm.*, 2005, 1321).

In consideration of the above, we can register in the recent years several legislative interventions, not aimed at totally reforming the administrative appeals discipline, but directed at enhancing the potentialities of some of them. In particular, the area of applicability of the hierarchical improper appeal has been extended to relevant fields such as the access to documents; and, moreover, most of the characteristics of the judicial institutes have been made applicable to the extraordinary appeal to the Italian President procedure.

2. THE OPPOSITION APPEAL AND THE HIERARCHICAL APPEAL: ANACHRONISM AND INEFFECTIVENESS

The opposition appeal⁹ is a claim that the citizen can use, when provided by law, referring to the same administration which has enacted the contested measure. With this

⁸ Neutral administration A.M. SANDULLI, *Funzioni pubbliche neutrali e giurisdizione*, in *Riv. dir. proc.*, 1964, 200 ss.; T. MARTINES, *Diritto costituzionale*, Milano, 1984, 440; M. MANETTI, *Poteri neutrali e costituzione*, Milano, 1994; F. MERLONI, *Amministrazione «neutrale» e amministrazione «imparziale». (A proposito dei rapporti tra «politica» e «amministrazione»)*, in *Dir. pubbl.*, 1997, 319 ss.; L. BARRA CARACCILOLO, *Funzione amministrativa e amministrazione neutrale nell'ordinamento USA*, Torino, 1997; A. VERZA, *La neutralità impossibile*, Milano, 2000.

⁹ Opposition appeal S. LESSONA, *Opposizione (dir. amm.)*, (voce) in *Nss. dig. it.*, XI, 1965, 1058 ss.; P. STELLA RICHTER, *Opposizione*, (voce) in *Enc. giur.*, XXX, Milano, 1980, 523 ss.; V. CAPUTI JAMBRENGHI, *La funzione*

appeal, it is possible to object both legitimacy and merits defects, within 30 days from the notification of the measure or its full knowledge (except in the case of a different time-limit set by special provisions). The opposition appeal is an exceptional legal institute, so it can be legitimately used only when it is introduced in a field/matter by a specific disposal; when, as frequently happens, these disposals do not contain a fully discipline of the appeal, it is necessary to refer to the general provisions identified by d.P.R. 24 November 1971, n. 1199. The fields where the opposition appeal mostly finds application are: public sector employment, healthcare and public instruction. Among the most recent hypothesis, it is possible to recall the appeal granted to State executives who wanted to contest the candidates list concerning the composition of the Committee of guarantors provided by d.lgs. n. 165/2001 (art. 4, d.P.R. 2 March 2004, n. 114).

This legal institute is totally devoid of the requirement of impartiality: the convergence in the same subject of both roles (“adverse party” and “judge”) compromise *ex se* the possibility – even in the abstract – of guaranteeing the level of neutrality necessary to protect the citizens’ interests; that is why we can see a limited application of this remedy. Nevertheless – although the mentioned limits – the opposition appeal seems able to fulfill specific citizen needs, such as inciting the public administration to solving gross errors in the preliminary investigation and reconstruction of the facts. The remedy under consideration is also one of the few legal instruments through which citizen can object merits defects, even though the relevance of this prerogative seems doomed to fail considering the recent implementation of the infra procedural participation moments (e.g. the communication of reasons preventing the allowing of an application, provided by the art. 10 *bis*, l.n. 241/1990).

giustiziale nell’ordinamento amministrativo, Milano, 1991; L. MAZZAROLLI, *I ricorsi amministrativi*, in AA.VV. *Diritto amministrativo*, (a cura di) Mazzarolli, Pericu, Romano, Roversi Monaco, Scoca, Bologna, 1998, 2048; M. IMMORDINO, *I ricorsi amministrativi*, in *Giustizia amministrativa*, a cura di F.G. SCOCA, Torino, 2013, 628.

The hierarchical appeal¹⁰ traditionally represents the principal legal instruments of administrative protection, both because it has a general application, and the role (played in the past) of instrument necessary to achieve the finality of the administrative measure. From a procedural point of view, the cross-examination principle is respected: in fact the petitioner (and the administration) has the duty to notify the appeal to the other parties involved, who can intervene within 20 days. When a citizen files an hierarchical appeal, there is the duty of the administration to express itself (within the limits of required) (Cons. Stato, Sez. IV, 18 September 2012, n. 4942, in *Foro amm. CDS*, 2012, 2290); jurisprudence is divided on the consequences deriving from the lack of an explicit decision within the time-limit provided by law: some judgments interpret this omission as a silence-equal-default (T.A.R. Sardegna, Sez. I, 13 December 2012, n. 1114, in *Foro amm. TAR*, 2012, 4055; Cons. Stato, Sez. VI, 3 May 2002, n. 2351, in *Foro amm. CDS*, 2002, 1282), others as a mere trial condition, which would consent to object/challenge the original measure contested with the hierarchical appeal (Cons. Stato, Sez. III, 17 October 2012, n. 5287, in *Foro amm. CDS*, 2012, 2526; Cons. Stato, Sez. VI, 9 July 2012, n. 4004, in *Foro amm. CDS*, 2012, 2049). In any case, it is unquestioned that, even if the deadline expires, the administration still have the power of deciding on the hierarchical appeal (though late) (Cons. Stato, Sez. IV, 18 September 2012, n. 4942, in *Foro amm. CDS*, 2012, 2290). Considering, on the one hand, that the hierarchical appeal is not a “procedure requested by

¹⁰ Hierarchic appeal A. DE VALLES, *Per un “sistema” dei ricorsi gerarchici*, in *Foro amm.*, 1930, 37 ss.; F. CAMMEO, *Ricorso gerarchico e rinvio all’ autorità inferiore*, in *Giur. it.*, 1935, 1 ss.; G. MIELE, *Questioni in tema di silenzio-rigetto del ricorso gerarchico*, in *Cons. St.*, 1954, 91 ss.; M. NIGRO, *La decisione silenziosa di rigetto del ricorso gerarchico nel sistema dei ricorsi amministrativi*, in *Foro it.*, 1963, 49 ss.; M.S. GIANNINI, *La giustizia amministrativa*, Roma, 1972, 43 ss.; E. CANNADA BARTOLI, *Ricorso gerarchico: silenzio e facoltà*, in *Giur.it.*, 1990, 113 ss.; V. CAPUTI JAMBRENGHI, *La funzione giustiziale nell’ ordinamento amministrativo*, Milano, 1991; L. ARCIDIACONO, *Ricorso gerarchico*, voce in *Enc. giur.*, XXVII, Roma, 1991, 1 ss.; A. TRAVI, *Ricorso gerarchico*, (voce) in *Dig. disc. pubbl.*, XIII, Torino, 1997, 394 ss.; N. LONGOBARDI, *Modelli amministrativi per la risoluzione delle controversie*, in *Dir. proc. amm.*, 2005, 52 ss.; A. TRAVI, *Lezioni di giustizia amministrativa*, Torino, 2013, 149; M. IMMORDINO, *I ricorsi amministrativi*, in *Giustizia amministrativa*, a cura di F.G. COCCA, Torino, 2013, 616.

interested parties” (because it objects a previous measure), and on the other, the essential secrecy of the final decision until it is issued, the discipline of the communication of reason preventing the allowing of an application (art. 10-*bis*, l.n. 241/1990) does not find application (Cons. Stato, Sez. V, 3 May 2012, n. 2549, in *Foro amm. CDS*, 2012, 2945).

The hierarchical appeal, however, encounters the limits – in terms of effectiveness – of the opposition appeal: in this case, the assigning of the decision-making function, although is not represented by the same administration entitled of the power objected, is close to the latter through a superiority relationship. It permits him to decide “as if” he was the administration in charge of the original measure, with a consequential effect of renewal and not of removal. The authority in charge of the hierarchical appeal, in fact, has the power-duty to review the case in its entirety, not limiting its evaluation to the legitimacy profiles, but rather examining the merits. It entails that the final decision, even if it will confirm the content of the measure challenged, takes the original measure place (Cons. Stato, Sez. III, 25 September 2012, n. 5089, in *Foro amm. CDS*, 2012, 2273), and the (eventual) trial has to be sued against the decision on the hierarchical appeal (Cass. Civ., Sez. Un., 7 July 2010, n. 16039, in *Giust. civ.*, 2010, 1019).

It is clear that the functional connections which are the basis of a hierarchical relationship do not permit the realization of that (organizational and functional) “distance” between the administrations involved, necessary to guarantee the level of impartiality essential for a justice activity. In regard of this, part of the jurisprudence has been led to see, in the remedy under consideration, the coexistence purposes of citizen protection and administrative interest management (Cons. Stato, Ad. Gen., 10 June 1999, n. 8, in *Cons. St.*, 1999, 1976). Moreover – as can be simply verified through an empirical analysis – the superior public body is rarely willing to modify or annul the measure contested, as well as preserve a good relationship between offices.

The decline of the hierarchical appeal does not originate only from its insufficient effectiveness, but also due to structural reasons: in the last twenty years, several reforms modified the organizational system of the Italian public administration and a pluralistic model – founded on guidance and coordination relationships – taking the place of the

previous centralistic model. It entailed, among other things, a foreseeable fainting of one of the fundamental elements of the appeal under consideration: the hierarchical relationship. Therein, it has to be underlined that – as a result of the recent division of jurisdictions between political and administrative bodies – Ministers are no longer in charge of the hierarchical appeal decisions. Coherently, art. 11 of the d.lgs. n. 80/1998 expressly reserved to State general executives the responsibility of deciding on hierarchical appeals, also improper, filed against public servant measures (T.A.R. Lazio, Roma, Sez. III, 20 December 2005, n. 14278, in *Foro amm. TAR*, 2005, 3995).

3. PECULIARITY OF THE HIERARCHICAL IMPROPER APPEAL AND ITS APPLICATIONS. THE CLAIM CONCERNING THE ACCESS TO DOCUMENTS

The hierarchical improper appeal¹¹ is an exceptional legal institute, aimed to guarantee the citizen an administrative instrument of protection against the activity of authorities not vertically organized (e.g. the collegial bodies, by nature devoid of a hierarchical top executive) (Cons. Stato, Ad. Gen., 10 June 1999, n. 8, in *Cons. St.*, 1999, 1976). Despite the actual diversity existing between the hierarchical and hierarchical improper appeals, it is generally uncontested that the d.P.R. n. 1199/1971 discipline finds its application in both cases (Cons. Stato, Sez. IV, 25 May 2005, n. 2675, in *Foro amm. CDS*, 2005, 1399). Obviously, in the hierarchical improper hypothesis, the general

¹¹ Hierarchic improper appeal L. RAGNISCO, *I ricorsi amministrativi*, Roma, 1937, 209 ss.; F. BENVENUTI, *Note sul ricorso gerarchico improprio*, in *Scritti giuridici in memoria di Pietro Calamandrei*, Padova, 1958, 50 ss.; E. CAPACCIOLI, *Prime considerazioni sulla nuova disciplina dei ricorsi amministrativi*, in *Giur. it.*, 1973, 1 ss.; M.P. CHITI, *L'influenza dei valori costituzionali sul diritto processuale amministrativo*, in *Studi in memoria di Vittorio Bachelet*, Milano, 1987, 71 ss.; V. CAPUTI JAMBRENGHI, *La funzione giustiziale nell'ordinamento amministrativo*, Milano, 1991; A. TRAVI, *Ricorso gerarchico*, (voce) in *Dig. disc. pubbl.*, XIII, Torino, 1997, 394 ss.; M. IMMORDINO, *I ricorsi amministrativi*, in *Giustizia amministrativa*, a cura di F.G. SCOCA, Torino, 2013, 626.

provisions have a supplementary role compared with the special ones provided by the law which introduces the remedy in a specific legal sector. In some cases, for example, the legislator allows that the simple presentation of a hierarchical improper appeal has the result of suspending the execution of the measure impugned, except for contrary urgent reasons (Cons. Stato, Sez. IV, 18 September 2012, n. 4942, in *Foro amm. CDS*, 2012, 2290).

It is worth highlighting that the absence of a hierarchical connection contextually entails total diversity – both under the organizational and functional profiles – between the administration in charge of the decision and the administration which issued the measure contested. With this, it is possible to register a level of impartiality, at any rate in abstract terms, compatible with the requirements of an administrative judicial function. The administrative body called to decide on the appeal does not become appointed of the public power “in place of” the administration whose activity is contested: in other words, we have not a temporary jurisdiction transfer, because the administrative authority which decides on the hierarchical improper appeal cannot use the average way of acting (balance between the prevalent public interest and the others public and private interests involved) because it has the only purpose to solve – neutrally – the litigation (Cons. Stato, Sez. VI, 10 November 1999, n. 1782, in *Foro amm.*, 1999, 2549). Thus, for example, the challenge of a decision on the hierarchical improper appeal which confirms the measure contested, has to be notified not only to the authority who has decided on the appeal, but also to the administration in charge of the administrative function (T.A.R. Abruzzo, L’Aquila, Sez. I, 2 November 2009, n. 452, in *Foro amm. TAR*, 2009, 3205).

The peculiar characteristics of the legal institute in consideration entail other several differences with the hierarchical appeal. Consider the hypothesis of a Minister in charge of deciding a hierarchical improper appeal against a local authority: in this case, the relationship of complete autonomy existing between the two administrations involved enables the local authority to impugn the state decision, in order to preserve its own constitutional prerogatives and competences (T.A.R. Lombardia, Milano, Sez. II, 8 February 2011, n. 384, in *Foro amm. TAR*, 2011, 357). Part of the judicial decisions, moreover, consider the possible application of the self-protection legal institutes

(annulment and revocation) to the hierarchical appeal, because of the same *ratio* and requirements (precise evaluation of the emerging public interest reasons). However, it is necessary to come to opposite end in regard to the hierarchical improper appeal, considering the remarkable difference existing between the power to decide on the appeal – assigned to an independent public authority – and the self-protection power, assigned to the same administration which issued the contested measure (T.A.R. Puglia, Lecce, Sez. I, 7 February 2008, n. 367, in *Foro amm. TAR*, 2008, 593).

The outstanding potentialities of the hierarchical improper appeal in terms of citizen protection led the legislator, in the past, to propose an enhancement of this legal institute. In 1994, a government study committee on the “justice in the administration” suggested several reforms, among which the foundation of independent authorities to whom assign public administration justice functions. This legal model is today partially traceable in the non-judicial protection procedures exercised by independent administrative

authorities¹² to whom it is often assigned not only the possibility of conciliating, but also of deciding bindingly on administrative claims. On the contrary, during the recent years, the state legislator has abolished some (not so relevant) hierarchical improper appeal typologies, in particular in the field of local authorities compulsory winding up, (cfr. art. 87, d.lgs. n. 77/1995, abrogated by art. 7, co. 1 *bis* del d.l. n. 80/2004); and in the field of prices review of public contracts (cfr. art. 4, d.lgs. n. 1501/1947, abrogated by art. 24 del d.l. n. 112/2008). We can probably explain this phenomenon thanks to the ineffectiveness of most of the traditional hierarchical improper appeals, especially because of the lack of an adequate level of neutrality.

Otherwise, the appeal under consideration is still present in several fields: social housing allocation (cfr. artt. 19 e ss., d.P.R. n. 655/1964); craft business register admission (cfr. art. 7, l. 8 August 1985, n. 443); designation of the Chamber of Commerce councils members (cfr. art. 7, d.m. n. 501/1996); road sign placing (cfr. art. 37, d.lgs. n. 285/1992).

¹² Non-judicial protection procedures exercised by independent administrative authorities M. CLARICH, *L'attività delle autorità indipendenti in forme semicontenziose*, in S. Cassese e C. Franchini (a cura di), *I garanti delle regole. Le autorità indipendenti*, Bologna 1996, 149 ss.; A. PAJNO, *L'esercizio di attività in forme contenziose*, in S. Cassese e C. Franchini (a cura di), *I garanti delle regole. Le autorità indipendenti*, Bologna, 1996, 107 ss.; G. NAPOLITANO, *Autorità indipendenti e tutela degli utenti*, in *Giorn. dir. amm.*, 1996, 19 ss.; F. CARINGELLA, *Le autorità indipendenti tra neutralità e paragiurisdizionalità*, in *Cons. Stato*, 2000, II, 540 ss.; P. LAZZARA, *Autorità indipendenti e discrezionalità*, Padova, 2001; V. CAPUTI JAMBRENGHI, *La funzione giustiziale delle amministrazioni indipendenti*, in F. Francario (a cura di) *Diritti, interessi ed amministrazioni indipendenti*, Milano, 2003, 68 ss.; N. LONGOBARDI, *Autorità amministrative indipendenti e diritti: la tutela dei cittadini e delle imprese*, in *Foro amm. T.A.R.*, 2007, 2925 ss.; F. ASTONE, F. SAITTA, *La giustizia innanzi all'autorità garante delle comunicazioni*, in *La tutela delle situazioni soggettive nel diritto italiano, europeo e comparato. La tutela delle situazioni soggettive nell'amministrazione giustiziale*, a cura di G. Clemente di San Luca, Napoli, 2012, 247 ss.; M. GOLA, *La giustizia innanzi all'autorità garante della privacy*, in *La tutela delle situazioni soggettive nel diritto italiano, europeo e comparato. La tutela delle situazioni soggettive nell'amministrazione giustiziale*, a cura di G. Clemente di San Luca, Napoli, 2012, 233 ss.; N. PAOLANTONIO, *La giustizia innanzi all'Autorità per l'energia elettrica e il gas*, in *La tutela delle situazioni soggettive nel diritto italiano, europeo e comparato. La tutela delle situazioni soggettive nell'amministrazione giustiziale*, a cura di G. Clemente di San Luca, Napoli, 2012, 179 ss.

At the same time, the state legislator (as many regional legislators) has recently introduced new typologies of hierarchical improper appeals in other fields, in order to allow for faster and easier litigation resolutions (cf.: art. 69, d.lgs. n. 42/2004 in the field of cultural heritage circulation; art. 17, d.lgs. n. 124/2004 in the field of Job Provincial Directorate; art. 145, d.lgs. n. 196/2003 in the field of personal data protection).

Among the recent typologies of hierarchical improper appeals, one of the most interesting works in the field of the access to administrative documents. Under art. 25, co.4, l. n. 241/1990, in case of (either expressly or tacitly) denied or postponed access, the requesting party shall have the right to appeal to the ombudsman¹³ with territorial jurisdiction (in relation to the activity of municipal, provincial o regional activities), or to a Commission for access¹⁴ (in relation to State central and decentralized administrative branches activities). Both the mentioned public bodies have the duty to answer within thirty days of the claim presentation; once such timeframe has expired fruitlessly, the appeal shall be deemed refused. If the ombudsman or the Commission deem the denial or the postponement to be unlawful, they inform the requesting party of this fact, and

¹³ Appeal to the ombudsman in the field of access to administrative documents F. VETRÒ, *Articolo 25, commi 4, 5, 5 bis e 6*, in *La pubblica amministrazione e la sua azione*, a cura di N. PAOLANTONIO, A. POLICE, A. ZITO, Torino, 2005, 751 ss.; A. SCARCIGLIA, *L'istituto del difensore civico in Italia fra "declamazioni", poteri di fatto e regole procedurali*, in *Dir. pubbl. com. eu.*, 2006, 1773 ss.; M. SANINO, *Il diritto di accesso ai documenti amministrativi: le modalità di esercizio e tutela*, in V. Cerulli Irelli, *La disciplina generale dell'azione amministrativa*, Napoli, 2006, 443 ss.; A. CELOTTO (a cura di), *Il "ruolo" del Difensore civico. Aspetti evolutivi e comparati*, Napoli, 2008; M. CALABRÒ, A. SIMONATI, *Le modalità di esercizio del diritto di accesso e la relativa tutela*, in *Codice dell'azione amministrativa*, a cura di M.A. SANDULLI, Milano, 2011, 1123 ss.

¹⁴ Appeal to the Commission of access W. GIULIETTI, *Commissione per l'accesso ai documenti amministrativi*, in *La pubblica amministrazione e la sua azione*, a cura di N. PAOLANTONIO, A. POLICE, A. ZITO, Torino, 2005, 777 ss.; M. OCCHIENA, *I poteri della Commissione per l'accesso ai documenti amministrativi: in particolare, la funzione giustiziale ex l. 241/1990 e d.p.r. 184/2006*, in www.giustamm.it; G. BUSIA, *La commissione per l'accesso ai documenti amministrativi*, in AA.VV., *L'accesso ai documenti. Limiti, procedimento, responsabilità*, Milano, 2006, 295 ss.; M. CALABRÒ, *La Commissione per l'accesso ai documenti amministrativi*, in *Codice dell'azione amministrativa*, a cura di M.A. Sandulli, Milano, 2011, 1202 ss.

communicate it to the authority holding the document. If the latter does not issue a measure confirming and stating the reasons for its decision within thirty days of receipt of the communication from the ombudsman or the Commission, access shall be permitted.

This specific typology of hierarchical improper appeal implies some critical issues, first among everything, the lack of a sufficient level of independency. In fact, the Commission for access is placed in the Presidency of the Council of Ministers and is nominated by a President of the Council's decree; in addition, among the members of the Commission, there is the Presidency of the Council of Ministers chief of the staff, and also the Presidency of the Council of Ministers Undersecretary. The strong relationship with the Presidency of the Council of Ministers inevitably compromises the independency of the Commission, in consideration of its jurisdiction on the activities of the State central and decentralized administrative branches. It is also possible to come to similar conclusions as regard to the ombudsman – particularly referring to the designation procedures (basically political) and the role performed – even if it is not qualified as a government body (Corte Cost., 29 April 2005, n. 167, in *Foro amm. CDS*, 2005, 2823).

Furthermore, the appeal under consideration is not really effective: the acceptance of the appeal simply entails a communication to the administration holding the document, who can nevertheless confirm the denial on the base of new statement of reasons (T.A.R. Lazio, Roma, Sez. III *ter*, 3 April 2008, n. 2835, in www.giustizia-amministrativa.it.; T.A.R. Veneto, 4 February 2008, n. 218, in *Nuova rass.*, 2008, 853). The legislator merely establishes that if the administration does not answer within thirty days “access shall be permitted”, without giving the Commission nor the ombudsman powers to order the document exhibition in case of (probable) inactivity of the administration (T.A.R. Lazio, Latina, Sez. I, 26 September 2011, n. 738, in *Foro amm. TAR*, 2011, 2761). In other words, the acceptance of the appeal does not bind the administration holding the document and, consequently, does not really protect the citizen interest (T.A.R. Lazio, Roma, I, 5 May 2008, n. 3675, in www.giustizia-amministrativa.it).

In conclusion – although the fragility (in terms of independence and effectiveness) of most of the current hierarchical improper appeals – the majority of Italian doctrine

wishes the development of this administrative appeal, through the improvement of the model. In the broader context of the enhancement of the alternative dispute resolution (ADR)¹⁵, the European Union has also recently encouraged the use of s.c. *internal reviews*, administrative legal instruments of protection that can be substantially assimilated to the hierarchical improper appeals (cf. the reference to objective justice criterion and the assignment of the decisional function to an independence authority). Furthermore, the remedy under consideration would not risk being reduced to a mere duplication of the judicial appeal, because of: the simplicity of the formalities, the promptness, the economy, the no-need of a technical legal aid.

¹⁵ Alternative dispute resolution (ADR) in the administrative law M.P. CHITI, *Le forme di risoluzione delle controversie con la pubblica amministrazione alternative alla giurisdizione*, in *Riv. it. dir. pubbl. com.*, 2000, 1 ss.; S. STICCHI DAMIANI, *Sistemi alternativi alla giurisdizione. Adr nel diritto dell'Unione Europea*, Milano, 2004; A. CASSATELLA, *Il ricorso alle a.d.r. nelle controversie fra privati e pubblica amministrazione: ammissibilità e limiti*, in *Dir. e formazione*, 2004, 1203 ss.; N. LONGOBARDI, *Modelli amministrativi per la risoluzione delle controversie*, in *Dir. proc. amm.*, 2005, 52 ss.; S. DE FELICE, *Le A.D.R. (alternative dispute resolution) nei confronti della pubblica amministrazione*, in www.giustizia-amministrativa.it; A. MASSERA, *I rimedi non giurisdizionali contro la pubblica amministrazione: tendenze contemporanee*, in *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato*, a cura di G. FALCON, Padova, 2010, 86 ss.; F. CINTIOLI, *Le tecniche di Alternative Dispute Resolution*, in www.giustamm.it; L. GIANI, *Gli strumenti di giustizia alternativa*, in *Giustizia amministrativa*, a cura di F.G. COCCA, Torino, 2013, 655 ss.

4. THE RECENT DEVELOPMENT OF THE EXTRAORDINARY APPEAL TO THE ITALIAN PRESIDENT

4.1 The traditional debate on the legal status

The uncertainty on the (administrative or judicial) legal status of the Extraordinary appeal to the Italian President¹⁶ originates from its historical framework. In fact, part of the doctrine connects it to the “retained justice” remedies (judicial appeals whose jurisdiction were assigned directly to the Sovereign); whereas, other authors interpret it as an evolution of the “graceful” remedies (administrative appeals whose jurisdiction were assigned directly to the Sovereign). Before the latest reforms introduced by l.n. 69/2009 and the Administrative proceeding code, there was a widespread debate on the possibility to include the appeal under consideration in the area of judicial activity. In favour of this opinion, in effect, it was possible to quote several elements: the cross-examination full guarantee (assured by the duty of notify the appeal at least to one of the parties with conflicting interests “through the way and the formality prescribed for the judicial appeals”, art. 9 d.P.R., n. 1199/1971); the fact that the State Council semi-binding opinion which

¹⁶ Extraordinary appeal to the Italian President S. LESSONA, *La Giustizia nella amministrazione*, Bologna, 1958; V. BACHELET, *Ricorso straordinario al Capo dello Stato e garanzia giurisdizionale*, in *Riv. trim. dir. pubbl.*, 1959, 788 ss.; G. PALEOLOGO, *Ricorso straordinario*, (voce) in *Enc. giur.*, XXVII, Roma, 1991; M. GOLA, *Nuovi sviluppi per le funzioni consultive del Consiglio di Stato: il «caso» del parere per la decisione dei ricorsi straordinari al Presidente della Repubblica*, in *Dir. proc. amm.*, 1999, 152 ss.; C.E. GALLO, *La tutela del cittadino nei confronti della pubblica amministrazione ed il ricorso straordinario*, in *Foro amm. CDS*, 2002, 1172 ss.; M. GIOVANNINI, *Il ricorso straordinario come strumento alternativo alla giurisdizione amministrativa: il difficile percorso di un rimedio efficace*, in *Dir. amm.*, 2002, 61 ss.; L. MAZZAROLLI, *Riflessioni sul ricorso straordinario al Presidente della Repubblica*, in *Dir. amm.*, 2004, 691 ss.; L. BERTONAZZI, *Il ricorso straordinario al Presidente della Repubblica: persistente attualità e problemi irrisolti del principale istituto di amministrazione giustiziale*, Milano, 2008; M. CALABRÒ, *La presunta natura giuridica ibrida del ricorso straordinario al Capo dello Stato: tra amministrazione e giurisdizione*, in *Nuove Autonomie*, 1/2009, 113 ss.; A. TRAVI, *Lezioni di giustizia amministrativa*, Torino, 2013, 160; M. IMMORDINO, *Il ricorso straordinario al Capo dello Stato*, in *Giustizia amministrativa*, a cura di F.G. SCOCA, Torino, 2013, 631 ss.

precedes the final decision was significantly qualified “expression of plain application of objective law” (Cons. Giust. Amm. Reg. Sic., 19 October 2005, n. 695, in *Foro amm. CDS*, 2005, 3066); the circumstance that the final decision – although did not represent a *res iudicata* (T.A.R. Lombardia, Sez. II, 13 May 2004, n. 1695, in *Foro amm. TAR*, 2004, 1300; Cons. Giust. Amm. Reg. Sic., 7 November 2002, n. 604, in *Foro amm. CDS*, 2002, 3021) – was “substitutive” of the definitive judge sentence in force of the alternative principle (T.A.R. Toscana, Sez. II, 15 March 2000, n. 451, in *Ragiusan*, 2000, 51; T.A.R. Lombardia Milano, 11 July 1995, n. 954, in *TAR*, 1995, 3628). In support of this position, furthermore, there was a European Court of Justice decision (Court Just., 16 October 1997, in *Cons. St.*, 1997, 86), where the State Council giving the opinion in the procedure under consideration was expressively qualified a “judicial body”.

However, the prevalent position affirmed that the extraordinary appeal to the Italian President – though was closely related to the judicial remedies – still had to be considered as an expression of administrative function. There were many reasons in support of this thesis, for example, the secrecy of the preliminary fact-finding activity (unilaterally managed, *de facto*, by the Government); or the lack of an oral discussion (Cons. Stato, Sez. IV, 11 May 2007, n. 2322, in *www.giustizia-amministrativa.it*). However, the main reasons was the circumstance that the one in charge of the final decision was the Minister, devoid of impartiality, and in condition to depart from the State Council opinion investing the Council of Ministers with the question (Cass. civ., Sez. Un., 18 December 2001, n. 15978, in *Riv. amm. it.*, 2002, 229). Before the reform of the 2009, in fact, the cited opinion had a semi-binding nature and a re-examination by the advisory body was not admitted, except for the exceptional hypothesis of revocation (Cons. Stato, Sez. I, 14 July 2010 n. 2775, in *www.giustizia-amministrativa.it*), or of objective non-compliance of the opinion to the *ius superveniens* pending the decree issue (Cons. Stato, Sez. II, 9 March 2011, n. 4421, in *Foro amm. CDS*, 2011, 1022).

Recognizing to the extraordinary appeal an administrative legal status descends several proceeding consequences, such as the impossibility of appealing to the Court of Cassation against the extraordinary appeal decision (Cass. civ., 5 April 2007, n. 8618, in *Giorn. dir. amm.*, 2007, 650), as well as the impossibility of raising constitutional

exception¹⁷ (Corte Cost., 21 July 2004, n. 254, in *Foro amm. CDS*, 2004, 2460). The most heated debate concerned the usability of the compliance remedy¹⁸ in order to force the administration to execute the final decision.

Part of the judicial decisions were inclined to a favourable response, with regard to both the substantial holding of the decision making power in the hands of head of the State Council (Cons. Giust. Amm. Reg. Sic., 18 May 2009, n. 415, in *www.giustizia-amministrativa.it*; Cons. Giust. Amm. Reg. Sic., 19 October 2005, n. 695, in *Foro amm. CDS*, 2005, 3066; Cons. Stato, Sez. V, 22 November 2001 N. 5934, in *Foro Admin.*, 2001, 2844), as well as assimilability of the final judgment, expected the regime of the alternativity and the reduced charges of appeal, only due to *errores in procedendo* (TAR Campania, Napoli, Sez. VIII December 19, 2012, n. 5254, in *Foro amm. TAR*, 2012, 3969; Cons. Stato, Sez. V, 27 February 2007, n. 999, in *Giorn. dir. amm.*, 2007, 532). The administrative jurisprudence majority argued, on the contrary, the non applicability of the

¹⁷ Extraordinary appeal to the Italian President and constitutional exception A.L. TARASCO, *La funzione consultiva e la proponibilità dell'incidente di costituzionalità: la Corte costituzionale si pronuncia sulla natura del ricorso straordinario*, in *Foro amm. CDS*, 2004, 2460 ss.; M. GIOVANNINI, *L'equiparazione tra ricorso straordinario e giurisdizionale: un'occasione sfumata*, in *Giorn. dir. amm.*, 2005, 652 ss.; N. PIGNATELLI, *La natura del ricorso straordinario e la nozione di «giudizio»: la Corte costituzionale e l'«ircocervo»*, in *Giur. cost.*, 2005, 2149 ss.; F. FRENI, *Amministrazione giustiziale e Costituzione: il «nuovo» ricorso straordinario al Capo dello Stato*, in *www.giustamm.it*; L. PLATANIA, *Può il legislatore ordinario aprire le porte del cielo?*, in *www.forumcostituzionale.it*.

¹⁸ Extraordinary appeal to the Italian President and compliance remedy F. GAFFURI, *L'esecuzione delle decisioni sui ricorsi straordinari al Presidente della Repubblica attraverso il giudizio di ottemperanza: analisi del nuovo orientamento del Consiglio di Stato*, in *Dir. proc. amm.*, 2001, 800 ss.; M. GIOVANNINI, *Il ricorso straordinario come strumento alternativo alla giurisdizione amministrativa: il difficile percorso di un rimedio efficace*, in *Dir. amm.*, 2002, 61 ss.; F. FRENI, *Quando l'abito fa il monaco. Sull'ammissibilità del giudizio di ottemperanza per l'esecuzione delle decisioni dei ricorsi straordinari*, in *Foro amm. CDS*, 2005, 3737 ss.; A. CORSARO, *Esecuzione di decisione su ricorso straordinario e giudizio di ottemperanza*, in *Foro amm. CDS*, 2005, 3066; P. QUINTO, *Le Sezioni Unite: la «giurisdizionalità» del ricorso straordinario e l'azionabilità del giudizio di ottemperanza*, in *Foro amm. CDS*, 2011, 1466 ss.

solution of compliance, stating that the administrative nature of the decisional act, one with its binding nature, imposes upon the recipient that legitimately demanded the execution of challenging the refused silence based on the notice to provide (Cons. Stato, Sez. V, 15 February 2007, n. 641, in *Foro amm. CDS*, 2007, 538; Cons. Stato, Sez. V, 29 August 2006, n. 5036, in *Foro Amm. CDS*, 2006 2214), or – in the case of such an act clearly elusive or in conflict with the presidential decision – of challenging said act and have it annulled as invalid due to the misuse of powers (Cons. Stato, Sez. VI, February 10, 1999, n. 146 in *Cons. St.*, 1999 254).

4.2 The reform by art. 69 l. June 18, 2009, n. 69 and the judicial trend of the Institute

This structure has undergone a substantial upheaval following the changes made to the rules of appeal to the Italian President by art. 69 l. June 18, 2009 n. 69¹⁹ (*Provisions for economic development, simplification, competitiveness, as well as in civil proceedings*). Previously, the legislature had intervened in order to integrate – in terms of completeness and speed of protection – the regime of the institution in question. In particular, adapting to what has been established by the law (Cons. Stato, Sez. II , 14 February 2001, n. 127, in *Cons. St.*, 2001 2222), art. 3, para. 4 of law n. 205/2000 had recognized the possibility of requesting precautionary measures even in the extraordinary appeal, assigning the relevant

¹⁹ Reform of the rules of the extraordinary appeal to the Italian President and law n. 69/2009 L. CARBONE, *La revisione del ricorso straordinario al Presidente della Repubblica e la riaffermata natura giurisdizionale del rimedio di tutela*, in www.giustizia-amministrativa.it; A. AULETTA, *Il legislatore “muove un passo” verso la giurisdizionalizzazione del ricorso straordinario al Presidente della Repubblica*, in *Foro amm. TAR*, 2009, 1619 ss.; F. SALVIA, *Il ricorso al Capo dello Stato e l’effettività della tutela (rilevi critici sull’approccio)*, in *Foro amm. CDS*, 2009, 1606 ss.; A. GIUSTI, *Il ricorso straordinario dopo la legge n. 69 del 2009. Notazioni a margine di TAR Lazio-Roma, Sez. I, 16 marzo 2010, n. 4104*, in *Dir. proc. amm.*, 2010, 1008 ss.; G. MARTINI, *Il ‘ricorso straordinario’ al Capo dello Stato dopo la riforma introdotta con la L. 69/2009*, in www.giustamm.it, 2/2010.

Minister, after consulting the Council of State the power to suspend the effectiveness of the decision. It should be noted, how the discipline in the context of pre-trial proceedings in the present extraordinary appeal is still significant – compared to what is currently in force within the administrative process – establishing itself only in the possibility of requesting the annulment of the contested measure, with all the limits that follow (Cons. Stato, Ad. Spec., 28 April 2009, n. 920, in *Foro amm. CDS*, 2009, 1097).

However, it is with the above-mentioned reform of 2009 that the legislature intended to carry out an organic intervention aimed at solving those interpretative nodes that the law had brought out over the years. On the one hand, it is expressly admitted the deferability of issues relating to the constitutionality by the Council of State called upon to adjudicate in an advisory capacity on an extraordinary appeal, while on the other that opinion was made formally and substantially binding to the extent that it is no longer possible for the competent minister to depart through the referral of issues to the Council of Ministers.

Both changes have undeniably led to an increase in the level of protection that the institution in question is able to guarantee the citizen. It is also the opportunity to raise the constitutionality of accidents within the procedure, both – to a greater extent – having transferred the power of decision from a biased party (the Minister) to a body constitutionally endowed with independence and impartiality (the Council of State), thus represents a clear step forward in view of the function of which the justice institution is an expression. With regard, more specifically to the second of those corrective actions, it marks the disappearance of the main argument in favour of the recognition of an administrative nature to the remedy in question, represented by the faculty, previously assigned to the Minister, to finalize the procedure on the basis of an independent assessment, differing from the opinion of the State Council.

4.3 *The latest innovations introduced by the Code of Administrative Procedure*

The legislature of 2009 had not, however, expressed in relation to the issue of compliance, which until then had mostly engaged doctrine and jurisprudence. The point is subsequently regulated by the Code of Administrative Procedure (Legislative Decree n. 104/2010)²⁰, in which article. 112 would seem to extend the institution of compliance also to the decisions in question. It is worth noting, how not expressly include the final measures of the extraordinary appeal, and this has led to the emergence of a debate – still in progress both in doctrine as well as in jurisprudence – on the applicability to this case of the letter. b) or letter. d) II co. art. 112 cited above. In particular, the supporters of the first theory believe that the legislature, in providing for – according to the above letter. b) – the extension of the operation of the remedy of compliance also to “other enforcement measures of the administrative judge” merely wanted to refer to the decisions that the Council of State takes the form of a binding opinion, in the proceedings in question (Cons. Stato, Ad. Plen., June 5, 2012, n. 18, in *Foro amm. CDS*, 2012, 1520; Cass. civ., Sez. Un., 19 December 2012, n. 23464, in *Foro amm. CDS*, 2012, 3126). Join this reconstruction, among other things, would further confirm the change occurred on the legal nature of the institution in question, from administrative to judicial (Cass. civ., Sez. Un., 28 January 2011, n. 2065 in *Giust. civ.*, 2011, 136; Cons. Stato, Sez. VI, 10 June 2011, n. 3513, in *Foro amm. CDS*, 2011, 2039).

On the other hand, there are those who consider the decision on the extraordinary appeal an executive order of the administrative judge according to letter b) cited above

²⁰ Discipline of extraordinary appeal to the Italian President and the Code of Administrative Procedure F. FRENI, *Il nuovo ricorso straordinario al presidente della Repubblica Storia, natura e disciplina positiva del rimedio dopo la legge 18 giugno 2009, n. 69, ed il D.lgs. 2 luglio 2010, n. 104*, Roma, 2010; P. QUINTO, *Il Codice e la giurisdizionalizzazione del ricorso straordinario*, in www.giustizia-amministrativa.it; R. CHIEPPA, *Il processo amministrativo dopo il correttivo al codice*, Milano, 2012; F. TUCCARI, *Ricorso Straordinario al Presidente della Repubblica alla luce del codice del processo amministrativo*, in *Urb. e app.*, 2012, 84 ss.

hides a forcing to the extent that – as the opinion of the Council of State is now binding – the final measure is not in any case due to the administrative court, but to the President of the Republic upon the proposal of the competent minister. According to this argument, therefore, that among the decisions to comply also covers those issued in the extraordinary appeal is clear, rather, by the letter d) of Art. 112, para. II ° cit., where extending the compliance to the measures treated as *res judicata* “for which no provision is made for compliance with the remedy”. Thus, this different reconstruction places the decision on the extraordinary appeal not within the measures of the administrative court, but within the measures (administrative) substantially (but not formally) equivalent to the judgments of the administrative courts Cass. civ., Sez. Un., 7 June 2012, n. 9183, in *www.lexitalia.it*; Cons. Stato, Sez. III, 4 August 2011, n. 4666, in *Foro it.*, 2011, III, 633; TAR Sicilia, Palermo, Sez. I, 12 December 2011, n. 2341 in *Foro amm. TAR*, 2011, 4145).

Opting for the first or second of these reconstructions also affects the identification of the competent court to rule on compliance, to the extent that – if describing the decision as an administrative measure in paragraph (d) and not as an executive order of the court paragraph (b) – would be not applicable the co. I of art. 113 c.p.a. (“The judge who issued the warrant of which is compliance”, i.e. the Council of State in a single degree) (Cons. Stato, Ad. Plen., 5 June 2012, n. 18, in *Foro amm. CDS*, 2012 1520, Cass. civ., Sez. Un., 28 January 2011, n. 2065 in *Guida al diritto*, 2011, 13, 52), but the subsequent co. II of the same art. 113 cited above. (“Regional administrative court in whose jurisdiction the court that issued the judgment which it is sought compliance”, i.e. the Lazio Regional Administrative Court) (TAR Sicilia, Palermo, Sez. III, 19 March 2012, n. 585, in *Foro amm. TAR*, 2012, 1001; Cons. Stato, Sez. III, 4 August 2011, n. 4666, in *Foro it.*, 2011, III, 633). On this point, it is worth highlighting the order n. 673/2013, through which the judges of Sec. VI of the Council of State – in light of the ongoing oscillation between the two interpretations and even siding specifically for the application of the letter. d) of Art. 112, co II ° cit. – put forward to the Plenary Assembly the question of the legal nature of recognizing the ruling issued following an appeal to the Italian President (Cons. Stato, Sez. VI, 1 February 2013, n. 673, in *www.lexitalia.it*). With a recent decision (6 May 2013, n. 9, in *www.lexitalia.it*) the Council of State Plenary Assembly has expressly qualified “judicial decision” the presidential decree which concludes the extraordinary appeal –

considering determined the binding character of the Council of State opinion – and has consequently opted for the application, related to the compliance field, of the combined provision of artt. 112, co. II, lett. b) e 113, co. I, c.p.a.

In any case, with the recognition of the use of the instrument of compliance, the legislature undoubtedly intended to ensure greater effectiveness at an extraordinary appeal – thus allowing the definitive overcoming of that minority jurisprudence that, although it believes that the decision on the extraordinary appeal had, in principle, a binding force (Cons. Stato, Sez. V, 15 February 2007, n. 641, in *www.giustizia-amministrativa.it*), it did not rule out that, where it emerged the manifestly unfounded nature of the claim, the administration would have been entitled to not enforce the decision “because it would not be helpful to the applicant and all prejudicial to the administration of the imposition of the obligation to rule on the question” (TAR Lazio, Roma, Sez. III-b, 30 July 2007, n. 7179, in *www.giustizia-amministrativa.it*). Even after the recent Plenary Assembly decision (n. 9/2013), remains, on the other hand, the uncertainty about the change occurred or not of the legal nature. There are, in fact, rulings which – while discussing “judicial decisions” – stress factors potentially capable of calling into question the reconstruction of the extraordinary appeal as an expression of judicial power, such as the lack of an adversarial hearing, the attribution of jurisdiction investigation only to the Minister (in fact, “part” of the dispute), and the absence of two levels of jurisdiction (Cons. Stato, Sez. VI, 1 February 2013, n. 673, in *www.lexitalia.it*; Cons. Stato, Sez. I, 7 May 2012, n. 2131, in *Foro it.*, 2012, III, 525; Cass. civ., Sez. Un., 19 December 2012, n. 23464, in *Foro amm. CDS*, 2012, 3126). In addition, there is how – in the silence of the legislature – the law is still oscillating about the operation of the stay of proceedings pursuant to art. 295 Code of Civil Procedure²¹ in the case of pending contention promoted by an extraordinary appeal whose contents ruling (in favour: TAR Campania, Napoli, Sez. IV, 12 July 2011, n. 3736, in *Foro*

²¹ Extraordinary appeal to the Italian President and suspension of judgment pursuant to art. 295 Code of Civil Procedure N. BASSI, *Applicabilità dell’art. 295 c.p.c. ai rapporti fra ricorso straordinario al Capo dello Stato e ricorso giurisdizionale amministrativo*, in *Dir. proc. amm.*, 1999, 555 ss.

amm. TAR, 2011, 2451; *contra* Cass. civ., Sez. Un., 31 May 2011, n. 11964, in *Giust. civ.*, 2011, 826).

In addition to the provisions regarding the profile of compliance, the Code of Administrative Procedure also intervened by limiting the operation of the extraordinary appeal to the Italian President to only “disputes devolved to the administrative jurisdiction” (art. 7, para. 8 L. n. 104/2010). The reasons for this change regarding the organization above are in the new role (“substantial” owner of the decision) recognized the Council of State and the consequent need not to breach the boundaries of division of jurisdiction set out in Art. 103 of the Constitution. Previously, on the contrary, it was believed that the extraordinary appeal could also be exercised for the protection of individual rights, though falling under the area of jurisdiction of ordinary courts (Cons. Stato, Ad. Gen., 10 June 1999, n. 9, in *Foro Amm.*, 1999, 2160). The Supreme Court has considered this requirement to be able to read in a further confirmation of the “legalization” of the remedy in question, pointing out that the jurisdiction has thereby become a general condition of eligibility of the extraordinary appeal, not unlike what happens to the ordinary appeal to the court administrative (Cass. civ., Sez. Un., 19 December 2012, n. 23464, in *Foro amm. CDS*, 2012, 3126). The General Assembly of the Council of State has also commented on Article. 7 cit., recognizing the innovative scope of this provision and not merely interpretive, resulting in non-retroactivity of the same (Cons. Stato, Ad. Gen., 22 February 2011, n. 808, in *www.giustizia-amministrativa.it*). Concerning the limits that characterize the scope of operation of the remedy in question, it is stressed that its use is expressly excluded in the event of a dispute over the electoral proceedings (Art. 128 CPA), and – indirectly – in subjects whose needs for celerity require special or abbreviated rituals, such as access to the documents (Cons. Stato, Sez. II, 25 October 2012, n. 4280, in *Foro amm. CDS*, 2012, 2678; Cons. Stato, Sez. III, 26 October 2009, n. 1670 in *Foro amm.CDS*, 2009, 2409), the procedures of awarding public works, services or supplies, as well as the related provisions of the Authority for the Supervision of public contracts for works, services and supplies, challenged only by appeal to the competent Regional Administrative Court (Art. 120 CPA).

Article. 48 of the Code of Administrative Procedure, thus, confirms and further specifies that alternativity regime subsisting between the appeal to the Italian President and

the ordinary appeal to the administrative court, according to which, as noted, *electa un via non datur recursus ad alteram*. In this regard, the most recent law has expanded the sphere of operation of the scheme, proclaiming it as the application not only in reference to appeals of the same administrative act, but in all the cases in which acts are considered in relation to places of presupposition and consequentiality (T.A.R. Liguria, 11 December 2012, n. 1589, in *Foro amm. TAR*, 2012, 3827; Cons. Stato, Sez. IV, 16 April 2012, n. 2158, in *Riv. giur. edilizia*, 2012, 807; Cons. Stato, Sez. II, 22 June 2011, n. 3035, in *Foro amm. CDS*, 2011, 2151). It is well known that the alternative nature of the regime only involves the foreclosure of the extraordinary appeal once it has been brought to the courts, having no value in the opposite direction due to the expected possibility of asking for the transposition of the dispute from the justice seat to the judicial one (TAR Lazio, Roma, Sez. I, 3 January 2013, n. 36, in *Foro amm. TAR*, 2013, 87).

Regarding what was originally the provisions of art. 10 of Presidential Decree n. 1199/197, art. 48 cit., it has extended the right to request the transposition of the dispute not only to counterparties, but to any “part” to whom it is proposed to be an extraordinary appeal, including, therefore – in addition to the administration which adopted the contested measure – even the citizens having an interest opposed to the one of the appellant (Cass. civ., Sez. Un., 19 December 2012, n. 23464, in *Foro amm. CDS*, 2012, 3126; *contra* T.A.R. Friuli Venezia Giulia, 27 June 2011, n. 321, in *Giur merito*, 2012, 958). It is worth highlighting how art. 10 cit. – not repealed by the Code of Administrative Procedure – provides that the institution of the transposition acts as a suitable way to “the appeal to be decided in the courts,” positing that the extraordinary appeal itself does not constitute a judicial venue (T.A.R. Lazio, Roma, Sez. I, 16 March 2010, n. 4104, in *Foro amm. TAR*, 2010, 2818). The law believes it can justify the permanence of the system of alternativity – despite recent major innovations introduced within the discipline of the extraordinary appeal – not because of the risk of infringement of the principle of *ne bis in idem* (T.A.R. Veneto, Sez. I, 23 April 2012, n. 572, in *Foro amm. TAR*, 2012, 1154), but in view of the greater assurance that judicial protection is still able to provide, such as the two levels of jurisdiction, the publicity of hearings, the oral discussion, the deadline for the publication of the decisions, the possibility of resorting to the Supreme Court on the grounds of

jurisdiction pursuant to art. 111 of the Constitution (T.A.R. Veneto, Sez. II, 11 October 2011, n. 1538, in *Giur. merito*, 2011, 3197).

The major changes introduced by the legislature in 2009 and, most recently, the Code of Administrative Procedure have undoubtedly helped to clarify several elements of uncertainty that previously marked the discipline of appeal to the Italian President, as well as implement the degree of effectiveness, notwithstanding the basic flaw, which has already been mentioned, represented by the confirmation of the recognition of ownership of the preliminary investigation only to the competent Minister (part of the dispute). That said – and regardless of the eventual change of legal status of the institution in question – it worth noting how the issues (in addition to longer-term appeal) have always justified the permanence of a remedy of protection structurally alternative to the ordinary, such as simplicity, speed and gratuity are not fully borne out by the facts. As for the alleged simplicity, for example, if it is true that in abstract, legislation does not require the use of special technical formulas for the preparation of the appeal, with the consequential right of private to draw it up without the help of a defender, in fact this rather rare, since, among other things, the Court has long held that complaints must be non-generic (though non-technical) and supported by appropriate evidence (Cons. Stato, Sez. III, 7 July 1998, n. 109, in *Cons. St.*, 1999, 1272); a circumstance which seems to be further confirmed by the recent substantial assimilation to the remedies of a judicial nature.

The assertion that the institution in question provides a form of quick protection is not entirely free from criticism: if it is true, in fact, that the competent minister is required to conclude the preliminary investigation within one hundred twenty days after the expiration of the term provided for the deduction of counterparties (otherwise the right of the person concerned to address their application directly to the Council of State), the legislature did not provide for any time limit for the issuing of the opinion by the Council of State, or for the issuance of the Ministerial decree once transmitted the opinion, resulting in that the final decision is often consumed after years of submission of the application. Finally, on the presumed cost of the remedy, it is worth noting how the lower cost compared to the forms of judicial protection is limited to the right to defend oneself in person by the individual, rights which, as already noted, are rarely exploited. Pursuant to

art. 37 of the Decree Law 6 July 2011, n. 98 (Urgent measures for financial stabilization), in fact, the previous regime of "gratuitousness" of the extraordinary appeal has been exceeded, having also been added in the proceedings for which it is necessary to make the payment of the unified contribution (equal to €650) required for the filing of charges.