

ADMINISTRATIVE PROCEEDINGS AND PARTICIPATION

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1. ADMINISTRATIVE PROCEEDINGS IN THE ITALIAN TRADITION

It seems necessary to start from a very brief description of the context within which the juridical theory of proceedings developed in our Country, so as to describe better the novelties to be reported in the legislation, the legal literature and in case law. In particular, the following observations refer to the legal theory of proceedings as such, and to the participation of private individuals in administrative proceedings, which is an essential element of said theory.

1.1 Theories on proceedings and participation

It is well known that Italy lacked a general law on administrative proceedings until 1990 and that both doctrine and case law built the entire administrative law around the central role of the administrative decision, of the public body and of the power that the latter wields in executing the former. Administrative proceedings, therefore, have had a residual role for a long time.

The doctrine¹ of the MID-XX century created the highest developments of the administrative proceedings, based mainly on two concepts of proceedings: a sequential concept, that focused on the role of the administration, its development and the possibility that the proceedings might legally protect the individual², and a second concept, that considered the proceedings as an occasion in which power is transformed into action and that, therefore, found in the proceedings the reasons for the objective wielding of power and for the legitimisation of the idea that the positions of public subjects and private individuals are equal³, centred around the rule of law.

¹ For necessary framework, VILLATA e SALA, *Procedimento amministrativo*, Dig. Disc. Pubbl., XI, Turin, 1996, 574 and BELLAVISTA, *I procedimenti*, in PERFETTI (ed.), *Manuale di diritto amministrativo*, Padua, 2007, from 377.

² See SANDULLI A.M., *Il procedimento amministrativo*, Milan, 1959.

³ I allude to Benvenuti (see: BENVENUTI F., *Eccesso di potere come vizio della funzione*, in *Rass. dir. pubbl.*, 1950, 1, ID., *Funzione amministrativa procedimento e processo*, in *Riv. trim. dir. pubbl.*, 1952, 118, ID., *Per un diritto amministrativo paritario*, in *Studi in memoria di Enrico Guicciardi*, Padua, 1975, 807, ID., *Funzione. Teoria generale*, in *Enciclopedia giuridica*, 1989, *ad vocem*) and his school (see: PASTORI, *La procedura amministrativa*, Vicenza, 1964, ID., *Introduzione generale*, in *La procedura amministrativa*, Milan, 1965, ID., *Relazione generale introduttiva in La disciplina generale del procedimento amministrativo, contributi alle iniziative legislative in corso*, in *Atti XXII convegno di studi di scienza dell'amministrazione*, Milan, 1989; BERTI, *La struttura procedimentale dell'amministrazione pubblica*, in *Dir. e soc.*, 1980, 437, ID., *Le difficoltà del procedimento amministrativo*, in *Amministrare*, 1991, 201, ID., *Procedimento, procedura, partecipazione*, in *Studi in memoria di*

Indeed, both the proceedings, the action (be it proceedings or trial), as well as the actions carried out by human beings, when they act within a rational dimension, and the function - in terms of a description of the rules of interdependence between phenomena (including in mathematical sciences) - can be explained as a task and as a focused action, as a relationship or a function.

The difference between these representations in administrative law is, however, highly significant. It is not a difference in the point of observation with regard to a phenomenon that has a shared nature (so that sequentiality or functionality are simply different ways of describing the same problem); the difference in the approach changes the very essence of the described phenomenon.

A. From the point of view of power, indeed, proceedings can be described as a task of a public subject or as an action focused on the making of a decision. Therefore, it has a negative value - that is to say, the violation of a procedural duty leads to the invalidity of the final decision; the decision is and remains the main focus, the proceeding is important only in terms of the final, authoritative decision, its validity, and the study of the proceedings - in technical terms - is significant only with regard to its morphological dimension (that is to say, its descriptive role of the sequence of procedural events pursuant to the template set out in the law, or on the contrary, illegitimately, in departure thereto).

The traditional approach to proceedings as a task described - already with Miele⁴ - the proceedings only from the point of view of a decision by the public authority; the finalistic approach allowed Sandulli to develop his very refined theoretical construction of an interconnected sequence of events aimed at creating a decision by the authority. Both

Enrico Guicciardi, *cit.*, 779; ALLEGRETTI, *L'imparzialità amministrativa*, Padua, 1965, ID., *Procedimento amministrativo*, in *Giuristi e legislatori*, Milan, 1997).

⁴ MIELE, *Alcune osservazioni sulla nozione di procedimento amministrativo*, in *Foro it.*, III, 1933, 380 (see also, ID., *Funzione pubblica*, in *Novissimo digesto*, VII, Turin, 1961, 686).

approaches preserve the centrality of the authority, of the importance of the procedure only in view of the unilateral, authoritative decision. It is not a coincidence that both approaches can be found in the synthetic works of one who, more than others, succeeded in affirming the exercise of authority as the construction paradigm of the whole concept of administration for the public good; indeed, Giannini describes the role of the procedure clearly as follows: «*the administrative proceedings*» are relevant only «*as a function of the weighing of interests*», so «*they tend to combine primary public interest, attributed to public administration, with any other interest it may acquire and which can be considered capable of being protected through the actions that make up the proceedings*»⁵; the action comes from the authority, within the context of the task it is called to perform - that is to say, the definition of the relationship with the unilateral authoritative decision - in order to pursue the interests attributed solely to it. In order to exercise this fundamental volition which allows it to define the role, measure and weigh of the interests that it considers material, public administration shall acquire such interest through the proceedings; in this case, however, proceedings are simply a finalistic sequence of legal actions. The proceedings get their meaning only from the unilateral provision, public power, the role of the authority.

B. In the opposite case, that of proceedings as function, proceedings are the place where abstract power, as envisaged by a law of the objective legislation, is transformed into a concrete, authoritative decision, so that the proceedings have a positive value; it is, indeed a legal activity that celebrates the equal role of the citizens and of public administration in verifying the facts and applying the law - the latter action shall be carried out solely by the public body, unilaterally but impartially. There are several consequences of this, as (I) power entrusted to the administration ceases to be a static concept and becomes "legal energy" emanating from the specific rule, (II) the dynamism of power, which transforms potential into action, necessarily requires a proceeding which is not simply the place in

⁵ See GIANNINI, *Lezioni di diritto amministrativo*, Milan, 1950, and ID., *Istituzioni di diritto amministrativo*, Milan, 1981.

which all relevant interest emerge, but rather the necessary - and therefore inevitable⁶ - vehicle to make the abstract rule contained in the law concrete, which must be observed by public administration and private individuals alike, so that (III) all the actors in the proceedings - including public administration - have equal positions with regard to the rule and interact with one another; this leads to the fact that (IV) the public subject (administrator) is no longer in the centre because proceedings are defined by the activity (administration) not by the subject, and the activity is carried out on the basis of the power that derives from a law of the objective legislation; (V) the public interest finality - which is at the roots of that power - is governed by all the players in the proceedings, in a confrontation that looks almost like a trial, all acting on an equal basis; the public authority governs jointly and its actions are bound by juridical concepts that subtract from its autonomy, as (VI) at the end of the proceedings it shall only act as an impartial party to adopt the unilateral decision (which is the only authoritative part of the process). The proceeding is a relationship.

This second doctrinal tradition dedicated more studies to the administrative proceedings, given their central role in that theory and these additions have a clear impact on the general law of 1990 on administrative proceedings.

C. From the point of view of the protection of the citizens' subjective position against the authority, the proceedings are a guarantee, a form of protection, so much so that through proceedings it is possible to discover any defects of the decision that might have been generated during the phase in which the authority's volition was being formed; this makes anything that might have occurred before the adoption of the provision also legally relevant. However, in the reconstruction in which the proceedings are a function, not a task, the guarantee function is not limited to the discovery of any invalid features of the authoritative decision, but is rather expressed in the equality of the parties involved in the ascertainment of facts and of the subject matter in the course of the proceedings.

⁶ For this, PERFETTI, *Il procedimento amministrativo*, in PALMA (a cura di), *Lezioni*, Naples, 2009, 663.

D. The theories on the participation in the proceedings are influenced by this material distinction and in some ways also anticipate it⁷. Several meanings have been attributed to the participation in proceedings⁸: its protective function with regard to the individual positions⁹ has been noted from the earlier studies¹⁰ - similarly to what happens in the jurisdictional joint input - and has been integrated, in the construction of the doctrine, by the democratisation of administrative activities¹¹ and the co-operation with the citizens in the making of public decisions functions, that are interconnected and mutually enriched

⁷ Art. 3, law March 20th 1865, n. 2248, annex E was understood in different ways: for some article 3 stated the right to participate to the administrative procedure (CAMMEO, *Commentario delle leggi sulla giustizia amministrativa*, Milan, year not disclosed, 512, GUICCIARDI, *La giustizia amministrativa*, Padua, 1954, 104, ZANOBINI, *Corso di diritto amministrativo*, II, Milan, 1958, GHETTI, *Il contraddittorio amministrativo*, Padua, 1971, 64, ALLEGRETTI, *Pubblica amministrazione e ordinamento democratico*, *Foro it.*, 1984, 205); otherwise case law and the majority in doctrine were on opposite side (see BENVENUTI, *L'attività amministrativa e la sua disciplina generale*, in PASTORI (a cura di), *La procedura amministrativa*, 1964, 540).

⁸ CASSESE, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, in *Rivista trimestrale di diritto pubblico*, 2007, 13, CARTABIA, *La tutela dei diritti nel procedimento amministrativo. La legge n. 241 del 1990 alla luce dei principi comunitari*, Milan, 1991, ZITO, *Le pretese partecipative del privato nel procedimento amministrativo*, Milan, 1996, OCCHIENA, *Situazioni giuridiche soggettive e procedimento amministrativo*, Milan, 2002; who wants can also see PERFETTI, *Partecipazione ed obbligo di motivazione*, in PASTORI (a cura di), *Legge 7 agosto 1990, n. 241 e ordinamenti regionali*, Padua, 1995, 155.

⁹ Recently LAZZARA, *I procedimenti amministrativi ad istanza di parte. Dalla disciplina generale sul procedimento (L. 241/90) alla direttiva «servizi»*, Naples, 2008, SCOGNAMIGLIO, *Il diritto di difesa nel procedimento amministrativo*, Milan, 2004, DURET, *Partecipazione procedimentale e processo*, in *Procedimento procedura processo*, Padua, 2010 and PERFETTI, *Diritto ad una buona amministrazione ed equità*, in *Riv. it. dir. pubbl. comunitario*, 2010, 789.

¹⁰ ALLEGRETTI, *L'imparzialità amministrativa*, above quoted

¹¹ It must be mentioned BERTI, *Procedimento, procedura, partecipazione*, in *Studi in onore di Guicciardi*, Padua, 1975, 779.

in the affirmation of the constitutional principle of fair proceedings¹².

1.2. The current regulatory framework

It is not difficult to observe that the physiognomy of administrative proceedings and of participation therein can be discerned, in its main features, through the reading of the provisions of Law n. 241 of August 7th, 1990. Of course, both themes are strongly influenced by doctrinal reconstructions and by the implementation in case law, and the wealth of references in several legislative sources other than the general law on proceedings (from regional to special laws, from the regulations of local public authorities to those of independent regulatory authorities, and so forth); however, at first sight the reference to the general law provisions on the proceedings seem to prevail. In this report, however, it shall be necessary to limit the discussion of this facet only to some references, as specific reports have already been dedicated to individual themes that can only be mentioned here.

1.2.1. In this sense, and in order not to overlap other comments, it seems appropriate to start from the suggestion stated in art. 29 of the law, concerning the scope of implementation of the relevant precepts, so that *"the duties of the public administration to guarantee the participation of the involved parties in the proceedings, to identify a subject to preside over such proceedings, to ensure their conclusion within the set deadlines and to guarantee access to all the administrative documentation, as well as that concerning the maximum duration of the proceedings"* constitute essential levels of performance *"concerning the civil and social rights"* which must be guaranteed all over the national

¹² CRISAFULLI, *Principio di legalità e <giusto procedimento>*, in *Giur. cost.*, 1962, 135, SALA, *Il principio del giusto procedimento nell'ordinamento regionale*, Milan, 1985; more recently MANFREDI, *Giusto procedimento e interpretazioni della Costituzione*, in *Procedimento procedura processo*, above mentioned, 59, CLINI, *La giusta procedura nella funzione amministrativa e giurisdizionale*, *ivi*, 81, BELLAVISTA, *Giusto processo come garanzia del giusto procedimento*, *ivi*, 155.

territory pursuant to the relevant article of the Constitution¹³. The duties of public administration and the rights of the individual within the dynamics of the proceedings, therefore, constitute an essential element of the relationship between authority and citizen's rights.

The duty of the administration to decide through proceedings - included implicit or silent ones (such as in the case of a certified notice of the start of the activity or of silent consent) - for which a responsible subject can be identified and in which the involved parties can participate - and discuss - with previous knowledge of their duration, and that must end with a decision¹⁴, are essential characteristics of the position of the individual and of its rights when they come into contact with the authority and, as such, are a development of its constitutional position vis-à-vis the authority. This seems to be the most interesting feature of the proceedings and of the individual's participation therein.

The law also establishes the principles which the party promoting the proceedings must comply with; at the beginning of the law (art. 1) it is stated that "*administrative activities pursue the goals established by law*" - thus clarifying the role of the proceedings - and are "*governed by economy, effectiveness, impartiality, publicity and transparency criteria*" - thus clarifying the principles that characterise the proceedings; very recently¹⁵, also due to the progressive increase of cases in which administrative activities are carried out by private subjects, a provision indicating that such subjects, too, must be obliged to comply with the same "criteria and principles" has been added (par. I *ter*). This latter

¹³ This rule was extremely clear also under Constitutional Court case law.

¹⁴ See also art. 2, paragraph I, letter *b*), and art. 21, paragraph I, Law February 11th 2005, n. 15, art. 3, paragraph VI *bis*, Law Decree March 14th 2005, n. 35, art. 7, paragraph I, lettera *b*), Law June 18th 2009, n. 69, art. 3, paragraph II, annex 4 Law Decree July 2nd 2010, n. 104, Presidential Decree July 16th 2010, n. 142, Presidential Decree July 16th n. 144, Presidential Decree November 18th 2010, n. 231, Presidential Decree November 17th 2010, n. 246.

¹⁵ art. 7, paragraph I, letter *a*) Law June 18th 2009, n. 69.

provision seems very important, for several reasons. First of all, it recognises that private subjects, who remain such for all purposes, can too be "*appointed to carry out administrative activities*" second, their activity is also an administrative proceeding, as it is regulated by the same criteria and principles; finally (and as a consequence of the above), it seems to deny the idea that proceedings are within the exclusive purview of public subjects, as they can be carried out also by private subjects.

1.2.2. As there are several specific reports on many of the institutions regulated by Law n. 241 of August 7th, 1990 (as subsequently, variously and too often amended), it seems wiser to analyse the provisions specific to the participation in proceedings. In this case, too, before detailing the novelties in the matter, a brief summary or the existing regulations seems appropriate.

1.2.2.1. The law - incorporating a strongly consolidated position of both case law and doctrine¹⁶ - requires (art. 3) that every administrative decision be motivated by the enunciation of the "*factual premises and legal reasons that determined the decision by the administration, with regard to the results of the investigation*", except when such

¹⁶ Classical are CAMMEO, *Gli atti amministrativi e l'obbligo di motivazione*, in *Giur. it.*, 1908, 253, MORTATI, *Necessità di motivazione e sufficienza della motivazione*, in *Giur. it.*, 1943, 1, CANNADA BARTOLI, *Motivazione "per relationem" ad atto non approvato*, in *Foro amm.*, 1962, 527; before Law 241: VANDELLI, *Osservazioni sull'obbligo di motivazione degli atti amministrativi*, in *Riv. trim. dir e proc. civ.*, 1973, 1595, BERGONZINI, *La motivazione degli atti amministrativi*, Vicenza, 1979, ROMANO TASSONE, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità*, Milan, 1987; subsequent Law 241 ANDREANI, *Idee per un saggio sulla motivazione obbligatoria dei provvedimenti amministrativi*, in *Dir. proc. amm.*, 1993, 19, CIMELLARO, *La motivazione del provvedimento amministrativo. Una rassegna della dottrina e della giurisprudenza di ieri e di oggi*, in *Dir. amm.*, 1993, 441. In general see GIANNINI, *Motivazione dell'atto amministrativo*, in *Enc. dir.*, XXVII, 1977, 257, MAZZARELLI, *Motivazione: motivazione dell'atto amministrativo*, in *Enc. giur.*, XX, 1990, *ad vocem* and CORSO, *Motivazione dell'atto amministrativo*, in *Enc. dir.*, IV, 2000, 167. For a recent overview RAMAJOLI, *Lo statuto del provvedimento amministrativo a vent'anni dall'approvazione della legge n. 241/90, ovvero del nesso di strumentalità triangolare tra procedimento, atto e processo*, in *Dir. Proc. Amm.*, 2010, 459 and COCCONI, *La partecipazione all'attività amministrativa generale*, Padua, 2010.

provisions are "regulatory actions" or "general in contents", or when the motivation can be inferred *ob relationem* "from another deed by the administration, referred to in the decision itself". This provision, although strengthening a consolidated principle, gave rise to considerable discussion - in terms of both the persistence of a lack of motivation within the context of an excess of powers¹⁷, and of the essential elements of administrative decision¹⁸.

1.2.2.2. If the motivation of the measure is a guarantee of participation in the proceedings at the time of decision, the provisions included in paragraph III of the law (¹⁹) are more specifically dedicated to the decision-making process. In particular, the drafter of law n. 241 provides (art. 7) that "subjects that are the recipients of the direct effects of the final measure and those who are called by law to participate in it" and, if "identified or easily identifiable", "subjects other than the direct recipients", if in danger of being prejudiced, have the right to receive notice a notice of the start of the proceedings - save when "there are obstacles derived from specific reasons of speed" ; these notices can be sent also with telematic means (²⁰); the notice is delivered (art. 8) through a personal

¹⁷ SALA, *L'eccesso di potere dopo la l. 241/90: un'ipotesi di ridefinizione*, in *Dir. amm.*, 1993, 211 and recently CODINI, *Scelte amministrative e sindacato giurisdizionale : per una ridefinizione della discrezionalità*, Naples, 2008.

¹⁸ For a wider argumentation, PERFETTI, *Manuale di diritto amministrativo*, Padua, 2007, from 338.

¹⁹ Still fundamental BERTI, *Procedimento, procedura, partecipazione*, in *Studi in memoria di E. Guicciardi*, Padua, 1975, 779, BENVENUTI, *Per un diritto amministrativo paritario*, ivi, 807; after Law 241 see LEDDA, *Problema amministrativo e partecipazione al procedimento*, in *Dir. amm.*, 1993, 133, TRIMARCHI F., *Questioni in tema di partecipazione al procedimento amministrativo*, in *Amministrare*, 1993, 135, COGNETTI, *Partecipazione al procedimento e ponderazione degli interessi*, in SCIULLO (ed.), *L'attuazione della legge 241/90*, Milan, 1997, 15, and "Quantità" e "qualità" della partecipazione. *Tutela procedimentale e legittimazione processuale*, Milan, 2000, DURET, *Partecipazione procedimentale e legittimazione processuale*, Turin, 1996, FRACCHIA, *Analisi comparata della partecipazione procedimentale nell'ordinamento inglese e in quello italiano*, in *Dir. Soc.*, 1997, 189, VIRGA G., *La partecipazione al procedimento amministrativo*, Milan, 1998.

²⁰ See also art. 3 bis Law n. 241; on digital administrative proceedings see Law Decree March 7th 2005, n. 82 (Digital Administration Code), Law Decree December 30th 2010, n. 235 and the recent book by MASUCCI,

communication (or, if this is impossible or too difficult, with other eligible means), and shall contain the name of the proceeding authority, the object of the proceedings, the office and officer responsible for the proceedings, the deadline for its conclusion and the remedies that can be adopted in case of lack of activity and the office where the relevant documentation is available for perusal. If the proceedings are started by third parties, the notice shall also show the date of filing of the motion.

The interested parties and the parties representing common interests to whom the proceedings might be prejudicial can (are *entitled to*) participate in the proceedings (art. 9), by filing "*written briefs and documents*" which, if relevant "*the administration is obliged to examine*", and by examining the relevant documentation (art. 10); by reason of both reference to the European Union law principles contained in art. 1 of the law and their higher effectiveness, the greater participation guarantees (the right to cross-examination) included in the European Union legal structure (and, in particular, on the basis of the right to a good administration) shall be considered applicable here. The duty of the proceeding authority to examine the participation documents might convince it to settle the matter with the private citizen, rather than making a unilateral decision (art. 11), or to reject the application filed by third parties; in this way the initiative taken by the filing party is further guaranteed by the fact that such party shall be given (art. 10 *bis*) a "*notice of impediments*" that clarifies the "*reasons why the application must be rejected*", against which the applying party has "*the right to appeal in writing*" by producing defence arguments ("*observations, integrated by documents if necessary*").

1.2.2.3. While the aforementioned notice does not apply in some instances (bankruptcy proceedings and welfare matters), more generally, the concept of participation

Procedimento amministrativo e nuove tecnologie. Il procedimento amministrativo elettronico ad istanza di parte, Turin, 2011 (see also ID., *La " telematizzazione " del procedimento amministrativo. Primi lineamenti*, in PERFETTI (ed.), *Le riforme della l. 7 agosto 1990, n. 241 tra garanzia della legalità ed amministrazione di risultato*, Padua, 2008, 225.

in proceedings is not guaranteed (art. 13) when it is aimed at the adoption of "*regulatory, general administration, planning and programming actions*" (and, the law adds, in the case of fiscal proceedings, seizure of assets in the event of kidnappings and change of personal details for prosecution witnesses), while the specific rules concerning participatory instruments for those proceedings remain applicable; there is a clear symmetry with the exclusions concerning the obligation to provide grounds for the decisions.

The lawmaker has further introduced a - very controversial - provision (art. 21 *octies*) that states that provisions that are unlawful by reason of a "*violation of the rules of proceedings or those on the formal structure of the action*" cannot be annulled if "*given the mandatory nature of the provision, it is clear that its executive contents could not have been different from the ones actually adopted*" and that "*in any case*" the unlawful action cannot be annulled "*because of the lack of a notice of the start of the proceedings*" if the administration "*during the proceedings*" is able to demonstrate, which is not easy, that "*the contents of the decision could not have been different from the ones actually adopted*".

1.2.2.4. Of course, there are principles that can dictate the depth and outlook of proceedings and precepts that regulate the participation therein throughout the whole body of law - from the procedural agreements described in art. 11, that are a consequence of the "*acceptance of observations and proposals*" filed in the proceedings, to the calling of a service conference (art. 14, par. IV) by the private subject and to the importance of the private subject during its performance; from self-certification (art. 18) to the certified notice of the start of the activity (art. 19) and to silent consent (art. 20) as means to achieve a decision, to the wide chapter on the access to documents and information - and in other national and regional laws; it is not possible here to examine the whole of it, and this work shall be limited to some brief observations - for the sake of highlighting any novelties - on the certified notice of the start of the activity (a proceedings and as a form of participation).

1.2.2.5. On the other hand, it is worth mentioning that the outlines of the proceedings and of the private subject's participation therein must be looked for also outside of the text of the general law on administrative proceedings.

First of all, it is necessary to look at the statute establishing public administration - a theme on which the Italian doctrine has not yet reached a consensus, with a division between those who think that the Constitution has fixed the classic system, later eroded by European Union law, and those who see a complete overhaul of it - as the theories on administrative proceedings that have been used since the 1960s to build them as a function were based on the constitutional text. Secondly, participation in proceedings and the concept of proceedings owe a lot to the reflection on their relationship with trial, and so it shall be necessary to pay attention also to this facet - especially given the very recent codification of the administrative trial. Thirdly, sectorial and case law contribute in a material way to the creation of the institutes that have been discussed here and , from this point of view, too, it shall be necessary to explain the introduced novelties.

1.3. Success of positive regulation of proceedings and discard of its theoretical basis

A last general observation might be useful. The consolidation of the proceedings also through the approval of Law n. 241 of August 7th, 1990²¹, the consolidation of the principle of fair proceedings (at a constitutional level) and the subsequent principle of good administration (derived from European Union law) seem to have widened the scope of attention of the doctrine and of case law considerably, as well as their importance in practice; however, the wealth of rules - general and sectorial - and the frequency of their implementation in case law have, for the most part, released these institutions to be interpreted and described - two activities that have a considerable importance in the Italian administrative law studies. The innovative strength of the doctrinal reconstructions that had created those institutions was consequently reduced. In line with the leaning towards

²¹ On Law n. 241 chiaroscuro, BERTI, *La responsabilità pubblica (Costituzione e Amministrazione)*, Padua, 1994, 319, 323, 403.

juridical technicality that goes together with the respect for written decisions, administrative proceedings and participation in proceedings, in the end, coincide with the text of the law, so that the whole development of administrative proceedings has been reduced to a mere regulation of how the public official must carry out their tasks in order to reach the goal that is the authoritative decision, and thus lost their richness, depth, and meaning. In this process - seemingly unknowing - the proceedings end up coinciding with the interpretation of the positive rules that regulate them, and their interpretation is carried out in light of the traditional approach of the proceedings as task, with a strong link to the proceeding public subject: importance is thus assigned to the administrator, not to the act of administration.

The less descriptive profiles - such as, for instance, the subjective position of the participants in the proceedings²², or the collective private interests - therefore, remain in the shadows of conditional public interest. More generally, the profile and significance of both the proceedings and the participation therein, seen as tools to make the exercise of power an objective action (as it is a simple implementation of a rule) and the decision-making process equal, remain in the background and are superseded by the centrality of the traditional conception of proceedings.

It seems as if the proceedings and the participation therein are not a consequence of constitutional principles and theoretical constructs that can explain positive law; without action on the part of the lawmaker, there would be nothing, so it is enough to note down the provision made by the lawmaker. In these terms, most of the ability of the proceedings and of the participation therein to govern the authority and make it functional to the full enjoyment of rights is cancelled; the idea of proceedings as a task the authority must carry out according to its own rules prevails; legal science, if it is satisfied by exegesis, does not seem able to guide the development of the system, and simply suffers the novelties introduced by the national and European lawmakers.

²² ZITO, *Le pretese partecipative del privato nel procedimento amministrativo*, above mentioned.

2. UPDATES

Within this general framework, here are the novelties. The themes described here have not been updated in any material way recently, and the relevant legal literature seems characterised by specific analyses or celebrations of the twentieth anniversary of the introduction of Law 241/1990, rather than by radically new contributions²³.

2.1 *Regulatory novelties*

As far as the legislative news are concerned, a brief description of the provisions that introduced a code of administrative procedure, as well as further proceedings streamlining systems and the certified notice of the start of the activity (segnalazione certificata di inizio attività - SCIA) seems in order.

2.1.1. No argument is needed to demonstrate the importance of the relationship, both theoretical and practical, between proceedings and trial, between participation in proceedings and jurisdictional protection; in this respect, the approval of the code of administrative procedure (Legislative decree n. 104 of July 2nd, 2010) cannot be overlooked. Of course, the analysis of the importance of procedural rules for the discipline

²³ See *status quaestionis* after twenty years the Law n. 241 is in force, in CORSO, *Il principio di legalità*, 4, DELLA CANANEA, *Il rinvio ai principi dell'ordinamento comunitario*, MARZUOLI, *Il principio di buon andamento e il divieto di aggravamento del procedimento*, 207, POLICE, *Il dovere di concludere il procedimento e il silenzio inadempiuto*, 228, RAMAJOLI, *L'intervento nel procedimento*, 517, CHIRULLI, *I diritti dei partecipanti al procedimento*, 530, VAIANO, *Il preavviso di rigetto*, BASSI [N.], *Gli accordi integrativi o sostitutivi del provvedimento*, ZITO e TINELLI, *L'ambito di applicazione delle norme sulla partecipazione*, 588, PAOLANTONIO e GIULIETTI, *La segnalazione certificata di inizio attività*, 750, LAMARQUE, *L'ambito di applicazione della legge sul procedimento amministrativo*, 1234, all in SANDULLI [M.A.] (ed.), *Codice dell'azione amministrativa*, Milano, 2010. For a more theoretical approach, please refer to the various essays in *Procedura, Procedimento, Processo*, Padua, 2010, above quoted and the recent book by COGNETTI, *Principio di proporzionalità*, Turin, 2011.

of proceedings would require wide comparisons with the whole structure of the code of administrative procedure, which is not required here. However, a few profiles, at least, are worth mentioning.

A. First of all - and of material importance, in our opinion - the administrative jurisdiction itself is defined by the implementation of the rules of administrative proceedings (art. 7 of the code of administrative procedure) Indeed, given that the jurisdiction of the administrative judge concerns litigation over the exercise of, or failure to exercise, administrative power ("*concerning provisions, actions, agreements or behaviours that can be traced back, even indirectly, to the exercise of said power*") by "*public administrations*", the code clarifies that, for the purpose of determining jurisdiction, all subjects "*that are in any case called to observe the principles of administrative proceedings*" are also to be considered equivalent to public administrations. The purpose of this provision is clear, but the provision itself gives rise to hermeneutic and systematic disagreements, which we need not consider here.

It is important, instead, to underscore the strong relationship that exists between the mandatory implementation of procedural rules for the purpose of making a decision, and the consequent determination of administrative jurisdiction over said decision, independently from the subjective title of the person who actually makes the decision.

B. Secondly, the provisions of the code of administrative procedure that confirm the possibility, in general, for the judge to verify (and repeat) the assessment of facts carried out by the administration within the context of the proceedings (for instance, art. 19 of the code of administrative procedure) and thus the importance of the equality in both the definition of facts and the participation in the proceedings - and the consequent possibility of filing documents and briefs to allow a better definition thereof - seem important. It seems equally important to underscore that "*factual circumstances and the general behaviour*" of the private subject and of the administration are trial materials in trials for damages (art. 30 of the code of administrative procedure).

C. Independently from the lively discussion on the lack of provisions for a general

assessment action, the provision of art. 31 of the code of administrative procedure must be mentioned; the article does, indeed, provide for an assessment, and this provision states that, after the expiration of the deadline *"for the conclusion of the administrative proceedings, the interested parties can ask for an assessment of the compliance of the administration with its obligations"*; it is clear that the object of the process is the assessment of procedural compliance, with the consequent observations on the structure of the proceedings and on the subjective positions during the same.

D. With regard to the development of the procedural cross-examination, it is important that there be the possibility of having summary (and therefore quick) judgements, with regard to both access to administrative documents (art. 116 of the code of administrative procedure) and the failure to adopt the provision within the deadline set for the ending of the proceedings (art. 117 of the code of administrative procedure); for this reason it does not seem difficult to consider the presence of a trial as a tool for the effectiveness of cross-examination within the proceedings, a tool that can be used also during the proceedings - and especially in judgements on silence, during complex or composite proceedings - with theoretical consequences that are easy to understand with regard to the concept of equality of the parties during the proceedings.

2.1.2. As already mentioned, the lawmaker has often expressed a wish to act on the provisions of Law 241/1990, including recently. The lawmaker's starting point is the wish to reduce the procedural sequence, or substitute it with statements or certificates.

A. On the one hand, the lawmaker has introduced a wide-ranging recourse to silent consent, as well as several departures from the competences of the administrative bodies, in an attempt to reduce the time that is necessary to issue consents to the start of entrepreneurial activities: in this sense, law decree n. 78 of May 31st, 2010, Urgent measures for financial stabilisation and economic competition, which, in art. 43, introduced *"zero bureaucracy areas in Southern Italy"* in which *"new productive initiatives"* would be promoted also by the fact that *"the final decisions in administrative proceedings of any nature and with any object, started by a request by a third party"* are to be considered approved by means of silent consent unless issued by a Government Commissioner acting

(also as a consequence of "*ad hoc service conferences pursuant to Law . 241 of 1990*") in departure from ordinary competences, is emblematic. These provisions are not new in the Italian system (witness, for instance, law decree n. 112 of June 25th, 2008) and often present a "propaganda" aspect, as they are filled with emphatic and dubious statements⁽²⁴⁾; additionally they lack precision in the use of legal categories which makes it very difficult to implement them and represents a constant departure from the template of procedural law.

B. On the other hand, it cannot be overlooked that the number of cases in which the law gives importance, within the proceedings, to certifications issued by monitored private subjects in substitution for administrative assessments is increasing⁽²⁵⁾. Within this context, mention must be made of art. 49 of law decree n. 78 of May 31st, 2010 (converted by Law n. 122 of July 30th, 2010) that completely overhauled the text of art. 19 of law 241/1990, substituting the commencement notice (*dichiarazione di inizio attività - DIA*) with a certified notice of the start of the activity (*SCIA*).

By reason of the new text of art. 19, every "*authorisation, licence, non constitutive concession, permit or clearance, however named, including the applications for the enrolment in professional registers required for the exercise of entrepreneurial, business or cottage industry activities whose issuance depends exclusively by the fulfilment of general legal or administrative requirements and assumptions, and does not require any limitation of quota or specific sectorial planning tools*"⁽²⁶⁾ is "*replaced*" by a "*self-certification*" integrated by statements in lieu of certification and by "*attestations and affidavits by expert*

²⁴ Such approach is particularly clear in Law Decree June 25th 2008, n. 122 («Government Action Plan for simplification and regulation quality»); see here articles named «Cut-administrative operations» (art. 25), «Cut-Public Bodies» (art. 26), «Cut-paper» (art. 27) or «Open an enterprise in a Day» (art. 38).

²⁵ See recently BENEDETTI, *Certezza pubblica e "certezze" private. Poteri pubblici e certificazioni di mercato*, Milano, 2010.

²⁶ Excepted «activities mostly of financial nature».

technicians or by declarations of conformity by the Agency for enterprise" which are proof of the satisfaction of the fulfilment of the requirements and assumptions for the obtainment of the relevant act; once the certified notice has been filed, it is possible to start the activity immediately, but the administration can stop it and order the elimination of its effects if it should ascertain "*any lack of fulfilment of the requirements and assumptions*" that had been certified; however, after sixty days have elapsed, the power of the administration to intervene is limited to a few cases. The lawmaker further declares that the described regime pertains to the protection of competition (so as to exclude any regional jurisdiction) and constitutes the basic level of performance with regard to civil and social rights (so as to exclude any regional jurisdiction), specifying also that said regime replaces the one based on the commencement notice, in all cases in which the latter is referred to ⁽²⁷⁾.

The doctrine has criticised the SCIA discipline ⁽²⁸⁾ and, for the most part, has brought this new institute back to the original outline of the commencement notice ⁽²⁹⁾ - on which, also because of the various swings of the lawmakers, an intense legal and doctrinal debate has ensued, especially with regard to the "self administration" nature of the action of the citizen, the nature of the power of public bodies with regard to the results of the activity that was launched without the relevant requirements and to the legal protection of third parties; however, it would be interesting to analyse this discipline also in light of Directive 2006/123/EC, to assess its systematic scope and to reach conclusions on the more controversial themes also from that point of view.

²⁷ Case law recently takes position for DIA overstay (see Tar Lombardia, section I, January 13th 2011, n. 89 and January 14th n. 123, see it in *Urb. e app.*, 2011, 579).

²⁸ See MATTARELLA, *La Scia, ovvero dell'ostinazione del legislatore pigro*, in *Giornale di diritto amministrativo*, 2010, 1328.

²⁹ In this way BOSCOLO, *La segnalazione certificata di inizio attività: tra esigenze di semplificazione ed effettività dei controlli*, in *Riv. giur. urbanistica*, 2010, 580

2.2 The most recent law developments

It seems that recently case law has taken no stances that can significantly modify the orientation of the general profile of proceedings or the participation therein of the involved parties.

A. The Constitutional Court, on its part, is taken with the problem of extending the obligation to provide grounds for administrative provisions. However, the Court does not seem to take a linear approach in its analysis, as on the one hand it has linked the obligation to provide grounds solely to the principles peculiar to the administrative activity (*"on the one hand, it is a corollary of the principles of good conduct and impartiality of the administration, and, on the other hand, it makes it possible for the recipient of the decision who believes that its legal position has been prejudiced, to have recourse to jurisdictional protection"*³⁰), excluding all guarantees of procedural cross-examination and of the right to procedural defence by limiting the obligation to give the grounds "solely to the trial procedure"³¹ (even though the remitting judges had emphasised this point, including by reference to European Union laws - *"this is a constitutional principle common to the European countries, which can be derived from art. 253 of the Treaty on European Union, which is today art. 296 par. 2 of the Treaty of Lisbon"*³²); the result hereof is that the admissibility of grounding a decision on the basis of a numerical score has been conformed, as the Court prefers to avoid weighing the administration with excessive burdens. Cross-examination and defence would be - clearly backtracking from the guarantee of a fair trial - requirements that would be valid only in a trial context. Other institutions of Law 241/1990 have been involved with constitutional law, but only as profiles that do not contribute to outline the shape of proceedings and participation therein - even though they might have

³⁰ Constitutional Court, November 2nd 2010, n. 310.

³¹ Constitutional Court, January 30th 2009, n. 20.

³² Constitutional Court, November 2nd 2010, n. 310.

has a considerable practical importance³³, as in the instance of case law on the applicability of DIA to the construction of power plants from renewable sources.

B. Recently, administrative case law has not had the opportunity to establish especially novel principles; nonetheless a sound tendency towards an accurate implementation of the general principles must be pointed out.

Thus, it has been stated that³⁴ the administrative action must be "*characterised by the classic features of transparency and publicity and by the principles of European Union law, but also by civil law-derived principles, including that of good faith, which can be considered an expression of actions carried out on the basis of principles of good administration*"; the administrative judge is therefore used to implement the principles of non-aggravation, of reasonable duration of the proceedings³⁵, of transparency and

³³ See Constitutional Court, June 8th 2011, n. 175 admitting the mark as a motivation and giving prominence to the administrative efficiency than judicial review above it.

³⁴ See Constitutional Court May 10th 2010, n. 171 on Environmental impact assessment, or May 29th 2009, n. 166, above Basilicata Environmental Regional Law April 26th 2007, n. 9, or March 22nd 2010, n. 119 on Puglia Renewable Energy Regional Law October 21st 2008, n. 31.

³⁵ For Administrative Court of First Instance (TAR), Naples, section III, March 29th 2010, n. 1719, Sicily, Palermo, section III, January 11th 2010, n. 232: article 1 of Law 241, as modified in 2005 introduced in Italy good faith principle.

impartiality³⁶, of effectiveness³⁷, proportionality³⁸, and caution³⁹. It cannot be overlooked that all these principles can be derived, by and large, from our Constitution and that, however, case law - following a long-standing tendency to interpret the law - has fully implemented them only after the reformation of art. 1 of Law 241/1990, even going so far, in some instances, to attribute their origin to European Union law⁴⁰.

The result is that the developing confirmation of the legal relevance of these principles reduces the space attributed to administrative merit⁴¹.

There is nothing new with regard to the limits to the participation in proceedings pursuant to art. 13 of Law 241/1990, and yet, in observing the cases in which case law has long been validating decisions made without a notice of the start of proceedings, and so

³⁶ In such way TAR Pescara, section I, February 11th 2011, n. 113; TAR Brescia section I, November 2nd 2010, n. 4520 explicate that is to prefer admittance with prescription than a new decision because in this second way applicant is due to a new instance; TAR Firenze, section I, January 19th 2010, n. 67, clarify that is not due the full examination of an instance if it seems inadmissible; for TAR Sardinia, Cagliari section I, December 7th 2009, n. 2014, sealing of the application in a public tender procedure is to be examined in a not- formalistic way, looking at the goal of the procedure itself.

³⁷ For TAR Palermo, section I, January 26th 2011, n. n. 126 publicity in public tender procedure is a part of the general principle of fairness,

³⁸ Administrative decisions with multiple recipient seems ad expression of such principle at TAR Naples, section VIII, September 10th 2010, n. 17398.

³⁹ Proportionality is for TAR Genoa, section II, May 27th 2009, n. 1238 the measure of the qualifications requested to become public administration contractor due to a public tender.

⁴⁰ An example in TAR Trento, section I, July 8th 2010, n. 171.

⁴¹ Notwithstanding such principles are plainly stated in Italian Constitution, for Supreme Administrative Court (Consiglio di Stato) section V, January 19th 2009, n. 4035 concurrency, fairness, publicity, transparency, proportionality, are UC principles, due to observance under UC Laws immediately compulsory in Italy.

without participation⁴², it is easy to see that participation is considered much less important than it appears to be in the law.

However, even though such opinions are often unsound⁴³ and only slightly consistent with the logic of protecting the right to a defence in proceedings⁴⁴ - which is upheld by European Union case law - it must be said that they are now very much established in case law. In fact, it might almost be said that procedural guarantees are limited today to slightly more than self-protection procedures⁴⁵ and that the number of subjects to whom notice of the start of proceedings is mandatory is extremely limited, as many nominal opponents are also excluded⁴⁶.

⁴² Recently, TAR Sicily, Catania, section III, February 4th 2011, n. 258, TAR Calabria, section II, February 11th 2011, n. 211, TAR Rome, section III, January 10th 2011, n. 66, TAR Molise, section I, December 10th 2010, n. 1532.

⁴³ Case law exclude the notice is due in (i) proceedings on instance of the applicant, (ii) not discretionary decisions, (iii) emergency decisions, (iv) decisions related to security measures.

⁴⁴ Case law must to be criticized: Supreme administrative Court legitimate the lack of notice in case of exclusion from public tender procedure of the participant if the administration is unfulfilled with requirements, (Consiglio di Stato section VI, December 21st 2010, n. 9324); neither due the notice is – for Consiglio di Stato, section V, June 23rd 2010, n. 3966 – in case the tender is awarded to another participant.

⁴⁵ Coherent with UC case law is Italian Supreme administrative Court admitting the lack of the notice in case the participant received the due information in other ways (Consiglio di Stato, section VI, March 9th 2011, n. 1476, section VI, March 2nd 2011, n. 1305, Consiglio di Stato section II, January 7th 2011, n. 1585.

⁴⁶ Participation is anytime due in case of decision negative for the applicant (Consiglio di Stato section V, January 17th 2011, n. 206, TAR Salerno, section II, September 20th 2010, n. 11084, TAR Rome, section II, July 7th 2010, n. 23285, TAR Naples, section IV, May 4th 2010, n. 2480, TAR Bari section I, April 12th 2010, n. 1330, TAR Rome, section II, December 13th 2010, n. 36323, TAR Florence, section I, March 24th 2010, n. 742, TAR Rome, section III, March 2nd 2010, n. 3241, TAR Florence, section II, July 6th 2010, n. 2316.