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INTERVIEW WITH PROFESSOR JEAN-BERNARD AUBY**



Professor Auby, on the occasion of your lectures at Roma Tre University, I would like to ask you a few questions concerning some issues of administrative law in France and how it compares with other European legal systems, including the one in Italy.

1. According to the new Code des relations entre le public et l'administration, what are the current problems that France shares with other legal systems such as the Italian one?

I would say there are six main problems shared by the French and Italian legal systems.

The first is about the consequences of administrative inactivity and there are three

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different main solutions in the various European legal systems. In most systems, this inactivity triggers some kind of public administration liability; in other cases, such as Italy and France, it implies tacit agreement; in other systems, silence means the citizen can get the judge to force the public administration to fulfil its administrative duty (e.g., *mandamus* in the UK and Germany). The second shared problem consists of the so-called multi-layered proceedings that require the actions of the various administrations involved in the same proceedings to be coordinated. The different legal systems provide for two kinds of solution: some have formal consultation mechanisms: such as the *conferenza di servizi*, in Italy. Others rather trust in tacit agreement mechanisms in the case of inactivity from the authorities in question: this is the case of the French one. The third problem is how administrative appeals are governed, which is somewhat different in the various systems. In France, these appeals are traditionally fairly informal, while in the UK they are always more similar to judicial appeals (and in Germany most precisely regulated in the Administrative Procedure Code). The fourth category of problems common to all systems are those related to the digitalization of public administration. Computerizing procedures necessitate at least solving problems associated with using and regulating electronic instruments, data protection and automatic decisions based on algorithms. The fifth shared problem is the need to implement and continually fine-tune the ways in which citizens take part in administrative decisions. Above all, this concerns third-party opposition to unfavorable rulings, town planning, public works and regulatory acts. The last major problem is the classic one of access to administrative documents. Nowadays, all the legal systems comply with some kind of Freedom of Information Act (FOIA); the primary issue becomes the re-use of public data.

2. What are the main changes introduced by the new French Code, and what are the main differences with the Italian law on administrative proceedings?

The new French Code adopted in 2016 is essentially pragmatic, with few proclamations of principle and widespread absorption of case law. It was followed by a few important rulings clarifying the relationship between the Code and specific laws, as well as by additional laws on some of the problems we talked about earlier, such as access.

The main difference between the French and Italian systems is the significance attributed to the administrative proceedings. French administrative law focuses more on the individual administrative act. There are several rules common to both systems, such as annulment of the act for violation of procedural rules and administrative silence. Having said that, the Italian system is more complex when it comes to admini-

strative inactivity insofar as it makes provision for different forms of silence and, above all, different procedural mechanisms which can be activated depending on the type of silence in question. One of the main differences is definitely the obligation to state reasons for the administrative measure. In France, this obligation applies only to unfavorable or exceptional (special) acts, whereas in Italy, it applies to any measure excluding legislative and regulatory acts. With regard to the participation of citizens, the French system contains measures enabling citizens to be consulted via public debate or online. A further significant difference between the two systems concerns the rules governing revocation and annulment following an internal review process.

3. Regarding the stability of rights vested by administrative acts, what are the main differences between the various European legal systems in terms of rules and instruments for the protection of individuals?

The power of the public administration to amend and influence existing administrative acts is governed by various principles, including: administrative efficiency, changeability, legality, and *autotutela* (self-protection) in Italy and Spain. At the same time, the amendment power applicable to administrative acts is restricted by the principles of legal certainty, legitimate expectations, obligation to protect acquired rights and non-retroactivity.

The power to influence existing acts is governed differently from a conceptual perspective by the various legal systems. Some systems are based on the distinction between favorable and unfavorable acts; others are based on the distinction between acts that attribute rights and acts that do not; others, meanwhile, use the criteria of the legality or otherwise of the act.

Under Spanish law, *autotutela* on favorable acts is possible only if these are invalid (null or nullifiable). Unfavourable acts, on the other hand, can be automatically revoked (*revocación de oficio*).

Under German law, however, acts attributing economic benefits (favorable but illegitimate) cannot be withdrawn by the administration because the principle of individual legitimate expectations precludes revocation or annulment except in certain cases, such as fraud or corruption. In other cases, *autotutela* is possible but entails indemnification obligations. In addition, the power to withdraw may be exercised within

a year of becoming aware of the reasons justifying said withdrawal.

For legitimate favorable acts, revocation is never permitted while annulment is effective *ex nunc* for a period of one year with the possibility of compensation. For unfavorable acts, there is considerable scope for withdrawal if they are illegitimate; if they are legitimate, retroactive annulment is not possible but revocation *ex nunc* is permitted. Articles L242-1 and L242-2 of the French Code distinguish between acts that attribute rights and those that do not create rights. In the case of the former, the administration cannot repeal or withdraw a measure at its own initiative or at the request of a third party unless the measure is illegitimate; if it is, withdrawal must take place within four months for explicit acts and two months for implicit acts. As a general rule, a legitimate act can only be withdrawn *ex tunc* in exceptional circumstances. In the case of the latter (acts that do not create rights), these can always be withdrawn *ex nunc* but *ex tunc* withdrawal is in general excluded by virtue of the non-retroactivity principle. In Italy, the latest version of the law on administrative proceedings includes new rules on the power of automatic revocation, which in addition to the illegitimacy of the act, presupposes that the irregularity is not only procedural or formal, and that acts attributing rights have a time frame of 18 months. The power of revocation has also incurred greater restrictions in terms of acts which are legitimate but no longer deemed to be appropriate.

4. Another area of considerable importance in Europe is that of public sector contracts. What are the measures for combating irregular procedures and what powers do judges have in the French legal system?

The public procurement sector is undoubtedly one of the most important at a European level. European directives on protecting competition in the internal market have prompted national laws that can guarantee the utmost level of competition in public tenders. The functioning of the public tender system is hugely dependent on the effectiveness of its relevant judicial procedures.

Laws on judicial reviews have taken an important step forward on the back of European directives and case law from the French Council of State.

The French Code of Administrative Justice provides for two summary judgments: the *référé pré-contractuel* and the *référé contractuel*. The former concerns bre-

aches of freedom of access to public procurement or equal treatment. The Court can order the contracting authority to comply with its obligations and suspend the implementation of any decision relating to the contract. However, this procedure can be filed only for a limited time known as the stand-still period. Once the contract has been signed, its validity can be challenged only with the *référé contractuel*. This is a special procedure within the judicial review.

Apart from these urgency procedures, the Code of Administrative Justice provides for two types of actions: those targeting the contract itself and those aiming for compensation.

The actions targeting the contract itself aim to have the contract-making procedure annulled or adjusted. There are also actions whose objective is to obtain monetary compensation in case of infringement of the contract, in case of “*imprévision*” or “*fait du prince*” (both concepts refer to unpredictable events coming to unbalance the implementation of the contract) or for having unlawfully deprived a party of the contract. One of the biggest problems concerning the fight against public procurement irregularities is the issue of persons entitled to directly challenge the validity of contracts. In particular, the main issue is the definition of “third parties.” In recent years, the category of third party was opened to the candidates who were ousted during the award procedure. Those candidates are entitled to directly contest the contract.

In the French legal system, there is a special prerogative granted to the Prefect to bring grievances concerning the operating condition of public services before the administrative courts. Prefects can avail themselves of this power in order to control the legality of public contracts.

Nowadays, the main question is if the notion of third parties can be extended to persons outside the contract procedure.

With an important decision of 2014 (Council of State of France, 4 April 2014, no. 358994), the Council of State recognized the existence of different third parties entitled to appeal against the validity of a public contract and the lawfulness of the award procedure.

According to the Court’s opinion, third parties which have a specific interest in bringing the action have the right to file an appeal before the contract judge.

The Council of State identifies different classes of third parties entitled to bring action:

priority and ordinary. The first group includes the Prefect and the member of the decision-making body of the territorial collectivity or grouping of territorial collectivities. The ordinary third parties are those who have to prove to the Court that they have a sufficient interest in filing the appeal.