

ANTONIA SALVATO*

JOINT SECTIONS OF ITALIAN COURT OF CASSATION,
JUDGMENT NO. 8236/2020: A CHANGE
IN THE DEFINITION OF LEGITIMATE INTEREST?

ABSTRACT. TIn Judgment No. 8236/2020 of the Joint Sections of the Italian Court of Cassation, the judges affirmed the jurisdiction of the ordinary judge over the damage caused by misbehaviour of the public administration. It is indeed stated that this incorrect behaviour generates an infringement of the private individual's general subjective right to the respect of good faith by public authorities. This judgement, if on the one hand qualifies the relationship between public administration and private individual as a "qualified social contact" – following the previous majority case-law –, on the other hand, declaring the jurisdiction of the ordinary judge, implicitly rejects the current notion of legitimate interest. Today, in fact, the subjective legal situation of legitimate interest can no longer be summarized in the mere interest of the private individual in the legitimacy of the administrative act. The notion of legitimate interest has a relational dimension: legitimate interest of the private individual includes the general claim that public power behaves according to correctness and good faith. After this judgement, it is correct to ask whether there is change in the definition of legitimate interest.

CONTENT. 1. Introduction – 2. Legitimate interest: an Italian category of active legal subject situation – 3. Delay damage and mere delay damage: what compensation? – 4. Principles affirmed by the Joint Sections of the Italian Court of Cassation in Judgment No. 8236/2020 – 5. Emerging problems and final considerations

* Law Graduate, Roma Tre University.

1. Introduction

In the Italian legal system, there are two different judges: the ordinary and the administrative judge. The ordinary judge is normally competent for all situations in which a “subjective right” is violated, whilst the competence of the administrative judge concerns the injury of the so-called “legitimate interests”, except in cases expressly provided for by law,¹ caused by the public power.

As for subjective rights, the private individual is entitled to compensation for damage deriving from the violation of legitimate interests.² A specific unfair damage that the public administration can cause to the private individual is the damage which derives from the failure to respect the time constraints within which the administrative power must respect: it is called “delay damage”. The public administration has the obligation to compensate the unjust damage caused by the non-observance, intentional or negligent, of the procedural deadline. The public administration, in fact, has the obligation to observe the duties of correctness and good faith, provided by Italian civil law, in the context of its relationship with the private individual. For this damage, Art. 133, para. 1, lett. a), n. 1, Italian Administrative Procedural Code provides for the exclusive jurisdiction of the administrative judge.

In a context of prevailing uncertainty³ about whether the private individual is entitled to compensation for damage caused by misbehaviour of the public administration, in the absence of the attribution of the subtended essential value, the Joint Sections of Italian Court of Cassation judged on it⁴ and affirmed the compensation of the damage caused by the misbehaviour of the public administration, declaring the competence of the ordinary judge.

¹ For the definition of “legitimate interest”, see *infra*, para. 2.

² See *infra* para. 3.

³ See *infra* para. 3. The majority of the previous case-law excludes compensation in the case of the absence of the attribution of the subtended essential value.

⁴ Joint Sections of Cassation, 28 April 2020, n. 8236.

2. Legitimate interest: an Italian category of active legal subject situation

The Italian legal system is characterised by an autonomous subjective legal situation in the context of the administrative relations, different from the “subjective right” shared with other legal systems,⁵ namely, the “legitimate interest”.⁶

The bipartition between subjective right and legitimate interest stems directly from the Italian Constitution, in particular from Arts. 24, 103 and 113,⁷ which confirm the existence of this category. Nevertheless, a specific definition of legitimate interest is not present in the current legal framework.⁸

At first, legitimate interests were considered only as instrumental subjective legal situations to administrative power legitimacy, without any link to a specific essential value.

With the passing of time, several theories on the definition of “legitimate interest” have been formulated.⁹ First, the theory of the so-called “occasionally protected

⁵ In foreign legal systems, the category of “legitimate interest” does not formally exist (except for the Spanish system, as enshrined in Art. 24 of the Constitution). Nevertheless, in all legal systems, the private citizen can enjoy a subjective legal position towards the public administration; for example, the German system considers “public subjective rights”, which have a different denomination but the similar substance to the Italian legitimate interests. For further details, in particular on the English and French systems, see S. CASSESE, *Le basi del diritto amministrativo*, Torino, Garzanti, 1995, p. 66.

⁶ The legal institution of the legitimate interest has been part of the Italian system since 1889, with the so-called “Crispi Reform” (Law no. 5992 of 31 March 1889). The protection of the legitimate interest could not be entrusted to the ordinary judge, which was competent only for subjective rights. The jurisdiction of the ordinary judge, in fact, would have entailed a violation of the principle of separation of powers, since the judicial power would have replaced the executive power of the public administration. Therefore, protection was delegated to the Council of State, which at the time was not a judicial body, but an advisory body of the government.

⁷ Art. 24, para. 1, Italian Constitution: “*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi*”; in this article, legitimate interest is equated with subjective right and its judicial protection is guaranteed.

Art. 103, para. 1, Italian Constitution: “*Il Consiglio di Stato e gli altri organi di giustizia amministrativa hanno giurisdizione per la tutela nei confronti della pubblica amministrazione degli interessi legittimi e, in particolari materie indicate dalla legge, anche dei diritti soggettivi*”. This Article provides that legitimate interest is the administrative jurisdiction’s principal object.

Art. 113, para. 1, Italian Constitution: “*Contro gli atti della pubblica amministrazione è sempre ammessa la tutela giurisdizionale dei diritti e degli interessi legittimi dinanzi agli organi di giurisdizione ordinaria o amministrativa*”, the protection of legitimate interest is always admitted against administrative acts.

⁸ G. NAPOLITANO, *La logica del diritto amministrativo*, Il Mulino, Bologna, 2020, p. 279; E. CASSETTA, *Manuale di diritto amministrativo*, Milano, Giuffrè, 2018, p. 330.

⁹ For further considerations, see F.G. SCOCCA, *Interesse legittimo, Storia e teoria*, in *Diritto pubblico*, n. 3, 2017, pp.

interest”: the legitimate interest consists in a favourable position of the subject not protected directly but only occasionally, i.e. when the position corresponds with a prejudice to a public interest, resulting instrumental in maximizing the public interest. Second, the procedural theory: the legitimate interest coincides with the interest to appeal of the recipient of the unfavourable provision. Third, the theory of legitimate interest being instrumental in ensuring the legitimacy of administrative acts: the former substantiates itself in the private claim to the legitimate exercise of administrative power. Lastly, the normative theory: the legitimate interest is a substantial legal situation – not procedural –, directly protected by the legal system, and it attributes to its owner multiple powers and faculties aimed at achieving or protecting an essential value potentially damaged by the administrative provision.¹⁰

Following the important judgment of the Court of Cassation of 1999,¹¹ which recognized the direct enforceability of the legitimate interest, including compensation when a violation of an essential value occurs, the aforementioned regulatory theory has been incorporated into the Administrative Procedural Code (CPA).¹² In particular, Art. 34, para. 1, lett. c), CPA¹³ provides that the administrative judge has the power to issue a judgment ordering the public administration to adopt a binding measure; the previous failure to adopt these measures, in fact, denied the private individual the due favourable effects. With this provision, which consequently admits a judgment reversing the adoption of an act entirely attributable to the public administration, Italy aligns with other European systems.¹⁴

945-984.

¹⁰ This theory finds its foundation in Art. 24, Italian Constitution, which, for the purposes of judicial protection, has equated the notions of legitimate interests with subjective rights. The private interest would be differentiated from the interest of the *quisque de populo*, and thus qualified, as it consists of an advantageous position in relation to a specific essential value.

¹¹ Joint Sections of Court of Cassation 22 July 1999, n. 500.

¹² Legislative decree No. 104 of 2 July 2010.

¹³ Art. 34, para. 1, lett. c), CPA: «L'azione di condanna al rilascio di un provvedimento richiesto è esercitata, nei limiti di cui all'art. 31, comma 3, contestualmente all'azione di annullamento del provvedimento di diniego o all'azione avverso il silenzio».

¹⁴ The action introduced in the Italian code conforms to the German paradigm of *Verpflichtungsklage* and to the

A situation of “subjective right” is undoubtedly present when, in order to satisfy an active legal situation, there is no need for intermediate intervention by the public administration, whilst a “legitimate interest” exists when a private subject aspires to a result for which the intermediation of administrative power is necessary. This latter subjective legal situation is indispensable in a legal system, as it legitimizes the private subject to require compliance for correctness (understood as good faith already in the moment prior to the issuance of a provision) by the public administration.

From the point of view of the protection of the legitimate interest, it is entrusted to a different judge from the ordinary one, who, however, is not completely excluded from the dispute with the public administration:¹⁵ in fact, the ordinary judge is still competent for all remaining disputes with the public administration concerning subjective rights. Article 103 of the Italian Constitution, entrusts jurisdiction in the matter of legitimate interests to the administrative judge and, in particular areas provided for by law, also of subjective rights.¹⁶

3. Delay damage and mere delay damage: what compensation?

As already considered, following Judgment No. 500/1999 of the Court of Cassation,¹⁷ the private individual is entitled to compensation for damage deriving from

English one of mandatory order. In Germany, paras. 42 e 113 of *Verwaltungsgerichtsordnung* (German administrative process code) allow the adoption of a sentence condemning an act previously refused or omitted if the plaintiff claims that their own subjective public right has been violated by the illegitimate behaviour of the public administration. In the United Kingdom, similarly, the mandatory order is the order commanding a public authority to perform a public duty.

¹⁵ G. NAPOLITANO, *La logica del diritto amministrativo*, Il Mulino, Bologna, 2020, p. 278.

¹⁶ In the latter case we can talk about “exclusive jurisdiction”, whilst the administrative judge can be considered the “natural judge” of legitimate interests.

¹⁷ Before this judgement, the only protection recognized and granted to the injured party for unjust damage to legitimate interests, was the indirect one within an action for annulment, through which the private individual could only obtain the elimination of a specific damaging illegal measure issued by the public administration. Indeed, prior to the CPA, the protection of legitimate interests was focused not on the administrative relation – which arises between the proceeding administration and the citizen – but only on the administrative provision. Thus, the public administration was requested to compensate only damages to fundamental rights. This was because Art. 2043 of the Italian Civil Code (CC) was interpreted in reference only to subjective rights (Art. 2043 CC: «Qualunque fatto doloso o colposo, che cagiona a altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno»).

infringement of legitimate interests. In particular, for the compensation of the so-called legitimate “pretensive interests”¹⁸ – aimed at achieving the adoption of a specific administrative measure expanding their legal sphere – the administrative judge must make a prognosis of the specific essential value underlying the legitimate interest: the basis of the private claim must be verified.¹⁹ The decision of the Cassation was transposed in Art. 30 CPA; this provision explicitly confers compensatory protection, which can be exercised before the administrative judge, against unjust pecuniary damage deriving from the unlawful exercise of administrative activity or from failure to exercise mandatory administrative activity.²⁰ In this way, public administration is responsible for the so-called “pre-contractual liability”: when an administrative procedure is initiated, a “qualified relational situation” arises between the private individual and the public administration, so responsibility derives from “qualified social contact”.²¹ Public administration abuses its power by violating the duties of fairness and good faith.

A specific unfair damage that the public administration can cause to the private individual is the damage which derives from the failure to respect the time constraints within which the administrative power must act.²² This damage is called “delay damage”: it is stated that the public administration has the obligation to compensate the unjust

The judgment n. 500/1999 was precisely the expression of a change in the function of compensation protection which had already taken place in civil law, no longer aimed at punishing unlawful behaviour, but at restoring the assets of the injured party. P. FIORENTINO, *La tutela risarcitoria dell'interesse legittimo*, in *Salvis Juribus*, 26 June 2018, available at <<http://www.salvisjuribus.it/la-tutela-risarcitoria-dellinteresse-legittimo/>>.

¹⁸ M. NIGRO, *Giustizia amministrativa*, Bologna, Il Mulino, 1983.

¹⁹ Part of the Italian doctrine disputes this need for the judgment of attribution for the purposes of compensation for damage. It is indeed argued, that following such judgment there can no longer exist a legitimate interest, but, directly, a subjective right, for which a full protection is always required.

²⁰ Art. 30, para. 2, CPA: «Può essere chiesta la condanna al risarcimento del danno ingiusto derivante dall'illegittimo esercizio dell'attività amministrativa o dal mancato esercizio di quella obbligatoria».

²¹ Qualified social contact is a situation suitable to create reasonable and well-founded expectations for the private individual, who has a procedure opened with the public administration (a “negotiation” started). Court of Cassation, section I, 20 December 2011, n. 27648.

²² Art. 2, Law n. 241/1990 (Law of Administrative Procedure), establishes the fundamental principle of certainty of the time in which the public administration must provide. In this way, Art. 41 of the Charter of Nice (Charter of Fundamental Rights of the European Union) is implemented. The citizen has the right to “good administration”: matters concerning him must be dealt with within a reasonable time.

damage caused by the non-observance, whether intentional or negligent, of the procedural deadline. For this damage, Art. 133, para. 1, lett. a), n. 1, CPA provides for the exclusive jurisdiction of the administrative judge.

The fundamental problem concerning the delay damage is whether it can be compensated regardless of the attribution of the subtended essential value.

There are two possible cases of delay damage.²³ In the first one, the damage derives from the delay with which the public administration issued the favourable act requested; in this case, the private individual is the owner of the subtended essential value. Therefore, compensatory protection is certainly admitted. The injustice of the damage, in fact, derives from the belated achievement of the essential value by the private individual.

In the second case, the administration does not issue any act, or it does issue a negative – even if legitimate – act beyond the final term. In this case, damage is caused by the so-called “mere delay”, as the private individual asks for the related compensation regardless of the attribution of the subtended essential value.

The case-law on the subject is divided on whether or not the compensation for damage caused by mere delay can be deemed as admissible. Part of the jurisprudence, in fact, starting from the affirmation of the exclusive jurisdiction in matter of delay of the administrative judge, affirms that time is an effective subjective right; the delay damage, therefore, must be compensated regardless of the demonstration of attribution of the subtended essential value.²⁴ However, in opposite pronouncements, majoritarian jurisprudence affirms that compensation for delay damage cannot disregard the pertaining of the essential value. The compensation is therefore subject to the demonstration that the provision of the public administration would have been favourable for the private individual as, lacking such proof, there can be no unfair damage.²⁵

²³ L. FACONDINI, *Danno da ritardo: la tutela risarcitoria degli interessi procedimentali*, 26 July 2019, available at <<https://www.diritto.it/danno-da-ritardo-la-tutela-risarcitoria-degli-interessi-procedimentali/>>.

²⁴ Italian Council of State, section V, 10 February 2015, n. 675; Council of State, section V, 21 June 2013, n. 3407; Council of State, section V, 28 February 2011, n. 1271.

²⁵ Italian Council of State, section V, 18 March 2019, n. 1740; Council of State, section IV, 12 July 2018, n. 4260; Council of State, section IV, 8 February 2018, n. 825; Council of State, section IV, 17 January 2018, n. 240; Council

4. Principles affirmed by the Joint Sections of the Italian Court of Cassation in Judgment No. 8236/2020

In this jurisprudential and regulatory context, the recent Judgment No. 8236 of the Joint Sections of the Court of Cassation of 28 April 2020 has profoundly innovated the system just described concerning the compensation of delay damage. It is necessary to analyse the case to better understand the decision of the Court of Cassation.

A company wanted to realize a big hotel complex in a particular area in the Italian Region Friuli-Venezia Giulia and, to that purpose, presented a construction project to the relevant municipal administration in June 2012. Following this, the municipal administration gave to the company a positive opinion on the project. Nevertheless, after a change in the building regulations on the urban area at issue, the municipal administration denied the permission to build the hotel complex in September 2016.

Therefore, the company complained that the administration had behaved in a non-univocal way²⁶ and thus started a trial against the administration to obtain compensation for the damage.

The company took legal actions before the ordinary judge, as it complained

of State, section IV, 23 June 2017, n. 3068.

With the 2009 legislative reform, Art. 2 *bis* was introduced into Law n. 241/1990. Art. 2 *bis*, para. 1, («Le pubbliche amministrazioni e i soggetti di cui all'articolo 1, comma 1-ter, sono tenuti al risarcimento del danno ingiusto cagionato in conseguenza dell'inosservanza dolosa o colposa del termine di conclusione del procedimento») expressly establishes the compensation for damages deriving from non-compliance with the procedural deadlines, thus providing a new argument in support of those who claimed the compensation of the mere time factor, independently considered. The dominant jurisprudence has, however, continued to support the need for a positive verification of the attribution of the subtended essential value for the purpose of compensation. The administrative judges, in fact, reaffirm the definition of legitimate interest given in the sentence of the Plenary Assembly of the Italian Council of State n. 3/2011: it is an advantageous position linked to a specific essential value. See F. NERLI, *Il danno da omessa o ritardata emanazione del provvedimento amministrativo*, 5 March 2020, available at <<https://www.diritto.it/il-danno-da-omessa-o-ritardata-emanazione-del-provvedimento-amministrativo/>>; M. BENEDETTI, *Danno da ritardo*, 23 May 2019, available at <<https://www.diritto24.ilsole24ore.com/art/dirittoCivile/responsabilita/2019-05-23/danno-ritardo-151054.php>>.

²⁶ Joint Sections of Cassation, 28 April 2020, n. 8236, para. 2, which refers to para. 55 of the introductory summons of the company to judgment.

that the administration had denied the building permission even though its previous conduct suggested that the construction of the hotel complex would have been allowed. This positive behaviour produced in the company a legitimate expectation on the possibility of a permission concerning the construction of the building. In support of its claim, the company recalled the ordinance of the Joint Sections of the Court of Cassation No. 6594/2011, for which the damage has to be “causally” connected to the matter indicated by the law to be the exclusive competence of the administrative judge, connection which is absent in the present case.

The municipal administration, on the contrary, raised an exception founded on the lack of jurisdiction, stating that the jurisdiction pertained to the administrative judge. In fact, in the administration’s opinion, there was no positive formal action suitable to justify the birth of a legitimate expectation, but there was only a mere violation of the procedural terms: the damage to be compensated was a delay damage. Moreover, the administration supported that the construction subject belonged to the exclusive jurisdiction of the administrative judge.²⁷ Finally, the municipal administration argued that what was stated in the ordinance was not applicable to the specific case. In fact, ordinance No. 6594/2011 concerned a case in which the administration had issued an act extending the legal sphere of the private individual; in this case, instead, there is not any favourable act.

The Joint Sections of the Court of Cassation note firstly how the issue undoubtedly falls within the construction field, as stated by the municipal administration. Nevertheless, the company’s claim for compensation concerns damage not caused by acts or provisions of the administration, but by its conduct, in the relations between its offices and the company: it is therefore a damage from conduct; the legitimacy of administrative acts is not discussed.²⁸ In this case, the injury derives

²⁷ As it is stated in Art. 133, para. 1, lett. f), CPA: «Sono devolute alla giurisdizione esclusiva del giudice amministrativo, salvo ulteriori previsioni di legge [...] le controversie aventi ad oggetto gli atti e i provvedimenti delle pubbliche amministrazioni in materia urbanistica e edilizia, concernente tutti gli aspetti dell’uso del territorio, e ferme restando le giurisdizioni del Tribunale superiore delle acque pubbliche e del Commissario liquidatore per gli usi civici, nonché del giudice ordinario per le controversie riguardanti la determinazione e la corresponsione delle indennità in conseguenza dell’adozione di atti di natura espropriativa o ablativa».

²⁸ The Joint Sections of the Court of Cassation analyse their previous ordinances, especially n. 6594, 6595 and

from the violation of the rules of correctness and good faith of private law, to which the behaviour of the public administration must conform. The violation of these rules gives rise to a responsibility of qualified social contact, for the overall behaviour held.²⁹ The qualification derives from the status of the public administration as a subject required to comply with the law as a source of legitimacy for its acts.

Moreover, the Court affirms the applicability of the principles expressed in ordinances No. 6594, 6595 and 6596/2011 to the present case. These principles are valid not only when there is an infringement of the reliance deriving from the issuing and subsequent cancellation of an administrative act, but also when no provision has

6596/2011, in which the judges determined the existence of the ordinary judge's jurisdiction. In all cases, private individuals complained the damage of their expectations on the legitimacy of favourable acts later annulled; they also asked for compensation for their negotiating decisions made in the meantime, trusting in the legitimacy of the acts. In the opinion of the Court of Cassation, the jurisdiction belongs to the ordinary judge as there is no infringement of a legitimate interest but of a subjective right: the "right to the preservation of the integrity of assets", harmed by the choices made trusting in the legitimacy of administrative acts. The three mentioned ordinances overcame the previous jurisprudential orientation, for which a mere connection of the dispute with a matter indicated by the law was enough to establish the exclusive jurisdiction of the administrative judge: the damage has to be "causally" connected to the matter indicated by the law to be the exclusive competence of the administrative judge.

Neither Art. 7, para. 1, CPA, nor Art. 30, para. 2, CPA affect the provisions of the ordinances. Article 7, para. 1, CPA devolves disputes concerning legitimate interests and, in the particular matters indicated by law, subjective rights, about the exercise or non-exercise of the administrative action to the administrative jurisdiction. In fact, this article, mentioning the exercise or non-exercise of the administrative action, implicitly requires that there must be a link, even mediated, to the exercise of administrative power. Article 30, para. 2, CPA establishes that, in cases of exclusive jurisdiction, the administrative judge may also be required to establish compensation for damage from injury to subjective rights. Administrative jurisdiction over subjective rights presupposes that they are involved in the performance of the public function; therefore, also in matters of exclusive jurisdiction it is necessary that the dispute is inherent in a situation of power of the administration. This inherence does not exist when the cause of the damage, for which compensation is requested, is not the bad exercise of administrative power but an illicit behaviour, which is independent of the exercise of power. It is necessary for the administration to act as an authority to entrench administrative jurisdiction, i. e. the administration must exercise its powers or adopt conduct relating to the exercise of the public function.

²⁹ Joint Sections of Cassation, 28 April 2020, n. 8236, para. 32: «Il dovere di comportarsi secondo correttezza e buona fede rappresenta, infatti, una manifestazione del più generale dovere di solidarietà sociale, che trova il suo principale fondamento nell'articolo 2 della Costituzione e grava reciprocamente su tutti i membri della collettività. Tale dovere si intensifica e si rafforza, trasformandosi in dovere di correttezza e di protezione, quando tra i consociati si instaurano momenti relazionali socialmente o giuridicamente qualificati, tali da generare, unilateralmente o, talvolta, anche reciprocamente, ragionevoli affidamenti sull'altrui condotta corretta e protettiva [...]».

been issued.³⁰

Lastly, the Court, affirming that in the present case administrative behaviour is not linked, not even mediately, to the exercise of administrative power, declares the jurisdiction of the ordinary judge.

5. Emerging problems and final considerations

In their 2020 judgement, the Joint Sections underline the behavioural duties of the public administration, which has not only to respect publicistic rules, but it has a general duty of fairness in its action. Therefore, the Joint Sections states what has already been found in the previous case-law. The responsibility of the public administration in its relationship with the private individual is of a “qualified social contact” nature. What is protected is not the so-called “legitimate expectation” – which implies only the verification of the legitimacy of the acts of the public administration –, but an autonomous situation, protected in itself, and not in its connection with the public interest.³¹

Moreover, the judges of the Court of Cassation, underlining that the behaviour of the public administration considered harmful is not related to any institutional purpose, implicitly claim that two relationships are established with the initiating of the administrative procedure. The first one is a publicistic relationship, subjected to the jurisdiction of the administrative judge. The second one is a private relationship, which is not functionally related to public power but only occasioned by it; thus, this relationship is subjected to the jurisdiction of the ordinary judge.

The Court’s conclusions contain several critical profiles.³²

Firstly, the provision of a different jurisdiction, depending on which aspect is harmed in the relationship between the administration and the private individual, leads

³⁰ Joint Sections of Cassation, 28 April 2020, n. 8236, para. 34.

³¹ Joint Sections of Cassation, 28 April 2020, n. 8236, para. 28.2: «si tratta, in sostanza, di un’aspettativa di coerenza e non contraddittorietà del comportamento dell’amministrazione fondata sulla buona fede».

³² See also G. TULUMELLO, *Le Sezioni Unite e il danno da affidamento procedimentale*, available at <https://www.giustizia-amministrativa.it/documents/20142/1717313/LE_SEZIONI_UNITE_E_IL_DANNO_DA_AFFIDAMENTO_PROCEDIMENTALE_Tulumello.pdf/3d6e52a7-c529-4a49-d979-feb15f10a18c>.

to a greater difficulty for the subject to reach full protection. In fact, in the context of the same relationship, the private individual must act before two different judges.³³ The Court of Cassation changes the concept of legitimate interest, degrading it to mere compliance with publicistic rules. As mentioned above,³⁴ legitimate interest is not just an interest in compliance with the law by the public administration, but it is a complex substantive position: the demand that the public administration performs its functions correctly. There is no autonomous subjective right to respect the rules of conduct because misbehaviour is not an independent element of evaluation. The judges create a *tertium genus* with respect, on the one hand, to administrative behaviours – in the strict sense – and, on the other, to behaviours that are direct or indirect exercise of power: the Joint Sections mention “behaviours occasioned by the exercise of power”.³⁵

Secondly, the Joint Sections affirm the duplication of the relationship between public administration and private individual. However, public administration cannot be, at the same time, both a public and private entity: public administration acts only as an authority in the administrative procedure. This unitary relationship is also confirmed by Art. 6 of the European Convention of Human Rights (ECHR) – “right to a fair trial” –, which states that the public administration must respect the correct procedure, understood as the only system of rules.³⁶ Evolution of the concept of legitimate interest implies that the administrative judge evaluates the entire administrative relationship and not just the administrative act. Otherwise, it would be

³³ This same criticism was also raised in the past against the mentioned judgement of the Joint Sections of the Court of Cassation n. 500/1999.

³⁴ See *supra*, para. 1.

³⁵ G. TROPEA, A. GIANNELLI, *Comportamento procedimentale, lesione dell'affidamento e giurisdizione del g.o. Note critiche (Nota a Cass., Sez. un., 28 aprile 2020, n. 8236)*, 2020, available at <<https://www.giustiziasieme.it/it/il-magistrato-3/1087-la-cassazione-afferma-la-giurisdizione-ordinaria-da-lesione-dell-affidamento-oltre-il-caso-dell-annullamento-di-provvedimento-favorevole-alcune-note-critiche-nota-a-cass-sez-un-28-aprile-2020-n-8236>>.

³⁶ Art. 6, para. 1, ECHR: «[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice».

admitted that a singular behavioural misconduct of the public administration can produce both illegitimacy of the act and damage caused by incorrect behaviour.

Lastly, Art. 133, paras. 1, lett. e) and f), CPA establishes the jurisdiction of the administrative judge in building subject. Contrary to what is stated by the Joint Sections, the fundamental reason for this provision is that there can be no misconduct of the administration disconnected from the public function. The behaviour occurs precisely because an administrative procedure is initiated. In the Italian legal system, the administrative judge is competent for the entire administrative relationship, not only for the act.

Finally, Judgement No. 8236/2020, on the one hand recognizes the nature of the administrative relationship as a “qualified social contact”, on the other hand, it does not consider the legal provisions. Perhaps, it would have been preferable for the Court to consider the misconduct as part of the public relationship, declaring the jurisdiction of the administrative judge.