6. Lawfulness of administrative action in Italy: A principle in transformation

Anna Simonati (*University of Trento, Italy*)

Abstract

This chapter explores *lawfulness* in the Italian context, where it is a 'fluid' value. Despite the Italian constitution providing a rigid foundation for public administration, a level of flexibility is found within the processes of governance exercised by both the executive and legislature. In effect, the instruments of state comply with the general principles in place as well as the rules in force. This allows at least three different conceptions of lawfulness, depending on how strongly the rules are able to influence the structure and content of the administrative measures. An element of complexity characterizes the relationship between lawfulness and the corollaries of the principle of good administration; the possible existence of discretionary power is also important from the point of view of judicial review. The increasingly close link between public and private law and the introduction of 'new' sources of law are the last (but not least) pieces of a kaleidoscopic puzzle.

Lawfulness, rule of law and typicality of administrative action

The principle of lawfulness belongs to the deepest tradition of the democratic legal systems and it is considered a direct consequence of popular sovereignty (Guastini, 1990: 99; Tarello, 1989: 345; Cattaneo, 1987: 260; about democratic legitimacy, see also Buckwalter & Balfour, in this volume). Notwithstanding that value pluralism has been chosen as the starting point for this collective research (Paanakker, Adams, Huberts, in this volume), lawfulness may be considered as a cornerstone, at least from a methodic point of view, and it represents an aspect of integrity and quality of governance (Huberts, in this volume; but see the interesting *caveat* on the importance of the context by Masters and Paanakker, in this volume). In other words, even though values are necessarily flexible, lawfulness as a principle that requires the legal rules to be respected is expected to be a stable foundation of administrative action.

In Italy, art. 97 of the Constitution makes clear that 'public offices are organized according to law, so as to ensure good functioning and impartiality of administration'. Hence, lawfulness means compliance with the rules in force (Giannini, 1970: 82); the principle works by making invalid those acts issued by public powers that are not compatible with the statutes. Its function is basic, especially when the protection of individual rights and interests is concerned, but it has a general value. A normative reference is contained in art. 1, Law no. 241/1990 (the general statute about

administrative action and procedure), where it is held that administrative action pursues those aims determined by the legislator.

The perception of the binding strength of lawfulness for administrative action has changed over time. At the beginning of its history in democratic legal systems, a 'formal' notion of lawfulness seemed to be enough, and was intended to compel the executive power to respect 'the law'. This refers to the primary level sources of law; in the Italian system in force, Parliamentary and Regional statutes, as well as primary sources created by central government, either by Parliamentary delegation – the *legislative decrees* – or in case of necessity and urgency and under ratification by a Parliamentary statute – the *law decrees*.

In a more modern conception, however, the principle of lawfulness also has to do with necessary compliance with the general principles and with all the rules in force (bearing in mind their different nature and legal force), in a more substantial perspective. In legal systems where the Constitution is rigid and not flexible, then, the principle is connected not only with the expression of executive (and, of course, judiciary) power, but also with the exercise of legislative power, in accordance with the hierarchy of the legal sources (Guastini: 1993; Guastini: 1992: III; Zagrebelsky, 1991: 8; Zagrebelsky, 1992). In Italy, the (rigid) Constitution lays down the basic purposes to be pursued by the institutions, and ordinary legislation imposes more specific rules aimed at achieving specific objectives; at the same time, the pursuit of objectives that are incompatible with the Constitution is not permitted. The exercise of administrative power (which is separate from the legislative and the judicial) is normally subject to the control of special courts that verify compliance with the rules in force.

There are at least three different conceptions of the principle of lawfulness. In a 'weak' view, administrative measures should be compatible with the rules, which still allows *praeter legem* acts (Zagrebelsky, 1992: II). In a second view, administration is allowed to issue measures when a rule expressly permits it and affords the corresponding power, at least in general terms. Finally, the principle may mean that a rule of law must determine the structure and content of the administrative measures (Guastini, 1993: 86).

The first view fits more easily with administrative regulations, which are expression of normative administrative power (Carlassare, 1966: 113; Carlassare, 1988: 621; Carlassare, 1990: 2; Zagrebelsky, 1991: 49-54). In fact, in art. 4.1. of the preliminary rules to the civil code, it is held that regulations may not be contrary to statutes. If they are, notwithstanding that they cannot be directly challenged before an administrative court, administrative courts may decline to apply them in a specific case (Macchia, 2013: 261). Consequently, public authorities are allowed to produce regulations – the so called 'independent' regulations, described in art. 17.1, *c*), Law no. 400/1988, the issuing of which nevertheless requires that the general principles are respected (Pizzorusso, 1987: 330; Cheli, 1990: 53; Amato, 1962: 15; Carlassare, 1988: 626; Zagrebelsky, 1991: 299-300) – even in the absence of a specific statute in the same field, if the subject is not covered by a rule of law.

There are two routes that can be followed in establishing the rule of law in Italy. Sometimes the Constitution requires that a subject is covered completely by a statute or a primary-level source (the so called 'absolute' rule of law). But at other times, the statutes simply must determine the general legal scenario, while the details may be ruled on by secondary sources, such as executive (and also 'independent') regulations: this is the so-called 'relative' rule of law.

The consensus is that in light of art. 97 of the Italian Constitution, administrative action is covered by a 'relative' rule of law. There are other points in the Constitution where the rule of law has to be applied in various fields connected to a greater or lesser extent with administrative action: at least, in art. 23 (where the rule of law is required to impose personal and financial obligations), in art. 95 (where the legislative power to rule the government is set out), in art. 101 (where it is made clear that courts are subject only to the law), in art. 113 (according to which anyone may protect his/her rights and legitimate expectations before an ordinary or an administrative court, especially by challenging administrative measures). None of these rules is sufficient in itself, but the whole system represents the basis by which the principle of lawfulness is applied to administrative action (Carlassare, 1966: 148; Giannini, 1970: 83; Amato, 1962: 129). In particular, the principle of the justiciability of administrative measures plays a fundamental role in taking lawfulness to the Constitutional level. It is clear, in fact, that the subordination of administration to legal rules is needed to allow for judicial review of administrative action, in order to have a measure quashed

when it has been issued in breach of the law, in the absence of a specific power or with *excess of power* (art. 21 *octies*, Law no. 241/1990).

The Constitutional Court has held that administrative power may never be assigned to the competent authority without specifying the criteria to be followed in taking decisions (Constitutional Court, no. 32/2009; Ead., no. 272/2005; Ead., no. 307/2003). Therefore, the principle of lawfulness in the field of administrative law also binds the legislator, who, while allocating administrative powers, must indicate their purpose, conditions for implementation, content and legal effects (Constitutional Court no. 35/1961).

Depending on which idea of lawfulness (weak or strong) is accepted, the role of the legislator will change. Sometimes, it is enough that an administrative power is given to the competent authority: in such a case, if the administrative act is undertaken by the competent subject, this assures its lawfulness. But where the issuing of individual administrative measures is concerned, the statutes normally must indicate *how* administration may act in the different fields. In other words, the categories of administrative measures that may be issued by each public authority, their legal effect and the conditions which allow and/or compel the intervention are decided by the legislator; so, the administrative act is lawful if it respects all the elements specified. This is the principle of the typicality of administrative measures (recently, Cons. Stato[1], IV, no. 3700/2016 and Id., V, no. 3674/2016; Id., V, no. 4147/2015), which (together with the principle of the separation of powers) forbids the administrative courts to issue administrative measures on their own (recently, Cons. St., VI, no. 3194/2016).

The exceptions to this principle (as a corollary of lawfulness) must also be typical (Cons. St., III, no. 3048/2013).

One of the most relevant examples is the power of mayors and the prefects to issue emergency ordinances: in this case, the conditions for the legal issuing of the administrative measure are very broad, because it is enough to be facing imminent danger (Pedrabissi, 2014: 409; Rissollo, 2012: 2183; Brocca, 2012; Marazzita, 2011:55; Furlan, 2010: 141).

[1] The Consiglio di Stato is the Italian supreme administrative court; the first degree administrative courts work at the Regional level and are named Tribunali Amministrativi Regionali (T.A.R.).

From another perspective, there is a further example in the debate about the existence of implicit administrative powers (Bassi, 2001). In the past, it was commonly held that some administrative powers were implicitly contained in the powers that had been expressly given to public authorities if they were closely connected with the exercise of the same public function. Later on, in the 2005 legislative reform of Law no. 241/1990, the legislator decided to rule for the first time a number of such powers, especially with reference to the issuing of 'secondary degree' measures, such as those aimed at removing an act because it is voidable or not proper any more, and those aimed at keeping an act valid when it ought to be voided. by correcting it and making it compatible with the statutes in force. This legislative choice has produced relevant systemic effects. In fact, in the past, while using the power to issue 'secondary degree' measures, public subjects were not required to comply with detailed rules (as happens at present), but merely with the general principles of fair administration, (but compliance with the general principles for the issuing of 'secondary degree' measures is still important: Cons. St., VI, no. 3659/2015, Id., III, no. 3452/2013 and Id., VI, no. 3963/2011).

The need for strong administrative measures allows them to have direct effect even if invalid, until they are quashed. The only exceptions are those measures that lack the essential elements, those issued in absolute lack of power or adopted in breach or in avoidance of a judgement: they are therefore null and void (art. 21 *septies*, Law. no. 241/1990). The same need is particularly important when the act requires to be implemented by the addressee with a practical behavior. In such a case, the aim of economy and speed of administration takes precedence, empowering the issuing authority to unilaterally enforce the private recipient to make the measure effective, without applying to any court (art. 21 *ter*, Law no. 241/1990). However, this is possible only in accordance with a specific rule of law (Cons. St., VI, no. 2565/2013 and Id., IV, no. 2431/2013; Grüner, 2012; Continella, 2010; Pagliari, 2007; Raffaele, 2007).

Lawfulness and plurality of legal sources: the 'traditional' scenario and the relationship between statutes and regulations

A general issue concerns the increasing multiplicity of the normative levels.

In art. 117 of the Constitution, those areas wherein legislative power is reserved to the national legislator are indicated. In a separate list, art. 117 indicates the fields where legislative power is split between central and regional legislators; in these fields, the state regulates the general principles, the regions regulate the detail. In all of the areas that are not mentioned, legislative power is fully owned by regional legislators. In addition, public entities, in general, have autonomous normative power. Except when an 'absolute' rule of law is spelled out in the Constitution, they may produce regulations that implement the primary-level normative sources.

Art. 117 of the Constitution refers to regulation as the typical secondary-level source of law. Hence, according to a doctrinal opinion, regulations, as described in the statutes in force, are the only 'lawful' secondary sources or at least the only ones with Constitutional legitimacy (Cheli, 2003*;* Modugno, 1993*;* De Siervo, 1992; Bin, 2004*;* Di Cosimo, 2005*;* Batistoni Ferrara, 2005). However, at the same time, in light of art. 117, the government may produce regulations only in the areas which are totally reserved to the national legislative power. In the areas of concurrent competence, the power to issue secondary-level sources of law belongs to the regional legislators. Therefore, the governmental regulation model, whose procedure of production is strictly described in Law no. 400/1988, is not the only one. That model has been considered inefficient by public authorities, and as a result they have begun issuing different kinds of secondary-level sources of law, without respecting those procedural rules (and among the scholars discourse this phenomenon is known as 'escape from regulation': Guzzetta, 2001; Moscarini, 2008*;* Padula, 2010*;* Marcenò, 2011; Di Cosimo, 2005*;* Albanesi, 2011).

Another issue concerns the emission of very detailed statutes, because – in light of the principle of separation of powers – a statute may not have the same specific kind of content as an individual administrative measure (Constitutional Court no. 241/1998, Ead., no. 267/2007, Ead. no. 271/2008). If such a statute directly and immediately were to have an adverse legal effect on some individuals, then, it would contradict the principle of justiciability, because statutes are not individual administrative measures and therefore they may not be challenged by citizens. This last point has been occasionally raised in the case law of the Constitutional Court (Constitutional Court no. 271/2008), but the Court also held that the Constitution does not fully forbid the issuing by Parliament of statutes with specific content (Constitutional Court no. 347/1995; Ead. no. 267/2007). However, since the probability of breaching the principle of equality is strong (Rescigno, 2007: 319;

Rescigno, 2008a; Rescigno, 2008b) the Court added that these kind of provisions could be subject to administrative judicial review, to check their potential arbitrariness or unreasonableness (Constitutional Court no. 492/1995, Ead. no. 195/1998, Ead. no. 429/2002; Ead. no. 364/1999; Ead. no. 2/ 1997, Ead. no. 241/2008; Ead. no. 271/2008; Cons. St., IV, no. 1918/2014).

Lawfulness and good administration

Notwithstanding that the parameter of good functioning is expressly indicated in art. 97 of the Italian Constitution, in the past there has been a tendency to deny the existence of a real legal duty to provide good administration, because – similarly – there may not be a legal duty of legislators to produce good statutes and rules (Casetta, 1957: 315). In this view, art. 97 had to do essentially with the efficient organization of public bureaux and with the personal virtues of public servants, which cannot be legislated for. More recently, however, awareness of the strategic importance of the principle of good administration has grown and it is at present connected with many different corollaries: not only efficiency, efficacy and economy of administrative action (Melis, 2014; Pellegrino, Manzo, 2010; Lillo, Festa, 2003; Sortino, 2003), but also its ability to be understood by citizens (Cons. St., III, no. 2497/2016), its affordability, the justiciability of administrative decisions, accountability (as a sort of *species* of 'responsibility': O' Kelly & Dubnick, in this volume), openness and fairness.

An important element – that is also closely linked to lawfulness and is expressly ruled on in art. 118 of the Italian Constitution – has to do with subsidiarity, both in the vertical sense (in the mutual relationships among authorities) and in horizontal sense (in the relationship with private subjects). In the former perspective, it is important to mention art. 120 of the Constitution, according to which the statutes lay down procedures to ensure that public powers are exercised in compliance with the principles of subsidiarity and fair cooperation. In the perspective of horizontal subsidiarity, participation by citizens in administrative action of course plays a fundamental role.

Another basic principle mentioned in art. 97 of the Italian Constitution is impartiality. Impartiality of administrative action potentially has multiple in relation to the principle of lawfulness. In fact, impartiality is a general rule of behavior for public authorities, a consequence of the more general principle of equality, *ex* art. 3 of the Constitution. Moreover, impartiality corresponds to a precise

duty of administration, in order to implement parameters of good faith in its daily action (Benvenuti, 1975: 818; Merloni, 2009; Spuntarelli, 2008; Cons. St., III, 10.6.2016, no. 2497).

An interesting point concerns the harmonization between lawfulness and administrative efficiency: the latter, of course, is not concerned only with costs, but also with the overall quality of governance. The two principles must work together. The harmonization between lawfulness and a results-based approach to administration (Iannotta, 2003; Perfetti, 2008) is related to the evaluation not only of single measures, but also of the wider view of public action that goes beyond the analysis of behaviors by individual employees in individual procedures. The two levels have different objects, aim at partially different purposes and are based on different methods. When it concerns single measures, the principle of lawfulness may be easily redirected to the general criteria of legitimacy of administrative acts. When it is used in a comprehensive perspective, compliance with the general principles of planning, programming and policy-making action becomes more important. Moreover, rule-making is also involved, as is demonstrated by the introduction to the Italian legal system of the A.I.R. and V.I.R. mechanisms, both provided for in art. 14, Law no. 246/2005. Before the issuing of a normative act by government, the first, Analysis of Impact of Regulation, studies reasons for its being issued and its probable impact; the second, Evaluation of Regulatory Impact, makes an analogue analysis after a primary period of implementation of the act (Fracchia, 2016: 9).

The link between lawfulness and good administration and between good administration and its main corollaries (primarily, efficiency, efficacy and economy of administrative action) has created a need for the evaluation paramers of administrative action to be ‘translated’ into qualitative terms.

This problem is evident in case law created by the Constitutional Court, where it is very seldom that the principle of good administration alone has been the basis of a declaration that the Constitution has been violated in a contested statute. In most cases, rather, the Court has recognized the existence of a wide legislative power of choice when it comes to how the principle should be implemented in practice. Good administration is normally referred to, in order to void primary sources of law, together with the principle of impartiality, primarily at an ‘organizational’ level. For instance, some statutes were considered not compatible with art. 97 of the Constitution, because they requested that a number of political appointees be made members of administrative boards that had technical competences: the Constitutional Court held that provisions allowing a majority

of politicians rather than technicians to be included on a selection panel for the recruitment of civil servants were not compatible with art. 97 (Constitutional Court no. 453/1990). Such a conclusion is considered a consequence of the principles of good administration and of lawfulness of administrative action. In light of the same principles, to be really impartial, each administrative decision requiring a choice among various candidates seeking a favorable measure, must be based on an objective method of selection. An effect of this is the separation of politics and administration: if democracy is the legitimizing source of governments, the rules about recruitment and career path assure competency, professionalism, and expertise of public servants (Cons. Stato, V, no. 4192/2013, Id., V, no. 808/2014 and Id., V, no. 4139/2015; Monzani, 2014; Mascagni, 2012).

If good administration in itself cannot be the basis for an objective check of the overall quality of administrative action, in various recent rulings the principle of quality of administrative action is has been mentioned. Of course, the problem of how to measure the quality of administration is still open, and the answer given by rules inevitably relies on quantitative criteria. For instance, this happens in connection with public utilities (see, in general, art. 11, Legislative Decree no. 286/1999) and in this field the Citizens' Charter may be an instrument for proposing specific indicators. Further proof of efforts to ensure quality of administration by imposing quantitative criteria are found in the necessary respect for the terms under which the procedures are concluded, which is ruled upon in Law no. 241/1990 (even if, according to the case law, they are not strictly compulsory: Cons. St., V, no. 4980/2013). Such an orientation is particularly evident, then, in Legislative Decree no. 33/2013 (emended in 2016) about administrative transparency, according to which some types of documents and information must be published on the authority's website or may be given to people asking for it, in order to contrast corruption and maladministration. It is, however, relevant that in these rulings great attention is paid to enforcement and justiciability, both before the administrative courts and through a.d.r. mechanisms. This shows that the whole administrative and judicial system is involved to ensure compliance with the rules that impose respect for the criteria of good administration.

Other relevant tools to assure good administration are provided for in Law no. 241/1990. As already pointed out, this is the fundamental statute about administrative procedure in Italy; it has generalized principles that previously had been implemented often by the administrative courts (de Pretis, 2010).

Following the administrative procedure indicated in the statute not only corresponds to formal compliance with the legal system, but also ensures that all the relevant interests for the final decision are taken into account by the competent authority. The fair execution of the procedure is a method of granting that the principle of good administration, which is a direct corollary of lawfulness in a broad sense, works to achieve efficiency without causing an excessive or disproportionate sacrifice on the part of the individual (Trimarchi Banfi, 2016: 361). From this perspective, lawfulness of administrative action requires, in a 'positive' view, conformity to reasonableness, correspondence with the facts and substantial equity (de Pretis, 2010).

To provide just a few examples, one may say that the first important procedural tool is described in art. 2 of Law no. 241/1990 and concerns the duty to ensure each procedure produces an expressed act. This means that the exercise of administrative power, at least when a procedure has formally begun, normally corresponds to a duty of the competent authority (Cons. St., III, no. 3827/2016). Hence, the principle of lawfulness does not work only to prevent administrations acting in breach of the statutes in force. It compels administrations to exercise their power and to exercise it properly, fully respecting the rules and principles and within a reasonable time. This is a consequence of lawfulness – in a 'constitution-oriented' interpretation – as the source of a duty to pursue the public interest. In other words, where the statutes assign an administrative competence to fulfil a public interest, the owner of such a power can (but must, as well) act to protect that interest.

However, rigidly interpreting this duty can produce an excessive and inefficient complications. As a result, sometimes there will be a legislative reduction in public authorities' duty to exercise power, using a provision for tacit decisions. This so called 'significant silence' is lawful (as it has to be expressly allowed by a ruling) and of course it makes administrative action simpler, but at the same time it opens up some serious issues from the point of view of good administration (Constitutional Court no. 245/2015). In fact, *de facto* it allows administration not to examine the case in hand and, consequently, not to take into account the interests involved (Bombardelli, 2016: 758; De Clementi, 2016: 17; Scalia, 2016: 11; Certomà, 2014: 322; Pastori, 2010: 267; Corso, 2010: 274).

Nonetheless, the duty of administration to protect the individual interests of private parties who are directly involved in administrative action is of primary importance and is considered a direct consequence of the principles of lawfulness and good administration (Cons. St., V, no. 4140/2015). The link between lawfulness, good administration and participation by private parties is quite evident, even if, in recent years, the Constitutional Court has not recognized the Constitutional relevance of the administrative due process of law (Constitutional Court no. 13/1962, Ead. no. 143/1989, Ead. no. 344/1990, Ead. no. 103/1993, Ead. no. 57/1995, Ead. no. 68/1998; later, the Court held that administrative participation corresponds to a general principle: Constitutional Court no. 353/2001, Ead. no. 133/2005, Ead. no. 397/2006; due process is imposed by art. 97 of the Constitution, instead, according to Constitutional Court no. 103/2007). It must be borne in mind that although on one hand participation is clearly useful for allowing an administration to undertake a complete inquiry step, in order to get all the relevant factual and legal elements to take the a decision, on the other hand it also complicates things, both from the point of view of administrative organization and from the point of view of costs. The same may also be inferred with reference to institutional cooperation, which is required when different public interests are involved in decision making (Marzaro, 2016; Cons. St., IV, no. 4280/2014; Id., V, no. 5292/2012).

The potential conflict between efficiency, efficacy and economy is only sometimes directly solved in advance by the legislator (for instance, when a specific provision permits ‘tacit decisions’ by the administration) (Cons. St., IV, no. 2136/2005). In other cases, there is space for the exercise of administrative discretionary power that is reserved to administrative authorities and allows them to choose the best solution in the specific situation, in light of a balance between the interests involved (Cons. St., VI, no. 6041/2013). Therefore, legal attention gradually moves from the content of the final measure to the procedure. The former is seen as the effect of the inquiry step. The real focus becomes the compliance with the principle of due process, and administrative action is not seen as a monolithic activity any more, on the contrary being based on bilateral or even multilateral legal relationships.

Finally, another basic general tool to ensure good administration is provided for in Law no. 241/1990 and is the duty of administration to give reasons for each administrative final measure. The duty to give reasons is the classical corollary of the principle of lawfulness, because it compels

administration to show what rules have been implemented and the decisional path that has been followed in the inquiry stage (Cons. St., III, no. 1656/2016; Id., III, no. 5857/2014).

The evolution of lawfulness of administrative action and the judicial review: brief remarks

Due to the necessary synthesis of ideas in this chapter, it is only possible to offer some basic information about the judicial review of administrative measures (Romeo, 2012; Scoca, 2009: 118), and only with reference to the Italian legal system and not to its links with the E.U. one.

Discretionary administrative power cannot be the object in its substantive content of a judicial review; its exercise can be checked by the administrative courts, not on its merits, but only from the point of view of whether it is in accordance with the aims indicated in the statutes. In other words, judicial review is permitted to check whether or not the discretionary power was correctly used: in the negative, the measures are vitiated with excess of power. A fundamental parameter for checking whether an administrative measure is voidable because of excess of power, is the principle of proportionality. This ensures that the desired result in the public interest is obtained with the least sacrifice of private interests. (Cons. St., V, no. 4733/2012; Id., VI, no. 5615/2015; Id., VI, no. 287/2016). Another parameter is the prohibition of unequal treatment: this cannot be used to obtain a favorable unlawful measure, even if it has been already applied to someone else (Cons. St., VI, no. 1298/2013; Id., VI, no. 3044/2011).

The rules governing possible reasons for voiding an administrative measure have evolved, and at present an act cannot be declared void simply just because of formal procedural infringement of an individual's rights. Moreover (and in parallel), if there is no proof of a substantial breach of an individual's interests, the act may not be declared void in the presence of certain procedural irregularities. In such cases, the autonomous relevance of public interest in compliance with the principle of lawfulness is not enough; a voidable administrative measure may be quashed if there is another (and further) public interest to eliminate it (Cons. St., IV, no. 4148/2013; Id., IV, no. 1216/2014).

Evidence of this evolution may be found in art. 21 *octies*, Law no. 241/1990, amended by Law no. 15/2005. According to this rule (as has already been made clear), administrative measures are

voidable if they have been issued in breach of the law, without the specific powers required, or are vitiated by excess of power. At the same time, when the breach of law concerns rules about forms or procedure, the measure has just 'formal defects' and it cannot be quashed if it is evident that its content should have been the same in any case. Besides, an administrative measure is not voidable if the breach consists in the failure to communicate to the interested private parties that the procedure has begun, if the authority shows that the content of the final measure would have been the same, even if those subjects had been allowed to participate. Therefore, notwithstanding that in these cases lawfulness has been breached, what really matters is the absence of an individual interest to be concretely protected. The need for stability in administrative decision making is the dominant value. The overall coherence of the legal system is saved, because the exception to the general principle of administrative lawfulness is also ruled by a statute. The administrative decision in this case is unlawful (even if not voidable) and consequently the way to a damages action may be open (de Pretis, 2010; about the conditions for compensation of damages before an administrative court, see recently in general Cons. St., V, no. 1584/2016 and Id., IV, no. 4375/2015).

Public interest and private law: No more a dichotomy for administrative action

In Italy, the principles and rules about administrative action represent a special branch of public law. Notwithstanding this, privatization has been developing, especially since the 1990s, with various consequences.

First, privatization has determined the progressive withdrawal of public bodies from certain fields, and their replacement by (at least formally) private subjects. The direct involvement of private subjects in the fulfilment of public interest is partially an effect of the growing legal and economic integration – especially at the European level – with the supra-national systems.

The Italian legislator transformed numerous public entities already involved in economic activity into public companies; in those areas, administrative involvement was no longer direct and became instead about rule-making and supervising. At the same point, various independent authorities were created and given regulatory powers; their constitution is an effort to reduce the political influence in strategic sectors in accordance with good administration, lawfulness and impartiality. Hence, issues arise from the perspective of protecting the public interest (Cons. St., VI, no. 1574/2012) and avoiding maladministration in the interwoven with profit-oriented activities. An indirect effect of

privatization concerns the mutual approaching of private and public law. Besides the (so to say) 'traditional' principles of fair administration, the new parameters involving reduction of costs and good performance levels have been acquiring value. Such principles are especially linked with service provision and customer satisfaction (Margheri, 2009; Alagna, 2010; Nardozzi, Carbone, 2011; Nicodemo, 2014; about the possible role of public—private partnerships, Reynaers, in this volume).

This phenomenon has also produced some relevant effects on the principle of administrative lawfulness. Art. 1 of Law no. 241/1990 provides that when adopting non-authoritative measures, administration acts in accordance with private law, unless a rule provides differently. The interpretation of this provision is very complicated, but it is clear that it opens up the use of private law by authorities when it is compatible with the pursuit of public interest. Nonetheless, one must realize that private law criteria are not completely extendable to public action, as the latter may not be reduced simply to the fulfilment of economic benefits (Astone, Martines, 2016: 109; Mazza Laboccetta, 2015: 633; Wright V., 1994: 137; Immordino, Police, 2004; Cons. St., IV, no. 326/2016; Id., VI, no. 5617/2015; Id., VI, no. 3571/2015).

From another point of view, privatization has also been relevant to the employment of public servants, who nowadays are normally subject to private law for many aspects of their legal position, after their recruitment (which is instead mainly ruled by public law; Polizzi, 2012; Romeo, 2010; Battini, 2006; Carinci, 2006; Cons. St., III, no. 1017/2015).

Finally, privatization has worked with the aim of simplifying administrative action, by removing direct competences from the public authorities and replacing them with (partially or totally self-sufficient) interventions by private parties, who are normally the subjects aiming at obtaining a favorable administrative measure (in general, *ex* art. 19, Law no. 241/1990). In such cases, private subjects are allowed either to start their activity immediately, or to start their activity after having sent all the relevant documents to the competent authority. Then, the public power acts *ex post*, to check the compliance with the legal system of the private action. In the recent legislative evolution, however, this power has been progressively reduced (especially with the provision for a strict timetable within which the power should be exercised), in order to make it compatible with the principles of legal certainty and of the protection of legitimate expectations. This may mean that, in this case, privatization is able to move the balance point between lawfulness and other values, with

a tendential sacrifice of the traditional role of public authorities as 'sentinels' of lawfulness, on their own as a first step and in co-operation with the courts as a second.

Simplification v. complication and the pitfalls of lawfulness: Two significant examples

It would be a mistake to think that the age of reforms, begun in Italy with the issuing of the 1990s statutes (especially Law no. 241/1990) and still partially pending, has made the complex relationship between lawfulness and good administration clearer and simpler. Certainly, the aim was to introduce a new vision of administrative action, based on transparency and the participation of the citizens (Pastori, 2009); nonetheless, the rules issued in recent years are often partial and fragmentary. Consequently, it is necessary to have some 'read across' of the various statutes in force to get a comprehensive view of how administration really works or should work.

Besides, some subjects require a deep technical knowledge to be properly ruled upon and the legislator is not always able to express detailed contents; moreover, technical and scientific rules frequently develop and change and they are hardly compatible with a static set of binding legal sources. The typical example, from this point of view, concerns the use of new technologies by public authorities, that, clearly, has changed the techniques of administrative activity. Digitalization is not considered as a principle or a goal in itself, but as an element of a comprehensive strategy of reform, in order to make administration more efficient (Cardarelli, 2015: 271; Civitarese Matteucci, 2016: 127). The rules are partly proposed in the so-called digital Code (Legislative Decree no. 82/2005, later emended several times), partly in other primary sources (such as Legislative Decree no. 33/2013, focused on administrative transparency) and specific indications live together with general principles, whose implementation requires an effort at adapting them.

From another point of view, slightly paradoxically, complication may be an effect of legislative reforms. One example is the discipline of the principle of transparency, as a corollary of good administration. Basically, the rules are contained in Law no. 241/1990 and in Legislative Decree no. 33/2013 (which aim at preventing and contrasting corruption in administrative action: Carloni b, 2013: 34). In Law no. 241, the principle of administrative transparency is mentioned, but it is not described (Manganaro, 2012: 3; Marsocci, 2013; Occhiena, 2011: 143), and so the legislator accepts the 'traditional' idea of transparency, which – in general terms – compels administrative action to

be comprehensible during the procedure and checkable in its final results (Abbamonte, 1991: 13; on the relationship between transparency and predictability, Schnell, in this volume). In this view, publicity is just one of the mechanisms for obtaining transparency (Arena, 2006: 5945) and, in order to be substantially transparent, the subjects acting in the public interest have a general duty to make sure their measures are able to be fully understood by the citizens (Spasiano, 2011: 89; Bonomo, 2012). At the same time, according to Legislative Decree no 33/2013, transparency is closely allied with publicity, because it is intended as total accessibility of information, in order to encourage widespread control of the pursuit of the institutional duties and of the use of public resources. At present, therefore, there Italy has two different notions of transparency. The first, and traditional, one (implicitly but clearly accepted in Law no. 241/1990) essentially aims to grant to private parties information tools for self-protection in their relationship with administration. The second one (now expressed in Legislative Decree no. 33/2013) is essentially based on publicity and despite the limits set by the protection of public confidentiality, of an individual's right to privacy and by administrative efficiency, aims to give citizens broad control of public action. Ensuring a fair and rational co-existence of the twin souls of the same principle is a not simple mission for legal scholars and practitioners.

The independent authorities' guidelines and the acceptance of atypical legal sources as an answer to the crisis of 'traditional' administrative lawfulness

In recent years, numerous independent authorities have been created, with the role of actively cooperating in the issuing of rules, in technical or specialized sectors. The legislator often provides them with the power to issue guidelines to be implemented. This has the fundamental effect of adding new legal sources in the administrative system.

For instance, interesting rules concern the joint action of the Data Protection Authority and the National Anti-Corruption Authority, in the field of access to administrative documents and information. After a participatory procedure, they indicate the groups of information which may not be published or may only be published in part, compatibly with the principles of proportionality and simplification (art. 3 and art. 5 *bis*.6, Legislative Decree no. 33/2013). Other relevant examples concern, first, the competence of the A.N.A.C. in the emission issuing of guidelines related to the implementation of the 'public procurement code' (Legislative Decree no. 50/2016) and, second, the

issuing of guidelines by the Independent Authority for Data Protection in many fields concerned with data processing

The integration of the legal framework with guidelines issued by independent authorities is not in itself a breach of the 'relative' rule of law, contained in art. 97 of the Constitution. In any case, notwithstanding that they may be globally indicated as secondary-level sources of law, the various kinds of guidelines are quite different from one another. In fact, while some of them only have the status of indicating best practices to be followed, other are legally binding (such as some of those issued by the A.N.A.C. in the field of public procurement). Therefore, it is not correct to define all of them as 'soft law' measures, because their effect is not reduced to moral suasion (Morettini, 2011). When they produce binding effect, they also determine the abrogation of pre-existing regulations. This is not a problem when a statute requires that they are approved with a decree of the competent Secretary of State, because such a choice substantially makes them Ministerial regulations, with a clear place in the legal system. But, in the other cases, they work as atypical legal sources. They are of course an answer to the need for quick and flexible rules, and may be considered as the most advanced paradigm of administrative lawfulness. At the same time, they must be very carefully looked at, because they allow public authorities – which are not democratically legitimated and are often closely aligned with groups of private subjects, holders of economically and socially strong interests – to create binding rules. This could be in conflict with the basic corollaries of the principle of good administration, such as impartiality.

Actually, the procedure for their issuing grants participation by the interested parties, and their proper publication is also assured . But this is probably not enough to regard them as regulatory acts (which are similar to regulations in strict sense), sometimes issued by the independent authorities in execution of specific statutes. In case law, such regulations are commonly referred to as secondary-level sources (Cons. St., advice 14.2.2005; Id., VI, no. 2182/2016; Id., VI, no. 1532/2015; Id., VI, no. 4874/2014), based on a series of conditions: first, their frequent strong supra-national legitimacy (often at the E.U. level); second, their technical nature and the narrow dimension of the field of implementation; third, a strong need that rule-making is independent of government and political power, especially due to the primary relevance of the interests involved. These conditions do not work (or, at least, do not work in the same way) with guidelines (Morbidelli, 2007), and their full compliance with the principle of lawfulness is thereby put in doubt. They are

clearly a breach of the ‘strong’ conception of the principle, while instead they are compatible with a weaker idea of lawfulness, according to which the rule-making action by the independent authorities is an expression of the ‘regulatory role’ assigned to them by the legislator.

There is just one common point in the various views: guidelines are unlawful when a statute allows their issuing only in pursuit of a broad goal or value, and this is surely a too general reference. Opinion remains open about their definition either as a new sort of normative act or as administrative acts with general content, addressed to the group of stakeholders who are the subjects acting in the specific field of competence. In both cases, they show that in recent years in Italy, the principle of lawfulness has become much more flexible than it used to be.

Final remarks

In Italy, administrative action is based on the (rigid) Constitution, on some fundamental statutes and on a series of different sources of law, that have recently grown in number and in importance. It is not reduced to the mere execution of the rules in force, because the principle of good administration often requires that decisions are taken through a discretionary evaluation of the concrete circumstances and interests involved in the case.

While in the past one could think of the legal order as at a sort of ‘closed’ system, this is no longer possible. In addition to each rule, there are now a number of exceptions. Moreover, the relationship between administrative competence and private action has progressively become more and more complicated and, in numerous fields, authorities simply have a supervisory role in relation to the initiatives of individuals (especially, in economic and productive sectors; Bin, 2009). In summary, lawfulness sometimes works through very specific and technical statutes and regulations; at other times it is based on general rules.

Complexity is evident from a procedural point of view. The comprehensible and proper desire to ensure that each relevant interest is taken into account, either before the production of new rules or the issuing of individual measures, determines the necessity of involving a number of subjects, particularly when the public intervention concerns technical fields.

At the normative level, this metamorphosis is based on the progressive replacement of ordinary statutes with emergency law decrees as primary-level legal sources, and on the progressive abandonment of the 'traditional' executive regulations issued by government (their production is considered too complicated from a procedural point of view) as secondary-level sources. The other interesting element is the frequent emission of guidelines by independent authorities, not only as soft law tools, but also with real normative effect.

The result is that legal sources often require careful interpretation, to be really understood and properly implemented. Consequently, the role of scholars and of the courts has a primary relevance.

The courts are often able to have the last word. Even if in Italy their voice has no legislative value, as it can have in other legal systems, it is nonetheless listened to carefully.

In this perspective, one must keep in mind that the judicial system is not made up only by the national courts, but also by the supra-national ones, especially the European Court of Justice. Case law made by the Luxembourg Court is normally binding for the national courts and it is also able to produce an indirect influence on the legislators (Della Cananea, Franchini, 2013; Pepe, 2012). The scholars are influenced by the supra-national rules and case law. Therefore, the parameters for a check on the lawfulness of administrative action has changed in recent decades. In particular, the general principles of administrative action are accepted as a product of sharing concepts and views in a wide cultural and legal context. Clearly, such a method takes with it a danger, which is a possible 'legal colonialism' in the field of the principles of good administration by the E.U. member countries, whose older and more settled tradition is considered (and objectively is) stronger than another's.

In conclusion, in light of all the elements indicated one could infer that at present, and also in the view of the legislator, the 'traditional' idea of lawfulness is too rigid and should be partly replaced with more flexible rules that are the product of negotiation among various subjects, representative both of the institutions and of the stakeholders in the specific sector. In this perspective, lawfulness is becoming, so to say, 'less authoritative'. Nonetheless, such a transformation is at present driving lawfulness toward a stronger conception of the protection of procedural rights, in order to produce both normative acts and individual administrative measures (Cons. St., VI, no. 2182/2016; Id., VI,

no. 1532/2015). Such “evolutional” conception of lawfulness may offer food for thought for further research, in both empirical and comparative study. In particular, in the dichotomy between clarity and confusion (Master, Paanakker, Huberts, in this volume), one may say that as far as Italy is concerned, the principle stays somewhere in the middle. This is because the concept of administration itself is becoming increasingly complicated, from both subjective and objective points of view. Nonetheless, lawfulness still represents and will necessarily represent one of the main reference points for good administration. It could be that some other values could be added, and others might change their physiognomy in the near future (think for instance of the views on accountability expressed by O’ Kelly & Dubnick, and those on providing service quality through public—private partnerships expressed by Reynaers, in this volume). The principle of lawfulness seems to be a stable foundation for all administrative systems, even though the content of the rules in force can change over time. The potential transformation of the principle has mainly to do with the enrichment and progressive flexibility in the number and typology of legal sources. Therefore, the physiognomy of lawfulness needs to be explored further, especially with the purpose of making clear its relationship with other values.

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