Consiglio Nazionale delle Ricerche

ITALIAN PAPERS ON FEDERALISM

Rivista giuridica on-line – ISSiRFA – CNR

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Thhe ECHR's Influence on the Italian Regulation of the Administrative Trial. The Right to an Independent and Impartial Tribunal*

SOMMARIO: 1. Introduction. The right to a fair trial in the Convention system . – 2. The guarantee of the judge's impartiality and the various outcomes of the dialogue between legal systems. – 3. A case of clear ECHR influence: the so-called force of prevention. – 4. A case of extremely complex dialogue: the simultaneous presence of consultative and jurisdictional functions in the bodies of administrative justice. – 5. A case of missed dialogue: non-judicial positions held by administrative magistrates. – 6. Conclusions.

1. Introduction. The right to a fair trial in the Convention system.

Art. 6 of the ECHR, which recognizes the right to a fair trial, indicating all the guarantees in which this right takes substance, is the provision of the Convention that, historically, gave rise to the greatest number of judgments in the half-century period between 1959 and 2010[1]: the norms contained in this article have been invoked in more than one half of the trials held before the Strasbourg Court (8,019 out of a total of 13,697); and not merely with reference to the problem of reasonable time – which also figures greatly in the number, with judgments corresponding to a little more than one half (4,469) – but also as regards the other guarantees the claimed violation of which has resulted in more than 3,500 trials (a number decisively higher than any other norm in the Convention[2]).

This fact points to a high rate of problems arising in identifying and applying these guarantees in many countries that signed the Convention. At any rate, on a more general level, it must be recognized that trial guarantees occupy a central role in all legal systems, in that they are functional to the actual protection of all the other rights, and legitimate the very performance of jurisdictional function.

* This paper has been written for the book *The Constitutional Relevance of the ECHR in Domestic and European Law – An Italian Perspective*, ed. G. REPETTO, currently under publication by Intersentia, Antwerpen.

1 Reference is made to the statistical data on the years from 1959 through 2010, published on the institutional website of the European Court of Human Rights (www.echr.coe.int).

2 For an idea of the proportion, it is sufficient to consider that, of the other norms, the one that has given rise to the highest number of questions before the ECtHR is that pursuant to art. 1 Prot. 1 protecting property, with 2,414 trials; then, the right to liberty and security (art. 5) with 1,944 trials.

Hence the particular intensity that dialogue between the convention system and the domestic system has taken on with regard precisely to those issues, producing, from time to time, outcomes that differ, but that are always (or almost always) on a constitutional level: either because they are able to directly influence the same domestic norms on a formally constitutional level, leading the constitutional lawmaker to modify their text; or because they are of importance for the purpose of reading the guarantees contained in the constitutional clauses, conditioning their interpretation and helping to define the actual range of their provisions.

With reference to the Italian system, both these possible models of influence find concrete correspondence.

In fact, in the first place, the formulation of art. 6 of the ECHR was the main source of inspiration for a major constitutional reform, implemented with constitutional law no. 2 of 1999, which modified art. 111 of the Italian Constitution, introducing guarantees that mostly retraced the corresponding ECHR norm[3] and that earlier had not been formulated in such explicit terms in the 1948 Constitution (although largely already surmisable through interpretation from other constitutional norms)[4].

This is a case in which the conditionings derived from the ECHR system are evident – albeit while not being the only reasons for reform – and emerge explicitly from the same parliamentary debate during which numerous references may be traced to the perceived need to insert the guarantees under art. 6 ECHR into the Constitution. In fact, it should be kept in mind that at the time of the reform – before constitution law no. 3 of 2001 inserted, into art. 117, first paragraph, Const., the reference to lawmakers' necessary respect for international obligations – the legislative norms for carrying out international treaties were held in the Italian system as operating at a level equivalent to that of ordinary legislation.

However, it is more complicated – and more interesting – to investigate the other type of constitutional influence by the ECHR system on the national legal system: that which operates on the level of interpreting, and thus defining, the actual meaning of constitutional guarantees in their concrete applications. It is a setting in which the interaction between national systems and the convention system operates in accordance with more complex and articulated procedures.

In effect, it is precisely how constitutional provisions are understood and live in the legal system that defines their actual configuration; it is therefore precisely analysis of this

[3] The very expression "due process," now introduced into the first paragraph of art. 111 Const., in addition to evoking the *due process of law clause* in the American tradition, refers to and even patterns itself after the title of art. 6 ECHR ("right to a fair trial"). On the identical value of the expressions "due process" and "fair trial," see the considerations by S. FOIS, *Il modello costituzionale del "giusto processo"*, in *Rassegna Parlamentare*, 2000, p. 572.

[4] For a more complete analysis both of the genesis of the Italian constitutional reform cited in the text and of its innovative scope – topics we cannot go into here in any depth – reference may be made to M. MENGOZZI, *Giusto processo e processo amministrativo*, Milano 2009, pp. 24 and following.

type of influence that allows the outcomes of the domestic legal system's relationship with the ECHR system to be truly and fully grasped.

This work thus proposes to re-examine the various occasions for dialogue and mutual influence between the Italian legal system and the convention system, precisely with respect to the reading of trial guarantees, analyzed in relation to the concrete problems posed by the national regulation of the administrative trial.

2. The guarantee of the judge's impartiality and the various outcomes of the dialogue between legal systems.

For the purposes of the analysis to be made, more particular account will be taken of one of the aspects of the guarantees under the convention that has given rise to the most significant opportunities for exchange between the systems: that regarding the judge's impartiality – a guarantee that the Strasbourg Court has qualified, even recently in the *Udorovic* judgment of 2010, as "inalienable" and not susceptible to appeal, exception, or offsetting[5].

It is thus a requirement that is present both in art. 6 of the ECHR and in the aforementioned text of art. 111 of the Italian Constitution (which speaks of "an impartial judge in third party position"[6]).

Its concrete applications have raised considerable problems, precisely with reference to the regulation of the administrative trial, and, as already pointed out, have given rise to a lively interaction between the ECtHR and domestic legal systems, leading from time to time to different outcomes.

In particular, three problems will be considered; although distinct from one another, they are all connected with the theme of the judge's impartiality, with regard to which the dialogue between national and supranational judges in fact appears to have yielded divergent results.

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[5] *Udorovic v. Italy* judgment of 18 May 2010; see in particular par. 47, for the definition of the judge's independence and impartiality as guarantees that are *inaliénables*. In other words, Strasbourg's jurisprudence has indicated a sort of ranking of guarantees, stressing that the need for the trial to be held before an independent and impartial judge is an essential rule not susceptible to exceptions, on any occasion, unlike other guarantees, such as for example that of a public hearing, which do not find necessary application in all cases, thus permitting exceptions.

[6] The terms "impartial" and "third party," in fact, are mostly used interchangeably, as a hendiadys, in Italian constitutional jurisprudence (see, for example, judgment no. 131 of 1996, in which the Court defines the judge's "impartiality" as an aspect of his "third party position" characterizing the exercise of his functions, distinguishing it from that of all the other public subjects). Some attempts to attribute to each of these terms its own autonomous meaning have actually been advanced by Italian doctrine (see, among others, N. ZANON-F. BIONDI, *Diritto costituzionale dell'ordine giudiziario*, Milano, 2002, p. 111), but they are always formulated in quite problematic terms, and often lead to the conclusion that "the two profiles absolutely cannot be separated" (M. CECCHETTI, *Giusto processo (dir. Cost.)*, in *Enc. Dir.*, V aggiorn., Milano 2001, p. 610).

On the first issue, that of the so-called force of prevention, one may note a considerable influence by ECHR jurisprudence on the orientations of domestic jurisprudence – an influence in fact that although mostly not explicitly recognized, is evident all the same.

However, on the second issue (the relationship between jurisdictional and consultative functions), we are dealing with a more complex dialogue. In fact, on the one hand, the ECHR system's conditioning of the national systems cannot be denied: however, this conditioning, while quite strong in some countries, has not been as strong with regard to Italy, where the deep historical roots of certain institutions created staunch resistance to the more extreme outcomes. On the other hand, it must be noted in this case that certain positions by the European Court have, over time, been formulated also taking into account the organizational needs of the member states (among which, of course, Italy): that is, in certain respects, the influence between the two systems has worked "backwards," from down up, causing the arrangements widespread in many member states to end up guiding how the same guarantee is understood in the ECHR legal system as well.

Lastly, on the third issue, that of non-judicial positions, a "missed" dialogue must be recorded, as indications from European jurisprudence have met with no response in our country.

3. A case of clear ECHR influence: the so-called force of prevention.

The first point, as just discussed, thus regards the so-called force of prevention.

For years, Strasbourg's jurisprudence has pointed, as an element objectively capable of raising doubts as to the judge's impartiality[7] pursuant to art. 6 of the ECHR, to the *cumul des fonctions judiciares* that occurs when a judge, also in the context of the same level of proceedings, is entrusted different decision-making moments: after having expressed a judgment in a given phase, the magistrate will appear biased when having to return to the same choices at another moment in the trial[8].

[7] It should also be kept in mind that the Strasbourg Court, in applying the principle of the judge's impartiality, developed the so-called doctrine of appearances: for the requirement of impartiality to be met, it is extremely important not only for the judge to be effectively equidistant from the interests at play, but also for him or her to appear as such to the parties, and to inspire trust in those subjected to his or her judgment. Therefore, for the decision-making body to be deemed impartial, it is enough that the circumstances create the appearance of a prevention, at least when this suspicion is founded upon elements that have objective consistency (and therefore, it cannot merely be the personal opinion of those subjected to judgment that comes into relief, but objective justifications for a fear of this kind are needed): see the judgments *Piersack v. Belgium of* 01 October 1982, and *Castillo Algar v. Spain* of 28 October 1998.

[8] Among the earliest decisions taken in this regard by the European Court, see the *Piersack* judgment of 01 October 1982 and the *De Cubber* judgment of 26 October 1984.

This interpretation of the impartiality requirement is more far-reaching than that adopted in the Italian legal system, in which the judge's incompatibility was affirmed only between different levels of jurisdiction.

However, our Constitutional Court long ago adopted the indications originating from Strasbourg, at least with reference to the criminal trial, stressing the existence of a "natural tendency [of the judge] to maintain a judgment already expressed or an attitude already taken in other decision-making moments in the same proceedings"[9], that may compromise his or her impartiality; it thus referred the incompatibility provided for by the Italian code of criminal procedure[10] not only to the various levels of jurisdiction, but also to the distinct phases in a given trial.

In civil and administrative trials, on the other hand, although developments were far more cautious, they have not gone lacking in more recent years: these developments were not actually such as to invest the relationship between pre-trial proceedings and decision of merit (a point to be returned to shortly), but regarded other particular cases which, until a few years ago, ruled out application of the abstention obligation in the instance of a judge coming to the case "as a magistrate in another level of the trial" (according to the provisions of art. 51, no. 4, of the Italian code of civil procedure[11], to which the regulation of the administrative trial makes express reference; see art. 17 of the administrative trial code).

Thus, with Plenary Assembly no. 2 of 2009, the Council of State expressly modified its prior jurisprudence, declaring the aforementioned case of obligatory abstention applicable to judicial review as well, and affirming the incompatibility of the judge/physical person that has taken part in the decision later nullified by review.

Actually, on this point, national jurisprudence has gone even further than what was required by the orientations of the ECtHR, which considers incompatible, in review, judges that have already taken part in the first decision in cases where nullification is determined on procedural grounds (*Vaillant* judgment[12]). At any rate, the Council of State's *revirement* appears absolutely guided, or at least highly conditioned, by the indications originating from the European setting. In truth, it bears noting that ECHR jurisprudence is in no way cited in the Council of State's decision, which, rather, justifies

[9] Starting from the judgment of 15 September 1995, no. 432, which innovated prior constitutional jurisprudence on the point; see also, among the most significant judgments, no. 155 of 20 May 1996 and no. 131 of 24 April 1996.

[10] See art. 34, paragraph 2, of the code of criminal procedure.

[11] According to this measure, the judge must abstain "if he has given counsel or lent advocacy in the case, or has deposed in it as a witness, or has come to the case as a magistrate at another level of the trial, or as arbitrator, or has lent assistance as technical consultant."

[12] *Vaillant v. France* judgment, 18 December 2008: "*Il y a lieu en effet de distinguer le renvoi en cas de vice de fond affectant de manière irrémédiable la décision attaquée de celui où, comme en l'espèce, ce n'est qu'un problème de procédure qui est en cause. Si l'on peut concevoir, dans la première hypothèse, des appréhensions du justiciable à l'égard de l'impartialité des magistrats appelés à rejuger l'affaire, tel est difficilement le cas dans la seconde hypothèse*".

the change in orientation on the basis of a series of other factors: the constitutional need for an impartial judge in third party position, the doctrine of the so-called force of prevention, and some other precedents in the jurisprudence of the Italian Constitutional Court and the Court of Cassation. However, it is precisely these elements that are in turn in some way ascribable – as already discussed – to the stimuli originating from the convention system.

On the occasion of the same important decision, the Plenary Assembly declared the aforementioned case of obligatory abstention applicable in repeal as well[13] – not only, as was already accepted, in the case in which the judge's malice is claimed (art. 395, no. 6, of the code of civil procedure), but also when the petition is based upon an error of fact (art. 395, no. 4, of the code of civil procedure), even when it is a matter of "blunder of senses" and not of erroneous appreciation[14]; here, in this case as well, was an innovation from prior orientations.

However, this case is not considered applicable in third-party opposition proceedings[15], given that, in this case, the code of civil procedure (art. 405 of the code of civil procedure) establishes that the decision belongs to the judge that made the judgment.

There was no change, however, as regards the relationship between the various phases of the same level of jurisdiction, and in particular that between pre-trial proceedings and decision of merit. On this point, national administrative jurisprudence is firm in holding that art. 51, no. 4, of the code of civil procedure does not apply.

The Italian Constitution Court has justified this choice by positing that the relationship between pre-trial proceedings and decision of merit differs in civil and administrative proceedings from what occurs in criminal ones[16]. That is to say, in the former ones, the two moments would be treated as sequential phases within the same trial, in which the ruling must be based on different elements. There is no identity of the *res judicanda*, because the ruling on the *fumus* typical of the pre-trial phase would be qualitatively different from that of merit, it being a matter of a summary ruling. In the criminal trial, however, the pre-trial proceedings have to take into account all the possible

[13] This is the special means of appeal provided for by articles 106 and 107 of the administrative trial code and regulated in the administrative trial through broad reference to articles 395 and 396 of the code of civil procedure as regards the cases and modes of appeal.

[14] The type of error that may justify recourse to the repeal instrument, based on art. 395, no. 4, of the code of civil procedure, is in fact: "merely perceptive error that in no way involves the judge's assessment of trial situations exactly perceived in their objectivity, and is not apparent in principle when a presumed erroneous assessment of the trial records and results, or an anomaly in the logical proceedings of interpretation of evidentiary material is complained of, as, in this case, everything comes down to in an error of judgment " (Cons. St., sect. V, 19 June 2009, no. 4040; Cons. St., Ad.Pl., 17 May 2010, no. 2).

[15] This is another means of extraordinary appeal, regulated by the administrative trial code under articles 108-109, along the pattern of the configuration this institution has in the civil trial.

[16] See judgment no. 326 of 07 November 1997; this arrangement was then adopted and used in various subsequent orders by the Constitutional Court, which make reference to it: cf. ord. no. 359, 21 October 1998; ord. no. 168, 31 May 2000; and ord. no. 497, 28 November 2002.

elements of the final decision and, although not based upon actual proof but merely on clues, could not be treated as a ruling of a summary nature, and would not have an object substantially different from that of merit, expressing a "positive prognostic ruling."

Although this now well-established arrangement has received various criticisms from doctrine, especially trial/civil-law doctrine[17], it does not appear to have been cast into doubt by the Strasbourg Court which, although not having ruled precisely on the point, at times seems to attribute an importance, in evaluating questions that are in some way similar, to the circumstance that the trial puts rights of a civil nature rather than criminal charges into play. In the *Sacilor Lormines* judgment[18], for example, in assessing the importance of decisions taken by the judge prior to the trial for the purposes of meeting the impartiality requirement, it expressly states that "*En «matière civile», le simple fait, pour un juge, d'avoir déjà pris des décisions avant le procès ne peut passer pour justifier en soi des appréhensions relativement à son impartialité*", holding, rather, that the judgment is rendered based on the evidence produced and the arguments made in the hearing. Although the cases in point, both in the judgment just mentioned and in the precedents it cites, differ, and do not regard the relationship between pre-trial proceedings and decision of merit, the specification made by the Court appears in some way to follow the logic of a possible different approach to the problem of the force of prevention in the various types of proceedings.

4. A case of extremely complex dialogue: the simultaneous presence of consultative and jurisdictional functions in the bodies of administrative justice.

An additional issue that allows us to reflect upon the mutual influence between the domestic legal system and that of the ECHR is, with reference to the guarantee of the judge's impartiality in the administrative trial, that of the simultaneous presence of consultative and jurisdictional functions in certain bodies of administrative justice. This issue is a highly delicate one, in that it regards arrangements deriving from long-standing traditions, and involves the systems of administrative justice in various member states (including Italy).

European jurisprudence has dealt with this aspect on a number of occasions and, over time, has gradually diminished its action, settling upon a "minimal" reading of the requirement of impartiality.

Probably, as already discussed, in this case it may be said that the "dialogue" between legal systems has worked in the other direction, and the Strasbourg Court has ended up

[17] B. CAPPONI, *Brevi osservazioni sull'articolo 111 della Costituzione (procedimento monitorio, processo contumaciale, art. 186 quater c.p.c.)* ane N. SCRIPELLITI, *L'imparzialità del giudice ed il nuovo articolo 111 della Costituzione*, both published in M.G. CIVININI-C.M. VERARDI (ed.), *Il nuovo articolo 111 della Costituzione e il giusto processo civile*, Milano 2001, respectively pp. 105 and following, and pp. 108 and following.

[18] *Sacilor Lormines v. France* judgment of 09 November 2006.

being influenced by how the guarantee in question is understood by many of the national legal systems it addresses.

The first ruling on the issue, 1995's *Procola* judgment[19] rendered against Luxembourg, in fact provided a glimpse of potential high-impact developments which, however, were allowed to lapse in later decisions. Indeed, even though the judgment is based exclusively upon the fact that the physical persons of the magistrates that had dealt with the same issue in two different guises concretely coincided (four out of five members of the panel of judges had already dealt with the same issue in consultation), the Court had also gone so far as to add – albeit only incidentally – that the very fact that the members of Luxembourg's Council of State could exercise both functions with regard to the same act was enough to raise doubts as to the institution's "structural impartiality."

The finding opened scenarios of considerable scope. It is no accident that the content of this decision led Luxembourg to a constitutional reform[20] that profoundly modified the arrangement of the Council of State, separating the two functions: this body retained only the consultative function, which was further reinforced[21], while jurisdictional duties were given to an administrative court created ad hoc.

Thereafter, however, the Court never developed these points, settling on the now well-established position inaugurated in 2000 by the *McGonnell* judgment[22] and then adopted in the *Kleyn* judgment of 2003[23] and the *Sacilor Lormines* judgment of 2006[24]: the

[19] *Procola v. Luxembourg* judgment of 28 September 1995.

[20] Through the constitution revision of 12 July 1996, which entered force on 01 January 1997.

[21] The Council of State was, in fact, also vested with the mission of preventively checking that bills and regulations complied with higher-level legal norms. See www.conseil-etat.public.lu/fr/historique/index.html. On the issue, cf. also V. PARISIO, *Il Consiglio di Stato in Italia tra consulenza e giurisdizione alla lice della Convenzione europea dei diritti dell'uomo*¸ in ID. (ed.), *Diritti interni, diritto comunitario e principi sovranazionali. Profili amministrativistici*, Milano 2009, 245, and J. MORAND-DEVILLER, *La Cour Européenne des droits de l'homme et le droit admistratif français*, in V. PARISIO (ed.), *Diritti interni,* supra, p. 216.

[22] *McGonnell v. United Kingdom* judgment of 08 February 2000.

[23] Grand Chamber judgment, *Kleyn and others v. the Netherlands*, of 06 May 2003. This is probably the judgment in which the Court expressed its clearest refusal to abstractly assess the compatibility of the institution's structure with art. 6 ECHR, while adopting and emphasizing some considerations that had remained only hinted at in the *McGonnell* decision.

[24] *Sacilor Lormines v. France* judgment of 09 November 2006. This decision actually marks a decided convergence towards the orientation indicated in the text, because it was taken unanimously. In *Kleyn*, on the other hand, the decision was made by a majority with 12 votes in favour and 5 votes against (this was a Grand Chamber decision). In particular, the dissenting judges' opinions (see above all the opinion of the judges Thomassen and Zagrebelsky) stressed that where there is no clear separation of functions within a given body, there must be particularly rigorous scrutiny as to the deciding panel's objective impartiality. Another dissenting opinion (by three other judges), went even further, stigmatizing in more general terms the mingling of jurisdictional and government functions in the same bodies, and urging, as the absolutely most effective solution for removing any doubt as to the impartiality of these bodies, the clear separation between the two functions. In *Sacilor Lormines*, on the other hand, none of the judges expressed doubt any longer as to the correctness of the arrangement that had been adopted. The only dissenting opinions, in fact, regarded a different aspect of the issue. On the latter decision, in Italian

Convention does not require the States to adopt a given conception of the relations between powers, and the Court must limit itself to assessing the circumstances of the individual case; the "dual" structure of certain bodies of administrative justice (in Italy, the issue involves, above all, the Council of State) is thus considered acceptable and compatible with art. 6 ECHR, provided that the differentness of the physical persons dealing with the same questions in the two venues is guaranteed.

Therefore, as already discussed, the Court – after the first, more courageous pronouncement – then opted for a reading of the impartiality requirement that did not radically upset the organizational arrangements present in many of the member states, going no further than demanding the minimum guarantee that the subjects that, on the various occasions, decide the same issues, do not coincide.

The problem of course remains that of establishing when it is a matter of the "same issue," especially in the case of acts connected with one another[25].

One might at any rate expect that Italy may be thought to be in line with the "minimal" reading of the impartiality requirement adopted by the Court with reference to this issue.

Actually, however, a number of problems remain open, for which the influence of the ECHR legal system appears yet to have completely fulfilled its potential.

In the first place, the new administrative trial code[26] abrogated the long-standing regulation (until that time still in force in the Italian legal system) contained in art. 43, paragraph 2, of the consolidation act of laws on the Cons. St.[27], which expressly established the prohibition against taking part in decisions in the jurisdictional setting for magistrates that had, in the consultative section of the Council of State, contributed to providing an opinion on the issue that was the object of the petition ("*Council members that have, in the consultative section, contributed to providing an opinion on the issue that is the object of the petition cannot take part in the decisions*").

Today, this special grounds for abstention might be considered to come under the case of obligatory abstention pursuant to art. 51, no. 4, of the code of civil procedure (to which art. 17 of the administrative trial code refers for determining the grounds for abstention and recusal), in the part in which it states that the judge who has "given

doctrine, see V. PARISIO, *Il Consiglio di Stato in Italia*, supra no. 21, p. 247; and P. DE LISE, *Corte europea dei diritti dell'uomo e giudice amministrativo*, Report to the Congress *Le giurisdizioni a contatto con la giurisprudenza della Corte europea dei diritti dell'uomo* held in Rome on 20 April 2009, and published at www.giustizia-amministrativa.it.

[25] The Court initially (in the *McGonnell* judgment) provided a broader interpretation of the reference to the "same issue," and then adopted a far more restrictive reading in the *Kleyn* and *Sacilor Lormines* judgments; in the latter decisions, it ended up providing, from this standpoint as well, a less rigorous assessment of the impartiality guarantee.

[26] A code approved in Italy in rather recent years, with legislative decree no. 104 of 02 July 2010.

[27] Royal decree no. 1054 of 1924. Moreover, the norm was already present in consolidation act no. 638 of 1907, under art. 35.

counsel" in the case must abstain. In fact, beyond any possible doubt as to the two possibilities coinciding, this formulation now appears based upon the need to interpret the corresponding norms in a manner that complies constitutionally (and "*conventionally*"), as per art. 117, first paragraph, and art. 111 of the Constitution. Any other interpretation, at any rate, would expose Italy to international liability before the European Court.

In any event, given the delicacy of the issue, it would perhaps be preferable to leave the already existing specific case of abstention in force. The inappropriateness of this abrogation appears rather clear when considering that, precisely following the positions taken on the point by the European Court, a similar case of incompatibility was in fact recently introduced in France, with decree no. 225 of 06 March 2008[28].

An additional problem is linked to the innovation introduced by decree law no. 112 of 25 June 2008, under art. 54, which appears to run counter to the indications coming from Strasbourg's jurisprudence, thereby increasing the confusion between the two functions held by the Council of State. The rigid breakdown of consultative and jurisdictional functions between the various sections of the Council of State (the first three with consultative functions, the others with jurisdictional functions) was thus eliminated, in favour of a "flexible" division that was to change every year at the determination of the President of the Council of State who, upon hearing the Council of Presidency, by his own measure, identifies which sections are to perform one type of function, and which ones the other. This system appears to multiply rather than reduce the occasions for possible "prevention" by the judges.

Lastly, certain special cases might pose an additional problem, where the General Assembly of the Council of state, composed of the totality of magistrates in service at the Council of state, is called upon to render an opinion on an act (as may occur at the request of the consultative section for regulatory acts, or of the President, based on the regulations provided for by art. 17, paragraph 28, of law no. 127 of 1997). In this case, the minimal guarantee required by the European Court could not be guaranteed, in the case of subsequent jurisdictional appeal of the same act (consider, for example, a regulation by the executive, which may well be the object of a petition before the bodies of administrative justice).

5. A case of missed dialogue: non-judicial positions held by administrative magistrates.

Lastly, moving on to the third point, some observations need to be made regarding an additional opportunity for dialogue that, for now, has been missed. We are referring to the

[28] The decree 2008-225 introduced the rule according to which "*les membres du Conseil d'Etat ne peuvent participer au jugement des recours dirigés contre les actes pris après avis du Conseil d'Etat, s'ils ont pris part à la délibération de cet avis*". On the point, see J. MORAND-DEVILLER, *La Cour Européenne des droits de l'homme*, supra no. 21, p. 216, and V. PARISIO, *Il Consiglio di Stato in Italia*, supra no. 21, p. 248.

issue of non-judicial positions held by administrative magistrates, vis-à-vis the guarantee of impartiality.

In this regard, the European Court, in the aforementioned *Sacilor Lormines v. France* decision – despite having deemed admissible the government's appointment of State Councillors by virtue of the guarantee of non-removability that characterizes their position[29] –, declared the violation of art. 6 ECHR for the circumstance that one of the administrative judges that had decided the jurisdictional petition had been, a few days prior to the publication of the ruling, appointed Secretary General of the Ministry that had been a party to the proceedings. According to the Court, the magistrate had to have already been "in the running" for this appointment for some time. And this determines an objective prejudice to the judge's appearance of impartiality[30].

On this front, while the introduction into the Italian legal system, in rather recent times (legislative decree no. 35/2006), of the obligation to publicize non-judicial positions given to administrative judges is to be hailed with undoubted favour, it still remains to be established how, in our system, the need for a substantial containment of said positions – a need that, given a practise of broad reliance on them that has always been quite widespread in the Italian system, has been urged not only by doctrine[31] but also by the Constitutional Court, which already expressed itself in this sense many years ago[32] – has gone absolutely unanswered.

On the other hand, the regulation in force in Italy, contained in D.P.R. no. 418 of 06 October 1993, is anything but restrictive. At any rate, the fact that such regulatory provisions are absolutely insufficient for the purpose of effectively containing the phenomenon is demonstrated, empirically but significantly, by the data on the number and importance of the positions assigned to administrative magistrates every year[33].

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[29] From this standpoint, the French regulation is similar to Italy's. In this regard, Strasbourg Court's position actually appears difficult to share. It is, however, entirely similar to the one that, in Italy, the Italian Constitutional Court had already taken long ago (judgments no. 1 of 1967 and no. 177 of 1973) with respect to this system of investiture, which in our country regards a component both of the magistrates of the Council of State and of those of the Court of Auditors. This perplexing arrangement leaves room for perplexity, and appears to confuse the two guarantees of independence and impartiality. At any rate, on the point, domestic constitutional jurisprudence and supranational jurisprudence have shown themselves in perfect alignment and consistency; it thus does not appear necessary to dwell on the subject in this work.

[30] Actually, on the point, the decision was taken by majority; three judges in fact expressed a dissenting opinion, holding that the so-called doctrine of appearances could lead to excessive outcomes, as in the case in point, in which there was no objective proof of the lack of impartiality.

[31] Among others, cf. F. SORRENTINO, *Profili costituzionali della giurisdizione amministrativa*, in *Diritto Processuale Amministrativo*, 1990, p. 71; U. ALLEGRETTI, *Giustizia amministrativa e principi costituzionali, in Amministrare*, 2001, p. 200; S. PANUNZIO, *Il ruolo della giustizia amministrativa in uno stato democratico. Osservazioni sul caso italiano*, in V. PARISIO (ed.), *Il ruolo della giustizia amministrativa*, supra no. 21, pp. 89 and following; A TRAVI, *Per l'unità della giurisdizione*, in *Diritto Pubblico*, 1998, pp. 371 and following.

[32] See judgment no. 177 of 1973.

[33] Today easily retrievable, as they are published every six months by the Council of Presidency of Administrative Justice, also through its institutional site.

On this issue, therefore, the national system and the European one do not yet appear to have entered a real conflict; it is a conflict, however, that appears unavoidable in the future.

6. Conclusions.

Many other aspects of the Italian regulation of the administrative trial might offer an opportunity for considerations similar to those made here, also with reference to requirements other than that of impartiality. All the guarantees provided for in art. 6 ECHR, in their concrete application, have in fact opened possibilities for dialogue and mutual influence between the systems, in some cases showing a strong influence of the convention's legal system, and in other cases a more difficult and disputed relationship.

For example, of great importance is certainly the issue of reasonable time, and of the compensation obligations that descend from violating this right – which, however, cannot be discussed here[34].

The domestic system and the conventional one may now be said to have been placed in stable communication with one another, and the modes of this relationship now make comparison inevitable.

Moreover, awareness of this appears to have been demonstrated by the drafters of the recent Italian administrative trial code which, in art. 1, expressly indicated the intent to ensure a jurisdictional protection "in accordance with the principles of the Constitution and of European law" – which inevitably includes the ECHR system.

Note:
The original paper is contained in: *The Constitutional Relevance of the ECHR in Domestic and European Law – An Italian Perspective*, ed. G. Repetto, Intersentia, Antwerpen.

[34] Here we merely point out that the ECHR's regulations have had, among other things, the effect of necessitating the introduction in Italy of an internal remedy for violation of the right to the reasonable time for the trial: an instrument, that is, that would afford the individual "effective recourse in the presence of a national claim" in order to invoke the injury, as required by art. 13 ECHR. This remedy is the one instituted by the so-called Pinto law, no. 89 of 24 March 2001.