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THE IMPACT OF ARTICLE 41 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS ON ITALIAN ADMINISTRATIVE LAW: SOME OBSERVATIONS.

Michele TRIMARCHI

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1. INTRODUCTION

Many provisions of the EU Charter of Fundamental Rights (ECFR) are relevant for the overall system of administrative law[1]. The warning of an eminent Italian scholar that

[1] For example: art. 8, second paragraph, concerning the right of access to personal data, which also regards the data held by the administration; art. 17 concerning property and the limits of the power of eminent domain; art. 18, concerning the right of asylum; art. 36, concerning the access to services of general economic interest; art. 42, concerning the right of access to documents; art. 43 on the European Ombudsman; and, in general, the overall system of freedom, which indicates, not unlike the Italian Constitution, what the government cannot do.

anyone "who wants to know how the administration is governed in our constitution should not only read two articles, but the whole constitution"[2] is valid both for the Charter of Fundamental Rights and the European treaties[3].

Having said that, some provisions of these Acts are *expressly* related to public administration: for example, Articles 97 and 98 of the Italian Constitution and Article 41 ECFR, entitled "Right to good administration"[4]. The first two are contained in the section

[2] C. ESPOSITO, *Riforma dell'amministrazione e diritti costituzionali dei cittadini,* in Id., *La Costituzione italiana. Saggi*, Padova (1954) 248; G. CORSO, *La costituzione italiana negli studi di diritto amministrativo*, in *Riv. Dir. cost*. (1999) 120 ff.; Id., *Manuale di diritto amministrativo,* Torino (2008) 29 ff.

[3] An overview of the provisions contained in the TFEU relevant for the overall regime of administrative law is provided by P. CRAIG, *EU Administrative law. The* acquis, in *Riv. It. Dir. pubbl. com.* (2011) 329 ff.

[4] M.P. CHITI, *Il mediatore europeo e la buona amministrazione comunitaria,* in *Riv. It. Dir.Pubbl.Com* (2000) 313 ff.; F. TRIMARCHI BANFI, *Il diritto a una buona amministrazione,* in M.P. CHITI e G. GRECO (ed), *Trattato di diritto amministrativo europeo*, I, Milano (2007) 49 ff.; D. SORACE, *La buona amministrazione e la qualità della vita, nel 60° anniversario della Costituzione,* in *www. Astrid-online.it*; R. BIFULCO, *Art. 41. Diritto a una buona amministrazione,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (ed.), *L'Europa dei diritti,* Bologna (2001), 284 ff.; A. ZITO, *Il "diritto a una buona amministrazione" nella carta dei diritti fondamentali dell'Unione Europea e nell'ordinamento interno,* in *Riv. It. Dir. Pubbl. Com.* (2002) 425; G. DELLA CANANEA, *I procedimenti amministrativi della Comunità Europea*, in M.P. CHITI, G. GRECO (ed.), *Trattato di diritto amministrativo europeo,* I, Milano, (1998) 230 ff.; Id., *Al di là dei confini statuali,* Bologna (2009) 91 ff.; G. DELLA CANANEA – C. FRANCHINI, *I principi dell'amministrazione europea,* Torino (2010) 86 ff., 101 ff.; E. SANNA TICCA, *Cittadino e pubblica amministrazione nel processo di integrazione europea,* Milano (2004) 330 ff.; A. SERIO, *Il principio di buona amministrazione procedurale. Contributo allo studio del buon andamento nel contesto europeo,* Napoli (2008) 1 ff.; D.U. GALETTA, *Le garanzie procedimentali dopo la legge 15/2005: considerazioni sulla compatibilità comunitaria dell'art. 21-octies L. 241/90, anche alla luce della previsione ex art. 41 CED,* in L.R. PERFETTI (ed), *Le riforme della l. 7 agosto 1990 n. 241 tra garanzia della legalità ed amministrazione di risultato,* Padova (2008) 322 ff.; L. R. PERFETTI, *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità*, in *Riv. It. Dir. Pubbl. Com.* (2010) 789 ff.; S. VILLAMENA, *Mediatore europeo e ‹‹buona amministrazione›› (Profili ricostruttivi della tutela del Mediatore Europeo* attraverso *la buona amministrazione comunitaria)*, in A. CONTIERI, F. FRANCARIO, M. IMMORDINO, A. ZITO (ed.), *L'interesse pubblico tra politica e amministrazione,* vol. II, Napoli (2010), 251 ff.; M. C. CAVALLARO, *Clausola di buona amministrazione e risarcimento del danno,* ivi, 649; P.P. CRAIG,

on government, the last one in the section on citizenship. The difference is not without relevance, as we shall see.

The following considerations are concerned with the impact of Article 41 on Italian administrative law, and in particular on the regulation of administrative activity.

Since the Court of Justice has always qualified "good administration" as a general principle of the European institutions' activity or as a right of the citizens[5], the "right to good administration" is usually studied simply as a right of the European citizens towards the EU institutions[6].

This approach is correct but incomplete, because, according to Article 51 ECFR, "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*": therefore the "right to good administration" (Article 41) concerns not only the European institutions but also the national ones when acting as agents of the Union or where issues of Union law are involved7.

Administrative law, London, Sweet & Maxwell (1994) 18 ff., 409 ff.; S. CASSESE, *Il diritto alla buona amministrazione*, in *Studi in onore di Alberto Romano*, I, Napoli (2011) 105-113.

[5] A. SERIO, *op. cit*., 21 ff., 126 ff.; R. BIFULCO, *op. cit*., 285; otherwise D. U. GALETTA, *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona,* in *Dir. Amm*. (2010) 629 ff..

[6] See A. SERIO, *op. cit*., 1 ff..

[7] C. HARLOW – R. RAWLINGS, *National administrative procedures in a European perspective: pathways to a slow convergence,* in *Italian Journal of Public Law* (2010) 220; P. CRAIG., *EU administrative law,* cit., 330; F. ASTONE, *Le amministrazioni nazionali nel processo di formazione ed attuazione del diritto comunitario,* Torino (2004) 65 ff.; D.U. GALETTA, *Diritto a una buona amministrazione,* cit.. 630.

Moreover, since Article 1 of the Italian Administrative Procedure Act (APA) (law 241/90) provides for administrative activity to be governed by the principles of European law, it must be assumed that the "right to good administration" refers to the relations between Italian citizens and national public administrations[8] even when they are not acting as agents of the Union[9]; in fact, if the assimilation of the principles of European law by the APA also concerned the conditions attached to their application by European law itself (Article 52 ECFR), Article 1 APA would have no meaning, because the relevance of Article 41 in the relations between Italian citizens and national public administrations which act as agents of the Union derives directly from Article 52 and the supremacy of EU law.

If, therefore, Article 41 also applies to the relationship between Italian citizens and national public administrations, the question arises whether and to what extent it innovates national administrative law.

2. ARTICLE 41 ECFR AND THE ITALIAN ADMINISTRATIVE PROCEDURE ACT: A COMPARISON

As written in the explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Article 41 is based on the existence of the Union as subject to the rule of

[8] D.U. GALETTA, *Diritto a una buona amministrazione*, cit.. 631 s

[9] D.U. GALETTA, *Diritto a una buona amministrazione*, cit., 637; D. SORACE, *La disciplina generale dell'azione amministrativa dopo la riforma del titolo V della Costituzione. Prime considerazioni*, in *Annuario AIPDA 2002*, Milano (2003) 31 f.

law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law[10]. It consists of four paragraphs.

a) The first paragraph states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by institutions;

b) The second paragraph could be considered as a specification of the first one. It states that the "right to good administration" includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right for every person to have access to his or her file (while respecting the legitimate interest of confidentially and of professional and business secrecy); the obligation of the administration to give reasons for its decisions.

c) The third paragraph provides the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties.

d) The fourth paragraph states that every person may write to the institutions of the Union in one of the languages of the treaties and must have an answer in the same language.

The wording for that right in the first two paragraphs derives from case-law[11] and the wording regarding the obligation to provide reasons comes from Article 296 (2) of the

[10] See C.G.C.E., 31/3/1992, c-255/90 P *Burban* [1992] ECR I-2253; C. F. I., 18/9/1995, t-167/94 *Nölle* [1995] ECR II-2589; C.F.I., 9/7/ 1999 t-231/97 *New Europe Consulting and others* [1999] ECR II-2403.

For an interesting analysis of the case law on art. 41, see L.R. PERFETTI, *op. cit*. 793 ff..

[11] C.G.C.E., 15/10/1987, c. 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds; C.G.C.E., 18/10/1989, c. 374/87 *Orkem* [1989] ECR 3283; C.G.C.E., 21/11/1991, c. 269/90 *TU München* [1991] ECR I-5469; C. F. I., 6/12/1994, t-450/93 *Lisrestal* [1994] ECR II-1177; C.F.I., 18/9/1995, t.167/94 *Nölle* [1995] ECR II-2589.

Treaty on the Functioning of the European Union (TFEU) (ex Article 253 TEC), which provides that "legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"[12]. Paragraph 3 reproduces the right now guaranteed by Article 340 (2) TFEU (ex Article 288 TEC) ("in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties"); paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) (right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language).

But "prior to the Charter the protection of rights was fragmented and piecemeal, thereby making it more difficult for the citizenry to understand the legal status quo"[13] and, increasing the scope of Union power, through the promulgation of some form of European bill of rights has become more pressing. The positive effect of Article 41 should be the increase of rights-based claims within judicial review actions.[14]

More generally, "the Court of Justice has read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice into the TFEU, and used them as the foundation for judicial review": on this see P. CRAIG, *EU administrative law*, cit., 331

[12] (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration)

[13] P. CRAIG, *EU administrative law*, cit., 348.

[14] P, CRAIG, *EU administrative law*, cit., 350. "claimants will be able to point to a clear set of rights, which are legally binding on EU institutions and member states when they act within the sphere of EU law."

Like the entire Charter[15], Article 41 takes into account the legal experiences of the States too, with specific reference, rather than to the constitutional provisions, to the APA[16]. For this reason, almost all the principles and rules laid down by Article 41 are already known in the Italian legal system[17].

a) The Republican Constitution refers to impartiality with regard to public office organization (Article 97), but *la doctrine*[18] and case law have long since expanded the provision to administrative action, underlying that organization should precede and shape activity[19].

[15] As provided by Article 52, paragraph 6

[16] See D. SORACE, *La buona amministrazione e la qualità della vita*, cit; *contra*, A. ZITO, *op. cit.*, 43. For a comparative analysis see the "European Code of Good Administrative Behaviour", available at http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf, 23ff.

[17] D. DE PRETIS, *Italian administrative law under the influence of European law*, in *Italian journal of public law*, 1 (2010), 12: "The principles and the values underpinning Italian administrative law are in line with the founding principles of the European Union (art. 6 TEU). The Italian legal system shares the values expressed in the European Convention of Human Rights (ECHR) as well. Bearing in mind the complex circuit of building of the European principles, it is natural [obvious] to mention that Italy has adhered to the common European legal systems since their origin".

[18] C. ESPOSITO, *op. cit.*, 257; U. ALLEGRETTI, *L'imparzialità amministrativa*, Padova (1965) 181 ff.; E. CANNADA BARTOLI,. *Interesse (dir. amm.)*, in *Enc. Dir., XXII*, Milano (1972) 3-6; G. CORSO, *Manuale*, cit., 360 f..

[19] D. DE PRETIS, *op. cit.*,88.

b) Equity[20] and reasonableness[21] are used by the Italian courts (not unlike the Court of Justice[22]) as the foundation for judicial review, in order to prevent discretion degrading into arbitrariness[23].

Article 41 of the Charter, however, refers not to reasonableness as a criterion of discretionary choice, but rather to qualify the time required to conclude proceedings (which must be "reasonable")[24]: it is not so much, then, a rule directed to the administration but to the national parliaments. In this sense we can say that Italian law is at the cutting edge: Article 2 APA provides terms for completing the process that balances the need for speed[25]

[20] Cf. F. MERUSI, *L'equità nel diritto amministrativo secondo Cammeo: alla ricerca dei fondamenti primi della legalità sostanziale*, in *Quaderni Fiorentini per la storia del pensiero giuridico moderno* (1993) 413 ff.; G. BOTTINO, *Equità e discrezionalità amministrativa,* Milano (2004) 124 ff.; in the European legal system, see E. SANNA TICCA, *op. cit*., 147 f. and L. R. PERFETTI, *op. cit*., 818 ff.;A. ZITO, *op. cit*., 434, notes that neither the Constitution nor Law 241/1990 refer to the concept of equity. Thus, fair administration, as a right, is something new for the Italian legal system

[21] *Ex multis,* L. D'ANDREA, *Ragionevolezza e legittimazione del sistema,* Milano (2005) 25 ff., A. SANDULLI, *La proporzionalità dell'azione amministrativa,* Padova (1998) 322 f.; F. LEDDA *Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica,* ora in Id., *Scritti giuridici*, Padova (2002) 231 f.; Id., *Variazioni sul tema dell'eccesso di potere, ivi*, 573 ff.; Id., *La concezione dell'atto amministrativo e dei suoi caratteri, ivi*, 249.

[22] P. CRAIG, *EU administrative law,* cit., 331.

[23] M. TRIMARCHI, *Dalla pluralità dei vizi di legittimità alla pluralità delle tecniche di sindacato,* in *Dir. Amm*. (2010) 993 ff.

[24] Scholars have long been aware of the importance of the timing of administrative activity. See F. LEDDA, *Il rifiuto del provvedimento amministrativo,* Torino (1964) 78 ff.; M. CLARICH, *Termine del procedimento e potere amministrativo,* Torino (1995) 27 ff.

[25] According to Article 2 l. 241/1990, state administrative proceedings must be completed within thirty days of commencing.

with the objective difficulties of the administrative matters to be resolved (and, in this sense, reference to the standard of reasonableness is clearly in *re ipsa*).

c) The Italian Administrative Procedure Act even establishes the right of citizens to be heard[26]. The interested parties have the right to be notified of the initiation of proceedings and, whether they have received such communication or not, have the right to intervene in the proceedings, presenting pleadings and documentation[27]. As in the EU legal system, a hearing is required even where no sanction is imposed "provided that there is some adverse impact, or some significant effect on the applicant's interest"[28]. The only difference is that European law provides for oral participation, that, despite the insistent pressure of scholarship, is not admitted under Italian law[29].

d) Article 3 APA provides that, with some limited exceptions, administrations are obliged to give reasoned decisions[30].

[26] On administrative procedure participation, see L.R. PERFETTI, *Procedimento amministrativo e partecipazione*, in *IusPublicum* (2011).

[27] G. CORSO, *Administrative procedures: twenty years on*, in *The Italian Journal of Public Law* (2010) 275.

[28] P. CRAIG, *EU administrative law*, cit., 335.

[29] Cf. A. ZITO, *op. cit.*, 438; L. R. PERFETTI, *Diritto ad una buona amministrazione*, cit., 798; G. DELLA CANANEA, *The Italian administrative procedure act: progresses and problems* (2011), in *IusPublicum*, 13.

[30] A. ROMANO TASSONE, *Motivazione (dir. amm.),* in *Diz. Dir. Pubbl.* edited by S. CASSESE, IV, Milano (2006) 3473 ff.; G. CORSO, *Motivazione dell'atto amministrativo,* in *Enc. Dir. Agg.*, Milano, (2001) 775 ff..

e) An entire chapter of APA is dedicated to the right of access to documents held by the public administration, and some special remedies (administrative and judicial) are provided in case it is denied.

f) The obligation for the administration to repair the damages caused to citizens is a recent but consolidated conquest of Italian administrative law[31].

3. THE IMPACT OF ARTICLE 41 ON ITALIAN ADMINISTRATIVE LAW.

Nihil sub sole novi for administrative law, then? No, for more than one reason.

a) First of all, Article 41, providing a definition of "good administration", introduces an important element of clarity in the Italian administrative law, where the expression "good administration" does not appear in any legislative text but is used in case law and by scholars with various meanings.

The Courts sometimes use the principle of "good administration" in order to strengthen the citizen's protection burdening the administration with obligations beyond those required by the Parliament Acts; at other times to reduce the citizen's protection, allowing the non-application of the provisions regarding participation when there is a need for speed[32], or, more generally, saving decisions affected by formal vitiating factors[33]. Good

[31] See an overview in G. CORSO – G. FARES, *La responsabilità della pubblica amministrazione. Casi di giurisprudenza*, Torino (2009) 1 ff..

[32] Council of State, sec. VI, December 10, 2010, n. 8704

[33] TAR Turin, sec. I, February 26, 2011, n. 216

administration is also used as a criterion for the organization of public services[34] or as a guiding principle in choosing the contractor[35]. Very often, finally, the violation of the principle of good administration is considered as an element used to detect administrative liability[36].

Nor is *La doctrine* is in agreement on what "good administration" means.

For example, is a "good" administration an efficient[37] or an impartial[38] one? Or, moreover, is an administration "good" if it observes the established rules[39]? Is an administration "good" when it adopts measures that are coherent with the results of the preliminary investigation or when it seeks the collaboration and consensus of individuals[40]? Or does "good administration" imply simplicity, transparency, subsidiarity, etc.[41]?

[34] Council of State, sec. V, February 8, 2011, n. 854

[35] TAR Trento, Trentino Alto Adige, sect. I, January 26, 2011, n.10

[36] Council of State, sec. VI, March 31, 2011, n. 1983 ; Council of State, sec. VI, January 12, 2011, n. 109; Council of State, sec. V, February 22, 2010, n. in 1083, Council of State, sect. IV, 24 December 2008, n. 6538.

[37] According to M.P. CHITI, *op. cit.*, 321, good governance occurs when the administration respects the criteria of efficiency and effectiveness;

[38] D. DE PRETIS, *op. cit.*, 88: "The concept of "good administration" in Italian administrative law includes the notion that the administrative act, besides being an instrument for the correct and faithful implementation of the law (the lawfulness of administrative action), which aims at pursuing the public interest according to criteria of efficacy, efficiency and economy (buon andamento), should be carried out in an objective and impartial way (imparzialità) in relation to the private parties involved""

[39] According to G. DELLA CANANEA, *Al di là dei confine statuali*, cit., 91 ff., the expression "good administration" has three meanings: observance of established rules, adequacy of procedures beyond those rules, coherence of the final measure with the results of the preliminary investigation

[40] E. SANNA TICCA, *op. cit.*, 336 f., notes that in the Italian legal system good administration is strongly linked to the principles of impartiality, proportionality and good performance. According to the author, a "good"

These elements are not incompatible, but the variety of meanings shows how in Italian law the concept of "good governance" is uncertain.

Nowadays, since the ECFR is binding, we can be sure about what "good administration" means, even if the list contained in Article 41 is not exhaustive[42]: it is a formula which summarizes the substantial and procedural rights of the citizens *vis-à-vis* the public bodies[43]. It is not so different from what more than a century ago was written by Oreste Ranelletti: it "must be said that the law aims primarily to implement good governance; the respect of these forms [the forms required by the administrative acts] is an element of good administration "[44].

administration is a "responsible" one, respectful of the principles that govern the action in order to guarantee the claims of individuals. Finally, an administration is "good", if it "does not impose its own choices, but seeks collaboration and consensus through participation of individuals."

[41] D. SORACE, *La buona amministrazione e la qualità della vita*, cit,

[42] It is widely believed that Article 41 does not reproduce all the procedural guarantees recognized by case law: see D.U. GALETTA, *Le garanzie procedimentali*, cit., 323; D. SORACE, *La buona amministrazione e la qualità della vita*, cit., 1 f.

The selection made is considered dangerous by some scholars who are against the "constitutionalization" of the right to good administration, because it involves the risk of an improper hierarchy among principles. On this see M.P. CHITI, *op. cit.*, 322 f.; R. BIFULCO, *op. cit.*, 286 s .

[43] P. CRAIG, *op. cit.*, 18, speaks of principles of good administration, with specific reference to Legality, procedural propriety, participation, openness, rationality, relevancy, propriety of purpose, reasonableness, legitimate expectations, legal certainty and proportionality: in this context, "good governance" is merely a summary of the whole formula of substantive principles and procedural safeguards that the administration must comply with.

[44] O. RANELLETTI, *Ancora sui concetti discretivi e sui limiti della competenza dell'autorità giudiziaria e amministrativa* (1893), in Id. *Scritti giuridici scelti*, II, *La giustizia amministrativa*, Napoli (1992) 98.

We can therefore speak of a double meaning of the "right to good administration", depending on whether the right is referred to the decision *stricto sensu* (the discretional choice) or to the procedure[45]. In the first case "good administration" indicates the rights to be heard, to access to one's files, the obligation to conclude the procedure within a reasonable time and to give reasoned decisions, etc.; in the second case, it implies the right of every person to have his or her affairs handled with fairness and impartiality.

It should also be considered that, according to Article 41, rules which in the Italian legal system are contained in ordinary acts (such as the right to be heard or the right of access and the obligation to give reasoned decisions) have been reproduced at the level of fundamental rights. This means, especially with regards to procedural rights, that these rights are nowadays considered as the founding pillars of modern supra-state democracy [46].

b) According to the traditional Italian way of thinking, APA provisions do not grant fundamental rights to individuals. When administrations act as authorities in order to manage the public interest, even if they take invalid decisions[47], the citizen's subjective rights (i.e. the right to property) "degrades" into legitimate interest[48].

[45] See F. TRIMARCHI BANFI, *op. cit.*, 49 ff.; D. SORACE, *La buona amministrazione e la qualità della vita*, cit., 2 ff..

[46] G. DELLA CANANEA, *Al di là dei confini statuali*, cit., 172 ff., *passim*.. On this see A. ROMANO TASSONE, *A proposito del c.d. ‹‹diritto globale›› (leggendo* Al di là dei confini statuali *di Giacinto della Cananea)*, in *Dir. e Proc. Amm.*, 721 ff..

[47] M. S. GIANNINI, *Discorso generale sulla giustizia amministrativa*, I, in Riv. Dir. Proc. (1964) 538; O. RANELLETTI, *Ancora sui concetti discretivi e sui limiti della competenza dell'autorità giudiziaria e amministrativa*, cit., 95 f..

[48] O. RANELLETTI, *A proposito di una questione di competenza della IV sezione del Consiglio di Stato (1892),* in Id. *Scritti giuridici scelti, II,* cit., 75, *passim*

Legislative definitions are not binding on the interpreter[49], but, is very difficult to assume that the rights laid down by an Article which is contained in the EU Charter of Fundamental Rights, are not properly subjective rights of citizens[50] (or, if you like, rights of citizenship[51]). This, from the hermeneutic point of view[52], means that between citizens and the administration there is a legal relationship[53] made of rights and obligations[54], and denies the traditional idea according to which citizens' claims towards administrative activity are simply legitimate interests. All the provisions governing the administrative procedure establish obligations for the public administration and grant the corresponding rights to the citizens. For example, the rule that establishes a deadline for the procedure obligates the

[49] S. PUGLIATTI, *Il trasferimento della situazione soggettiva*, I, Milano (1964) 11; A. BELVEDERE, *Il problema delle definizioni nel codice civile*, Milano (1977) 161 ff.. In Italy, the case of the right of access is emblematic: though qualified with some emphasis by the Administrative Procedure Act as a "right", it has often been (and sometimes continues to be) considered by *la doctrine* and case law as a legitimate interest

[50] D. SORACE, *La buona amministrazione e la qualità della vita*, cit.,

[51] G. PASTORI, *La disciplina generale dell'azione amministrativa*, in *Annuario AIPDA 2002*, Milano (2003) 35 ss; D. SORACE, *La responsabilità risarcitoria delle pubbliche amministrazioni per lesione degli interessi legittimi dopo 10 anni*, in *Dir. Amm.* (2009) 394.

[52] Constitutional provisions typically have a hermeneutic function: see. V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio*, Milano (1952); G. CORSO, *La costituzione come fonte di diritti*, in *Ragion pratica* (1998), 89.

[53] M. PROTTO, *Il rapporto amministrativo*, Milano (2008) spec. 163 ff.

[54] L. FERRARA, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa*, Milano (2003) 130-134; A. ORSI BATTAGLINI, *Alla ricerca dello stato di diritto. Per una giustizia non amministrativa (Sonntagsgedanken)*, Milano (2005) 170-175; G. PASTORI, op. cit., 35; M. RENNA, *Obblighi procedimentali e responsabilità dell'amministrazione*, in *Dir. Amm.* (2005) 566 f.; G.D. COMPORTI, *Torto e contratto nella responsabilità civile delle pubbliche amministrazioni*, Torino (2003) 60 ff.; *contra* M. OCCHIENA, *Situazioni giuridiche soggettive e procedimento amministrativo*, Milano (2002) 347 ff..

public administration at issuing the decision within that time and grants to citizen's the right to have an answer in the same period, the rule that requires the motivation grants to the citizen the right to obtain a full justification of the decision, etc.[55].

In other words, power is limited by the rights of those who come into contact with power[56], and not by what the Italian scholars use to call "norme di azione", that are rules which establish standards designed primarily to regulate the functioning of public administration, taking it as an objective value[57]. This could have some consequences for the profile of judicial actions, "with an increasing number of such claims having a strong rights-based component"[58]

Some scholars think that the existence of a "status of citizenship", consisting in a series of rights towards administrative behaviour, is already implied in the Italian Constitution[59]; others that it is inscribed in the inner logic of the theory of subjective

[55] A. ROMANO TASSONE, *Situazioni giuridiche soggettive (dir. amm.)* in *Enc. Dir. Agg.* II, Milano (1998) 985

[56] F. BENVENUTI, *Il nuovo cittadino*, Venezia (1994) 75 ff.

[57] E. GUICCIARDI , *La giustizia amministrativa*, Padova (1954) 33; A. ROMANO, Giurisdizione *amministrativa e limiti della giurisdizione ordinaria*, Milano (1975) 133 ff.; Id., Commento *all'art. 26 r.d. 26 giugno 1924*, n. 105, in A. ROMANO – R. VILLATA, *Commentario breve alle leggi sulla giustizia amministrativa*, Padova (2009) 1172 f.; F. VOLPE, *Norme di relazione, norme d'azione e sistema italiano di giustizia amministrativa*, Padova (2004) 170-182; contra, see E. CAPACCIOLI, *Interessi legittimi e risarcimento dei danni*, in Id., *Diritto e processo*, Padova (1978) 111 ff.; A. ORSI BATTAGLINI, *Attività vincolata e situazioni soggettive*, in *Riv. trim. dir. proc. civ.* (1988) now in Id., *Scritti giuridici*, Milano (2007) 1232 ff..

[58] As P. CRAIG, *EU administrative law*, cit., 350, notes with regard to the Union courts judicial review.

[59] G. PASTORI, *Statuto dell'amministrazione e disciplina legislativa*, in ANNUARIO AIPDA 2004, Milano (2005) 11 ff.; cf. also A. ORSI BATTAGLINI, *Alla ricerca dello stato di diritto*, cit., 101 ff.. L. R. PERFETTI, *Diritto ad una buona amministrazione*, cit., 814 ff.; G. CORSO, *Gli studi di diritto amministrativo*, cit., 129; D. SORACE, *La buona amministrazione e la qualità della vita*, cit

situations[60]. Either way, what is certain is that Article 41 represents a solid literal argument in favour of this thesis[61].

At a constitutional level, similar observations can be made. The canons of "buon andamento" and "imparzialità" (Article 97 of the Italian Constitution) are in principle objective values[62], defending the effectiveness of administrative action, rather than giving attention to the interests and positions of private parties which come into contact with the administration. "In short, we are dealing here with the administration's duty to pursue the interests entrusted to its care, respecting certain rules of organization and action, rather than with a true private right, to be obtained by observing those rules"[63]. Or, in other words "the canons of impartiality and buon andamento maintain their primary objective valence as criteria which are not strictly linked to any specific citizen's right"[64]. Otherwise, the right to good administration draws only incidental attention to the pursuit of the public interest to the extent that it directly affects the protection of the position of individuals.

[60] L. FERRARA, *Dal giudizio di ottemperanza,* cit., spec 168-172,

[61] As noted by A. ZITO, *op. cit.,* 430-432 the European administrative law is based "in modo inequivocabile (sul)la centralità del primo (l'individuo) nei confronti della seconda (la pubblica amministrazione) nel senso che è il contenuto delle sue pretese a riverberarsi sulle modalità di svolgimento della funzione amministrativa e non il contrario"; see also L. R. PERFETTI, *Diritto ad una buona amministrazione,* 813 ss, and E. SANNA TICCA, *op. cit.,* 153 f., 334, who observes that Article 41 ECFR builds the administrative relationship on citizen's rights and not on administrative behaviour. A citizen's claims "sono fonti di obblighi nel rapporto che si instaura tra amministrazione e cittadino ai fini della soluzione di un problema amministrativo…le pretese rappresentano il contenuto sostanziale dello statuto del cittadino comunitario e nazionale nel suo rapporto con l'amministrazione" (141 f.)

[62] See M. SPASIANO, *Il principio di buon andamento: dal metagiuridico alla logica del risultato in senso giuridico*, in *Ius Publicum* (2011), 11 ff.

[63] D. DE PRETIS, *op. cit.*,87.

[64] D. DE PRETIS, *op. cit.*,87.

c) According to Article 6 TFUE, the ECFR has the same value as the Treaties[65]. As the European Treaties have in Italy the same value as the fundamental principles which are contained in the first part of the Constitution, the "right to good administration" gains the legal status of a constitutional (and fundamental) right too. This has at least two practical consequences.

The first consequence is the "constitutionalization" of the procedural due process of law in Italy[66]. Any Italian Act that would unreasonably[67] restrict the exercise of the rights granted by the APA may be dis-applied by the national court or declared illegal by the Constitutional Court, for violation of Articles 11 and 117 of the Constitution. 1. More exactly, according to Article 52 ECFR, first paragraph, limitations on the exercise of the rights and freedoms recognised by the Charter are legitimate if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others; and, however, they are subject to the principle of proportionality and must respect the essence of those rights and freedoms.

The second consequence regards the direct application of Article 41. According to Article 13 of the Italian APA, some rules concerning participation (such as the right to be heard and the duty to give a reasoned decision) do not apply to planning and rule-making procedures. These limitations seem to be illegitimate, because the criteria established by Article 52 ECFR for restricting the exercise of the rights and freedoms recognised by the Charter do not appear to be respected: the right to be heard and the duty to give a reasoned decision concern the essence of the right to good administration, and the restrictions

[65] See P. CRAIG, *EU administrative law*, cit., 349.

[66] On this see G. DELLA CANANEA, *The Italian administrative procedure act*, cit., 7 ff.

[67] On this see L.R. PEFETTI, *Il diritto ad una buona amministrazione*, cit., 803 f.: in the European perspective the possibility of a reasonable restriction of a procedural rights does not call into question the nature of the individual subjective right, unlike in Italy.

provided by Article 13 APA are in contrast with the principles of proportionality and reasonableness since participation plays an essential role in wide-ranging decisions, which normally involve many discretionary choices concerning "not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests". While waiting for the Italian law to be amended, it must be assumed that national courts may, case by case, not apply Article 13 APA, directly applying Article 41 to planning and rule making procedure.

4. IS ARTICLE 21 OCTIES L.241/1990 (APA) IN CONFLICT WITH ARTICLE 41 ECFR ?

All the rights mentioned in Article 41 were already granted by the Italian procedure act. But is the Italian law able to guarantee the right to good administration to be effective?

As said, "if there have been problems, they did not involve compatibility between principles linked to the two systems, national and European, but rather the different value or degree of effectiveness given to the same principle or basically similar principles, in the two systems"[68].

The question arises because one of the recent amendments of the Italian Administrative Procedure Act aims at preventing the annulment of the administrative acts for the infringement of formal requirements (art. 21 *octies*, second paragraph): "a measure that is adopted in breach of rules governing procedure or the form of instruments shall not be voidable if, by virtue of the fettered nature of the measure, it is evident that the provision

[68] D. DE PRETIS, *cit.*, 12; see also D.U. GALETTA, *La giurisprudenza della Corte di Giustizia in materia di autonomia procedurale degli Stati Membri*, in *Ius Publicum* (2011) 9 ff.

it contains could not have been other than those actually adopted. In any event, an administrative measure shall not be voidable on the grounds of failure to communicate the commencement of a procedure if the authority shows at trial that the content of the measure could not have been other than that actually adopted".

According to some scholar, this rule reflects "a cultural shift, the idea that procedural constraints are only obstacles to a well-intentioned decision maker" or the idea that "the individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximes"[69]. Since due process of law is a (European) constitutional value, quashing an administrative measure only on formal grounds could not be considered unjustified or excessive by the national Parliament.

In a similar perspective, it has been argued that Article 21 *octies* APA, second paragraph, conflicts with Article 41[70]: the infringement of formal requirements could no longer be considered by our administrative Courts as irrelevant for the voidability of measures[71].

This idea does not seem to be persuasive for at least three reasons.

a) First, Article 41 makes no provisions regarding the penalty for infringing the right to good administration. Thus, discretion is left to national parliaments in this regard.

[69] G. DELLA CANANEA, *The Italian administrative procedure act*, cit.,15.

[70] D.U. GALETTA, *Diritto ad una buona amministrazione*, cit., 633 ff.; ma già Id., *Le garanzie procedurali*, cit.,333 f.: M.C. CAVALLARO, *op. cit.*, 655, shows what seems a paradox. If "good administration" means "efficient administration", not every breach of a formal rule should cause the invalidity of the measure; while, considering the "right to good administration" in the perspective of the individual's protection, Article 21 octies APA, second paragraph, seems to be an illegal rule.

[71] D.U. GALETTA, *op. ult. cit.*, 634 f.

The matter, at most, could regard whether their choices are effective and reasonable, but the infringement does not need to cause the voidability of the measure.

b) Moreover, all the main European legal systems contain the rule that not every infringement leads to the invalidity of the measure[72].

Section 46 of the *Verwaltungsverfahrensgesetz*, establishes that: "*die Aufhebung eines Verwaltungsaktes, der nicht nach § 44 nichtig ist, kann nicht allein deshalb beansprucht werden, weil er unter Verletzung von Vorschriften über das Verfahren, die Form oder die örtliche Zuständigkeit zustande gekommen ist, wenn offensichtlich ist, dass die Verletzung die Entscheidung in der Sache nicht beeinflusst hat*."[73]

In Spain the *Ley 30/1992, de 26 de Noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* states that "*el defecto de forma sólo determinará la anulabilidad cuando el acto carezca de los requisitos formales indispensables para alcanzar su fin o dé lugar a la indefensión de los*

[72] S. CIVITARESE MATTEUCCI, *La forma presa sul serio. Formalismo pratico, azione amministrativa e illegalità utile,* Torino (2006) 287 ss; W. GASPARRI, *Violazione delle regole formali tra invalidità degli atti e responsabilità risarcitoria. Una comparazione*, in *Dir. Pubbl.* (2007) 721 ff.; P. LAZZARA, *Procedimento e semplificazione. Il riparto dei compiti istruttori tra principio ed auto responsabilità privata,* Philos-Roma, (2005) 61 ff..

[73] The norm "history" and the various opinions on its opportunity are now clearly summarized by E. SCHMIDT-AßMANN, *L'illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino,* in *Dir.Amm.*,2011, 471 ff. Generally, German administrative law focuses on the result of administrative action and, for this reason, procedures have the function to reach the legally correct result. But in the last year "a scholarly discussion is evolving on whether German Administrative Law should shift its attention from substantive justice to procedural justice, giving more weight to the instrumental as well as the non-instrumental justification of administrative procedures": M. FEHLING, *Comparative administrative law and administrative procedure,* in *IusPublicum* (2011), *6*

interesados" (Article 63.2). And "*la jurisprudencia tiende a refundir los dos motivos de anulabilidad, identificàndolos en ambos casos con la indefensiòn*"[74]

In France there is no similar written rule, but "*conscient qu'un formalisme excessif paralyserait l'action de l'administration, le juge fait prevue de pragmatisme et admet que l'omission de certaines formalitès, don't le caractère n'apparaît que comme* accessoire (*plus prècisèment << non* substantiel *>>), n'entraîne pas l'annulation de l'acte"*[75]. The criterion of the "incidence sur la dècision à prendre et *sur les garanties don't bènèficient les destinataires*" is used by case law and *la doctrine* in order to recognize a formal breach and distinguish it from a substantial one[76].

And, overall, the ECJ itself does not annul if is proved that, in the absence of irregularities, the proceeding could not lead to a different result[77].

[74] J. BERMEJO VERA, *Derecho administrativo basico*, Zaragoza (1995) 284 f. See STS 6/6/1991: "la invalidez que viene originada por infracciones formales, bien sean èstas las constitutivas de numida de pleno derecho (...9 ya se trate, con mayor razòn, de las determinates de la anulabilidad (...) requieren junto a la constataciòn de la existencia de la infracciòn procedi mal o formal, el requisito esencial y finalista de que mediante ellas se haya causado indefensiòn a los interesados, excluyendo en consecuencia la de quello que tubiera permanecido identico y de quello otros en que no quepa cabla de indefensiòn para el interesado.

[75] J. MORAND DEVILLER, *Droit administratif*, Paris (2011) 645.

[76] Only the *illègalitès externes (incompetence* and *vice de forme et vice de procedure*) and not the *illègalitès internes* (*Dètournement de pouvoir*, *violation directe de la règle de droit* and *contrôle des motifs de l'acte*), can be formal.

[77] C.G.C.E., 10/71989, c. 30/78, *Distillery Company Limited*, in *Racc*., 1980, 2229; C.G.C.E., 11/11/1987, c. 259/85, *Francia/Commissione*; C.G.C.E., 21/3/1990, c. 142/87, *Belgio/Commissione*; Trib. U.E., V sec., 8/7/2004, *TEchnische Glaswerke*, c. T-198/01, in *Foro amm*., *C.D.S*., 2004, 1878.

c) The remedy of the voidability of the measure can sometimes be substituted by the remedy of the administration's liability. This is not in contrast with Article 41 because what is necessary is the existence of a sanction against the infringement.

Even when the measure is not voidable (pursuant to art. 21 *octies* APA, second paragraph), public administration should be considered liable: if the infringement results in damage for the citizen, the administration has to compensate him or her[78]. This is because in the Italian legal system, invalidity and liability are not interdependent[79]: a measure could be damaging but not voidable or voidable but not damaging.

[78] D. SORACE, *op. ult. cit.*, 393 f.; G.D. COMPORTI, *op. cit.*, 70 f..

V. A ROMANO TASSONE, *I problemi di un problema. Spunti in tema si risarcibilità degli interessi legittimi*, in *Dir. Amm.* (1997) 61 ff.; A. ROMEO, *Ancora in tema di responsabilità della pubblica amministrazione: dalla ‹‹spettanza del provvedimento›› alla ‹‹spettanza del comportamento››?,* in *Foro Amm. C.D.S.*, 165; G.M. RACCA, *Gli elementi della responsabilità della pubblica amministrazione e la sua natura giuridica*, in R. GAROFOLI, G.M. RACCA, M. DE PALMA, *Responsabilità della pubblica amministrazione e risarcimento del danno innanzi al giudice amministrativo,* Milano (2003) 179-194; cf. G. AVANZINI, *Responsabilità civile e procedimento amministrativo,* Padova (2007) 235 ff.. In giurisprudenza v. Caff., sez. I, 10-1-2003, n. 157, in *Foro it.*, (2003) I, 78, con nota di F. Fracchia.

[79] A. ROMANO TASSONE, *La responsabilità della p.a. tra provvedimento e comportamento (a proposito di un libro recente),* in *Dir. Amm.* (2004) 209 ff.; L. FERRARA, *La partecipazione tra ‹‹ illegittimità ›› e ‹‹illegalità ››. Considerazioni sulla disciplina dell'annullamento non pronunciabile,* in *Dir. Amm.* (2008) 108: "nell'ambito della contrarietà a una norma deve, in definitiva, distinguersi il caso in cui essa ridonda in una invalidità, la quale giustifica una misura che colpisca l'atto, da quello in cui la medesima contrarietà non rileva sul piano attizio"; v. altresì G. FALCON, *La responsabilità dell'amministrazione e il potere amministrativo*, in *Dir. Proc. Amm.* (2009) 249: "se l'amministrazione procede in modo irregolare o scorretto – senza che tale irregolarità o scorrettezza abbia a che fare con la *direzione* del potere, con il possibile *risultato decisorio* – essa non lede in particolare l'interesse legittimo, ma lede allo stesso modo le situazioni di tutti coloro che partecipano, in quanto connesse alla loro partecipazione. Ciò non significa, come è ovvio, che da tale lesione non possa derivare una responsabilità per comportamento illecito, ma tale responsabilità non avrà – a mio avviso – a che fare con la lesione degli interesse legittimi"

A problem can arise if the infringement of a procedural rule does not determine a "danno ingiusto"[80], required by Article 2043 of the Civil Code in order to consider a subject liable[81], because in this case the administration would remain immune from any penalty. The matter can be overcome by stressing the punitive function of the administration's liability[82], which can be affirmed also when the administrative behaviour does not cause real damage[83].

In this regard we should not overlook that the threat of liability enforces the right to good administration probably more than the voidability of the measure, causing the administration's interest in avoiding making breaches of rules[84].

5. CONCLUSIONS

In conclusion, we can say that all rights guaranteed by Article 41 ECFR were already guaranteed by some provisions contained in the Italian constitution and APA. In this sense, the right to good administration is not new for the national legal system.

[80] For example, when the infringement of Article 7 APA does not have any consequence, because the interested parties could not influence the decision.

[81] F. CINTIOLI, *I danni risarcibili nella giurisdizione di legittimità: presupposti e condizioni. (L'alternativa tra provvedimento e attività amministrativa)*, in www.GiustAmm.it

[82] On liability functions see, *ex multis*, P. TRIMARCHI, *Causalità e danno*, Milano (1967) 53 ff., 133 ff., 157 ff.; M. BARCELLONA, *Danno risarcibile e funzione della responsabilità*, Milano (1972) 30 ff.; P.G. MONATERI, *La responsabilità civile*, in *Trattato di diritto civile* diretto da R. SACCO, Torino (1998)19 ff.

[83] A. ROMANO TASSONE, *Vizi*, cit.

[84] G. NAPOLITANO, *Il danno da ritardo della pubblica amministrazione: il fondamento della responsabilità e le forme di tutela*, in *AA.VV., Verso un'amministrazione responsabile,* Milano (2005) 243.

However, since the Charter has become binding on a par with the European treaties, and since the principles of European administrative law are binding for all national administrative actions, Article 41 is not without relevance to the Italian administrative law.

The first point regards the meaning of good administration. In the Italian tradition, thus is an uncertain formula, used by scholars and case law in several ways; the European Charter shows, instead, that the expression "good administration" is simply a way to summarize the substantial and procedural rights of the citizens *vis-à-vis* the public bodies.

In this perspective, the most important consequence of the impact of Article 41 ECFR over the national legal system is a cultural shift, and more precisely a different position of the individuals *vis-à-vis* the administrative power. In fact, according to the Italian tradition, citizens' claims against administrative activity are simply legitimate interests, only indirectly guaranteed by rules which establish standards designed primarily to regulate the functioning of public administration, taking it as an objective value. According to the European approach (which should now be the national one too), meanwhile, power is limited by the rights of those who come into contact with power, with the consequence that an individual's interests are more relevant in the relationship between citizens and the administration.

Another effect of Article 41 ECFR is the "constitutionalization" of the procedural due process of law in Italy, where rights such as the right of citizens to be heard, the right to have reasoned decisions are provided by APA, which is an ordinary and not a constitutional law.

Italian administrative law does not seem to be entirely consistent with the growing importance of the procedural due process of law. For example, Article 13 APA provides that the right to be heard or the obligation to give reasoned decisions does not apply to rule-making and planning procedures: it is argued that these exclusions are illegal because they are not subject to the principle of proportionality, and fail to respect the conditions established by Article 52 ECFR.

Instead, it is argued, despite the opinion of some scholars, that Article 21 *octies* APA, which aims to prevent the annulment of administrative acts for the infringement of formal requirements, does not conflict with the right to good administration, since Article 41 does not require the measure to be deemed void if it fails to respect the right to good administration. For this reason, it does not seem to conflict with the principle of proportionality if the national law identifies some infringement of formal rules that could not imply the measure's annulment.