

## **Sabino Cassese**

### **Functions of administrative procedure: introductory remarks**

To introduce this seminar, I shall make three points: the first on administrative proceduralization, the second on the regulation of administrative procedure, and the third on the ambiguities and paradoxes of this regulation.

Throughout the world, administrative proceduralization is increasing. Procedures are at the center of contemporary administrations.

This is due to two different factors. The first is the increasing complexity of administrative structures. As administrative complexity increases, it becomes important to establish which office acts first, which second, which

third, and so on. In the European context, there is additional complexity, due to national-European shared or composite procedures.

A second factor is the weakness of representative democracy and the need to give the people a voice before decisions are taken (deliberative democracy). Deliberative democracy complements representative democracy. Administrative rights complement political rights.

Proceduralization has benefits and costs. It establishes well-ordered links between different bodies that are not necessarily hierarchically ordered, and gives the people an opportunity to be heard. But proceduralization also has costs: “one stop shopping” is less cumbersome than a procedure, because it requires less time and expenses.

As the operation of administrative bodies is more and more proceduralized, administrative procedure is

undergoing increasing regulation. The regulation of administrative procedure is part of the 20<sup>th</sup>-century revolution in government.

The regulation of administrative procedure raises five questions.

First: what do we mean by regulation of administrative procedure? By this term, we mean a phenomenon akin to that described by the United States Administrative Procedure Act: not *ad hoc* regulation of each proceeding (e.g. in relation to specific sectors such as urban planning or environmental regulation), but a body of general principles that apply – at least in principle – to all types of administrative proceeding.

Second: what is the purpose of a general regulation of administrative procedure? A general regulation of administrative procedure may have four different purposes:

to establish an order between different administrative bodies or to regulate the relevant sequence of acts (that is, establish an ordered list of events); to set standards that must subsequently be reviewed by independent courts (it is their job to review procedural irregularities, errors or flaws); to fill the gaps left by judicial review – courts can review only a very limited number of executive decisions (moreover, their decisions are necessarily *ex post*); to guarantee new rights for the people (e.g. the right to be informed may, in concrete, entail the right to disclosure of official documents or the right of access to documents; the right to be heard, the right to a hearing; the right to receive a reasoned decision may in turn give rise to a duty, imposed on the administration, to provide reasons for every decision that it takes). The last function becomes predominant in every country, because the regulation of administrative

procedure becomes instrumental to the rights of citizens vis-à-vis the executive: “freedom grows in the interstices of procedure”.

As for the third question that arises: why do some countries have an act that regulates administrative procedure, and others do not? Consider countries that do have an administrative procedure act and the years in which these were enacted: Austria, 1925; Poland and Czechoslovakia, 1928; Yugoslavia, 1930; USA, 1946; Hungary, 1957; Spain, 1958 and 1992; Switzerland, 1969; Germany, 1976; Italy, 1990. Countries such as the United Kingdom and France do not have a statute that regulates administrative procedure. While the case of the former country can be explained by reference to the traditional British criticism of written constitutions and bills of rights and to their reliance on the courts as regulators, for France,

the only explanation to be found can be traced to the traditional French deference *vis-à-vis* the executive, and the self-restraint displayed by the French Parliament in the regulation of internal administrative matters.

The fourth question: is there a minimum content (a minimum set of principles) that legislative regulation of administrative procedure must present? The answer is affirmative: an act regulating administrative procedure must regulate, at least, the right to be heard. This assumes that the State cannot be governed by the legislature alone: the executive branch of government is not a mechanical executor of statutes enacted by Parliaments. It is also under a duty to hear all interested parties (as occurred in the United States *Overton Park* case, of 1971; against the *Chevron* case, 1984). A similar development occurred in France, where there is no act that regulates administrative

procedure, but there is a statute that regulates the “*débat public*”, in a very similar fashion to that envisaged by the American interest representation model. The regulation of the duty to hear can produce a judicialization of administrative procedure: in the USA, the “hearing officer” has now become an “administrative law judge”.

As for the final question: does the regulation of administrative procedure present a global dimension? Again, the answer is affirmative. Consider the effort made by the Council of Europe to establish a standard code for administrative procedure (“The administration and you”, 1996), or the General Agreement on Trade in Services and the Trade-related aspects of Intellectual Property Rights Agreement 1995, that establish global standards for national administrative procedures; or the Internet Corporation for Assigned Names and Numbers (ICANN)’s

by-laws, that contain a detailed set of rules on ICANN procedures.

The regulation of administrative procedure is full of ambiguities and paradoxes. First, this regulation runs counter to the common trend towards de-regulation and simplification. Second, regulation through statutes and statutory instruments overlaps with judicial regulation (this area of law is very much under surveillance on part of the courts, that establish and develop principles for administrative procedure, such as proportionality and good administration). Third, regulation by means of statutes implies a certain stability, while administrative procedure acts are subject to frequent amendments (the 1990 Italian act has been amended ten times in twenty years).