Consiglio di Stato

Incontro con il Presidente della Corte Europea dei Diritti dell'Uomo

Meeting with the President of the European Court of Human Right

Roma 2 maggio 2012


NEC FLECTOR
NEC FRANGOR


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Welcome

Welcome to the Italian Council of State, a gorgeous palace, a historical palace, and also the "Home of administrative justice".

Our Council of State is now provided by our Constitution, but it was set up long before, by an Act of king Carlo Alberto in 1831.

Last year we celebrated the 180th anniversary of our Institution.

The Constitution of the Italian Republic defines the Council of State as an "auxiliary body" and assigns to it a "double nature" (under article 100 Constitution).

In fact the Council of State is both a consultative body and an administrative Court.

In detail, it delivers advisory opinions when requested by the Government or public administrations, including public independent Authorities.

It is also the Supreme Administrative Court, that is to say, the Court of appeal against judgements of the Regional Administrative Tribunals.

Review of administrative acts in Italy

In Italy, litigations concerning administrative decisions are brought before the administrative judges (namely the Administrative Judiciary), whose competence differs from that of the Ordinary Judiciary (namely the civil judges).

Originally, there was only one level of instance before the litigation sections of the Council of State (the fourth section, which was the first litigation section, was created in 1889).

In 1971, the Regional Administrative Tribunals (hereinafter TAR if one, TARs if more than one) were created and the Council of State became the administrative judge of second and last instance (i.e. the Supreme Administrative Court for appeals against the judgements of the TARs).

According to the Constitution (under article 103), the Italian administrative judges have jurisdiction over:

1) legally protected interests in matters regarding the administration (the so called "interessi legittimi");

2) individual rights (the so called diritti soggettivi) in the areas specified by the law (areas of the so called exclusive jurisdiction).

Legally protected interests may be defined as the advantages granted to an individual, subject to the administration's public power. Legally protected interests involve the attribution to an individual of the possibility of influencing the proper exercise of administrative power.

The Code of administrative judicial procedure (hereinafter also CAP or Code), is provided by legislative decree nr. 104/2010, and came into force on the 16th of September 2010.

This Code follows the two criteria of "type of interest" or "topic", in order to assign the jurisdiction either to the administrative judge or to the ordinary judge.

Article 7.1 CAP provides that the administrative courts have jurisdiction over the protection of legitimate interests before the public administration, and in particular matters laid down by the law, also over the protection of subjective rights concerning administrative deeds (namely decisions, acts, agreements and even behaviours) adopted by public administrations as long as they are related (even if indirectly) to the exercise of a public power.

The main cases of "exclusive jurisdiction" of the administrative judge are public services, urban planning and construction, and public proceedings for awarding contracts for public works, supplies and services.

The list of areas of exclusive jurisdiction is provided under article 133 CAP.

Moreover, since the reforms introduced between 1998 and 2000, the administrative judge may also order the public administration to compensate for damages suffered by an individual due to illegal administrative activity. The compensation for damages is now provided under article 30 CAP.

Purpose of the review of administrative acts and actions available before administrative Courts

The competence of the administrative judge currently protects individual rights and legal interests and doesn't include a general oversight of the administration's proper functioning.

As a result, a recourse against an administrative decision is examined by the judge within the limits of the complainant's interest.

That is to say, the judge examines whether the exercise of public power was legal, not in order to verify the administration's proper functioning but in order to determine whether the possible abuse of power infringed on the petitioner's rights and thus whether or not his/her request may be received.

Article 29 CAP provides for the action for annulment of administrative decisions, due to breach of law, misuse or abuse of power, or lack of competence.

As a general rule, this action must be filed within sixty days from the date of the legal acknowledgement of the impugned act.

In conclusion, three main actions can be filed against a public administration:

- an action for annulment of administrative decisions;
- an action for compensation for damages;
- an action against "the silence of a public administration", that is to say to oblige the administration to adopt a decision not adopted in due time; in this case the judge can order the administration to act, and, if it doesn't do so, can substitute the administration.

The enforcement proceeding (giudizio di ottemperanza)

The "enforcement proceeding" (in Italian: *giudizio di ottemperanza*) is provided for in Italy.

If judgements are not spontaneously implemented, this particular enforcement procedure may be used to ensure that judicial decisions be carried out (articles 112-115 CPA).

This procedure is applied to the administration or similar entities (for example public-law institutions) for various judicial decisions, including those rendered by civil judges.

This procedure is particularly effective insofar as the judge does not merely order the administration to comply within a determined time; but the Court may also appoint its own representative ("*ad acta*"), who acts in place of the administration and takes any measures required to enforce the judicial decision. This representative also has substantive powers.

The judge can even directly substitute the administrative body.

This is one of the rare cases where the administrative judge also has substantive powers.

The administrative Courts, therefore, have both the power to order the authority to enforce their rulings and judgements (power of injunction) and the power to appoint a representative who acts in place of the administration.

A novelty introduced by the legislative decree n. 104/2010 is that the administrative Courts also have the power to fine the administration if it does not comply within the time limit ("*astreinte*").

All these powers can be used by the Court in the "enforcement proceeding", and in particular in the judgement which concludes this proceeding.

Therefore, there is a second judgement which orders the enforcement of the previous judgement of annulment and/or compensation.

So this second judgement may:

- order the administration to enforce the previous judgement;
- indicate to the authority how it can rectify the illegality;
- impose a deadline;
- appoint a "*commissario ad acta*" in cases where the authority fails to adhere to the stipulated deadline;
- set a monetary penalty ("*astreinte*") for each day, or week or month of further delay.

As already explained, all these measures can be requested by the parties of the previous proceeding in which a judgement has been handed down, which quashes the flawed decision and/or awards compensation for damages.

The measures must be requested with a new action, the enforcement action.

This action can be lodged within ten years starting from the "*res iudicata*".

A novelty introduced by legislative decree n. 104/2010 is that the appointment of a representative of the Court – charged to act in place of the administration – can be requested with the same action of annulment/compensation.

In this case the Court, with a unique judgement:
- quashes the administrative decision and/or awards damages;
- sets a deadline for the enforcement of the judgement;
- appoints its representative, charged to substitute the administration, in cases where the latter fails to respect the deadline.

Organization of the court system and courts competent to hear disputes concerning acts of public administration.

The Administrative Judiciary in Italy includes:
1) twenty Regional Administrative Tribunals (one for each Region), as first instance judges;
2) the Council of State, as second instance judge, which has four jurisdictional sections (the third, the fourth, the fifth and the sixth), in addition to three consultative sections (the first, the second and the section for the Government's delegated legislation - namely legislative decrees, statutory instruments, and regulations);
3) the Council for administrative justice in Sicily, that is a special section of the Council of State, for administrative decisions adopted by Sicilian administrative authorities. This Court is second instance Court in case of appeals against judgements of the TAR for Sicily.

The fair trial within a reasonable time (article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms) and the Code of Administrative Judicial Procedure

The fair trial within a reasonable time, set by article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), is a basic principle of the Italian Code of administrative judicial procedure, provided by article 2, par. 2 ("*The judge and the parties cooperate to reach the goal of the reasonable duration of the trial*").

As a matter of fact, it's necessary to underline that the Italian Parliament has increased the competences of the administrative judges in the last 15 years: the administrative Courts deal with litigations concerning public procurements, public independent Authorities, competition law, environment, urban planning, and so on.

The increase of competences has not been accompanied by an increase in the number of the judges. The judges' staffing is currently more or less the same as 20 years ago.

Furthermore, in Italy as in other European countries, the recent economic crisis has affected the efficiency of the Judicial system, due to lower budgets.

As a result, the workload of the judges is heavier than in the past, and this situation can affect the timeliness of the trials.

Anyway, according to statistical data, in recent years the backlog of Administrative Judiciary as a whole has been reduced significantly, rather than increased (see annexed

statistics for years 2008, 2009, 2010, 2011): in the year 2011 the backlog of TARs reduced by 13.3%.

The Code of administrative judicial procedure, entered into force in September 2010, has provided for several measures to reach the goal of timeliness of the trials.

Even before, Parliamentary Acts approved in years 1998-2000 and in the year 2010, aimed at the same result of improving the efficiency of the administrative Courts.

The Code focuses on three major areas aimed to improve efficiency and timeliness of the judgements:

1) Simplification of judicial proceedings;
2) Implementation of ICT, and digitalized procedures;
3) Economic incentives for administrative staff and Courts.

Simplification of judicial proceedings

A large number of simplified procedures are provided for in the Code, which are faster than the ordinary procedure.

First of all, during the interim phase, if the Court deems that that the adversarial principle has been respected and the case can be easily decided, it may inform the parties that it intends to render a simplified decision (summary decision) which will end the dispute (this accelerates the process considerably) (article 60 CAP).

In addition to the interim proceeding, there are simplified and faster procedures for litigations regarding the right to access public documents, the "silence of a public body" (when a public body fails to reply to a request of a decision), the enforcement of previous judgements, public procurements, administrative elections, competition law, and so on.

As a general rule, simplification of the proceeding means shorter time limits for the activities of the parties and of the Courts, namely for the delivering of the final judgements.

Simplification of the proceeding can also include:

- the elimination of the public hearing, substituted by an oral hearing "in camera" (see proceeding for right to access public documents, for an order to act in case of silence of a public body, for enforcement of a previous judgement); in the hearing "in camera" only the parties to the case and their lawyers are allowed, not the public, namely press, mass media, journalists; the lawyers are allowed to orally explain their defences, in addition to the written recourses, replies, rejoinders and surrejoinders;
- the final judgement in a shorter and simplified form; that is a short written decision in which the judge does not have to respond to all arguments of the lawyers.

When a simplified procedure is provided for, the duration of the trial is no more than one year in first instance and one year in appeal (second instance).

Moreover, when an interim measure is applied for, the Court always has the possibility, if the case is simple, to deliver a final judgement at the end of the hearing (see article 60 CPA).

Information communication technologies (ICT) and digitalized procedures

Computerisation of the work of administrative judges has reached a satisfying level. Each judge has a computer workstation, where he/she can connect to the administrative justice intranet (he/she can also connect from his/her home), which he/she can use to dialogue via email with the secretariat, access any information related to appeals and access all jurisprudence texts and legal databases, including those available via the Internet.

Standard model of decisions have been adopted, and they are available on the "intranet desktop" (in Italian: "*scrivania informatica del magistrato*") for each judge.

The Code has introduced the digital exchange of documents.

For the parties it's compulsory to give a certified e-mail address and all the communications among the Courts and the parties are via e-mail.

For the parties it's also compulsory to deliver their recourses and acts in electronic format, in order to have, for each case, a digitalized dossier.

(See art. 136 CPA "*The defenders in the first act indicate their certified e-mail address and fax number where they wish to receive communications relating to the proceeding .*

2. The defenders shall provide copies of all the acts and, if possible, of all the papers, through a computerized system. The defender certifies the compliance of the contents of the document in electronic format with the paper one").

Administrative justice in Italy has an official website (www.giustizia-amministrativa.it) where anyone may consult all decisions published, monitor the status of an appeal and obtain the hearing date, learn whether the opposite party has filed acts or a statement, etc.; the most important information concerning administrative justice is accessible to all.

A "case tracking" system is also available for the lawyers; they can monitor their cases on-line.

It is possible to send an e-mail from the site, but this is not intended as a means of communication between the public and our services.

The digitalization of procedures is not complete yet:

- the digitalization of older pending cases has not been completed;
- the digital signature of the judgments has not been introduced yet.

Anyway the Administrative Judiciary is proactive on the path of the "e-Courts".

Economic incentives for administrative staff and Courts

The Code also provides for incentives for administrative staff and Courts to work faster and more efficiently: see article 16, annex 2 to the Code; it provides extraordinary measures in order to cut backlog and to incentivise productivity, to be set with a Prime Minister's decree. Anyway, this decree has not been approved yet.

Up to now economic incentives have been provided for only regarding administrative staff of the Courts.

On the other hand, magistrates' salaries have been cut by about 10% due to the current economic crisis.

(Alternative dispute resolutions)

Alternative dispute resolutions (hereinafter ADR) should in theory be a way to achieve a reduction of caseloads. But currently in Italy general ADR instruments in administrative litigations don't exist.

In the field of public contracts litigations, some instruments are provided for, that can be regarded as ADR, but they don't help to significantly reduce the number of cases pending before administrative Courts.

In a perspective of judicial reform, studies should be undertaken in order to verify the possibility to introduce out-of-court-settlements as an efficient alternative to administrative litigations before Courts.

The principle of "conciseness" of the acts of the parties and of the decisions of the Courts

According to article 3 CPA, the Courts and the parties shall draw up the acts in a clear and concise way.

The conciseness is a basic principle, and a fundamental one, in order to speed up the duration of trials and to ensure timeliness of final decisions.

Unfortunately so far this principle has not been respected, and the Courts deal with recourses that are easily more than 100 pages.

The exorbitant measure of parties' acts could also be regarded as "abuse of the process".

Currently the Code sets the principle of conciseness but doesn't provide for sanctions or penalties when the lawyers don't comply with this rule.

Italian lawyers are used to present cases in a lengthy way: currently the sole sanction, in theory, is a pecuniary penalty charged by the Court, but only when the Court deems that the litigation was "temerarious" (in Italian: *"lite temeraria"*).

We are currently studying the possibility to introduce new rules in our Code, because there' so doubt that more concise parties' acts could help the Courts try more cases, and as a result cut backlog and provide for a fair trial within a reasonable time.

Incompliance of a national rule with the European Convention for the Protection of Human Rights and Fundamental Freedoms: mechanisms for the delivery of a preliminary ruling

1) *"De iure condito"* (current legislation). In the Italian legal order, two cases are currently provided for, where a preliminary ruling can be delivered, and the proceeding is suspended.

The first one is the preliminary ruling procedure under article 267 of the Treaty on the functioning of the European Union (hereinafter TFEU), that is where a preliminary issue is referred to the European Court of Justice (hereinafter also ECJ).

The second case is the preliminary constitutional ruling: the proceeding may be suspended and the decision referred to the Italian Constitutional Court (hereinafter also Constitutional Court or ICC) if the judge has doubts about a law's constitutionality.

When a Court deems that Italian law doesn't comply with Community law, and has no doubts about the interpretation of European provisions, the Court cannot apply the Italian law inconsistent with European law, by virtue of the principle of "the precedence of Community law" (ECJ, 15 July 1964 C-6/64), that is "the supremacy of Community Law" (ECJ, 9 March 1978, C-106/77): this is the so called "power not – to – apply"[1]. It is available solely for incompliance of Italian law with European law.

Apart from this case, Italian legal order does not allow a Court "not to apply" a national legal rule.

A legislative provision, even if it is contrary to the principles set out in the Constitution, must, if it is not to be applied, be repealed or declared to be unconstitutional by the Constitutional Court.

As a result, Italian Courts haven't a similar "power not to apply" where they deem that Italian law doesn't comply with the Convention for the Protection of Human Rights and Fundamental Freedoms.

When this occurs, the judge has to deliver a preliminary ruling to the Italian Constitutional Court, in which the judge has to assert that the Italian rule, allegedly inconsistent with the ECHR, doesn't comply with article 117 of the Italian Constitution.

According to article 117 par. 1 afore mentioned, legislative powers shall be exercised – both by the State and the Regions -, in compliance not only with the Italian Constitution, but also with the constraints deriving from European Union (hereinafter also EU) legislation and from international obligations.

The Italian Constitutional Court, since the year 1997, with the decisions nrs. 348 and 349, has stated that the provisions of the ECHR are "interposed rules" according to art. 117, par. 1, Italian Constitution, and, consequently, the judges are not allowed "not to apply" a national rule that infringes the ECHR, but it falls within the exclusive competence of the Constitutional Court to verify whether or not the national rule complies with the ECHR; when it does not (comply), the Constitutional Court shall declare that the Italian rule is unconstitutional, because it infringes art. 117, par. 1, that is the obligation, on the part of the Italian legislator, to comply with the duties deriving from the ECHR, that is to legislate in consistence with international obligations. (See also the decisions by the Constitutional Court 25 July 2011 n. 245; 7 April 2011 n. 13, 5 January 2011 n. 1; 24 June 2010 n. 227; 4 June 2010 n. 196; 28 May 2010 n. 187; 15 April 2010 n. 138; 12 March 2010 n. 93; 27 February 2008 n. 39).

[1] ECJ 9 March 1978 C-106/77: "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. (…)a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".

This principle has been confirmed by the Constitutional Court even after the Charter of fundamental rights of the European Union (Nice Charter) entered into force.

Even if the texts are not perfectly identical, this Charter replicates, on the whole, the fundamental rights stated in the ECHR, and the same fundamental rights are also recognized in the Italian Constitution.

As a result, the fundamental rights now have their source in three different legal instruments: the Nice Charter, the Italian Constitution and the ECHR.

It must be noted, however, that the Nice Charter is applicable only in the fields falling within the competence of the European Union.

The existence of three different sources has a consequence on the kind of remedies, where a national rule infringes a fundamental right.

The national Courts have three options:

- to deem the national rule infringes the Italian Constitution;
- to deem the national rule infringes the Nice Charter;
- to deem the national rule infringes the ECHR.

In the first case, Courts have not the power "not to apply" the rule, but have to deliver a preliminary ruling to the Italian Constitutional Court: if the latter declares that the rule is unconstitutional, the rule is repealed with general effects (*erga omnes*). In fact, a judgement of unconstitutionality delivered by the Constitutional Court, does not apply only *inter partes* in the case to be decided, but it binds all national courts and applies *erga omnes.*

In the second case, it must be considered that the Nice Charter is now part of Community Law and has "direct effect" as law in the Member States. As a result, the Courts have the power "not to apply" the inconsistent national rule, because as the Nice Charter has a direct effect, it prevails over conflicting national law and must be applied in place of the latter; but in this case, the judgement has effect only for the specific litigation, and not *erga omnes*; as a result, the inconsistent national rule is not applicable to the specific case, but it is not repealed, and remains valid and effective.

The Courts could also decide, if they have a doubt about the interpretation of the Nice Charter, to deliver a preliminary issue to the ECJ, under article 267 TFUE, with the result that, if the ECJ deems that the national law is inconsistent with the Nice Charter, the national rule is considered generally void (*erga omnes*) and not in force any longer.

In the third case, it must be considered that, according to the Italian Constitutional Court, the ECHR neither used to be part of Community Law, nor has it become part of Community Law, even after the Nice Charter.

Therefore, even after the Charter of Nice, according to the ICC, the national judges, where they deem that a national rule infringes the ECHR, are not acknowledged "not- to – apply" the rule, but have to deliver a preliminary request to the ICC (see decision ICC 7 March 2011 n. 80; following the same principle, see also Council of State, sect. VI, 15 June 2010 n. 3760; TAR Campania – Napoli, sect. I, 29 July 2010 n. 17173; TAR Lombardia – Milano, sect. III, 15 September 2010 n. 5988).

This principle has also recently been stated by the ECJ, Grand Camera, with the judgement 24 April 2012 C-571/10. The Court asserts: "*The reference made by article 6(3) TEU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, does not require the national court, in case of conflict between a*

provision of national law and that convention, to apply the provisions of that convention directly, disapplying (sic) the provision of domestic law incompatible with the convention"[2].

2) *"De iure condendo"* (possible future legislation). Litigations in which either the parties claim the application of the ECHR or the Italian Courts apply on their own motion (*ex officio)* the ECHR or cite the jurisprudence of the European Court of Human Rights (hereinafter also ECourtHR) are more and more frequent.

In the specific field of administrative litigations, this happens when an administrative decision is alleged to violate human rights, for example in cases regarding expropriation of private estates, environmental and health matters, immigration law and namely residence permits for foreign nationals.

In addition, the administrative judicial proceedings are governed by principles stated by the ECHR and the ECourtHR, such as fair trial, reasonable duration, adversarial system, public hearing, and effectiveness of the enforcement of a judgement.

In order to give some recent examples, it's useful to mention:

- the decision of the Council of State, grand camera, 24 May 2011 n. 9, regarding a retroactive law; the decision cites the jurisprudence of the ECourtHR according to which the interference by the legislature in the outcome of the proceedings is prohibited (ECourtHR 10 November 2004 Lizarraga and Others v. Spain)[3] but it denies that the principle was violated in the case in question, because the retroactive law did not aim to influence the outcome of proceedings already under way;
- the decision of the Council of State, sect. VI, 29 September 2010 n. 7200, regarding an administrative revocation of a residence permit; cites the right to respect for family life, under article 8 ECHR;
- the decisions of the Council of State, sect. IV, 6 June 2011 n. 3406, and 28 February 2012 n. 1162, regarding the matter of the hearing "*in camera*" in the special proceeding for the right to access public documents, under article 6 ECHR; hold that the hearing *"in camera",* provided by article 87 CPA doesn't infringe article 6 ECHR;
- the decisions of the Council of State, sect. IV, 2 March 2010 n. 1220, sect. VI, 23 May 2011 n. 3047, 12 December 2011 n. 6501 and 5 April 2012 n. 2024, cite the

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[2] The reasons are in parr. 59-63 of the judgement, as follows:

2The second question

59. By its second question, the referring court asks in essence whether, in case of conflict between the provision of domestic law and the ECHR, the reference to the latter in Article 6 TEU obliges the national court to apply the provisions of the ECHR – in the present case Article 14 ECHR and Article 1 of Protocol No 12 – directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the Corte costituzionale (Constitutional Court).

60.According to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of the Union's law.

61. That provision of the Treaty on European Union reflects the settled case-law of the Court according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures (see, inter alia, Case C-521/09 P Elf Aquitaine v Commission [2011] ECR I-0000, paragraph 112).

62. However, Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.

63. The answer to the second question must therefore be that the reference made by Article 6(3) TEU to the ECHR does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention".

[3] "*While in principle the legislature is not precluded from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute save on compelling grounds of the general interest"*

jurisprudence of the ECourtHR regarding the right to the effective enforcement of a judgement, under articles 6 and 13 ECHR;
- the decision of the Council of State, sect. VI, 23 February 2011 n. 1127 refuses to concede a deferment of the hearing, requested by the parties, by citing the principle of reasonable duration of the trial and deducing from this principle the exceptionality of any delay in the trial, even if the ECHR is not specifically mentioned;
- the decision of the Council of State, sect. VI, 10 May 2011 n. 2755, invokes the principle "domestic remedies must be effective", under articles 6 and 13, ECHR, in order to affirm a "brand new" principle, that the effects of a judgement that quashes an administrative decision, are not necessarily retroactive; the effects can be postponed whenever this appears necessary to avoid that the temporary lack of rule (in the period between the judgement and its enforcement) damages rather than advantages the prevailing party; the case concerned a hunting plan judged void due to the lack of a necessary advisory opinion; the temporary lack of the plan would have produced a negative impact on the environment, and therefore the effects of the annulment have been delayed until the adoption of a new plan by the competent body.

As said, the possibility of a preliminary ruling referred by national Courts to the European Court of Human Rights is not provided for, currently.

A debate is ongoing for the introduction of this possibility.

The proposal deserves serious attention, because a mechanism of preliminary rulings by the ECourtHR could have significant advantages.

Direct dialogue between national Courts and the ECourtHR will help the correct interpretation of the European Convention and, consequently, help decrease its violations.

This correct interpretation is even more important due to the entry into force of the Nice Charter: fundamental rights herein stated are to be interpreted according to the principles handed down by the ECourtHR (see the preamble of the Nice Charter: "*The Charter reaffirms … the rights as they result ..from …the ECHR… and the case-law …of the European Court of Human Rights…").*

In this context, preliminary rulings handed down by the ECourtHR will help create an uniform case-law of fundamental rights, shared by national Courts, national Constitutional Courts, the ECourtHR, and the ECJ.

However, the preliminary ruling should respect some "technical precautions", in order to avoid that the introduction of such a mechanism could result in an increase in costs and duration of judicial proceedings.

Opening this option to first instance judges and Courts should be avoided, as it would create a heavy backlog, and increase frivolous recourses.

In the interest of efficiency, it would be best to allow access to these rulings only to the Supreme Courts of the Member States.

The proceeding before the ECourtHR should be adversarial, namely the intervention by other Member States as well as by the pertinent parties of the internal case in question, should be allowed.

However, two technical details of this proposal should be further investigated:

1) it would be preferable for the Italian system that the mechanism were facultative;

2) what will be the value of the response of the ECourtHR? Will it be an advisory opinion, or will it be a binding judgement? And, if it will be shaped as a binding judgement, will it be binding only for the specific case, or will it have "direct effects" *erga omnes*?

In assessing these matters, it should be taken into account the necessity to avoid dilatory requests from the parties of the judicial proceedings, and to prevent the risk that a dismissal of the requests should be grounds for further claims of civil liability against the judges who dismissed the requests.

The jurisprudence of the European Court of Justice handed down in the decisions of *Köbler v Austria* and *Traghetti del Mediterraneo SpA v Italy* is well known. They affirmed the civil liability of the Member States, when their Supreme Courts fail to comply with the duty to refer a preliminary issue to the ECJ.

What is probably less known are the consequences of this jurisprudence in the Italian legal praxis, and its misuse by the parties and their lawyers. A significant number of actions for civil liability of the State and the judges have recently been lodged due to alleged infringements of the obligation to request a preliminary ruling, even in cases where the Courts had given reasons for their refusal to refer the preliminary question to the ECJ (*per incidens*, it's useful to recollect the judgment of the ECourtHR 20 September 2011 n. 144 *Ullens de Schooten and Rezabek v. Belgium*, according to which the refusal by Supreme Courts to refer a preliminary question to the European Court of Justice, can, under certain circumstances, affect the fair trial, where that refusal is "arbitrary", namely without written reasons).

In conclusion, a system for preliminary rulings by the European Court of Human Rights, where established, could create a constructive dialogue among national and international Courts, for the formation of a global jurisprudential law of fundamental rights, provided that it doesn't penalize the national judges in the face of the duration of the trials and on adding further grounds for their civil liability.

STATISTICAL DATA (YEARS 2008, 2009, 2010, 2011)

Year 2008
Council of State and Council of State – Section for Sicily Region

New cases: 10,373 (recourses applying for final decisions: 6,905; recourses applying for interim measures 3,468); decisions: 15,109 of which 8,786 are final judgements.

Council of State – Section for Sicily Region: new cases 1,467 (recourses applying for final decisions 867; recourses applying for interim measures 600) decisions 2,262, of which 1,210 are final judgements.

Regional Administrative Tribunals

New cases 56,716; decisions 137,631, of which 96,683 are final judgements, and over 25,456 are set for interim measures.

Year 2009
Council of State and Council of State – Section for Sicily Region

New cases: 10,618 (recourses applying for final decisions 7,438; recourses applying for interim measures 3,178); decisions: 16,628, of which 8,786 are final judgements.
Council of State – Section for Sicily Region:
New cases 1,644 (recourses applying for final decisions: 1,025; recourses applying for interim measures 619); decisions: 2,453, of which 1,221 are final judgements.

Regional Administrative Tribunals

New cases: 55,019; decisions: 125.,086, of which 87,080 are final judgements.

YEAR 2010
COUNCIL OF STATE

New cases: 10,791 (recourses applying for final decisions: 7,618; recourses applying for interim measures: 3,173); decisions: 15,109, of which 10,589 are final decisions.

Regional Administrative Tribunals

New cases: 56,716; final decisions: 179,162

PROSPETTO RIEPILOGATIVO
Attività Giurisdizionale 2010

Consiglio di Stato

Attività Giurisdizionale

1.	Affari Pervenuti	Totale	10.791	di cui:	merito	7.618
					cautelari	3.173
2.	Affari Definiti	Totale	10.589		definiti con sentenza	6.796
					definiti con sentenza breve	315
					definiti con decreto decisorio	3.478
3.	Provedimenti Emessi	Totale	15.109	di cui:	decisioni definitive	5.643
					decisioni non definitive	205
					decisioni semplificate	289
					decreti decisori	3.477
					ordinanze cautelari	5.111
					decreti cautelari	798
					ordinanze presidenziali	11

4.	AFFARI PENDENTI AL 31 DICEMBRE 2008	32.249
	AFFARI PENDENTI AL 31 DICEMBRE 2009	29.921
	AFFARI PENDENTI AL 31 DICEMBRE 2010	27.225
	AFFARI PASSATI IN DECISIONE E/O PER I QUALI E' IN CORSO LA PUBBLICAZIONE	1.484
	AFFARI FISSATI AL 31 DICEMBRE 2010	2.962
	STIMA AFFARI PENDENTI	22.536

YEAR 2011
COUNCIL OF STATE

New cases: 10,538 (recourses applying for final decisions: 7,081; recourses applying for interim measures: 2,725); decisions: 12,616, of which 9,705 are final judgements.

Council of State – Section for Sicily Region:
New cases 1,458 (recourses applying for final decisions: 754; recourses applying for interim measures 460); 1,026 final judgements.

Regional Administrative Tribunals

New cases: 55,500; final decisions: 121,732; the cut of backlog is 13.3%

PROSPETTO RIEPILOGATIVO
Attività Giurisdizionale 2011
Situazione al 31 dicembre 2011

Consiglio di Stato

Attività Giurisdizionale

1.	Affari Pervenuti	Totale	10.538	di cui:	merito	7.081
					cautelari	2.725
					altre tipologie (Revocazione, mancata esecuzione del giudicato, regolamento di competenza, opposizione di Terzo)	732
2.	Affari Definiti	Totale	12.616		definiti con sentenza	6.160
					definiti con sentenza breve	531
					definiti con decreto decisorio	3.014
					definiti con ordinanze cautelari	2.911
4.	AFFARI PENDENTI AL 31 DICEMBRE 2008					32.249
	AFFARI PENDENTI AL 31 DICEMBRE 2009					29.921
	AFFARI PENDENTI AL 31 DICEMBRE 2010					27.225
	AFFARI PENDENTI AL 31 DICEMBRE 2011					25.923
	AFFARI PASSATI IN DECISIONE E/O PER I QUALI E' IN CORSO LA PUBBLICAZIONE					*1.239*
	AFFARI FISSATI AL 31 DICEMBRE 2011					*2.535*
	STIMA AFFARI PENDENTI					22.149

PROSPETTO RIEPILOGATIVO
Attività Giurisdizionale 2011
Situazione al 31 dicembre 2011

Consiglio di Giustizia Amministrativa per la Regione Siciliana

Attività Giurisdizionale

1.	Affari Pervenuti	Totale	1.458	di cui:	merito	754
					cautelari	460
					Altri (Revocazione, mancata esecuzione del giudicato, *etc.*)	244
2.	Provvedimenti Emessi	Totale	2.079	di cui:	decisioni	1.026
					ordinanze (di cui n. 70 decreti decisori)	1.053
3.	AFFARI PENDENTI					690

PROSPETTO RIEPILOGATIVO
Sedi TT.AA.RR - Attività anno 2011

TT.AA.RR.	Pervenuti	*Ricorsi definiti con sentenza*	*Ricorsi definiti con sentenza breve*	*Ricorsi definiti con decreto decisorio*	Totale ricorsi definiti	Pendenti Anno 2011 (al 31.12.2011)	Percentuale di variazione dei pendenti 2011 rispetto ai pendenti 2010	Pendenti totali al 31.12.2010
Ancona	1.150	344	260	901	1.505	6.803	-5,97%	
Aosta	81	75	2	8	85	83	-2,35%	
Bari	2.226	1.282	371	298	1.951	5.506	3,59%	
Bologna	1.454	710	124	590	1.424	7.488	-0,20%	
Bolzano	299	341	23	50	414	529	-17,60%	
Brescia	1.655	962	522	1.113	2.597	6.299	-14,56%	
Cagliari	1.182	1.074	73	475	1.622	4.010	-9,95%	
Campobasso	434	755	28	498	1.281	2.209	-42,01%	
Catania	3.765	2.164	427	4.279	6.870	66.842	-3,94%	
Catanzaro	1.525	1.127	135	2.191	3.453	21.582	-7,34%	
Firenze	2.366	1.385	397	1.910	3.692	9.963	-11,19%	
Genova	1.399	1.343	350	2.994	4.687	7.529	-25,08%	
Latina	1.187	885	96	1.362	2.343	6.682	-14,19%	
Lecce	1.909	1.645	266	1.495	3.406	5.234	-21,16%	
L'Aquila	794	582	49	192	823	2.085	-4,40%	
Milano	3.676	2.060	698	2.060	4.818	12.319	-9,98%	
Napoli	6.706	4.745	973	21.529	27.247	72.662	-21,97%	
Palermo	2.840	1.533	539	1.952	4.024	17.405	-7,51%	
Parma	532	321	74	140	535	1.324	-0,45%	
Perugia	567	327	70	240	637	2.174	-3,63%	
Pescara	552	541	184	193	918	831	-28,49%	
Potenza	502	522	41	748	1.311	3.454	-19,45%	
Reggio Calabria	758	675	201	4.053	4.929	7.758	-33,37%	
Roma	11.243	5.851	2.140	12.245	20.236	129.363	-8,25%	
Salerno	2.116	1.411	365	7.169	8.945	19.741	-23,96%	
Torino	1.481	955	201	4.286	5.442	8.386	-32,62%	
Trento	266	248	21	40	309	313	-17,63%	
Trieste	577	330	147	435	912	1.805	-14,50%	
Venezia	2.258	1.091	668	3.557	5.316	11.117	-19,98%	
TOTALE	**55.500**	**35.284**	**9.445**	**77.003**	**121.732**	**441.496**	**-13,30%**	**509.246**


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