THE ITALIAN JOURNAL OF PUBLIC LAW

ISSN 2239-8279

ITALIAN JOURNAL OF PUBLIC LAW, VOL. 9 ISSUE 2/2017
TABLE OF CONTENTS

EDITORIAL

ARTICLES

SHORT ARTICLES

BOOK REVIEWS

ARTICLES

THE FRENCH *CODE "DES RELATIONS ENTRE LE PUBLIC ET L'ADMINISTRATION"*. A NEW EUROPEAN ERA FOR ADMINISTRATIVE PROCEDURE?

*Marzia De Donno**

Abstract

The code of administrative procedure, long awaited by users and citizens, public employees and academics, was adopted in France in 2015 after a period of "isolation" within the EU. Although it represents a codification *à droit constant*, the "Code on the relationship between the public and the administration" (CRPA) has introduced some important and innovative principles.

This article enquires to what extent EU administrative law has had an influence on the new French Code. Its assessment of the CRPA proceeds in two steps: following an overview of the main innovations, the article compares the recent Spanish, Portuguese and Italian laws which had entirely or only partly reformed the related legislation in the very same year. This analysis will show that there has been a trend toward Europeanisation in administrative procedure.

TABLE OF CONTENTS

* Assistant Professor of Administrative Law, University of Ferrara

1. Introduction. A new European era for administrative procedure?

New challenges have recently arisen for public administrations in Europe: the modernisation of public agencies, e-government and the digitalisation of administration, the fight against corruption and the re-launching of administrative transparency, a drive toward a better quality of regulation and bureaucratic and administrative simplification, ranging from the simplification of local authorities to liberalisation, and to the reform of local public services and public sector employment. These are the objectives that have lent substance to the recent new series of administrative reforms which, nearly everywhere in Europe, are leading, under the stimulus of Community (as well as international) institutions, towards an alignment of the statutes of public institutions within the European administrative space.

This is not only an institutional, but also a temporal convergence, which may certainly be explained with the transformation of administrative issues into a "matter of common interest" under the Lisbon Treaty, the new competences of the Union in respect of administrative cooperation, and the definitive legal enshrinement of the principle of good administration and citizens' rights under Articles 41, 42 and 43 of the ECHR.

More recently, however, this convergence may also be explained in light of the responses that European institutions themselves have attempted to give to the economic and financial

crisis. As has been observed, in fact, the eruption of the crisis in the past decade has thus far precluded the new European legislative framework from concretely expressing its full potential, as the Union, under the weight of the emergency, has rather focused on new economic and financial instruments that might be able to bring sovereign debts under control and stabilise the markets.

At present, therefore, the influence exerted by European institutions on national administrations may be more frequently seen in acts of soft law, which seek to define a new model of public administration that is "effective", "simple", "transparent", "modern" and "accountable", precisely with the aim of combating the crisis, ensuring social cohesion, the competitiveness of businesses and the recovery of national economies. In this regard, we need only consider the recommendations formulated by the Council and the Commission during the annual cycle of coordination of national economic, social and labour reform policies and, last but not least, those regarding public administration reform, in the so-called European Semester.

Against this backdrop[1], administrative procedure – which is clearly tied to the subject of the relationship between administrations and citizens – undoubtedly becomes crucial once again.

This is attested, moreover, by the recent initiatives which, starting from around 2015, have been undertaken in numerous countries – Italy, but also Spain and Portugal – and which have had an impact on the general rules of administrative action,

[1] On which, without any claim of exhaustiveness and in addition to the doctrine cited further below, see C. Harlow, P. Leino, G. Della Cananea (eds.), *Research Handbook on EU Administrative Law* (2017); P. Craig, *UK, EU and Global Administrative Law. Foundations and Challenges* (2015); E. Chiti, G. Vesperini, *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (2015); S. Piattoni (ed.), *The European Union, Democratic Principles and Institutional Architectures in Times of Crisis* (2015); S. Fabbrini, *Which European Union? Europe after the Euro Crisis* (2015); F. Fabbrini, E. Hirsch Ballin e H. Somsen (eds.), *What form of Government for the European Union in the Eurozone?* (2015); J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen* (2014); C. Harlow, R. Rawlings, *Process and Procedure in EU Administration* (2014); P. Craig, *EU Administrative Law* (2012); H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union* (2011).

sometimes innovating them significantly. Probably, however, the most evident sign is France's adoption of a Code on *procédure administrative non contentieuse*, after a long wait of nearly thirty years.

Moreover, precisely the entry into force of the so-called *Code des relations entre le public et l'administration* (CRPA) in 2015 has also served to overcome one of the main objections to the adoption of European rules of administrative procedure: as is well known, this objection was founded on the observation that some of the major national legal systems – those of France and Britain above all – had no general legislation in this area.

We might therefore be led to wonder whether the proliferation of new legislative texts aimed at introducing or reinforcing rules for administrative action based on principles of good administration, simplification and transparency, legal certainty and the protection of legitimate expectations, as well as the development of digital administration, has inaugurated a new era – completely European – for administrative procedure.

The aim of this paper is thus to examine, first of all, the most innovative provisions of the French Code (para. 3). This analysis will serve as an introduction to two further ones: the first aimed at assessing the degree of influence exerted by European administrative law on the French codification (para. 4); the second aimed at examining how the CRPA fits in with the laws on administrative procedure recently adopted or amended in other EU States (para. 5).

2. The "*Code des relations entre le public et l'administration*": the end of the French exception

In order to "*faciliter le dialogue entre les administrations et les citoyens, fondé sur la simplification des relations, la transparence, et une plus grande réactivité de l'administration*"[2], Article 3 of *loi n° 2013-*

[2] *Exposé des motifs* of the *Projet de loi n° 664 du 13 juin 2013*. For first comments to the CRPA and for an account of the preparatory jobs of the Code see: Dossier 7 AJDA (2014) *La simplification des relations entre l'administration et les citoyens*», and, especially, P. Gonod, *Codification de la procédure administrative. La «fin de l'exception française?»*, 395; M. Guyomar, *Les perspectives de la codification contemporaine*, 400; M. Vialettes, C. Barrois de Sarigny, *Le projet d'un code des relations entre le public et les administrations*, 402; Dossier 43 AJDA (2015) and 44

1005 du 12 novembre 2013 entrusted the French Government with the task of adopting, within two years, a Code laying down general rules of administrative procedure.

The subsequent *ordonnance n° 2015-1341 du 23 octobre 2015*, concerning the legislative provisions of the Code, and *décret n° 2015-1342 du 23 octobre 2015*, which dealt with the related regulatory provisions, thus brought an end, after about thirty years[3], to what had been defined as the "*splendide isolement de la France*"[4] in the European landscape.

AJDA (2015), *La* lex generalis *des relations entre le public et l'administration*», and, especially, M. Vialettes, C. Barrois de Sarigny, *Questions autour d'une codification*, 2421; S. Saunier, *L'association du public aux décisions prises par l'administration*, 2426; J. Petit, *L'entrée en vigueur des actes administratifs dans le code des relations entre le public et l'administration*, 2433; G. Eveillard, *La codification du retrait et de l'abrogation des actes administratifs unilatéraux*, 2474; B. Seiller, *Le règlement des différends avec l'administration*, 2485; F. Melleray, *Les apports du CRPA à la théorie de l'acte administratif unilatéral*, 2491; Dossier 1 RFDA (2016) *Le Code des relations entre le public et l'administration*», and, particularly, D. Labetoulle, *Avant propos*, 1; M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, 4; P. Terneyre, J. Gourdou, *L'originalité du processus d'élaboration du code: le point de vue d'universitaires membres du «cercle des experts» et de la Commission supérieure de la codification*, 8; M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, 12; C.-A. Dubreuil, *Le champ d'application des dispositions du code*, 17; B. Bachini, P. Trouilly, *Les procédures contradictoires dans le code des relations entre le public et l'administration: de la clarté dans la continuité*, 23; P. Bon, *L'association du public aux décisions prises par l'administration*, 27; P. Delvolvé, *La définition des actes administratifs*, 35; G. Eveillard, *L'adoption des actes administratifs unilatéraux - Forme, délais, signature*, 40; P. Delvolvé, *L'entrée en vigueur des actes administratifs*, 50; B. Seiller, *La sortie de vigueur des décisions administratives*, 58; F. Roussel, *Un code également innovant dans sa partie outre-mer*, 69; and then, more recently, D. Custos, *The 2015 French code of administrative procedure: an assessment,* in S. Rose-Ackerman, P. Lindseth (eds.), *Comparative Administrative Law* (2017), 284.

[3] It is not possible here to detail the various attempts to codify the rules of administrative procedure that took place in France between the 19th century and the most recent ones of 1996 and 2004. As is well known, moreover, the broad debate accompanying this long process saw a division between advocates and opponents of codification. The flexibility of case law was prevalently seen as a virtue by the great judges of the *Conseil d'Etat* (R. Odent and E. Laferrière, cited further below) given the vastness and changeability of administrative law and the impossibility of transposing it into written texts, whereas the benefits of codification were broadly recognised mainly among academics. Warranting mention among the latter, without any claim of exhaustiveness, are G. Isaac, *La procédure administrative non contentieuse* (1968); C. Wiener, *Vers une codification de la procédure administrative* (1975); Y. Gaudemet,

As is well known, France, together with Britain, Ireland and, on the continent, Belgium and Romania, represented the group of States within the EU still without a code or a general law on administrative procedure[5].

In France, this legislative gap had always been attributed to a certain resistance on the part of both the French Parliament, reluctant to intervene in regulating the action of the executive branch, and the Government itself, as well as, and above all, the Council of State, which would have seen its historical role in the creation and development of French administrative law considerably reduced[6].

La codification de la procédure administrative non contentieuse en France (1986); P. Gonod, *La codification de la procédure administrative*, in AJDA 489 (2006). See also R. Schwartz, *Le code de l'administration*, in AJDA 1860 (2004).

[4] M. Vialettes, C. Barrois de Sarigny, members of the *Mission de préparation du Code des relations entre le public et l'administration*, in *La fabrique d'un code*, cit. at 2, 4.

[5] Austria adopted the first law on administrative procedure in Europe in 1925; Poland and Czechoslovakia followed shortly thereafter, in 1928, and Yugoslavia in 1930. The Administrative Procedure Act of the United States was introduced in 1946. The Hungarian law and the first Spanish law came into force in 1957 and 1958, respectively. In 1960 it was Switzerland's turn, in 1976 Germany's and in 1978 Luxembourg's. In the 1990s, the Italian law (1990), the Dutch law (1994) and the Greek law would finally be adopted (1999). For a comparative analysis of the principals legislative models, see: J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative. Comparative Law of Administrative Procedure* (2016); J.-B. Auby (ed.), *Codification of administrative procedure* (2014); M. Fromont, *Droit administratif des Etats européens* (2006); and then the Acts of the Lisbon Meeting on Administrative Procedure, *Functions And Purposes Of The Administrative Procedure: New Problems And New Solutions* (2011).

[6] S. Cassese, *Functions of administrative procedure: introductory remarks*, in *Functions And Purposes Of The Administrative Procedure: New Problems And New Solutions*, cit. at. 5, 10, 11; J.-B. Auby, *General Report*, in Id., *Codification of administrative procedure*, cit. at 5, 27; A. Le Pors, *Chronique d'une mort annoncée: le décret du 28 novembre 1983*, in 6 La Semaine Juridique Administrations et Collectivités Territoriales (2007), 21. In truth, in this country, the subtle balance that came to be created between legislative, executive and judicial powers has always been a major factor explaining the absence of a general law on administrative procedure. The refusal to legislate in this area has indeed always been based on the idea, also advanced by several French Presidents, that administrative procedure was a practical aspect that regarded the behaviour of officials and the internal organisation of administrations: thus a matter to be left up to administrative regulations rather than the law. A counterpoint to this idea was the almost exclusive predominance of the case-law of the *Conseil d'Etat*,

Therefore, after decades of attempts, the codification project was successfully re-launched, this time earning the support not only of the Secretary General of the French Government, the Vice-Chairman of the *Commission supérieure de codification* and the *Comité interministeriel pour la modernisation de l'action publique* (CIMAP), but also of the Vice-President of the *Conseil d'Etat*[7]. Indeed, it might be said that the success of the new French Code largely depended on the Council of State, which not only played a primary role in drafting the text[8], but in previous years had already laid the ground for its preparation[9].

Moreover, although in the mid 1970s, R. Odent, President of the *Section du Contentieux* of the *Conseil d'Etat*, held that the rigidity of written law compared to the flexibility of case-law was in itself a sufficient reason to render the idea of codification "*…contestable, dans son principe même…*"[10], in more recent times concerns tied to the need to ensure the effectiveness of the principles of *securité juridique* and *confiance légitime* made it urgent to adopt a legislative instrument that would guarantee the accessibility and intelligibility of administrative law to citizens.

As stated in a communiqué of the CIMAP dated 18 December 2012: "*Un français sur quatre juge complexe sa relation avec l'administration.* […] *Les règles qui régissent les relations entre l'administration et les citoyens sont éparses. Elles relèvent fréquemment de la jurisprudence. Elles sont donc difficilement accessibles aux usagers mais également aux administrations*". One of the objectives of the

---

which, on the one hand, readily accepted these tendencies and, on the other hand, responded to the need to establish rules governing the relations between users and administrations with its own *arrêts*.

[7] M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, cit. at 2, 4. It should be noted, furthermore, that the *loi du 12 novembre 2013* was unanimously adopted in both Chambers of the French Parliament.

[8] The *Mission de préparation du Code des relations entre le public et l'administration*, based at the *Conseil d'Etat*, was supported by a "*cercle des experts*" made up of administrative magistrates, university professors and professionals. The *Commission supérieure de Codification*, finally, also included some Councillors of State among its members.

[9] See, in addition to the annual Reports on *securité juridique* referred to further below, the judgment CE 26 octobre 2001, n° 197018, *Ternon*, which many consider also to be a call for codification by the administrative court, directed at Parliament.

[10] R. Odent, in the foreword to the book of C. Wiener, *Vers une codification de la procédure administrative*, cit. at 3, 7.

new French Code is thus to "*assurer la transparence et l'accessibilité des règles régissant les relations entre les citoyens et l'administration*"[11].

Therefore, the *Code des relations entre le public et l'administration* undoubtedly represents an advance of statutory law challenging the historical primacy of French case-law. However, this is true only in part.

In fact, the Code primarily limits itself to restating existing rules laid down by case-law, with limited, albeit important, innovative contributions[12]. Actually, in this respect the French Code seems very similar to the Italian law on administrative

[11] *Comité interministériel pour la modernisation de l'action publique. Simplifier l'action publique*, 31; available on http://www.modernisation.gouv.fr/le-sgmap/le-cimap/le-cimap-du-18-decembre-2012.

[12] Moreover, these were also the same limits drawn by the legislative delegation, in particular by paras. 2 and 3 of Art. 3, *loi du 12 novembre 2013: "I. — Dans les conditions prévues à l'article 38 de la Constitution, le Gouvernement est autorisé à procéder par ordonnances à l'adoption de la partie législative d'un code relatif aux relations entre le public et les administrations. II. — Ce code regroupe et organise les règles générales relatives aux procédures administratives non contentieuses régissant les relations entre le public et les administrations de l'Etat et des collectivités territoriales, les établissements publics et les organismes chargés d'une mission de service public. Il détermine celles de ces règles qui sont applicables aux relations entre ces administrations et entre ces administrations et leurs agents. Il rassemble les règles générales relatives au régime des actes administratifs. Les règles codifiées sont celles qui sont en vigueur à la date de la publication de l'ordonnance ainsi que, le cas échéant, les règles déjà publiées mais non encore en vigueur à cette date. III. — Le Gouvernement est autorisé à apporter aux règles de procédure administrative non contentieuse les modifications nécessaires pour: 1° Simplifier les démarches auprès des administrations et l'instruction des demandes, en les adaptant aux évolutions technologiques; 2° Simplifier les règles de retrait et d'abrogation des actes administratifs unilatéraux dans un objectif d'harmonisation et de sécurité juridique; 3° Renforcer la participation du public à l'élaboration des actes administratifs; 4° Renforcer les garanties contre les changements de réglementation susceptibles d'affecter des situations ou des projets en cours; 5° Assurer le respect de la hiérarchie des normes et la cohérence rédactionnelle des textes ainsi rassemblés, harmoniser l'état du droit, remédier aux éventuelles erreurs et abroger les dispositions devenues sans objet; 6° Etendre les dispositions de nature législative ainsi codifiées en Nouvelle-Calédonie, en Polynésie française, dans le respect des compétences dévolues à ces collectivités, ainsi qu'aux îles Wallis et Futuna, et adapter, le cas échéant, les dispositions ainsi codifiées en Nouvelle-Calédonie et dans les collectivités d'outre-mer régies par l'article 74 de la Constitution; 7° Rendre applicables à Mayotte les dispositions de nature législative ainsi codifiées issues des lois qui ne lui ont pas été rendues applicables. IV. — Ces ordonnances sont publiées dans un délai de vingt-quatre mois à compter de la promulgation de la présente loi. V. — Un projet de loi de ratification est déposé devant le Parlement dans un délai de trois mois à compter de la publication de chaque ordonnance".*

procedure. Law no. 241/1990, which differs from the analogous German law of 1976[13] in terms of completeness and coherence, elevated some general principles of administrative action established by case-law to a legislative rank, as well as introducing some innovative concepts, parallel to the emergence of a new model of public administration[14].

Similarly, the major work of "*codification administrative*" and "*à droit constant*"[15] undertaken by the experts of the *Mission de préparation du Code* represents a consolidation of only part of French case-law and, simultaneously, an attempt to harmonise a number of existing laws. Besides, limiting the perimeter of the CRPA as much as possible in relation to general principles and the rules established by case-law represented the only feasible approach to avoid the same problems that had caused the failure of the previous attempts.

Therefore, the CRPA does not aspire to be a full-fledged code, at least not in the Napoleonic and legal positivist sense of the word: it is neither exhaustive nor completely innovative.

It is not exhaustive, because it positivises only essential provisions, leaving the rest up to case-law or sectoral laws[16]. The rules concerning the effectiveness and entry into force of

---

[13] G. della Cananea, *Due Process of Law Beyond the State* (2016), 24.

[14] See, for all, A. Sandulli, *Toward codification of the discipline of administrative action?*, in M.P. Chiti (ed.), *General principles of administrative action* (2006), 33.

[15] Regarding the meaning of these two expressions, also in comparison with the Italian experience, see S. Cassese, *Codici e codificazioni: Italia e Francia a confronto*, 1 Gior. dir. amm. 95 (2005).

[16] These were in any case prudent, carefully thought-out choices of the *Mission de préparation du Code*. As pointed out by M. Vialettes and C. Barrois de Sarigny in regard to the provisions of the Code dealing with administrative appeals: "*…notamment en matière de recours administratif préalable obligatoire, la difficulté est de savoir où mettre le courser : faut-il codifier toute la jurisprudence ou se limiter aux chaînons essentiels du régime de recours administratifs? C'est cette second option qui est retenue: trop bavard le droit écrit est non seulement peu lisible, mais aussi peu évolutif. Or cette souplesse et cette plasticité, c'est précisément l'avantage du droit jurisprudentiel sur le droit écrit: il convient donc de lui laisser une grande place*" (see M. Vialettes, C. Barrois de Sarigny *La fabrique d'un code*, cit. at 2, 6). As for the continual references to sectoral legislation, these were also justified on the grounds of practical expediency, again in connection with the need for intelligible rules. That is, it did not seem desirable to disrupt the habits of users of sectoral codes and laws by transferring the relevant provisions entirely into the new Code. See C.-A. Dubreuil, *Le champ d'application des dispositions du code*, cit. at 2, 7.

administrative acts (Article L. 211-1 *et seq.*), or those on administrative appeals (Article L. 410- 1 *et seq.*), for example, may be interpreted in this light: the *Mission de préparation du Code* did not in fact endeavour a complete positivisation of the relevant rules; on the contrary, only the fundamental rules were codified. Accordingly, the general principles drawn from the administratve jurisprudence will continue to stand alongside them.

Not innovative because it incorporates, on the one hand, the essential provisions of already existing laws, such as *loi n° 78-753 du 17 juillet 1978*, concerning access to and reuse of administrative documents, *loi n° 79-587 du 11 juillet 1979*, on the obligation to give reasons for administrative decisions, *loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* (so-called *loi DCRA*), and, on the other hand, the case-law.

It was clearly the result of strategic choices and compromise which – it is reasonable to expect – will not significantly reduce the role of the *Conseil d'Etat*. On the contrary, as has already been pointed out in the literature[17] and seems to be confirmed by the first judgments following the introduction of the CRPA[18], the CE will continue to have significant weight both in the interpretation of the general principles of procedure that the legislator has chosen not to codify and in relation to the principles now expressly transposed into the provisions of the Code[19]. Moreover, the principles elaborated by the *Conseil d'Etat* will inevitably

[17] D. Custos, *The 2015 French code of administrative procedure: an assessment,* cit. at 2.

[18] Cf. CE 21 mars 2016, n° 368082, 368083 e 368084, *Société Fairvesta International GMBH*, on the subject of the right of defense, and CE 19 juill. 2017, n° 403928, *Association citoyenne "Pour Occitanie Pays Catalan" et autres*, on the subject of public consultation; here the French court continued to rely on general principles of law, also in relation to areas now covered by the CRPA. An analogous attitude was maintained by the Council of State after the entry into force of the *loi DCRA*; see C. Landais, F. Lenica, *Le Conseil d'Etat et les droits des citoyens dans leurs relations avec l'administration*, AJDA 1926 (2004).

[19] One need only consider, for example, the strategic motivation underlying the decision not to transpose into written law the general principles regarding the invalidity of administrative acts, in particular, the ones relating to non-invalidating formal and procedural defects, which would continue to be based on the rules established by case-law starting from the *Danthony* judgment (CE Ass. 23 déc. 2011, n° 335033).

continue to guide the application even of provisions that completely transpose previous rules deriving from case-law[20].

In this regard, the concerns voiced by E. Laferrière against the codification of administrative law also appear to have been definitively overcome. It seems reasonable to argue, in fact, that even after the introduction of the Code, case-law will continue to "*faire la part entre les principes permanents et les dispositions contingents, établir une hiérarchie entre les textes, remédier à leur silence, à leur obscurité, à leur insuffisance en s'inspirant des principes généraux du droit et de l'équité*"[21]. At the same time, however, the new Code no doubt has the merit of having placed a limit on the participation of administrative courts in the legislative function, which belongs to the Parliament; and of having brought forward a further argument in favour of the principle of *securité juridique* in the context of the *vexata quaestio* regarding the extension of the Court's power in the alternation between interpretation and creation of law. A well-known issue in France, which – not coincidentally - G. Isaac had laid emphasis on when warning of the indispensability of a code of administrative procedure precisely to ensure legal certainty for individuals[22].

---

[20] There is vast literature on the formulation of general principles of law by the *Conseil d'Etat*, their significance and their relationship with written law. Here we need only mention the work of B. Jeanneau, *Les principes généraux du droit dans la jurisprudence du Conseil d'Etat (*1954), with a preface by J. Rivero.

[21] E. Laferrière, *Traité de la juridiction administrative et des recours contentieux* (1887-1888), 8.

[22] "*Dans la voie qui conduit à la réglementation de l'activité procédurale de l'administration, la règle interne est le point de départ, la règle jurisprudentielle est souvent un point de passage, mais la sécurité [des administrés] n'est tout à fait garantie que lorsque la règle figure dans un texte écrit, surtout s'il contient une codification complète et cohérente*" (See G. Isaac, *La procédure administrative non contentieuse*, cit. at 3, 679). In France, the debate on the limits of the administrative court's power was recently reopened in concomitance with the last failed attempt to codify administrative procedure in 2006. See, also for more ample references, P. Gonod, O. Jouanjan, *A propos des sources du droit administratif. Brèves notations sur de récentes remarques*, in AJDA 992 (2005), in opposition to F. Melleray, *Le droit administratif doit-il redevenir jurisprudentiel? Remarques sur le déclin paradoxal de son caractère jurisprudentiel*, in AJDA 637 (2005). In actual fact this is an aspect which, after the amendments to the law on administrative procedure introduced by law no. 124/2015, has again raised concerns among Italian legal scholars. See M.A. Sandulli, *"Principi e regole dell'azione amministrativa": riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, in 23 Federalismi.it 1 (2017); the Author warns of the risks of creative jurisprudence

3. The main new features of the CRPA

Thus few of the provisions of the nearly six hundred articles making up the Code are actually new. Nonetheless, they are undoubtedly important and, in some cases, bear witness precisely to the progress of written law vis-à-vis the rules established by case-law. They are designed with a view to democratising the public administration and enhancing the protection of citizens, referred to earlier.

Among the main new features of the Code, it is certainly worth mentioning the codification of the rules concerning adversary procedure; new rules designed to enhance public participation in the rulemaking of the public administration; the introduction of the tacit decisions; new rules concerning the so-called *sortie de vigeur des actes administratifs* and *retrait* and *abrogation*. We shall now focus our analysis on these aspects.

3.1. Codification of the adversary principle and the right of defence of the interested party

The innovative contributions of the CRPA may be appreciated above all in relation to the exercise of the rights of defence of interested parties within the scope of administrative procedure, now provided for under Title II ("*Le droit de presenter des observations avant l'intervention de certaines decisions*") of Book I ("*Les échanges avec l'administration*").

Prior to the introduction of the Code, the adversary procedure between the public administration and private individuals was based essentially on the general principle defined by the *arrêt Dame Trompier-Gravier* of 1944[23], whereby the persone affected by a negative measure (or rather, one "*présentant un certain degré de gravité et prise en considération de la personne*"[24]) has the right to be informed by the administration concerning the

contra legem in addressing the principles of law formulated during the plenary meeting in relation to the new provisions on self-defence. Regarding the formulation of new general principles through Italian administrative case-law even after the entry into force of Law no. 241/1990, see A. Bartolini, A. Pioggia, *La legalità dei principi di diritto amministrativo e il principio di legalità*, in M. Renna, F. Saitta (eds.), *Studi sui principi del diritto amministrativo* (2012), 83. For a reconstruction from a historical perspective, see also M. Mazzamuto, *I principi costitutivi del diritto amministrativo come autonoma branca de diritto*, *ivi*.

[23] CE, sect., 5 mai 1944, n° 69751.

[24] On the meaning of this expression, see also: CE, sect., 24 juin 1949, *Nègre.*

prejudicial effects resulting from the adoption of the decision, to request access to his or her *dossier* and, accordingly, to submit relevant observations.

Over time this rule was followed by a sole legislative provision, Article 24 of the *loi DCRA*[25]. Moreover, the scope of application of the provision was further reduced, since on the one hand it limited the citizen's right to present observations – both in writing and orally – to negative ("*défavorable*") measures only, for which the administration was required to give reasons pursuant to the *loi du 11 juillet 1979,* and among the latter selected only the measures adopted by the administration on its own initiative, hence with the exclusion of acts issued following an application from a private individual[26].

The new Article L. 121-1 brings together and codifies the two rules: "*Exception faite des cas où il est statué sur une demande, les décisions individuelles qui doivent être motivées en application de l'article L. 211-2, ainsi que les décisions qui, bien que non mentionnées à cet article, sont prises en considération de la personne, sont soumises au respect d'une procédure contradictoire préalable*".

This operation is in itself innovative, firstly in view of the purposes of clarification and simplification being pursued, as it overcomes the previously existing dichotomy; secondly, because it broadens, by legislative means, the scope of the *procédure contradictoire préalable*, which now extends to all *décisions administratives* having a personal and negative character[27].

---

[25] The provision extended the rule of adversary procedure, previously applied only to State administrations under the *décret du 28 novembre 1983*, to all public administrations.

[26] In truth, the exclusion of the adversary procedure in the latter case has always been justified in consideration of the fact that private individuals can present their observations at the time of submitting the application.

[27] The subsequent Art. L. 121-2 contains a list of further exceptions to the requirement of initiating an adversary proceeding: in the event of urgency or exceptional situations; for reasons of public law and order or international obligations; and finally, in the case of decisions for which the provisions of sectoral laws have established particular forms of adversarial proceedings and of those related to social security and welfare (with the exception of measures involving sanctions). To these exceptions we must also add a further one established by the case-law of the Council of State, which rules out adversary proceedings in cases involving binding activities of the administration (CE 30 janv. 1991, *Min. de l'Équipement, du Logement, des Transports et de la Mer c/ Sté Route et Ville*, nº 101639), except where they are required to comply with

Certainly, it adds nothing to what was already established through case-law – which indeed represents the very limit of the legislative delegation; however, as some hope, the translation in positive terms of the category of administrative decisions "*prises en considération de la personne*" could in the future lead the French legislator to definitively bury the distinction between measures for which reasons must be given and measures subject to a prior adversary procedure; and, above all, to bring the law into line with the solutions of other European countries by extending the adversary procedure to all individual decisions, including those having a favourable nature and adopted at the request of a private person[28].

Furthermore, the new expression could subsequently also enable a broadening in the scope of the notion of "*personne intéressée*", now normally used to identify solely the person on the receiving end of the measure, and thus lead to an extension of the adversary procedure to other parties, as in other national legal systems; at present, in fact, other parties do not have the right to be heard under French law[29].

3.2. General provisions regarding public participation in the rulemaking process of the public administration

The provisions regarding public participation in rulemaking are now gathered together in Book I, Title III of the Code ("*L'Association du public aux décisions prises par l'administration*")[30].

The particularities of these provisions make some clarifications appropriate.

First of all, the notion of administrative act as interpreted in France (and in Belgium, the Netherlands and Greece) is very broad and embraces not only "*l'acte administratif comme application*

provisions of Community law (CE, sect., 13 mars 2015, *Office de développement de l'économie agricole d'outre-mer*, nº 364612; CE 22 juill. 2015, *Sté Halliburton Manufacturing and Services France*, nº 367567).

[28] B. Bachini, P. Trouilly, *Les procédures contradictoires dans le code des relations entre le public et l'administration: de la clarté dans la continuité*, cit. at 2, 23.

[29] M. Fromont, *Droit administratif des Etats européens*, cit. at 3, 216, 217.

[30] For a detailed analysis of these dispositions, see: S. Saunier, *L'association du public aux décisions prises par l'administration*, cit. at 2, 2426; P. Bon, *L'association du public aux décisions prises par l'administration*, cit. at 2, 27.

de la loi à une situation concrete", but also every act "*subordonné à la loi*". In general, therefore, in this country an *acte administratif* is not defined on the basis of the type of legal relationship it establishes, but rather according to the power exercised by its author. The notion thus includes both *actes individuels* and *actes règlementaires*[31].

Accordingly, whilst participation in individual acts takes on the connotations of the right of defence seen earlier, in the case of *actes réglementaires*, participation – or rather, the "*association*" of private individuals in public decision-making – may take place on different levels, from the simple provision of information to more structured forms of *consultation* and *enquête publique*[32].

The second clarification regards the very term "*association*" used by the Code. This is an emblematic notion for French administrative law, which already appeared in the earliest writings on *démocratie administrative* dating from the 1960s. It is meant to refer precisely to those occasions on which citizens are involved, as a *socius* (ally), in public decision-making[33]. France, moreover, unlike other countries like Italy, has long known and regulated various forms of public involvement in the rulemaking processes of the public administration.

Therefore, in this case as well the new Code defines a regime that is prevalently *à droit constant*. This applies, in particular, for the rules on consultation via online procedures (already provided in *loi n° 2011-525 du 17 mai 2011*) and those regarding the *commissions administratives à caractère consultatif*

---

[31] G. Marcou, T. I. Khabrieva, *Les procédures administratives et le contrôle à la lumière de l'expérience européenne en France et en Russie* (2012), 39. Moreover, the CRPA does not provide a single unambiguous definition of *acte administratif*, but rather limits itself to defining one for the limited purposes of application of Book II. See art. L. 200-1, according to which "*on entend par actes les actes administratifs unilatéraux décisoires et non décisoires. Les actes administratifs unilatéraux décisoires comprennent les actes réglementaires, les actes individuels et les autres actes décisoires non réglementaires. Ils peuvent être également désignés sous le terme de décisions, ou selon le cas, sous les expressions de décisions réglementaires, de décisions individuelles et de décisions ni réglementaires ni individuelles*". For a critique of this choice, see: P. Devolvé, *La définition des actes administratifs*, cit. at 2. On this question see also: F. Melleray, *Les apports du CRPA à la théorie de l'acte administratif unilatéral*, cit. at 2.

[32] But see also other principles laid down by *loi n° 2002-276 du 27 février 2002*.

[33] For an exegesis of the term "*association du public*", see: S. Saunier, *L'association du public aux décisions prises par l'administration* cit. at 2 and the doctrine cited therein.

(*décret n° 2006-672 du 8 juin 2006*, as amended by *décrets n° 2009-613 du 4 juin 2009* and *n° 2013-420 du 23 mai 2013*).

The main novelty is to be found instead in Article L. 131-1, which introduces for the first time a regime that applies for all proceedings, including those not specifically envisaged in legislative provisions: it is the definitive enshrinement of the general principle of public participation in the rulemaking of the public administration[34].

This principle, moreover, had already found expression in *loi n° 2013-1005*, which expressly authorised the Government to introduce the necessary changes in order to "*renforcer la participation du public à l'élaboration des actes administratifs*" (Art. 3, para. 3, point 3).

Thus, in response to the incitements originating from case-law, which had long allowed administrations the broadest freedom of initiative in adopting various forms of public consultation[35], with the Code this authorisation has become general also at the level of statutory law. Moreover, the new rules also fulfill a need to harmonise the different practices that had emerged, beyond the individual procedures expressly provided for under sectoral laws; a need that was also recognised by the *Conseil d'Etat* itself in its well-known *Rapport public Consulter autrement. Participer effectivement* of 2011[36].

Article L. 131-1 thus attempts to respond to these incitements by providing that "*Lorsque l'administration décide, en dehors des cas régis par des dispositions législatives ou réglementaires, d'associer le public à la conception d'une réforme ou à l'élaboration d'un projet ou d'un acte, elle rend publiques les modalités de cette procédure,*

---

[34] On the absence of this principle in the French system before the entry into force of the CRPA see: J. Richard, V. Kapsali, *La participation à l'élaboration des règlements administratifs en France*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative*, cit. at 5, 317.

[35] For recent jurispudence, see : CE 21 déc. 2012, n° 362347, *Groupe Canal Plus.*

[36] As has been pointed out by the *Rapport au Président de la République concernant l'ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du nouveau code*: "*le Titre III…comprend, de manière inédite, les principes directeurs qui doivent guider l'association du public aux réformes et opérations projetées par l'administration, y compris lorsque celle-ci agit en dehors des cas régis par des dispositions existantes. Le code traduit ici la prise en compte de recommandations émises par le Conseil d'État dans son rapport public annuel pour 2011 Consulter autrement, participer effectivement*".

met à disposition des personnes concernées les informations utiles, leur assure un délai raisonnable pour y participer et veille à ce que les résultats ou les suites envisagées soient, au moment approprié, rendus publics".

The provision, as can be seen, is formulated in a generic manner. It limits itself to providing some guidelines for assuring publicity, information and reasonable time frames for participation.

In this regard, among the first commentators there were those who expressed a number of reservations against this formulation. According to some, in fact, Article L. 131-1 appears to be a highly laconic provision, especially if one compares the few basic rules it lays down against the needs for regulation manifested by the *Conseil d'Etat* in the above-mentioned *Rapport public* of 2011[37].

On the other hand, however, precisely the use of generic terms like "*réforme*", "*projet*", and "*acte*" is likely to have a positive effect in that any type of proceeding or act may be open to public participation, irrespective of the administration concerned. The provision applies, in fact, to all state administrations, including

[37] In particular, the Report requested the formulation of rules based on six guiding principles: to guarantee the accessibility of information; to ensure that observations may be filed by anyone and favour their publicity; to guarantee the impartiality and good faith of the organiser of the consultation and arrange for the presence, where necessary, of a third guarantor; and, moreover, to ensure a reasonable timeframe for the public participation; to safeguard the presence of minorities during the course of the procedure; to provide adequate information on the outcomes of the decisions adopted within periods of time proportional to their importance. In this regard, see: P. Bon, *L'association du public aux décisions prises par l'administration*, cit. Therefore, it is no coincidence that, given the sparse wording of Art. L. 131-1, in its first judgment on the subject (C.E. 19 juill. 2017, n° 403928, *Association citoyenne "Pour Occitanie Pays Catalan" et autres*) the *Conseil d'Etat* once again completed the relevant rules with a list of general principles on the regularity of consultation, this time referencing its previous case-law (on the rule prohibiting the administration from transferring its competences and on guarantees of access to information, the establishment of a reasonable timeframe for participation and publicity of the results of the consultation); from general principles of equality and impartiality, now enshrined in Art. L. 100-2 of the CRPA, the CE instead derived a general rule of "*sincerité de la consultation*" in relation to the definition of the subject matter and exact delimitation of the public to be involved. For commentary on this judgment, see G. Odinet, S. Roussel, *Consultations ouvertes facultatives : règles du jeu*, in AJDA 1662 (2017).

independent administrative authorities and local authorities, as well as public agencies and public or private entities appointed to provide a public service (Art. L. 100-3)[38].

The same intention of providing general, common guidelines also underlies the new regime of *enquêtes publiques* (Book III, Chapter IV, Art. L. 134-1 *et seq*.). In this case the drafters of the *Code* undertook the major task of harmonising the twenty or so existing special provisions, including those contained in the *Code général des collectivités locales*, *Code de l'urbanisme*, *Code de l'envirennoment* and *Code de l'expropriation*[39].

In actual fact, the provisions now laid down in the CRPA do not supersede the special regimes contained in the latter two Codes – in defining the scope of application, Article L. 134-1 expressly excludes them – whereas they generally cover all the other cases already envisaged in other sectoral sources[40], as well as establishing common rules applicable in the event of atypical public inquiries.

The new regime, based on a total of five legislative provisions and twenty-nine regulatory provisions, essentially concerns the way in which an *enquête publique* is conducted: initiation and the authority responsible for opening the proceeding; designation and compensation of the *Commissair enquêteur* and members of the *Commission d'enquête*; preparation of

[38] A view held by S. Saunier, in *L'association du public aux décisions prises par l'administration*, cit. at 2, who likewise criticised the laconic character of the provision, as its exact interpretation will only be possible in the event of litigation, with an evident violation of the principle of legal certainty. In this regard, see also the considerations of D. Custos, *The 2015 French code of administrative procedure: an assessment*, cit. at 2.

[39] *Loi 2010-788 du 12 juillet 2010*, the so-called *Loi Grenelle II,* had already achieved a first important rationalisation of the legislation. Another important attempt at reorganising the rules on the *enquête publique* was made fairly recently also with the new *Code de l'expropriation* of 2015 (*ordonnance n° 2014-1345 du 6 novembre 2014* and *décret n° 2014-1635 du 26 décembre 2014*), which introduced, alongside provisions regarding *enquêtes publiques préalables à une déclaration d'utilité publique*, a complex set of rules dedicated to *enquêtes publiques de droit commun*, not tied to operations of forced expropriation.

[40] Art. 5 of *ordonnance n° 2015-1341 du 23 octobre 2015* identifies the inquiries that will be subject to the new provisions as of the entry in force of the CRPA. They are essentially the ones envisaged by the *Code des collectivitès territoriales*, the *Code de l'Urbanisme*, the *Code de la voirie routière* and the *Code rural et de la pêche maritime.*

the *dossier* to be used as the basis of the inquiry and presentation of citizens' observations; closure of the inquiry with a concluding report drafted by the Commission and in which it states its reasons; publication and filing of the report.

Notwithstanding the consideration that a large part of the provisions of the CRPA faithfully adhere to the model contained in *Code de l'expropriation*, taking into account the new legislation as a whole, the first commentators highlighted that it afforded fewer protections of rights as regarded the procedure for both the *enquêtes publiques* provided for in forced expropriation proceedings and (above all) in those envisaged by the *Code de l'environnement*. This is most likely due to the peculiarity of the latter two proceedings and related to the importance of the rights and interests involved, including public ones. The differences in the new model regard, in particular, the smaller degree of publicity and shorter duration of the procedure, as well as the less robust powers of the *Commissair enquêteur* and his or her position of less impartiality and greater dependence on the public administration.

3.3. The new principle of tacit consent and the regime of *décisions implicites*

The introduction of the principle that "*silence de l'administration vaut acceptation*" is one of the most important novelties of the Code. Not only does it represent a radical change in perspective for French administrative law, but also and above all, as we shall see, its introduction precisely demonstrates the influence that European administrative law had on the formulation of the Code.

The principle of tacit consent and the mechanism of the positive *décision implicite*, practically unknown in France up to now[41], constitute exactly a logical inversion of the general rule of "*silence vaut rejet*".

[41] In actual fact, in 1994 the *Rapport* Picq, *Pour une plus grande efficacité de l'administration* had already proposed the adoption of the rule of tacit consent for all authorisations of a non-financial character. This report was followed, in 1996, by a circular of the Prime Minister which called on the individual ministers to catalogue all the cases in which tacit consent could be applied. Finally, already at the time of the *loi du 12 avril 2000*, its introduction was a subject of discussion in Parliament. In this regard, D. Ribes, *Le nouveau principe*

In actual fact, the regime of tacit consent had already been provided for in the *loi du 12 novembre 2013*, which in turn amended Articles 21 and 22 of the *loi du 12 avril 2000*, but the subject was addressed in its entirety in Book II ("*Les actes unilatéraux pris par l'administration*"), Title III ("*Les décisions implicites*") of the Code.

Article 21 of the *loi DCRA* had established, precisely, the general rule of *silence vaut rejet*. The subsequent Article 22 provided for the possibility of identifying cases of *décision implicite d'acceptation* based on a secondary source and where certain conditions were met. However, this option was strongly circumscribed by administrative and constitutional case-law[42].

The effect achieved by the CRPA was thus to invert the relationship between rule and exception. The rule, as now set forth in Article L. 231-1, is that "*Le silence gardé pendant deux mois par l'administration sur une demande vaut décision d'acceptation*". However, the two-month period, which starts from the time the application is received by the public administration, may be derogated from on grounds of urgency or complexity of the procedure (Art. L. 231-6). The list of proceedings for which the tacit consent principle now applies is published on the Government Internet site; it also contains a specification of the competent authority and effective time limit for the adoption of a tacit decision.

As far as procedural guarantees are concerned, Article L. 232-2 introduces, as a protection for third parties, an obligation to publicise applications submitted by a private individual and, where appropriate, send an individual notification, also by electronic means, containing an express specification of the date on which the application will be regarded as accepted in the absence of an express decision to reject it. Article L. 232-3 instead recognises the interested party's right to obtain a written certification of the tacit assent upon request.

«silence de l'administration vaut acceptation», in AJDA 389 (2014); C. Broyelle, *Le traitement du silence et de l'inertie de l'administration en droit français*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative*, cit. at 5, 675.

[42] Cons. const. 18 janv. 1995; CE, sect., 1995, *Tchijakoff*, nº 127763; CE 21 mars 2003, *Synd. intercom. de la périphérie de Paris pour l'électricité et les réseaux,* nº 189191; and, more recently, CE 30 décembre 2015, *Cie nationale des conseils en propriété industrielle CNCPI*, nº 386805 and n° 386807.

Notwithstanding the innovative character of these provisions, the effectiveness of this principle has been greatly limited by the truly sensational extent of the exceptions. In addition to those initially provided for in the Code itself – i.e. cases in which the application is aimed at obtaining the repeal or amendment of regulations or calls into question decisions already taken; has the nature of a complaint or an administrative appeal; is of a financial nature; also, in cases where tacit consent would be incompatible with the fulfilment of international and European commitments, the protection of national security and public law and order, the protection of freedom and the fundamental principles enshrined in the Constitution; and, finally, in relations between the public administration and its employees (Art. L. 231-4) – we must now add the countless derogations contained in the more than thirty decrees adopted in the past year for "motifs *de bonne administration"*, on the basis of the express authorisation provided under Article L. 231-5.

Almost paradoxically, therefore, the scope of application of what was supposed to be a general rule has been narrowed, in reality, to a very limited number of cases[43].

3.4. The new provisions regarding the *retrait* and *abrogation* of unilateral administrative acts

The *corpus* of the thirteen articles dealing with the "*Sortie de vigeur des actes administratifs*", contained in Book II, Title IV of the Code ("*Actes unilatéraux pris par l'administration*"), adopted on the basis of the express mandate to "*simplifier les règles de retrait et d'abrogation des actes unilatéraux de l'administration dans un objectif d'harmonisation et de sécurité juridique*" (Art. 3, para. 3, point 2), has brought an end to the redundancy resulting from the combination of two legislative provisions and at least four different orientations manifested in the case-law on this subject.

The reference here is to Articles 16-1 ("*Abrogation des actes réglementaires*") and 24 ("*Retrait des décisions implicites*

[43] A critical view of the new principle was expressed, at the time of its introduction in the law of 2013, by B. Seiller, *Quand les exceptions infirment (heureusement) la règle: le sens du silence de l'administration*, in RFDA 35 (2014). See also: H. Pauliat, *Le silence gardé par l'administration vaut acceptation: un principe en trompe-l'œil?*, in JCP Adm. actu. 737 (2013); R. Noguellou, *Sur le silence de l'administration*, in Dr. Adm. alèrte 1 (2014).

d'acceptation") of the *loi DCRA*; and the judgments in the cases: *Ternon* (CE, ass., 26 Oct. 2001, no. 197018, on the *retrait des décisions individuelles explicites créatrices de droits*); *Mme Cachet* (CE, 3 Nov. 1922, no. 74010, on the *retrait des décisions implicites de refus créatrices de droits*); *Société Graciet* (CE, ass., 21 Oct. 1966, no. 61851, regarding the *retrait des actes réglementaires*); *Coulibaly* (CE, sect., 6 Mar. 2009, no. 306084, on the *abrogation des décisions individuelles créatrices de droits*)[44].

The new legislation, welcomed with a certain degree of favour by French legal scholars, hinged upon the Code's distinction between *décisions créatrices de droits* and *actes non créateurs de droits* (in turn divided into *actes réglementaires* and *actes non réglementaires)*. The rules regarding *abrogation* and *retrait* – the reasons justifying the voiding of an administrative act, as well as the period in which its elimination may take place – work differently depending on whether or not an administrative decision creates rights for the party concerned.

In the opening part of the Title in question, the Code also provides a definition of *retrait* and *abrogation*, in order to clarify the temporal effectiveness of the two measures, which exclusively target illegittimate administrative acts – *ex tunc*, in the former case, *ex nunc*, in the latter – thus overcoming the existing inconsistencies in both legislation and case-law[45].

The new legislation is substantially based on a generalisation of the rules defined by the *arrêt Ternon:* the withdrawal and repeal of a unilateral act are possible, in principle, on condition that the act is illegitimate and the measure is implemented within four months of its adoption.

The Code extends such criteria above all to explicit or implicit illegitimate *décisions créatrices de droits*, irrespective of whether the withdrawal or repeal was undertaken by an authority

[44] B. Seiller, *La sortie de vigueur des actes administratifs*, cit. at 2, 58; G. Eveillard, *La codification des règles de retrait et d'abrogation des actes administratifs unilatéraux*, cit. at 2, 2474.

[45] Art. L. 240-1: "*Au sens du présent titre, on entend par: 1° Abrogation d'un acte: sa disparition juridique pour l'avenir; 2° Retrait d'un acte: sa disparition juridique pour l'avenir comme pour le passé*".

on its own initiative or at the request of a third party[46]; or in response to an application of the party directly concerned[47].

The same rule is again proposed for the withdrawal of illegitimate *actes non créateurs de droits* (*réglementaires* and *non-réglementaires*)[48].

Outside of these cases, the *retrait* and *abrogation* of *actes créateurs de droits* may take place without any time limit, as in the case of the revocation of a subsidy where eligibility requirements are not met or, more in general, the revocation of a *décision créatrice de droits* if the conditions it was subject to are not met[49], and, finally, when the withdrawal or repeal has been requested by the individual concerned in the place of a more favourable decision, provided that this does not prejudice the rights of other parties[50].

To this second rule the Code further ascribes the repeal of *actes reglementaires* and *actes non réglementaires non créateurs de droits*[51] and the withdrawal of sanctions[52].

---

[46] Art. L. 242-1: "*L'administration ne peut abroger ou retirer une décision créatrice de droits de sa propre initiative ou sur la demande d'un tiers que si elle est illégale et si l'abrogation ou le retrait intervient dans le délai de quatre mois suivant la prise de cette décision*".

[47] Art. L. 242-3: "*Sur demande du bénéficiaire de la décision, l'administration est tenue de procéder, selon le cas, à l'abrogation ou au retrait d'une décision créatrice de droits si elle est illégale et si l'abrogation ou le retrait peut intervenir dans le délai de quatre mois suivant l'édiction de la décision*".

[48] Art. L. 243-3: "*L'administration ne peut retirer un acte réglementaire ou un acte non réglementaire non créateur de droits que s'il est illégal et si le retrait intervient dans le délai de quatre mois suivant son édiction*".

[49] Art. L. 242-2: "*Par dérogation à l'article L. 242-1, l'administration peut, sans condition de délai: 1° Abroger une décision créatrice de droits dont le maintien est subordonné à une condition qui n'est plus remplie; 2° Retirer une décision attribuant une subvention lorsque les conditions mises à son octroi n'ont pas été respectées*".

[50] Art. L. 242-4: "*Sur demande du bénéficiaire de la décision, l'administration peut, selon le cas et sans condition de délai, abroger ou retirer une décision créatrice de droits, même légale, si son retrait ou son abrogation n'est pas susceptible de porter atteinte aux droits des tiers et s'il s'agit de la remplacer par une décision plus favorable au bénéficiaire*".

[51] Art. L. 243-1: "*Un acte réglementaire ou un acte non réglementaire non créateur de droits peut, pour tout motif et sans condition de délai, être modifié ou abrogé sous réserve, le cas échéant, de l'édiction de mesures transitoires dans les conditions prévues à l'article L. 221-6*" and Art. L. 243-2: "*L'administration est tenue d'abroger expressément un acte réglementaire illégal ou dépourvu d'objet, que cette situation existe depuis son édiction ou qu'elle résulte de circonstances de droit ou de fait postérieures, sauf à ce que l'illégalité ait cessé. L'administration est tenue d'abroger expressément un acte non réglementaire non créateur de droits devenu illégal ou sans*

As may be seen from actual cases, the exact modulation of the regime applicable to the two categories of acts also depends on two further circumstances: in the case of *actes créateurs de droits*, the origin of the initiative is decisive; in the case of the second group of acts, the type of measure to be put in place.

In relation above all to the latter category, the needs underlying the principle of *securité juridique* have proved to be decisive: they have imposed, on the one hand, the extension of the strictest conditions deriving from the *arrêt Ternon* to the case of the *retrait* of *actes administratifs non créateurs de droits*, and, on the other hand the need to implement transitory measures in the event that such acts are withdrawn or repealed.

It follows, above all, that the illegitimacy of a regulatory act must justify more frequently repeal (with *ex nunc* effects) than withdrawal (with *ex tunc* effects), the latter being possible only within four months of its adoption. Secondly, the requirements of legal certainty oblige a public authority to adopt transitory measures, at the time of reasserting its regulatory power, in order to enable private individuals or entities to adapt to subsequent changes in the regulations governing their activity[53].

4. The influence of European administrative law on the CRPA

When looking at the "*procédure administrative extranationale*", both that of other national legal systems and that of European or international origin, the first impression manifested by some French commentators was that "*cela ne change guère au regard de ce que nous connaissons déjà en droit interne*"[54].

The *Code*, as said earlier, is the result of a codification prevalently *à droit constant*, which brings few innovations to the body of legal and administrative provisions elaborated over time

objet en raison de circonstances de droit ou de fait postérieures à son édiction, sauf à ce que l'illégalité ait cessé".

[52] Art. L. 243-4: "*Par dérogation à l'article L. 243-3, une mesure à caractère de sanction infligée par l'administration peut toujours être retirée*".

[53] Art. ex art. L. 221-5, which incorporates the principles of case-law, CE, ass., 24 mars 2006, n° 288460, *Société KPMG, Société Ernst & Young Audit*.

[54] M. Gautier, *Perspectives internationale et européenne*, in Aa.Vv., *Les procédures administratives* (2015), 69.

by the *Conseil d'Etat*. Thus, in response to question as to whether the new French Code of administrative procedure has been contaminated to some degree by European administrative law, it would be simple to answer in the negative.

Moreover, one might add by way of argument, French administrative law is an original model that has often played a role in the opposite direction, serving as a foundation for European law[55]. It suffices to consider the large influence exerted by the principles of *service public* and by the *contrat administratif* on EU law, at least at the initial stage.

Nor, on the other hand, can we forget the reciprocal tensions between the French and European legal systems, which are increasingly evident when the French legal identity is called into question[56]. Here, too, it would be sufficient to recall the long standoff between the Court of Justice of the European Union and France over the *conventions d'aménagement* and their subjection to the competition rules requested by the EU: it began in 2001 and ended eight years later after repeated legislative interventions and an equal number of rulings of the *Conseil d'Etat* and of the CJEU itself[57].

---

[55] See, for example, J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice de la C.E.C.A.*, 4 Annuaire Français de Droit International (1958), 295, where the Author highlights, among other things, the influence exerted by the French administrative procedural system on the initial functioning of the Court of Justice. In general, regarding the French origins of the European administrative system, see, e.g., C. Harlow, R. Rawlings, *Process and Procedure in EU Administration*, cit. at 1, 13, and, in the Italian legal literature, M. D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia* (1992); S. Cassese, *La costruzione del diritto amministrativo: Francia e Regno Unito*, in Id., *Trattato di diritto amministrativo* (2003), 1; G. della Cananea, *Administrative law in Europe: a historical and comparative perspective*, in 1 Italian Journal of Public Law (2009), 162.

[56] In the words of D. Costa, in her intervention at the 3rd International Congress of the *Red Internacional de Derecho europeo* (RIDE), *Diritto amministrativo europeo e diritti nazionali: influenze, tensioni dialettiche e prospettive*, Università degli studi di Roma Tre, 2 December 2016.

[57] C. Devès, *Le Conseil d'Etat met fin au débat sur l'inconventionnalité des conventions et concessions d'aménagement conclues avant 2005 sans mesure de publicité et de mise en concurrence*, in 6 La Semaine Juridique Administrations et Collectivités territoriales 2054 (2012).

If one wanted to continue reading the relationship between France and the European Union in this light, the fact that the French Council of State affirmed that the EU and the national legal orders constitute an "*ordre juridique integré*"[58] only in 2011 would come as no surprise, although the fiftieth anniversary of the *Costa* judgment fell just recently[59].

However, this does not seem to be the most correct interpretation.

On the contrary, it seems reasonable to argue, for reasons that will be explained below, that the Code and the very idea of codifying the rules underlying the relations between the public and the administration, conceived in terms not of opposition or conflict but of exchanges and dialogue[60], is in itself an expression of a modern, European idea of codification, based on the Community principle, by now interiorised, of good administration[61].

The French Code is therefore a modern text not so much, or rather, not only because of the provisions it contains[62], but precisely because – and unlike the laws and codes on administrative procedure of other European States – it was born in

[58] C.E. Ass., 23 décembre 2011, *M. Kandyrine de Brito Paiva,* n° 303, 678. In general, on the relationship between the French administrative jurisprudence, the CJEU and the European law, see the *Dossier thématique* of the *Conseil d'Etat*, *Le juge administratif et le droit de l'Union européenne* (2015); and also C. Otero, *Le Conseil d'Etat et la CJUE: de se battre le juge administratif s'est-il arrêté ?*, in Revue de l'Union européenne 182 (2013).

[59] On the celebration of this anniversary by the French doctrine, see: *Les 50 ans de l'arrêt Costa: de la primauté absolue au dialogue des juges?*, in 593 *Revue de l'Union européenne*, (2015).

[60] On the choice to employ the terms "*public*", "*administrations*", "*dialogue*" e "*relations*", and on their meaning, see: P. Terneyre, J. Gourdou, *L'originalité du processus d'élaboration du code*, cit. at 2; C.-A. Dubreuil, *Le champ d'application des dispositions du code*, cit. at 2; M. Vialettes, C. Barrois de Sarigny, *Le projet d'un code des relations entre le public et les administrations*, cit. at 2.

[61] D. Custos, *The 2015 French code of administrative procedure*, cit. at 2.

[62] The modern and "new generation" character of the contents of the French Code is recognised also by G. Napolitano in *Il Codice francese e le nuove frontiere della disciplina del procedimento in Europa*, in 1 Gior. dir. amm. 5, 7 (2016).

a wholly new legal and, if we like, cultural *milieu*, namely, that of European administrative law[63].

In this latter perspective, it is worth considering first of all an aspect of a temporal character that is certainly peculiar. While on the one hand it is undoubtedly true that France arrived at the process of codifying the rules governing administrative procedure later than other European countries, on the other hand precisely French administrative law and European administrative law are experiencing, at present, a significant temporal coincidence.

In fact, it was exactly in 2013 that both the French Parliament and the European Parliament[64] were jointly advocating an initiative aimed at the codification of the rules on administrative procedure. In addition, the drafting of the *Code* itself proceeded hand in hand with the drafting, on the part of an eminent group of scholars, of the well-known Code ReNEUAL on the administrative procedure of the European Union, and the preparatory work on the two Codes saw the involvement, in a continuous exchange, of experts engaged in the development of both texts[65]. Moreover, precisely France's choice to codify the rules on administrative procedure and the end, therefore, of the French exception in the landscape of continental administrative law could have a beneficial effect also in relation to the final adoption of European rules in this area, a process that is presently at an inexplicable standstill.

However, leaving aside hermeneutic criteria of a historical character, the influence of European administrative law on the French Code can also be perceived in other respects.

Although it is true that the European system rests upon the principle of the institutional and procedural autonomy of Member

---

[63] Also P. Gonod (in *Codification de la procédure administrative. La fin de «l'exception français»?*, cit. at 3, 398.) speaks of "*moyenne européenne*" in reference to the Code.

[64] Cf. the European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union. Regarding the draft code submitted by the ReNEUAL group of experts, see G. della Cananea, D.-U. Galetta, H.C.H. Hofmann, J.-P. Schneider, J. Ziller (eds.), *Codice ReNEUAL del procedimento amministrativo dell'Unione europea* (2016).

[65] J.-B. Auby, *Introduction. Historique de l'ouvrage*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative,* cit. at 5, 1, 2; M. Vialettes, C. Barrois de Sarigny *Question autour d'une codification*, cit. at 2, 2422.

Countries, it is common knowledge in the legal community that European administrative law by now exerts a strong influence on national administrative law, including French law[66]. This is not the right place to examine the legal mechanisms arising from the principles of *primauté*, effectiveness and equivalence both in the application, by the States, of Community law and, due to a spill-over effect, outside its narrow areas of relevance. Here it is sufficient to point out an essential circumstance that enables us to argue what was affirmed a little earlier, namely, that the *Code* has been permeated by a European legal culture which is wholly different compared to the first national experiences of the last century and has been, in all likelihood, determinant also for French intellectual change.

We are referring, in particular, to the very justification of the Code, which, according to its authors, rests exactly on two general principles of European Union law, legal certainty and the protection of the legitimate expectations of private individuals. Moreover, the transposition of these two principles into the French legal system was precisely the result of a fruitful dialogue between the two systems and, in particular, between the CJEU, which had already recognised them as early as 1962[67], and the *Conseil d'Etat*, which had formerly circumscribed the scope of their application to disputes regarding European law and, later, starting from 2006, with the *arrêt Ternon* concerning the *retrait* of acts of the public administration, it confirmed their general applicability also in relationships governed by internal law[68].

---

[66] About the influence of the European law on the French administrative law, cfr. J. Sirinelli, *Les transformations du droit administratifs par le droit de l'Union européenne* (2009); J.-B. Auby, *L'influence du droit européen sur les catégories de droit public* (2010); J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen*, cit. at 1, and especially the Parte VI dedicated to the *Incidences du droit de l'Union dans les droits administratifs nationaux (analyse dans le cas français)*, 1057.

[67] CJEU of 6 April 1962, *Bosch* – Case 13/61; CJEU of 14 July 1972, *Azienda Colori Nazionali* – Case 57/69. On the principles of legal certainty and of protection of legitimate expectations in the European law, vd. D. Dero-Bugny, *Les principes de sécurité juridique et de protection de la confiance légitime*, in J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen*, cit. at 66, 651.

[68] See: CE 19 juin 1992 n° 65432, *FDSEA des Côtes du Nord*; CE 9 mai 2001 n° 210944, *Entreprise personnelle de transports Freymuth*; CE, ass., 24 mars 2006, n° 288460, *Société KPMG*, *Société Ernst & Young Audit*; Cons. const. 29 déc. 2012, n° 2012-662 DC. For some references on the doctrinal debate of those years, see: B. Pacteau, *La sécurité juridique, un principe qui nous manque?*, in AJDA 151 (1995);

Furthermore, in 1991 and then again in 2006, the *Conseil d'Etat* published two Reports on these topics, thus definitively enshrining the two principles in the French legal system as well[69]. The *Code relatif aux relations entre le public et l'administration* now stands as the natural outcome of this process, as the exact positive precipitate of those same principles.

It seems, moreover, that the immanence of the principles of *sécurité juridique* and *confiance lègitime* in the CRPA cannot be denied merely because they are not explicitly stated within the Code, as occurs, for example, in Italian law on administrative procedure through its formal referencing of the principles of Community law (see Art. 1, law no. 241/1990)[70].

According to what we have been able to learn from the comments on the preparatory work, the fact that they are not expressly mentioned in the *Dispositions préliminaires* does not mean, in fact, that the authors did not want to take them into account[71]. They preferred rather to provide a list that was neither exhaustive nor strict, and above all not declaratory, a characteristic typical of other French Codes, and which upheld the idea of an agile, practical instrument at the disposal of citizens and users, not just of jurists and the administrations themselves.

Finally, for our purposes here, it is worth again drawing attention precisely to the relationship between citizens (between "public") and administrations. It seems in fact appropriate to focus on some reflected or indirectly influencing effects deriving from the process of European integration and the mere fact of France's membership in the Union.

C. Landais, *Sécurité juridique: la consécration*, in AJDA 1028 (2006); and more recently, S. Braconnier, *France*, in J.-B. Auby (ed.), *Codification of Administrative Procedure*, cit. at 5, 198; D. Dero-Bugny, *Les principes de sécurité juridique et de protection de la confiance légitime*, cit. at 67, 652, 653.

[69] See: *Conseil d'État, Rapport public annuel 1991, De la sécurité juridique* and *Conseil d'État, Rapport public annuel 2006, Sécurité juridique et complexité du droit.*

[70] In this regard, see: G. della Cananea, *Il rinvio ai princìpi dell'ordinamento comunitario*, in M.A. Sandulli, *Codice dell'azione amministrativa* (2017), 133.

[71] See, in particular, Art. L. 100-2: "*L'administration agit dans l'intérêt général et respecte le principe de légalité. Elle est tenue à l'obligation de neutralité et au respect du principe de laïcité. Elle se conforme au principe d'égalité et garantit à chacun un traitement impartial*". For an exegesis of the provision, see: M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, cit. at 2.

The recent emphasis laid on simplification policies in the EU's evaluations of national reform programmes, including France's[72], may represent, if we look closely, a further key to understanding the entry into force of general rules on administrative procedure in this country as well.

The *choc de simplification* launched by François Hollande for the three-year period 2013-2015 resulted in the adoption of over two hundred measures regarding citizens, businesses and public administration[73]. Among them, as we can read in the chapter headed *Simplifier les règles administratives, fiscales et comptables des entreprises* of the French national programmes for 2015 and 2016, in addition to various legislative initiatives relating to transparency and the prevention of corruption[74], there are amendments to the rules for the *enquête publique*, aimed at streamlining the formalities and favouring broad public participation, also through online consultation; more in general, digital administration and the possibility for citizens and businesses to communicate with public authorities via electronic means; the introduction of the rule of tacit consent and the new rules governing the repeal of administrative acts; finally, the reduction of the period for the issuance of construction permits and other authorisations. These measures, as will be noted, are largely contained in the CRPA itself.

---

[72] See, for the years 2015 and 2016, respectively, the *Recommandation du Conseil du 14 juillet 2015* and *du 12 juillet 2016, concernant le programme national de réforme de la France et portant avis du Conseil sur le programme de stabilité de la France* (2015/C 272/14 and 2016/C 299/27); and the *Document de travail des services de la Commission, Rapport 2016 pour la France contenant un bilan approfondi sur la prévention et la correction des déséquilibres macroéconomiques* (SWD(2016) 79 final).

[73] As stated in the communiqué of the CIMPA mentioned previously: "*Les simplifications administratives répondent ainsi à une forte attente des usagers et constituent l'un des principaux leviers d'amélioration de la qualité de service et d'accroissement de la satisfaction des usagers*". A constant updating on the realization of the objectives contained in the Program "*Moderniser l'Etat. Le choc de simplification*" is available on http://www.gouvernement.fr/action/le-choc-de-simplification.

[74] Reference is being made in particular to the so-called *Loi Sapin II*, *loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, which, after several legislative interventions in 2013, established provisions in this area. More specifically, the law introduced the *Agence française anticorruption*, with the express aim of bringing French legislation into line with European and international standards.

Ultimately, we can say that the very idea of the Code, and hence the consequent efforts to gather together and intelligibly reformulate legal rules, along with many of the principles present therein, and which have been discussed in the previous pages, are justified precisely in light of the general European principles of good administration, legal certainty and the protection of legitimate expectations, as well as precise objectives of administrative, legislative and regulatory simplification and, more in general, the modernisation of public administration, objectives also pursued by the European Union itself[75].

As the Vice President of the *Conseil d'Etat* affirmed, when greeting the Code's entry into force, "*la simplification n'est pas un objectif en soi. Elle est le moyen d'atteindre des objectifs plus larges […]: la sécurité juridique, la cohésion sociale, la compétitivité des entreprises, la capacité à mener à bien des projets. S'agissant de l'action publique, les réformateurs parlent plus volontiers de modernisation ou de performance de l'action administrative. Il est vrai que ce qui est le plus souvent recherché est l'efficacité, plutôt que la simplicité en tant que telle. Mais, l'une ne peut aller sans l'autre. Car l'efficacité et la modernisation de l'action publique passent par la sélectivité et la clarté des objectifs, mais aussi par l'efficience des moyens mis en œuvre et donc la simplification des dispositifs*"[76]. In this sense, therefore, according to some, despite adhering to European principles and common values, France continues to maintain its own character of undeniable originality (and distinctiveness) in the European landscape. Indeed, as has been argued, the concept of simplification underlying the French codification differs from the way it has been understood based on a certain economic analysis of law of Anglosaxon origin, often adopted precisely by international organisations, the European Union, and some Member States like Germany. The notion of

[75] That the Code is the result of legislative and administrative simplification is moreover demonstrated by the fact that the legislative delegation to the Government was included, at a later time, in a draft law on simplification already in the process of being defined, which in turn fits into the *choc de simplification* mentioned previously. In this regard, see: M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, cit. at 2, 15.

[76] J. Sauvé, *La simplification du droit et de l'action administrative, Introduction au Colloque organisé par le Conseil d'Etat et la Cour des comptes, Vendredi 16 décembre 2016*, 6. For an analysis of the approach of the French jurisprudence to the politics of simplifying legislation, see: C. Touboul, «*Simplifier n'est pas juger». Le juge et la simplification du droit*, in RFDA 105 (2017).

simplification as a legislative retrogression, as a mere reaction to the financial cost of laws and a reduction in the regulatory burden on businesses is viewed with distrust by France, as the *le cheval de Troie d'une entreprise libérale de déregulation*»[77].

Thus, though this legal system has become progressively more open to the idea of codifying the rules governing administrative action, the aim is certainly not to "*empêcher la volonté politique de s'exprimer*", but rather, on the contrary, to ensure that, by expressing these rules in a consistent, certain manner, it can "*produire les résultas tangibile espérés et ainsi restaurer l'efficacité de l'action publique*"[78]. A legislative simplification *à la française*, therefore, that goes in the direction not of *deregulation*[79], but rather of quality, effectiveness and hence legal certainty in a rediscovered *ésprit des lois* deriving from the most noble tradition of this country, and is aimed precisely at finding a balance between public and private interests, between written law and case-law, and among the consistency, accessibility and intelligibility of rules within the uneliminable legal and administrative complexity typical of our times.

5. Recent changes to administrative procedure in Spain, Portugal and Italy: some points of comparison

In Europe, likewise in 2015, at least three other major countries intervened in their own legislation governing administrative action. In actual fact, as in France's case, the adoption of the Portuguese code of administrative procedure, the approval of a new Spanish law on the common proceeding of public administrations and the amendments introduced to the corresponding Italian law seem to owe more to a vertical influence coming directly from the European Union than to a horizontal

[77] M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, cit. at 2, 13.
[78] *Ibidem*.
[79] A.-J. Kerhuel, B. Fauvarque-Cosson, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, in 57 Am. J. Comp. L. 811 (2009).

circulation among the different legal frameworks of the various States[80].

In Spain, the former *Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (LRJPAC) was replaced in full by the new *Ley 39/2015 de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas* (LPACAP), to which we may add several provisions of the new *Ley 40/2015 de 1 de octubre, de Régimen Jurídico del Sector Público* (LRJSP).

As we learn from the *Preámbulo* of *Ley 39/2015*, the new law seeks precisely to pursue the objectives of transformation and modernisation of Spanish public administration, as expressed in the *Informe* issued by the CORA in June 2013 and subsequently presented to the EU with the *Programa nacional de reformas de España para 2014*[81]. Thus, in response to European Union recommendations, as well as the Report of the OECD "*Spain: From*

---

[80] These aspects are inevitably tied to the broader subject of cross-fertilizations and legal transplants in European systems; here we can mention only a few fundamental contributions: J. Bell, *Mechanism of Cross-Fertilizations of Administrative Law in Europe*, in J. Beatson, T. Tridimas (eds.), *New Directions in European Public Law* (1998); Id., *Convergences and divergences in European Administrative Law*, in Riv. it. dir. pubbl. com. (1992), 23; J. Schwarze, *European Administrative Law* (1992); Id., *The role of general principles of administrative law in the process of Europeanization of National law*, in L. Ortega Alvarez (ed.), *Studies on European Public Law* (2005), 24; P. Craig, *European Administrative Law* (2006); A. Watson, *Legal Transplants. An Approach to Comparative Law* (1993); S. Cassese, *Le problème de la convergence des droit administratifs: vers un modèle administratif européen?*, in *L'Etat de droit, Mél. en l'honneur de Guy Braibant* (1996), 47; Id., *Diritto amministrativo comunitario e diritti amministrativi nazionali*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo, Parte Generale* (2007), 1; N. Garupa, A. Ogus, *A Strategic Interpretation of Legal Transplants*, in 35 Journal of Legal Studies (2006), 339; M.P. Chiti, *Les droits administratifs nationaux entre harmonisation et pluralisme eurocompatible*, in J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen,* cit. at 66, 867 ; G. della Cananea, *La comparazione dei diritti amministrativi nazionali nell'Unione Europea tra omogeneizzazione e diversità culturali*, in G. Falcon (ed.), *Il diritto amministrativo dei Paesi Europei tra omogeneizzazione e diversità culturali* (2005), 409; Id., *Transnational public law in Europe. Beyond the* lex alius loci, in M. Maduro, K. Tuori, S. Sankari, *Transnational Law. Rethinking European Law and Legal Thinking* (2014), 321.

[81] A. Boto Alvaréz, *La reordinación de las estructuras administrativas como mecanismo de reducción del gasto público: tendencias globales*, in A. Ezquerra Huerva, *Crisis Económica y Derecho Administrativo. Una visión general y sectorial de las reformas implantadas con ocasión de la crisis económica* (2016), 143.

Administrative Reform to Continuous Improvement" expressly referenced in the Preamble of the law, the Spanish legislator, citing the principles of "*regulación inteligente*" and "*seguirdad jurídica*", justified the new rules by citing the need to "*dinamizar la actividad económica, simplificar procesos y reducir cargas administrativas"* and to "*garantizar de modo adecuado la audiencia y participación de los ciudadanos en la elaboración de las normas y lograr la predictibilidad y evaluación pública del ordenamiento*".

These objectives are reflected precisely in the largest innovations of *Ley 39/2015*: the overhaul of legislation concerning the time limits for the conclusion of a proceeding, based on a calculation also expressed in hours; introduction of the conclusion of a proceeding in simplified form, in cases where the procedure is not particularly complex or for reasons of public interest, with a thirty day time limit; the inclusion, within the same law, of rules on digital administration and express sanctioning of the right of citizens to interact with public authorities using electronic means; some limited additions to the rules for the repeal of *actos de gravamen* and *actos desfavorables,* the possibility of which is now restricted to an unspecified limitation period; finally, the introduction of new provisions regarding administrative rulemaking, which opens the door to broad citizen participation[82].

Again in 2015, Portugal also adopted, with *Decreto-Lei n.º 4/2015, de 7 de janeiro*, a new *Código do Procedimento Administrativo*, which, unlike the Spanish law, significantly amended the previous CPA of 1991 by introducing major innovations.

As stated in the Portuguese decree, once again in the Preamble, the formulation of a new text was imposed not only by the need to update some precepts and adapt to developments in case-law and legal doctrine, but also in view of comparative law and the legislation of the European Union itself, along with the exhortations coming from some international organisations. Also in this case, the pursued objective is to "*...Transformar profundamente o modo de funcionamento da Administração Pública nas suas relações com os cidadãos"*.

[82] On the LPACAP see 2 (2016) *Actualidad administrativa*, entirely dedicated to the *Ley 39/2015.* About the influence of European law on the Spanish public administration see, *inter alia*, RAP 200 (2016), *El Derecho administrativo a los 30 años de nuestro ingreso en la Unión Europea.*

In a "*visão mais moderna do direito administrativo*", the new Portuguese provisions outline the features of an open, transparent, participatory, rapid and efficient, simple and impartial administration.

In the case of the new Portuguese code, one can perceive the European influence to a much greater degree, but also the influence – as expressly stated in the part setting forth the reasons for the decree – of the experiences of other legal systems, in particular the German, Italian and Spanish ones.

Therefore, the reader will not fail to notice the express mention, in the general provisions, of the principles of good administration, proportionality, reasonableness and impartiality, good faith and collaboration with private individuals and entities, and the principle of loyal cooperation with the European Union, among others.

As in the case of the Spanish law and the French Code, moreover, there are numerous provisions regarding the digitalisation of administrative procedure. From the Italian experience, the new CPA borrows rules such as those on the designation of a person responsible for each proceeding, the *Conferenza di servizi* (a procedural format designed to enable coordination among different authorities), in the dual form of the *conferência de coordenação* and the *conferência deliberativa*, and administrative agreements (*acordos endoprocedimentais*). The new provisions on the so-called *auxílio administrativo*, on the other hand, are expressly drawn from corresponding German legislation regarding collaboration and assistence among public administrations (*Amtshilfe*).

The Code also features new rules on administrative transparency, including, in particular, the recognition of the right of citizens to be informed; precise rules regarding the time limits for the conclusion of proceedings; additionally, clarification of the powers of administrative self-correction, with a more effective distinction between the two specific cases of *revogação*, in the strict sense, and *anulação administrativa,* the application of which is now subject in this country as well to a precise time limit. The list of novelties, similarly to what has occurred with the French Code and the Spanish law, is completed by a new Title entirely dedicated to the rulemaking procedure of the public administration, which has been enriched with numerous

provisions on public participation and some options for negotiation with private parties[83].

Unlike Spain and Portugal, Italy has not undertaken a general overhaul of the legislation on administrative procedure. The *l. 7 agosto 1990, n. 241*, amended a considerable number of times since its introduction over 25 years, was recently again amended by an enabling law – *l. 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche* (so-called *Legge Madia*) – and the associated implementing decrees and regulations[84].

According to the minister who proposed it, the public administration reform fits into the framework of general structural reforms «*per consolidare la crescita*» and «*per una ripresa duratura e di qualità*». The reform «*applica la logica della semplicità in quattro grandi aree: l'uso delle nuove tecnologie; la certezza e la velocità dei sì o dei no da parte delle amministrazioni; l'organizzazione più snella ed efficiente delle amministrazioni stesse; una normativa più chiara in alcune materie di particolare importanza*»[85].

In our own country as well therefore, the changes introduced through *l. 124/2015* (amending the administrative procedure law) were aimed at speeding up the conclusion of proceedings, which justified implementing the principle of tacit consent also among public authorities; simplifying and concentrating administrative action, through the new rules governing coordination among public authorities and the provision contained therein regarding the sole representative of state administrations; circumscribing self-correction powers in relation to private activities, so as to ensure a certain degree of

[83] For an analysis of the new dispositions of the CPA, see: C. Amado Gomes, A. Fernanda Neves, T. Serrão, *Comentários ao Novo Código de Procedimento Administrativo* (2016).

[84] See, particularly: *d.lgs. 30 giugno 2016, n. 126*; *d.lgs. 25 novembre 2016, n. 222*; *d.lgs. 30 giugno 2016, n. 127* and *d.p.r 12 settembre 2016, n. 194*. For a punctual examination of the modifications to the *l. 241/1990*, see: M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2017).

[85] M. Madia, *Prefazione*, in F. Mastragostino, G. Piperata, C. Tubertini (eds.), *L'amministrazione che cambia. Fonti, regole e percorsi di una nuova stagione di riforme* (2015), 11, 12. See, in this respect, the *Raccomandazione sul Programma Nazionale di Riforma 2015* COM(2015) 262 final, with which the Council exhorted the Italian Government to adopt the law of modernization of the public administration, that then was still in discussion in Parliament.

stability in measures attributing economic advantages; streamlining preliminary verifications and authorisation procedures, which has resulted in new changes in respect of notification to the authorities of the start-up of construction work or a new business (SCIA) and tacit consent.

However, *l. 241/1990* does not include any provisions concerning digital administration[86], administrative transparency and civic access, which is modelled after the American FOIA[87]. Finally, unlike their French, Spanish and Portuguese counterparts, Italian lawmakers have preferred not to reform the rules for the participation of citizens in rulemaking processes of the public administration, which remain irremediably anchored to the by now outdated provisions of Article 13 of the administrative procedure law. This is a sign that, as recognised by a number of legal scholars[88], Italian law by now really needs a complete restyling.

What emerges from this brief overview of the main innovations and most important changes introduced in Spain, Portugal and Italy is a progressive convergence in the rules governing administrative action in these countries. In all three, legislative interventions have been justified in the light of the general principles of legal certainty and regulatory simplification;

---

[86] Such provisions remain within the Digital Administration Code, most recently amended by *d.lgs. 179 del 26 agosto 2016* on the basis of powers delegated under Art. 1 of *l. 124/2015*, which confirms, among other things, the so-called principle of *digital first.* In this case as well, Art. 3 of the legislative decree expressly sanctions every person's right to use electronic means in relations with the public administration. On the recent developments of the digital administration in Italy, see: E. Carloni, *Tendenze recenti e nuovi principi della digitalizzazione pubblica*, in 2 Gior. dir. amm. 148 (2015); B. Carotti, *L'amministrazione digitale: le fide culturali e politiche del nuovo codice*, in 1 Gior. dir. amm. 7 (2017).

[87] Provisions contained in the so-called *Testo Unico Trasparenza (d.lgs. 33/2013)*, likewise recently amended by *d.lgs. 25 maggio 2016, n. 97* on the basis of powers delegated under Art. 7 of *l. 124/2015*. On the new dispositions see: G. Gardini, *Il paradosso della trasparenza in Italia: l'arte di rendere oscure le cose semplici*, in Federalismi.it 1 (2017); B. Ponti (a cura di), *Nuova trasparenza amministrativa e accesso alle informazioni* (2016).

[88] In these terms, recently, G. Napolitano, *La legge n. 241 del 1990 è ancora attuale?*, in 2 Giorn. Dir. Amm. 145 (2017), and M. Ramajoli, *A proposito di codificazione e modernizzazione del diritto amministrativo*, in 2 Riv. Trim. Dir. Pubbl. 346 (2016).

in all three they were prompted and justified by the same perceived need to modernise the public administration; in all three the underlying legal-political need, reflecting an evident European influence, is the recovery of national economies.

Although the solutions vary, the laws analysed here pursue these objectives by replicating the same approaches: from the emphasis laid on the principles of administrative simplification to the clarification of the limits of the *ius poenitendi* of the administration, from the reinforcement of the participation of citizens, especially in regulatory procedures, to the implementation of transparency and digital administration.

In short, what we are witnessing is a process of European harmonisation. A process that clearly goes beyond the limits of the procedural autonomy of the Member States, and in which the various national administrations appear increasingly like common entities in their functions and action, the integral part of a system that transcends state borders.

6. Conclusion

Overall, therefore, the CRPA may likewise be considered an expression of the same process of Europeanisation of national administrative laws, which consists in a general adaptation of the domestic legal order to common European legal values: a process of harmonisation that by now goes beyond purely the strict implementation of Community law.

It is a phenomenon that has also recently been furthered by the insturments employed by the European Union in order to deal with the crisis, which, given the inevitably binding nature they end up having at least when it comes to budget policies, by now constitute a primary channel of Europeanisation itself.

Certainly, therefore, the recommendations adopted by the Council and Commission within the framework of the European Semester for the coordination of Member States' economic policies and structural reforms by now serve as an unparalleled factor of progressive convergence between the national administrative law of the different States, though the particularities and problems of each will continue to be felt.

In France, not by coincidence, administrative simplification, an objective of the administrative reforms of the last forty years,

gathered pace with the *choc de la simplification* at the centre of the policies of *Modernisation de l'action publique* launched in 2012-2013. And though it is true that principles such as tacit consent, the simplification of authorisations and digital administration were already envisaged in the "Services Directive" of 2006, which already reflected the liberal rigour of European law aimed at maximising the well-known principles of the single market, their effective introduction into the CRPA, as we have seen, is presently justified in light of the measures recommended by the EU to counter the crisis.

In actual fact, this is what has occurred not only in France, but also in the other countries analysed here.

As was noted earlier, the competitiveness of the market has by now become the new parameter of reference for measuring the relationship between public and private, between the authorities and citizens[89]. And the recent amendments to the rules of administrative procedure adopted in Spain, Portugal and Italy, briefly outlined in these pages, point in the same direction, as we have seen. Another recurring *leit motiv* in these three laws is the simplification of administrative authorisation procedures, narrower time limits for the issuance of authorisations, limitations to the exercise of *ius poenitendi* by the public administration, and reinforcement of the principle of transparency and digital administration, all introduced under exactly the same Community influence.

At the same time, the French Code can also be considered the child of another current of European administrative law, aimed at the defence of civil rights, which culminated with EU adherence to the ECHR, first of all, and later with the Treaty of Lisbon[90].

The definitive enshrinement, in 2009, of the right to good administration has transformed the rules of procedure and guarantees – the right to be heard, access to documents, the giving of reasons for the measures taken, tort liability – in a legal statute of the European citizen before a public administration (regardless of which one) which can no longer be disregarded.

---

[89] P. Urbani, *Brevissime note sulle modifiche al TU Edilizia dopo lo "Sblocca cantieri"*, in 6 Riv. giur. ed. 123 (2014).

[90] M. Savino, *I caratteri del diritto amministrativo europeo*, in L. De Lucia, B. Marchetti, *L'amministrazione europea e le sue regole* (2015), 232.

It is no coincidence, moreover, that in a context of general distrust towards public authorities (national or otherwise), the principle of/right to good administration is one of the factors of strength that European institutions as well are focusing on, a rediscovered instrument of democratic legitimation and accountability of public powers to citizens[91].

Therefore, the very idea of codifying rules that underpin the relations between the public and administrations, no longer understood in terms of subordination and opposition, but in terms of exchange and dialogue, expresses a modern and European idea of codification, which diverges, at least in part, from the logics on which the first laws on administrative procedure of the last century were based.

Accordingly, in France, first of all, it is also thanks to the European influence that the concept of *procédure administrative*, understood not only as an instrument of guarantee, but also as a means of assuring legitimacy and the accountability of public authorities for their actions, has been progressively extended from the procedural realm and made its entry into substantive law. And, secondly, it is by virtue of these same processes that the reinforcement of the legality of administrative action has also seen the strengthening of the subjective dimension of the relations between the public administration and private individuals, particularly through growing recognition of the adversarial principle and the procedural rights of the parties concerned[92]. On the other hand, as has also been observed[93], in France the absence of any general law on administrative procedure until 2015 was possible and justified also in view of the increasing influence of European law in general and the European Charter of Fundamental Rights in particular. This, at least in part, enabled French administrative law to advance; similar progress was made elsewhere – in Italy for example – thanks to the adoption of general laws on administrative procedure.

---

[91] See European governance - A white paper. COM (2001) 428 of 12 October 2001, but also the recent White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025. COM(2017) 2025 of 1 March 2017.

[92] D. Custos, *The 2015 French code of administrative procedure: an assessment*, cit. at 2, 285-286.

[93] J.-B. Auby, *General Report*, cit. at 6, 27.

Therefore, independently of the need to achieve a renewed balance between written law and case-law, between new legislative provisions and general principles, the CRPA undoubtedly represents a step forward in terms of protection and guarantees for citizens, if only because of the new recognised areas of application in respect of the right of defence and above all public participation in regulatory procedures. Analogous provisions – it seems worth again highlighting – have been introduced also in Spain and Portugal. A novelty in comparison to which Article 13 of the Italian law and the formal prohibition it contains definitely appear outmoded.

In conclusion, the fact of having established, in France, the necessary logical and legal preconditions for the codification of administrative procedure, of being a vehicle, in the Member States, of a differentiated set of values, rules and principles of good administration, demonstrates to what degree European administrative law might serve as a stimulus (or at least a prod) for improving the treatment of citizens by administrative actors. After all, the fact that major crises have always generated transformations and even upheavals in institutions and in the rules by which they operate is something we know from common experience. Yet the changes that have taken place, particularly at this stage, require administrations to confront the challenges for change, which should be seen as an opportunity for improvement, especially if they have an impact on the relationship with citizens, with an eye to providing them with real guarantees.