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**The rationalisation of the *spoils system* taking
place at the Italian Constitutional Court**

**§1. Constitutional Court, 23 March 2007, no.103 – President Bile,
Author Quaranta;**

The constitutional illegitimacy of Art.3 comma 7 of Italian law no. 145 of 2002 must be declared for disagreement with Articles 97 and 98 of the Italian Constitution whereby it is stated that general managerial tasks «cease on the sixtieth day after the date when the current law was put into effect, giving, in that period, those same incumbents the exclusive task of regular administration». In fact, this regulation – which provides a legal mechanism (the so-called exceptional spoils system) for automatic termination, generalised by general managerial tasks which comes into effect sixty days after the moment the law in question became effective – violates, due to a lack of procedural guarantees, the specified constitutional principles and, in particular, the principle of continuation of the administrative task which is closely related to the effective performance of the task itself.

The revocation of the general tasks legitimately assigned to the managers can take place as a consequence of a determined managerial responsibility in the presence of specific requirements and at the outcome of strictly disciplined, guaranteed proceedings. It must therefore be considered necessary to guarantee that verbal disagreement proceedings are held between the parties, during which, on the one side, the administration expresses their motivations – related to previous methods of conducting relations with respect also to the objectives set by the new governing system – for not wishing to continue until the pre-determined contract ends; on the

other side, the manager is guaranteed the possibility of exerting the rights to a defence, presenting the results of their performance and organisational competencies carried out to reach the goals set by the political entity and identified specifically in the contract agreed upon at that time.

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§2. Constitutional Court, 23 March 2007, no.104 – President Bile, Author Cassese

Constitutional illegitimacy must be declared for the rules of Art. 71, commas 1, 3, and 4, letter a) of law no.9 of 2005 for the Region of Lazio, Italy and Art. 55, comma 4, of law no. 1 of 2004 for the Region of Lazio, Italy. This for the part in which it is stated that the general directors of the “Asl” (Azienda Sanitaria Locale – Local Health Corporation) are debarred from the job on the ninetieth day following the first seating of the regional council, subject to confirmation by the same means used for nomination; that this termination will take place after the first renewal, following the date when the statute became effective; that the duration of the contracts for the managing directors of the “Asl” are adapted by right to the termination date of the job. As per Art. 97 of the Italian Constitution, in order for the administration to be able to be impartial and effective it is required that the position of the general director be surrounded by guarantees; in particular, that the decision of the political body regarding the early termination of the assignment of the general director of the “Asl” respect the principles of correct proceedings.

Constitutional illegitimacy must be declared for Art. 96 of law no. 2 of 2002 for the Region of Sicily, for the part in which it is stated that the tasks mentioned under commas 5 and 6 of the same Article can be revoked within ninety days of the installation of the managing director in the structure where the same is appointed. With reference to Art. 97 of the Italian Constitution, it must be stressed that non-general managerial tasks, which are not assigned directly by the political board and therefore not related to it by the same degree of contiguity as the core tasks, can not depend on the discretionary political desire of the managing director, named by the new regional government, risk of violating the principle of reasonableness (with respect to the causes for the revocation of tasks according to Art. 10 comma 3 of the regional law of 15 March 2000, no. 10 named “Regulations on leadership and employment and work relations subject to the laws of the region of Sicily. The assignment of functions and tasks to local agencies. The institution of a single main office for production businesses. Regulations on the subject of civil protection. Regulations on the subject of retirement”, which are related to the negative outcome of the evaluation of the achievement of results and goals on the part of the director). This will also violate the principle of correct proceedings.

§3. Commentary

1. Almost four years following the first sentences passed by the Italian administrative law judges and the Italian ordinary courts, the Italian Constitutional Court has given a lengthy opinion on the particular disciplinary regime known as the “spoils system”, introduced, on a state level, by the well known “Legge Frattini” (Frattini Law)(law of 15 July 2002, no.145, entitled «*Disposizioni per il riordino della dirigenza statale e per favorire lo scambio di esperienze e l’interazione tra pubblico e privato*», i.e. Regulations for the reformation of state leadership and in favour of the exchange of experience and interaction between public and private) and, on a regional level, by a few laws which transformed the same system referring also to managerial relationships of relative pertinence (law of the Region of Sicily 26 March 2002, no.2, as well as the laws from the Lazio Region of 11 November 2004, no.1 and 17 February 2005 no.9)¹.

The importance of the intervention by the Italian Constitutional Court can be easily understood, above all when we recall that they had already confronted this subject, albeit in part, with reference to what is decreed in other regional laws (the laws of the Region of Calabria of 17 August 2005 no.13 and that of the Region of Abruzzo of 12 August 2005 no.27) and with the reason that, compared to what was said before, it seemed to justify a possible compatibility between the solutions and the institutes regulated in this way by constitutional order, particularly in relation to the passing on of the most contiguous managerial tasks to the area of competence of the political bodies and the consequent need that, in this case, the effective progress of the high administration could be suitably and legitimately guaranteed also by mechanisms for the automatic termination of managerial relationships inaugurated by executives who are no longer in charge².

¹ The complete text for the decree can be found at the web site www.giurcost.org, together with some short comments: JORIO (2007); CORSO, FARES (2007); DE GOTZEN (2007).

² See Italian Constitutional Court 16 June 2006, no.233, viewable at the website www.cortecostituzionale.it. With that sentence, among other things, some dispositions of the law from the Region of Calabria 3 June 2005 no.12 have been found to be constitutionally legitimate. This law allows for the automatic termination on the date of the proclamation of the nominated Regional Council Chairman, carried out during the nine months leading up to the date of the elections for the renewal of the regional political bodies, all characterised by *intuitus personae*, in the sense that they are based on personal evaluations in keeping with regional politics. According to the courts, concerning nominations passed on *intuitus personae* by the regional political entities, the regulation for which these stop when the new political bodies are installed is aimed at allowing

With the sentences in hand, however, the Court defines their position with the utmost care, embracing a more restrictive reading and so adopting an approach which is much closer to that already taken by most of the scholars and by the above mentioned jurisprudence of the administrative and ordinary courts, which, especially in relation to state regulations, tried to propose a reconstruction of the system *secundum Constitutionem*, suggesting that it be a *rationalising* application as it is connected to other transversal and fundamental principles of the system (such as the general principle of separation between politics and administration and the principle of correct administrative proceedings).

It is then evident, that, in comparison with the latest developments, the issue deserves a brief explanation, if not just to note, primarily, that although the regulations in matter have differed from time to time, the same reasons for which the judiciary in question decided to save the state “spoils system” have been given by the Constitutional Court to confirm unconstitutionality and to take from it equivalent conclusions concerning regulations expressed by corresponding regional laws (also in consideration of the peremptory tenor in which they were formulated).

2. It is opportune to remember, first and foremost, which are the constitutional confines of the problem faced by the Constitutional Court, a problem which, as noted, concerns the correct definition of the subject of managerial relations and, with that, the existing relations between the managerial and political body, having to, in other words, verify at what point a law which provides for an automatic form of termination and/or replacement of managerial tasks passed on by political bodies who are not longer in power is legitimate.

On this point, the potential dynamism of the constitutional principles is evident enough.

On the one hand it frequently evokes the central value as stated in Art. 97 of the Constitutional Law in question, in terms of subsistence of a general principle of separation between politics and administration, such as the expression of the principles of impartiality and effective performance, and so as highlighted by the contextual specifications concerning the

the latter to refill the positions, selecting (still on a personal basis) people suitable for guaranteeing their efficiency and effective performance in the tasks of the new governing council, to avoid this being conditioned by the nominations made in the final part of the previous legislature. To view a comment on this decree see BATTINI (2006).

responsibility of the public employee and the general rule of access to administrative positions through competition³.

On the other hand, however, we also notice that as decreed by Art. 95 of the Constitution, which makes it possible for the greatest governing body (Board of Ministers) to be the bearer of a specific administrative political orientation, of which it would be also politically responsible: in comparison with this, also the regulation for the subordination of the official to the service of the Nation (Art. 98, comma 1 of the Constitution.⁴) would be subject to being read as a potential subordination to the technical-administrative policies of the governing body democratically legitimised as responsible in front of the elected parliament, therefore the public, with a technical obligation of impartiality which, although unavoidable, must from time to time subside in the nearest or most contiguous managerial positions for the carrying out of typically political functions.

Such variations are by no means negligible.

While the first perspective represented the key element of a reformatory movement that saw its beginnings in the early nineties (with the approval of the fundamental law of 8 June 1990, no.142, «*Ordinamento delle autonomie locali*», i.e. Order of local autonomies⁵) and that was conclusively written in the report by the so called “Consolidated act on public employment” (legislative decree 30 March 2001, no. 165 «*Norme generali sull’ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*», i.e. General regulations for the order of work depending on public administration)⁶, the second approach has gathered more momentum

³ «The public offices are organised according to dispositions in the law so that they ensure effective performance and administrative impartiality (comma 1). In the ordering of the offices the areas of competency are determined as well as the assignment of tasks and responsibilities of the workers (comma 2). Positions in public administration are obtained through competition, except from those cases stipulated by law (comma 3)».

⁴ «Public employees are at the exclusive service of the nation».

⁵ Subsequently the regulation for local leadership has been modified many times. To this point the corrections made by both the so called “Bassanini” laws (in part of the law of 15 May 1997, no.127) and the so called “Vigneri” law (law of 3 August 1999, no.265) must be remembered. Finally, the regulation of law no.142/1990 was replaced by consolidated act local entities, Italian law. 18 August 2000, no.267.

⁶ Incidentally, the fundamental stages of the evolution of the regulation for state leadership can, as mentioned, be seen in the approval of Italian law 3 February 1993, no.29, which also started the procedure of privatisation of work relations dependent on public administration, and law of 31 March 1998, no.80, which completed these processes. We remember, in any case, that the first dispositions on the institution of state leadership appeared in the law of 30 June 1972, no.748; which was followed up by the law of 20 March 1975, no.70, on the so

in recent years, and for the noting of the law of 15 July 2002, no. 145, cited in agreement with the progressive change of the institutional system, as prompted by the most recent electoral reforms, and with the consequent virtual mutation of the general idea of administration, from an effective and efficient instrument of brief action to a vehicle of quick and prepared execution of laws promoted by the government and approved by parliament which granted this their trust on the basis of general public consensus.

The approval of law no. 145/2002, therefore, contributed to bringing the attention of the exponents back onto the limits which legislative discretionality can see in this difficult subject.

But what did such a law provide for exactly?

3. Art. 3 of the law in question states that: a) the regulation concerning the assignment of managerial tasks has been completely modified according to Art.19 of Italian law no.165/2001, however, with the expressive and general provision for the automatic termination of tasks, indicated in the third comma of the regulation, *«ninety days after the Government's vote of confidence»* (see. comma 1, letter. i)⁷; b) that the *«general managerial tasks»* and those *«of the managing director of public organisations supervised by the State where that figure is provided»* must cease automatically *«on the sixtieth day after the start of the contract»* of the same law, *«giving those same incumbents the task of ordinary administration»* (comma 7); c) that, *«for non-general managerial tasks»*, can *«proceed, within ninety days of the start of the present law, with the consignment of tasks in accordance with the regulations of the present article and the criteria for the rotation of the same as well as the related procedures set down in articles 13 and 35 of the national collective work contract for the period of four years 1998-2001 of the managing personnel of area 1»* (after that date, *«the tasks are considered to be confirmed, if no disposition has been adopted»* - comma 7 -)⁸.

Art.6, however, named *«Regulation regarding appointments at corporations, companies and agencies»*, provides for a particular

called "parastatal organisations" which instituted leadership also in public agencies different from the state but dependent on it.

⁷ This concerns the tasks of "general secretary to the ministers", and of "the management of structures articulated internally into general managerial offices" and finally of "equivalent level".

⁸ The regulation also states that "those executives who have not been reassigned their previous task will be given a task on the same salary level" or rather, when this "is not possible" (due to "lack of availability of suitable positions" or due to "the lack of specific professional qualities") a "training position will be given, maintaining the previous salary, lasting no longer than one year".

mechanism of revocation and/or confirmation and/or modification for specific elections made by the Government or its ministers during the months following the termination of their mandate.

The first comma states that the *«nominations of the top bodies and the components of the administrative board or of the associate bodies of public organisations, of businesses controlled or co-run by the State, of agencies or other nominated bodies, conferred by the Government or the ministers in the six months following the natural termination of the legislature, calculated by the starting date of the first meeting of the Chamber, or in the months following the early dissolution of both Chambers, can be confirmed, revoked, modified or renewed within six months of the Government vote of confidence»*⁹. Once this last date has passed, however, *«the tasks which haven't been covered are considered to be confirmed until their natural termination»*.

The second comma highlights, with a special and transitory law that the *«nominations of the present article conferred or however, put into operation over the last six months following the natural end of the thirteenth legislature, as well as those conferred or put into operation over the course of the fourteenth legislature until the date of the installation of the new Government, can be confirmed, revoked, modified, or renewed within six months of the starting date of the present law»*.

4. Given that, it is not difficult to work out the *ratio* or better the intention of the new regulation, as it is evident that its purpose is to give “new” Governments (e.g. Governments of new elections and of “fresh” parliamentary trust) the real possibility of creating around themselves, and in a generalised fashion, a compact and coherent team of “high administration” able to convert themselves into a suitable and effective instrument of rapid and immediate translators of directives of “new” political directions (e.g. of “fresh” programmatic definition and of the same recent electoral approval and parliamentary illustration).

The aim followed by the legislator is much clearer when it is noted that it is expressly betrayed by the particular desire to avoid the “old” Government (e.g. the “exiting” and “opposed” Government, in the logic of a predictable and perfectible rationale of alternation) from operating as a systematic design for the preventative “capturing” of summit locations, as

⁹ The last paragraph of the first comma states that these dispositions can also be applied to *“the representatives of the Government and the Ministers in every entity and at any level, as well as to members of boards, commissions and ministerial and inter-ministerial entities. Named by the Government or Ministers”*.

this is potentially strategic for the executive ability of the “new” majority systems: the time limits of Art. 6 furthermore, are almost designed based on the common knowledge that, usually and almost as a matter of tradition, in the last few days of legislature there are many attempts at “internal” radication of that which could be, following the elections, the political force of opposition; furthermore, both the regulation of Art.3 comma 7 and the specific and transitory formulation of the second comma of Art.6 express the desire (in any case disputable) for a *precise* and *orientated* activation of the new mechanism, in the *first* application of the regulation and in the sense of a recognisable historical desire of a certain Government.

5. In any case, when faced with this mechanism many relevant practical, as well as conceptual, dilemmas arise.

It is therefore sufficient to concentrate on Art.6 which represented the subject of the first jurisdictional controversies, above all those introduced before the administrative judge.

Firstly the scarce determination of the expressions used by the legislator (“*top bodies*”, “*other nominated bodies*”) makes the same area of application (both subjective and objective) of the power of revocation initially uncertain and dangerously all inclusive (or rather, *transversal*), thereby giving the exponent an operation of constant and recurring analogies, and with the not improbable risk of transformation of the same regulation from exceptional and chronologically defined to a regulation that is surreptitiously able to advise on the carrying out of the relations of governmental administration (and not only those)¹⁰.

Therefore the ways in which a similar power must or can be legitimately carried out have not been specified, with particular reference to applicability, or non-applicability, of the procedural guarantee set out in law no. 241/90, just like it doesn’t even seem sure which features to pass on to the provision which constitutes the final result, from the moment which if, on the one hand, we refer objectively to the most varied types (confirmation, revocation, modification or renewal), letting it therefore follow that that power, other than non-nominated, is also substantially atypical, on the other hand it states that once the period of almost *structural* caducity of the nomination in question has passed, the latter are substantially untouchable, as well confirmed «*until their natural termination*», with that giving rise to the fear that the same starting of a procedure of re-examination is essentially due to the passing (obviously negative) of a *test* of apparent faithfulness and

¹⁰ A particular problem, for example, valid for the identification of which are the “*companies controlled and co-run by the state*” and how the right to revocation is executed, within the companies: for these issues see ATELLI (2002).

that the whole procedure is, in its practice, fully and unquestionably discretionary.

Finally, however, it is noted that the explanation of the temporal space, in which the power of revocation can be correctly used, proposes some difficulties as, at least abstractly and especially with reference to what is stated in comma 2 of Art.6 it can easily ascertain the possibility of nominations which are however (and paradoxically) untouchable by that same power. If it is true that the timeframe in which the “old” nominations must be ranked to be legitimately revoked Art.6 coincides with the *«last six months preceding the natural end of the thirteenth legislature»* or with the first period of the fourteenth legislature, *«until the installation date of the new Government»*, we can safely conclude that nominations made between the end of the thirteenth legislature and the beginning of the fourteenth can be literally excluded from play (or rather between the short timeframe between the 8 and 30 May 2001) with a curious creation of an inexplicable “free zone”.

It should also not be forgotten that the legislator has not commented on the judiciary authority which should be able to understand the relative (and easily predictable) controversies, therefore determining a unique situation of immediate impasse for those who wish to receive a trial defence against provisional alleged arbitrariness. It is true that it will be sufficient to return to the regular criteria of allocation of jurisdiction, however, if it is clear that, based on Art. 63 of Italian law no. 165/2001 the ordinary court is responsible for all controversies relating to work relationships to the subjections of public administrations, including those concerning the consignment and revoking of managerial tasks and managerial responsibility; however, it is not said that the nomination concretely “revoking” is related to a task which can be defined as “managerial” nor is it even remotely said that, given the tendential all-inclusiveness of the verbal expressions used by the legislature of 2002, the tasks which are included among those temporarily “short-lived” according to Art.6 of law 145 are effectively attributable to dependant situations of work relations dependent in a technical sense.

Therefore, compared to revocations addressed to subjects who do not come under the categories similar to those of the regular public dependants (or vice versa included in the categories which were excluded from the so called “privatisation” of public employment) the subsistence of the administrative jurisdiction could be supposed without questioning on the apparently restricted limits of the supervisory body concretely operable as direct to checking the legitimacy of an action by the widely political-discretionary passages.

6. At this point it is interesting to note that the controversies surrounding the case in point in which the Government made use of the

privileges granted to them by Art.6 demonstrated the urgency to resolve these matters: a quick overview of the cases decided up to now is the more convincing additional evidence, and it is interesting to rediscount that above all the administrative judge lingered on the interpretational difficulties mentioned, with the explicit effort to rationalise and clear up the disciplinary order of the *quo*.

Particularly significant of the ways in which the above mentioned contentious matter and the consequent reconstructive options were carried out are two groups of sentences by the TAR del Lazio (Tribunale Amministrativo Regionale - Regional Administrative Courts)¹¹.

Those decisions stated that:

- the jurisdiction of the administrative judge can effectively exist if the provisions regarding relations not comparable to those of public employment and therefore not comparable to the revocation of a managerial task see Art. 63 of Italian law no. 165/2001 or, more general to an act of management of a relation of public employment; in the hypothesis in which the analysis leads to negative results, the administrative jurisdiction must become stronger¹²;

¹¹ The first made up by sentences nos. 3275-3278/2003 (Sec. II-ter), the second represented by sentence nos. 4441-4448/2003 (Sec. II). It is said, however, that there have been many rulings on art. 3 of law no.145/2002, this time however by the ordinary court, competent in strength on the strictly managerial nature of the involved cases. See, for example, The Court of Rome, ruling of 25 November 2002, no.41233, in *Giorn. dir. amm. (Giornale di diritto amministrativo – Journal of administrative law)*, 2003, 383 ss., and the Court of Rome, ruling of 3 February 2003, 4392, published in *Il Lavoro nelle pubbliche amministrazioni*, 2003, 59 ss., which confirmed the exceptional nature of the anulum regime regulated by comma 7, highlighting that given the termination in accordance with the law, it is not necessary to give any reason on the behalf of the public administration. on art. 3 see also the State constitution, Special commission for public employment of 29 July 2002, no.2552, in the *Journal of administrative law* 2002, 1167 ss. All rulings of the administrative judge cited in this footnote and in the following footnotes can be found on the website www.giustizia-amministrativa.it.

¹² It can be seen in fact that in sentence no.3276/03, the concrete case in question was in regard to the revocation of an extraordinary member of a public body: based on this the TAR of Lazio, once more calling upon the decree of the Civil Cassation., SS.UU., 13 February 1991, no.1521 (in the civil law book of maximsno.2/1991) believed to be in keeping with the case according to which the relation which connects the subject to the P.A. is not similar to a relationship of public employment, rather to an honorary service, which doesn't come into the scheme of subordinate work, or in that of autonomous work, or in that of carrying out of intellectual duties. In sentence no.4444/03, however, the jurisdiction of the administrative law has been confirmed demonstrating the irrelevance, in specific cases, of dual circumstances which the performance

- the exercising of the power of revocation as per Art.6 of law no. 145/2002 does not have value or (much less) a political “nature”: in fact it is about an act of “high administration”, fruit of a normal procedure that is easily verifiable with the regular solutions of administrative judgement (Art. 113 of the Constitution); the political basis of the choice of the Government using the acts set down in this office make up not only the reason for the exerting of this new power, which does not follow political interest, that is interest aside, but the interest of the public which is connected to the right (or rather the power) of the Government to create their own political programme using an impartial administrative device which respects the regulations of good procedure (as stated in sentence no.3276/03); however, the act of revocation is not a political act in a strict sense, as, while great in its discretion which characterises high administration, it is not free in its objectives.

- since we are talking about the real and true administrative act, this should be taken on with respect to the regular principles of law no.241/1990: the increased discretion of the act of high administration does not exclude the need for inquest and motivation, just as it does not exclude the need for communication of the starting of the relative procedural *path*; a procedure, on the other hand, is always necessary as the power of assignment to the Government or the single minister is a discretionary and authoritative power and is not a mere guarantee able power of an effect already proven in force of the already mentioned law (see sentence no.4448); the law, moreover, did not establish an automatic expiry date, which, vice versa would have required an explicit prevision (which does not make assimilation with the current laws in common secretaries feasible)¹³;

- it is therefore not possible to talk in a strict sense of “spoils system”, both as this concerns a specific and historically marketable experience in a structure different from ours, and also because the institution becomes foreign to our legal customs, and its application in any case would find obstacles in the constitutional principles which support the organisation of public administration (as can be seen in sentence no.3276/03, which

carried out by the plaintiff in the role of the Commission for the Evaluation of Environmental Impact must be at least equal to the minimum as prepared for the Executives of the State and that the relative pay is made equal to that of the general directors of level C” to be judged by the TAR, in fact these equalings have been carried out just to identify the scope of the rights and obligations of the interested party, while “surely” they can not be considered to the same standards as indexes to show the formation of a relationship of public employment of managerial qualification.

¹³ For a corresponding reading see also the opinion expressed by the State constitution, Sec. II, 5 November 2003, no.1743/2003.

mentions Articles 97 and 98 of the constitution): these principles, in fact, request that there is no relation of “staff dependency” between the top body of the machine and the political management body, nor that, between the same bodies, there is a reciprocal relationship of “autonomy”, but on the contrary that only a relationship of “working dependency” is legitimately recognisable, since it is the “job” of the administration to implement the address and the choice of the base of the political bodies; this task, moreover, must be carried out from a position of working independency, which includes the choice of the methods to use and the evaluation of their suitability for reaching the objectives in an impartial manner and with respect to the previously mentioned constitutional laws; the working dependency with the Government, therefore, can be translated into the continuity of administrative action, intended as constant correspondence of the same to with the Governments objectives, conducted from an independent and impartial position;

- just in the hypothesis that this last continuity can effectively be prejudged, so the exceptional and extraordinary power of revocation can be activated according to Art. 6 of law no.145/2002, and that as a detriment to the staff and subjective continuity, as however, this use is effectively necessary: it becomes effectively necessary when, following an evaluation (obviously balanced) of the personality of the subject nominated by the previous Government, it becomes reasonable to believe (mere suspicion is not enough) that his job of managing is not carried out legitimately and in full respect of the regulations for good procedure, which include legitimacy and the opportunism of choices in keeping with the political addresses of the Government in power; the subject of evaluation, therefore, is the “technical suitability” of the manager of providing loyal and positive collaboration in the meeting of the objectives of the executive power; for this, above all, the regulations of the attended procedure and inquest are essential; technical trust assumes personal acquaintance of the worker and his qualities, such as character, experience, professional experience, culture, balance and his abilities with regards to business relations and collaborations, from which we arrive at a reasonable expectation that his actions will meet the political objectives set by the Government.

7. Up to now the before mentioned direction has not found a definite confirmation as the first group of cited sentences of the Regional Administrative Tribunal of Lazio were confirmed by the Council of State only in a preventative seating¹⁴, then being interrupted by an abandonment

¹⁴ State constitution, VI, ord. 9 May 2003 no. 1798.

of the appeal, while with reference to the second group the non applicability of the regulation of law no.145/02 was presumed at the case in point¹⁵.

Now the Constitutional court, not pronouncing themselves much on Art. 6 or rather on comma 7 of Art.3 of the same law (no.145/2002; see above) and declaring unconstitutionality on this (sentence no.103/2007), confirms in any case the correctness of the solutions followed by the law in question, taking from it analogue conclusions on the plan of unconstitutionality of those regional laws, which standing strong on the exclusive competence must be recognised according to Art. 117, comma 4, of the Constitutional law (regional organisation is “residual” matter), having in the meantime tried to introduce into the area of high administration regional principles and institutions corresponding to those of the state (sentence no.104/2007).

The portrait of the principles expressed by the Italian Constitutional Court, is, none the less, articulated enough, since having the legitimacy of a widespread “spoils system”, they recognised a partial and limited effectiveness.

We seem to be able to conclude that, that those regulations considered to be constitutionally illegitimate (for the violation of Articles 97 and 98 of the constitution in the sense that to those attributed also by the above mentioned administrative law) are all those dispositions of law which intend to regulate the laws for the duration of “non top-level” managerial tasks (i.e. not immediately relating to the cover of top-level positions in a strict sense, or rather of *staff* positions and/or direct collaboration of trust with the political entity), that establish an immediate cessation in correspondence to the termination of the political organs from whom they came and/or the arising of the installation of new political bodies, and without similar consequences coming from an effective investigation in procedural debate of the technical suitability of the single manager.

Such a solution, in fact, would risk the regularisation of a regime of institutional insecurity of the public manager, a regime to be considered only contradictory with the principles of impartiality and good procedure, as expressed in the need to guarantee the efficient continuity of the administrative action. So, from this view point, it the regulations which assign task of excessively short duration would also be illegitimate.

For these managerial categories, the Constitutional Court (sentence no.104/2007) also underlined that:

¹⁵ State constitution, VI, 30 June 2004 no. 4997, which considered art.6 of law 145/2006 to not be applicable to the components of the commission for the evaluation of the environmental impact.

- the principle of impartiality is reflected immediately “in other constitutional regulations, such as art. 51 (all citizens can access public offices as a matter of equality according to requisitions written by law) and Art. 98 (public employees are a the exclusive service of the Nation) of the Constitution, with which they aim at protecting the public administration and its employees from political influences or, however, on the other hand, in relation to the complex phases concerning public employment (access to the office and carrying out of career)”;

- that which was already supported in the seating of the constituent Assembly must be confirmed concerning the need “to ensure the workers of some guarantees to remove them from influences coming from political parties”, to have “an administration which is objective of the public matter and not an administration of the parties”;

- that the administration “in the actuation of the political address of the majority, is tied (...) to act without distinction of the political parts, with the aim of fulfilling public objectives, set by the system”, at this prospective is “connected to the same constitutional structure of the administrative power in the picture of pluralist democracy”, in which “the public competition such as the mechanism of technical and neutral selection of the most able is still “the best method for the provision of entities called upon to carry out their functions in conditions of impartiality and at the exclusive service of the Nation”¹⁶;

- that also the regulations relating to private law of their working relationship have not abandoned the “needs for the following of general interest” and that with this in mind, the public workers enjoy specific protection “as for the verification that the tasks are assigned in consideration of, among other things, their behaviour and professional capabilities and that the early termination of the tasks will happen following the checking of their results”¹⁷;

¹⁶ Cases practically coincident can be found also in sentence no.103/2007.

¹⁷ In this sense also sentence no.103/2007, gave an explanation with extensible cases also for the general state managers (but “not apical”, with that they mean not tightly connected to the political organs): “the foreseen contractualisation of the leadership does not imply that the public administration has the possibility of freely withdrawing from the relationship itself (...). If it was like this, it is evident that, in fact, they would come to create a strong tie of trust between the parties, which does not allow the general managers to carry out their managerial tasks in an autonomous and impartial manner. From here the logical consequence for which also office relations, always on a structural plan, even if characterised by the short term nature of the assignment, must be surrounded by specific guarantees, which presuppose that this is regulated in such a way as to assure the tendential continuity of the administrative task and a clear working distinction between the tasks of political-administrative address and those of

- that, finally, among these same principles we refer to the discipline of correct procedure, in particular after the starting date for law no.7 of August 1990, no.241 (New regulations on the subject of administrative procedure and the right of access to administrative documents), as modified from law 11 of February 2005, no.15, for which the recipient of the act must be informed of the start of the procedure, have the possibility of intervening with their own defence, obtain a well reasoned provision, and go to a judge”.

Vice versa, all the dispositions of law which establish means for exceptional automatic cessation with reference to the “apical” managerial tasks (i.e. those tasks which, independently from their name, are tightly connected to the execution of functions of support of trust of the actions of the political body) must be considered legitimate.

With reference to similar cases in point, in fact, the need to guarantee a good procedure and the efficiency of the functions of political direction must prevail, to which such managers would make up part to the political entities.

Each assimilation between these managers and the “non top” managers would violate the principle of rationality.

But from the submission of the Court there should be *de jure condendo*, also later cues, able to further contain the applicability of the “spoils system” and to steer it towards the primary regulation on the behalf of the State and the regions:

- the apical character of the managerial positions (so then to allow automatic termination of the tasks and/or direct revocation of the same on the part of the new political leaders) would only be retained for those tasks characterised by extreme organisational closeness with the political entity, or rather by the necessity to supply suitable managerial figures for the direct support of activities of political address;

- the technical nature of the task would constitute however an indication of the absence of fiduciary aspects.

- with respect to these limits there is always marginal discretion, both for the state legislature and for the regional legislature, to come up with

management. This is with the aim of allowing the general manager to fulfil his duties – in the course of and within the limits of the predetermined duration of the contract – in conformance with the principles of impartiality and effective performance of administrative tasks (art.97 of the Constitution). In this respect, it is however, indispensable (...), that there are suitable procedural guarantees in the evaluation of results and the observation of the ministerial directives aimed at the taking on of an eventual provision of revocation of the task for assured managerial responsibility”.

instruments and institutes able to make the actions of political bodies more effective and that also via the provision of more flexible managerial figures.

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