

THE PUBLIC ADMINISTRATION'S LIABILITY FOR ILLEGITIMATE EXERCISE OF POWER.

The refund of illegitimate interest, proper of public law, would not exist in Italian legal system until the Supreme Court's judgement, 22nd July 1999, n. 500. This situation was due to two considerations: the procedural nature of the illegitimate interest and the case law established over the liability subject: according to an unanimous case law, article 2043 c.c. applies only just to an injury of subjective rights, with the exception of illegitimate interests.

With the judgement n. 500/99, instead, the Supreme Court changes its stance: it acknowledges the substantial nature of the illegitimate interest, enforcing that interpretation of article 2043 c.c. which applies the provision under examination apart from a subjective right's injury and applies it to all material detriments, provided it is joined to an injury of an interest protected by the legal system. The 205/2000 law confirms the new tendency of the Supreme Court.

The new law does not provides anything, though, about the juridical qualification of the liability adopted. Therefore, it is possible to mention different theories in this respect:

- 1) thesis of an extra-contractual liability: in accordance with the stance adopted by the judgement n. 500/99, the public administration's liability for the damages stemming from the injury of an illegitimate interest is a liability traceable in the art. 2043 c.c. Criticism: article 2043 c.c., describing an offence category typical of those occasional contacts happened among foreigners, does not fit well an administrative relation that starts among the parties before the fact that produces the damage.
- 2) Thesis of a contractual and contact liability: the P.A.'s liability stems not so much from the injury of an illegitimate interest but from the default of duties whose the P.A. is entitled in the proceedings. In front of those obligations, the individual claim a credit which, if not fulfilled, causes a contractual liability. Criticism: the incompatibility between a situation of power and one of obligation don't allow to depict real obligations on the p.a.
- 3) Thesis of pre-contractual liability: the structural and functional analogy between administrative proceedings and pre-contractual negotiations would allow to apply the liability's system, depicted in the articles 1337-1338, also to the PA's injury c.c. Criticism: the interest protected within the negotiations (the negative interest in not being involved in useless negotiations) is different from the illegitimate interest (the positive interest in the attainment of a life good).
- 4) Thesis of a special liability: the p.a.'s liability is an objective liability founded on articles 7, l. TAR and 35, d.lgs. 80/98. Criticism: such provisions have only a procedural value, not substantial.

From my point of view, the P.A.'s liability constitutes a kind of contractual liability for a default of the administrative power. In spite of the notion, the administrative power is a duty akin to an obligation as for the structure; unlike this, the administrative power has not at the opposite a situation of credit, but an illegitimate interest. Like the relationship credit-debt, also the power (duty) and illegitimate interest are related by a considerable judicial relation. Agreeing with a broad interpretation of the contractual liability as a model enforceable not only for the default of an obligation in a narrow sense, but also for all remaining breaches of a considerable judicial relation, it turns out that the PA's liability for illegitimate use of the power has also to be deemed according to the rules of the contractual liability.