Abstract

The fickleness of the concept of power and the general clause on the administrative competence in the Code of the Administrative Proceedings

by Massimiano Sciascia The waving nature of the concept of power drives to outline such an evolving line to the point to seek for new keystones in the dialogical structure, at intervals conflictual, between the exertion of the power and the subjective situations conflicting with it. If power is any kind of energy able to move the legal positions of subjects of the system, balancing between authority and freedom, the utmost expression of the time of authority is the adoption of administrative measures which take care of the public interest. It follows that the connection with the power is the distinguishing mark of the administrative competence according to par. 7 a.p.c. and also the knowledge of the rights is in the general clause related to the connection with the exertion or the non-exertion of the power.

Abstract

The participation of Universities and private law legal Entities in the perspective of the Third Mission

by Raffaele Picaro

Considered on the whole as the complex of activities through which Universities and Research Authorities directly relate to society, the Third Mission presents the question of the limits of private right legal instruments. This theme is scanned by current law trends, recently merged into the T.U.S.P., destined to the rationalization of the constellation of public participation Bodies. Against the background we may easily outline the fear that the establishment of the activities of the Third Mission may compromise the original function of public University which, as an intermediate social entity, represents altogether a guarantee of pluralism and of tutelage of the person, with the correlative individualism implementation, but also the protection of the freedom that our Constitution is to ensure to science and education

Abstract

Unlawful Administrative Acts and State's Liability

by Carlos Botassi

This paper describes the means by which Argentina's law provides compensations for damages caused by unlawful administrative decisions. It focuses on the need for recourse to administrative and judicial actions aimed to the annulment of the act as a condition to claim damages caused by its adoption. Due to its short limitation period, validity claim ends up depriving compensation remedies of any practical utility, and exposes the principles of the rule of law to a serious threat.

Abstract

«Regulatory» private law, conformation of the negotiating autonomy and control over the heteronomous rules issued by independent authorities

by Marco Angelone

The «regulatory» private law issued by independent authorities is studded with heteronomous rules that pervasively affect all the expressions of the negotiating autonomy, coming more and more often to influence even the organizational structure of the enterprises. The phenomenon of conformation under consideration also finds a very strong impulse in the activity of the European Supervisory Authorities and, more generally, in the expansion of «soft law» and «moral suasion» actions carried out by (national and supranational) regulatory bodies. Hence the need to identify a barrier to the «independent» regulation of the markets, which calls the interpreter to derive from the entire legal system the parameters on which to base the control over the correct use of the regulatory powers and over the outcomes of the conformation involving the negotiation autonomy, while ensuring the right to a full and effective judicial review.

Abstract

The democratization of science and technology-based decisions. Reflections on the public debate

by Viviana Molaschi

This article analyzes the new frontiers of public participation in the field of major works, contextualizing this issue in the complex and increasingly conflictual relationship between scientific and technological evolution and democracy. After outlining the emerging role of "deliberative arenas" as instruments for granting public discussion on science and technology-based public decisions, it examines the recent

introduction into the Italian legal system of the public debate, aimed at democratizing siting procedures of large-scale projects and preventing “proximity conflicts”. The paper compares it with the French débat public, underlining some differences: in particular, the Italian legislator has made some regulatory choices that weaken the role of public participation in the decision-making process, which is still characterized by a technocratic vision.

Abstract

The effectiveness of public services and the protection of fundamental rights in the european perspective

by Giuliano Taglianetti

The essay analyses the close relationship existing between the theme of effectiveness of public services and that of protection of the basic rights. Effectiveness is an essential characteristic of public services in function of concrete realization of constitutional projects of solidarity and of substantial equality. At the same time, it represents the essential presupposition to realize the reality of the rights of freedom. The consciousness of the close bond between public services and basic rights is very present in the European right. In this system, the perspective of the effectiveness of public services, in function of social and territorial cohesion of the Union and, so, of the protection of basic rights, has assumed a main role. In the European vision, the general interest in distributing public utilities able to satisfy the basic needs of citizens can’t be reached only through the application of competitive rules, but it imposes the recognition and the increase of the decision-making autonomy of the member States and of the local authorities. The last, in fact, in virtue of the principle of subsidiarity, sanctioned by the Treaty on the European Union, are intended as the first guarantors of the basic rights and the allocation of public utilities able to satisfy these rights. The autonomy recognized in favour of the local authorities in the acceptance of the public utilities doesn’t mean, however, an absolute and unconditional liberty, an end in itself, but it is “functional” to the attainment of real aims that the same local authorities, as interpreters of needs of collectivities that organize themselves in them, think necessary to assure. Consequently, the aim to assure the effectiveness of the public utilities is, at the same time, the justification of the autonomy recognized to the local authorities in this sector, but also the limit of their action.

Abstract

Critics and perspectives on the generalised access to administrative documents

by Anna Del Prete

The legislator focus on the “access to administrative documents” has grown in recent years. The legislative decree n. 33/2013 introduced new requirements for web based publications of documents, and informations as well as new form of civic access to administrative documents, inspired to the transparency principles. However the Italian rules for publications differ from the American FOIA: it is not possible to configure an unconditional obligation for publication of all data held by public authorities, but only for those documents contemplated in the law. Moreover, this access is not granted autonomously, but only after the non-fulfilment of a public administration. This essay concerns the introduction into the Italian system of a new instrument of administrative transparency: the so called “generalised access to administrative documents”. The d.lgs. n. 97/2016 acts to overcome two limits of civil access. As a matter of fact, with the generalised access, everyone can access the data and documents held by the public administrations in addition to the public once. Nevertheless, this decree introduces others limits on top of the article 5 bis, which according to the State Council, are more rigorous than those of article 24, law n. 241/1990. The A.N.A.C. has been asked to intervene so to decrease the contrasts, but it bounded itself to list the various limitations, distinguishing among absolute and relative exceptions. Many critics can be raised regarding this new access policy: the excessive number of instances, the high discretionality of public administrations, the difficult balance between transparency and privacy. On the specific issue we are awaiting the Constitutional Court pronunciation, whose importance is even more evident given the entry in power of the European regulation on the personal data protection (reg. n. 679/2016)

Abstract

The public debate on large infrastructures: which role for democratic participation?

by Alessandro Di Martino

The attention of the legislator to the role of democratic participation in strategic infrastructures has been confirmed by the introduction of public debate into the public contracts Code. In this framework, we inquired whether the introduction of this institute overcame the gaps arising from the legislators' choice to operate in an inconsistent way on the participation of local communities for the realization of huge activities. After the analysis of complex administrative decisions characteristics and the necessity to ensure an effective level of participatory safeguards, we focused on citizens' participation in the field of environmental and urban planning. Pursuant to the recent reform of the environmental code (introduced by Legislative Decree n. 104/2017), in fact, democratic participation has not been effectively guaranteed, leading the administration to think about whether or not to involve the citizens. The study concerns the analysis of public debate, both with reference to the article 22 of the public contracts Code, and to the draft decree - not yet into force - that must dictate the procedural rules on the use of the institute. While on the one hand public debate would seem to mark a turning point with reference to the effectiveness of democratic participation, since the activation of the procedure still allows to have a "zero option", on the other hand several limits deriving from the legislation still de jure condendo have been highlighted. The decree draft reveals problematic issues regarding the independence and the neutral nature of the subjective categories that will govern the public consultation process. Referring to citizens participation, instead, it would seem not fully guaranteed for two reasons: firstly, public debate activation restored the administration's discretionality, which will only have to reach very high standards in technical and economic. A further perplexity regards the guarantee of participation, since the forecast of the consultation outcome will be discussed at the conference of services, being this conference a board of administrations to which only certain categories of people in different qualifications can participate.

Abstract

Aspects of objective jurisdiction in the Spanish administrative procedural system

by Domenico Marrello

The recent reforms of the Spanish System of Administrative Justice has been made great progress towards the overcoming of the traditional objective nature of its jurisdiction. Despite the quickly reform process in renewing the system in a strong subjective and individual perspective and the doctrine endorsement, the current implementation of Jurisdicción Contencioso-administrativa seems to be suffering of some ancient practical aspects of the previously system.

Abstract

The atypical protection in the administrative judicial process between the principle of effectiveness, principle of fairness and proportionality principle: meta-jurisprudence essay

by Alberto Zito

The essay deals with the application of the principles of effectiveness, equity and proportionality in the decisions of the administrative judge. To this end, the work examines some innovative decisions taken by Regional Administrative Tribunals and by the Council of State, in which the judge has used the aforementioned principles in order to guarantee effective protection for the applicant. The study also highlights the impact these decisions can have on the main concepts of administrative system.

Abstract

The safeguard function carried out by the head of the financial service of the local authorities within the theory of the administrative organization: reconstructive issues of the topic

by Salvatore Dettori

The essay analyses the function attributed to the head of the financial service of local authorities concerning the safeguarding of the balance of local finance. First of all, the work shows that the aforementioned function aims to protect a general public interest of constitutional and European significance. In light of this, the essay deals with the aforementioned topic in the perspective of the administrative organization and the public office. The study reveals the possibility that the exercise of the aforementioned function includes the power of the public official to take legal action against the economic and financial planning of the local administration.