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# Recent Trends in Italian Public Administration

Giorgio Pastori

*Abstract:* Although the reality of an administration continues to provoke the public's harsh criticism and widespread discontent, at least from the beginning of the 1990s, a considerable quantity of reforming legislation and organisational measures has sought to create a new and better relationship between the public administration, society and citizens. The article argues that, although the Constitution of 1948 was left unchanged in these respects, these reforms, considered as a whole, introduce the new vision of administration. The first of such reforms was the introduction of a law laying down general principles of administrative action (Law no. 241 of 1990). Together with other legislative measures, this deeply affected the relationships between citizens and public administrations. Second, both the constitutional framework and administrative organization have been modified, the latter throughout the 1990's and the former in 2001. More recently, as a third step, several measures were introduced in order to improve judicial protection of individual and collective interests. After considering all these trends, the article observes, however, that, while a transformation occurred, it still has not influenced the spirit and behaviour of the people working in administration. A change in the ethic of the administration is thus needed.

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## I. *In Search of an Administration that serves Society*

If one examines current trends in Italian public administration and its related law, it is fairly evident that Parliament and the Government have been trying for some time to create a public administration capable of better meeting the general public's needs and expectations.

On the one hand, there is the reality of an administration that continues to provoke the public's harsh criticism and widespread discontent. On the other, at least from the beginning of the 1990s, a considerable quantity of reforming legislation and organisational measures (some very recent) has had the aim (despite manifest inconsistencies and second thoughts) of creating a new and better relationship between the public administration, society and citizens.

Although the reforms have had an impact on all the main areas of administration (the organisation of administrative structures, the procedural rules governing administrative activities and the forms of judicial protection available *vis à vis* the administration), they have a common source of inspiration and are interdependent.

It would be correct to say that underlying all the main reforms is the intention to implement a vision of public administration differing from the one that continued to dominate, even after the new Republican Constitution came into force in 1948. This new vision is, in fact, linked both to what the Constitution had itself prefigured and to requirements subsequently resulting from the national legal order's ever increasing integration with that of the European Community.

Briefly revisiting the main features of this vision, it should first be remembered that, within the new framework of political and social democracy it established, the 1948 Constitution identified novel objectives of personal and collective promotion and development and placed them at the heart of the relationship between public institutions and citizens. At the same time, it defined such objectives both as tasks to be shared by all public institutions and as the object of as many individual rights. For example, health protection is defined both as a collective interest and a right of the individual (article 32 of the Constitution).

At the same time and for the first time in Italy's constitutional history, the Constitution expressly considered public administration as a separate function (although it did so in the context of the rules dedicated to the Republic's Government). Article 97(1) provides that "public offices shall be organised according to the provisions of law in such a way as to ensure the good functioning and impartiality of administration".

In this way, the Constitution brought administration into relief as an activity to be organised and carried out separately, according to basic principles that in themselves govern and must govern every administrative activity, whether public or private (i.e. good functioning - a condensation of the requirements of effectiveness, efficiency and economy of action - and impartiality). This so that the objectives of general interest and the rights contemplated by the Constitution might be achieved.

The 1948 Constitution therefore sets public administration in a context of relationships between government institutions and society that differs radically from the one existing under the previous constitutional framework. Formerly, administration had been conceived as the manifestation of executive power and state authority. It was held to operate according to the legality principle but for the purposes of providing for public interests that were the preserve of government institutions and in a relationship that saw such interests as distinct from and contrasting with citizens' freedoms.

Under the 1948 Constitution, however, the public administration fits into a context of relationships that fosters the integration and convergence of public institutions, citizens and society. The meeting point may be found in the objectives of personal and social promotion and development established by the Constitution. Administration is conceived, in particular, as the instrument guaranteeing effective enjoyment by everyone of the civil, social and economic freedoms recognised by the Constitution and by the legislation enacted under it.

Thus administration is no longer pre-eminently conceived as the manifestation of authority, even if it involves the exercise of authoritative powers. Indeed, many of the Constitution's rules take care to reassert and reinforce the principle of legality, not only as the basis for administrative powers but also as the means of circumscribing them. Even when the administration avails itself of authoritative powers, however, it is conceived by the constitutional framework first and foremost as an activity that has the function of achieving specific goals. In such sense, it is significant that the above-cited article 97 refers to good functioning or the achievement of goals even before it refers to impartiality.

Likewise, the first of the general reform laws to introduce the new vision of administration (Law no. 241 of 1990), states at the beginning of section 1 that "administrative activity shall pursue the objectives established by law". It then immediately takes care to list economy of action and effectiveness amongst the criteria governing such activity, followed by impartiality, publicity and transparency. The Constitutional Court has, in its turn, described such aims as "goals that are objectified in legislation". Precisely for this reason, they cannot be considered the preserve of government institutions but are, rather, attributable both to the general public as a whole and to individual citizens (see the Constitutional Court's judgement no. 453 of 1990).

Such fact means also that administration is public not so much because it originates from or depends on government institutions as because it is aimed or directed at tasks and goals that are public insofar as they concern society or the general public. Public administration is defined as such not because of its provenance from one or other government institution but because of the objectives of general interest it is structured to achieve, although there are clearly various ways in which it may do so. Administration may take the form of regulation (whether or not authoritative) or of providing services, for example. It cannot be equated with government but has, rather, the function of serving society or (if one may summarize it so) of social organization.

Thus the first distinctive and determining feature of this new vision may be identified as the consideration of administration as a separate function (i.e. a function that is autonomous and distinct from the political function of government). Such function is mainly connoted with the duty to pursue pre-established goals and is governed, in the first place, by certain principles that it shares with every other administration and that may be summarised as good functioning and impartiality.

Administration therefore comes to be characterised as an activity directed at pursuing given goals rather than an activity distinguished by its provenance from government institutions and operative in its exercise of specific powers of command. Such a characterisation corresponds not only with an emphasis on administration's finalistic profile but also with a consideration of the goals as objective aims no longer ascribed to government institutions but to the legal order and social organisation. In short, it is what is meant nowadays when people are wont to say that a "goal-oriented administration" needs to be achieved. Such expression conveys the sense of the abovementioned change in perspective only too clearly.

This is, on closer inspection, the same vision of administration as the one drawn from the Community's legal order. By virtue of the reference provided for by the same Law no. 241 (as amended in

2005), the principles governing that legal order now apply integrally to Italy's national administrative activities. The Community's legal order sees administration as an activity essentially characterised by the tasks and objectives it is structured to pursue. It is said that the European Community is a "community founded on the rule of law". Whilst encompassing a plurality of States or government institutions, it can be identified (as the Founding Treaty and other subsequent Community rules show) by common tasks and objectives corresponding not only to new social and economic structures but also to rights enjoyed by individuals and groups of persons that must be recognised and effectively exercised throughout the Community space.

Naturally enough, at a Community level, this has resulted in administration being considered primarily in terms of the goals and tasks to be performed rather than the persons in charge of it. Thus the Community's administration is no longer the expression of a State or one government institution rather than another. It is defined as "Community administration" by virtue of the tasks that the Community's legal order gradually identifies and its actions are subject to common rules that the said legal order identifies independently of the institutions provided for by the various national legal orders.

In the light of such a conception of administration, provenance from public institutions or the lack of it loses its preliminary and characterising significance. Similarly, the type of instrument employed loses its decisive importance, whether such instruments be authoritative powers or not. What comes into prominence, instead, is the administration's functioning in accordance with the common principles and rules that govern it according to its distinctive binding goal and the fact that it has social organisation as its purpose.

Now, if this is so, then administrative law is also changing. It can no longer be defined as the law governing "administration-as-authority". The focal point becomes administrative action as a function that matches every organised social reality at a private or public level and at a local, national, Community, international or transnational level. Administrative law is freed from the particularism of national legal orders and tends to identify with a unitary body of principles and rules that administrations have in common and apply beyond national confines.

On the other hand, it is often said nowadays that we are moving in the direction of a global administrative law or "natural administrative law". This means that a convergence is occurring beyond national boundaries in relation to rules that regard the administrative function as cooperative action towards a given goal and that are applicable whether or not they have been provided for by any particular rule of positive law.

## **II. *The Main Reform Trends at an Institutional and Organisational Level***

The main implications of this vision of an administration at the service of society had already been outlined by the Constitution of 1948. They are now being confirmed and sometimes developed further by the most recent reform trends.

If one considers the institutional and organizational profiles, it must firstly be recalled how the Constitution opposed the centralised nature of the previous politico-administrative framework. Its original text had already provided for the creation of a pluralistic framework for government institutions: no longer

just the State but also Regions, Provinces and Municipalities alongside it. In this respect, the Constitutional

draftsmen then provided for a wide-ranging devolution of administrative functions from the State to the newly founded Regions and Local Authorities (articles 5, 114 and 128).

More recently, the constitutional reform of 2001 (anticipated by reforms enacted by Parliament during the period 1997-98) has further reinforced the system's autonomistic structure. It has established that the division of administrative functions between local, regional and central institutions must be provided for by national and regional legislation (each on the basis of its own areas of competence regarding subject-matters) according to the principle of "vertical" or "federal" subsidiarity and the related principles of appropriateness and differentiation. In other words, it provided that the distribution of administrative functions must start from the basic institutions (i.e. the Municipalities) and work upwards (i.e. "bottom-up"), according to the nature and scale of the functions themselves, whilst attributing different functions to institutions of the same kind, where appropriate (article 118 of the Constitution).

In its affirmation of such principles, the Constitution's new article 118 requires administrative activity, insofar as it is a function serving social organisation, to be primarily attributed to the institutions closest to citizens (or, at least, the relevant social and economic realities), where this is compatible with the requirement that the individual functions be performed effectively and efficiently.

Furthermore, article 118 adopts the requirement that administrative functions be attributed to the institutions best suited to the goal. Thus it overturns the traditional perspective: no longer from the public institution to the function but, rather, from the nature and scale of the function to the institution.

The requirement that administrative functions be distributed according to their nature and scale has been confirmed quite specifically by constitutional case law, from the well-known Judgement no. 303 of 2003 onwards. The Constitutional Court has highlighted how administrative functions can be divided between the State and the Regions according to the principle of subsidiarity and the other principles referred to above, without having regard to the division of legislative functions. Indeed, administrative functions draw the corresponding legislative functions to themselves (by way of the so-called "pull toward subsidiarity" [*"chiamata in sussidiarietà"*]). In this way, the Court has added an element of flexibility and mobility to the originally rigid division of legislative competences between the State and the Regions decreed by article 117. It has transformed the subsidiarity principle into a principle that allows the whole legislative and administrative system to be adapted to the administration's concrete requirements regarding the objectives and results to be achieved at the social and economic level.

A division of functions that is calibrated to concrete social and economic requirements implies, lastly, that each institution or administrative centre must be allocated a combination of functions capable of guaranteeing it a unitary responsibility for regulating the relevant activity, providing the service or achieving the result provided for (see section 4 of Law no. 59/1997, in this sense). In other words, there must be no molecular or subdivided distribution of competences but, rather, an administrative system that, from the bottom to the top, corresponds to a network of centres that are directly responsible towards their respective communities.

It should nevertheless be remembered that Italy is still waiting for Parliament and the Government fully to implement the scheme reordering the administrative system contemplated by article 118. The parent Act providing for so-called "fiscal federalism" (Law no. 42/2009) has recently been approved, however. This dictates that the criteria governing the distribution of resources must be established before those governing the division of functions. It should nevertheless be emphasised that, at the financial level, the legislation establishes the basic principle that each institution must be autonomously responsible for

managing its own functions and resources in relation to pre-established objectives and benchmarks.

Secondly, the reform of article 118(4) effected in 2001 expressly stated the principle of “horizontal” or “social” subsidiarity, as well. According to this principle, the conduct of activities of general interest by citizens (as individuals and as members of associations) must be promoted when citizens can themselves conduct such activities in an appropriate manner.

Article 118 of the Constitution adopts the idea (already present in article 2 of the Constitution’s original text) that it is not just public institutions that can pursue goals significantly defined (as in the Community’s legal order) as “of general interest”. Citizens themselves, both as individuals and as members of associations, also (and primarily) have the right to do so, in the exercise of those freedoms that the Constitutional Court calls “social freedoms” (see Judgement no. 300 of 2003). That is to say, whilst exercising their right to act through various, free and autonomous initiatives that have solidarity or social usefulness as their purpose.

Thus, under article 118(4) of the Constitution, public administration (in its objective connotation as an activity carried out for purposes of general interest) may also be carried out by private parties nowadays. From the Constitution’s point of view, administration must not only be close to the people and the social realities it is providing for, but it must also be carried out by society’s own structures when possible. Under article 118(4), citizens must be encouraged to play their part in the conduct of administrative activities i.e. the pursuit of objectives of general interest. The provision opens up the perspective of an administration spread through society. The rules commonly governing administrative activity nevertheless apply, even though the party in charge of it is a private party, as today generally provided for by the above-cited Law no. 241 of 1990.

Ordinary legislation now offers many examples of such a way of understanding and making the most of the contribution that private parties, especially “non-profit” ones, can make to the pursuit of objectives of general interest. In the past, the government and society were traditionally seen as opposed. The private sphere was considered eminently bent on protecting individual interests and personal economic advantages. It is well known that there are, however, other civil and cultural traditions inspired by the idea of social freedom and, therefore, of freedom-as-responsibility in the exercise of which private parties shoulder the burden of goals of general interest.

Thirdly and as is evident from the already-cited article 97(1), in giving priority to the principles of good functioning and impartiality, the Constitution was establishing the main lines along which to govern the organisation of administrative structures and the conduct of administrative activity, no matter which government institution was entrusted with it.

As far as the public structures in charge of administration are concerned, the Constitution accepts the basic need for them to be regulated according to the administrative function’s intrinsic requirements. In particular, article 97(2) provides that “the regulations of the offices shall lay down the areas of competence, the duties and the responsibilities of the officials”.

In contrast to the traditional ministerial model (according to which administrative units were directly subordinate to ministers or the corresponding organs in regional and local government), the Constitution required the administration to be organised in units enjoying their own competences and autonomously responsible for exercising them, albeit in observance of the policy-setting and monitoring prerogatives enjoyed by the political organs of government.

Whereas the political function is an expression of the majority and involves making free and innovative choices regarding the objectives and interests to be pursued within the Constitution’s framework,

administration has the task of executing the political choices by organising or seeing to the realisation of the goals such choices have identified. By virtue of its intrinsic connotation as an activity geared to pre-established goals or identified by its binding goal, administration is governed by principles differing from those governing the political function. As already stated, good functioning means the capacity to achieve the given goals in the simplest, fastest and most economic manner, whilst impartiality means the duty not to pursue goals other than those defined by law or by other policy-setting instruments.

Although such an organisational distinction between administration and government was introduced by the 1948 Constitution, it remained for decades merely a statement of principle, despite efforts to implement it (in a very reductive manner) during the early 1970s. Only with the advent of Law no. 142 of 1990 (regarding Local Government) and, then more generally, with that of Legislative Decree no. 29 of 1993, were the roles and competences enjoyed by the political structures of government (vested with the tasks of politico-administrative policy-setting and monitoring) distinguished from those enjoyed by the technical/professional structures (entrusted with the tasks of management).

The distinction between the roles and areas of competence attributed to organs of government and those attributed to managerial organs is now regulated by Consolidation Act no. 165/2001. This contains rules applying to all levels of public administration. Such distinction has now also been hallowed by the Constitutional Court as a constitutional principle deriving from the already-cited article 97 (see Judgement nos. 103 and 104 of 2007).

By virtue of such fact, at all levels of administration, the offices run by officials belonging to the special “manager” category must be identified. The managers in charge of such offices not only enjoy decision-making powers affecting the public but also the internal organisational competences needed to achieve the objectives and results established by government organs, the achievement of which they are responsible for.

Even after its general enunciation in the ordinary legislation, the organisational distinction between roles and competences pertaining to the political moment of government and those pertaining to the technical/managerial moment has often been contradicted by both national and regional legislation aspiring to restore the old organisational model and remove such a distinction. The Constitutional Court’s pronouncements mentioned above and the very recent Law no. 15 of 2009 nevertheless appear to be helping to consolidate the distinction-drawing organizational model today.

In particular, the new enabling Act no. 15 of 2009 provides for the re-organisation of state administrative structures. It has also specified the ways in which the overall planning/realisation/monitoring cycle for objectives and results is to be realised (this for the purposes of governing both how the administration functions and the relationship between political organs and managers). It should also be noted that the new law is intended not only to guarantee greater managerial autonomy and responsibility but also to foster transparency outside the administration with regard to the results achieved. In particular, section 4(g) of the Act provides that “full disclosure [both] of the data regarding the services provided by the public administration” and of the related assessments must be guaranteed. In this respect, Law no. 15 seems to confirm that transformations in the administration’s organisation and transformations in the position of citizens *vis-à-vis* the same are interdependent.

Nevertheless, the need to guarantee managerial autonomy and responsibility for matters concerning personnel management (the ways in which managerial appointments are conferred, the length of appointments and performance evaluations, in particular) has not yet been fully met. Today, despite some

guarantees directed at ensuring its impartiality, the management of such personnel remains to a great extent under the control of the political leadership or is, in any event, heavily conditioned by it.

Of itself, the political choice of “fiduciary managers” can only be justified for a limited number of people working directly with government leaders. Should the desire be, on the other hand, to achieve full autonomy both for the managers and for their management as personnel, then bodies and mechanisms similar to those envisaged for the judiciary will also be necessary.

That does not mean, however, that administration must be independent of the political institutions. It means, rather, that there is call for a management of the managers that is directed as far as possible at making the most of professional skills and commitment. This without prejudice to the policy-setting and monitoring competences enjoyed by government bodies, however, since it is they who are ultimately responsible for administration *vis-à-vis* the general public or electorate, by virtue of the democracy principle.

It should also be remembered that, on the basis of the same principles inferable from article 97, it has been possible to establish independent regulatory authorities in various socio-economic fields during the last two decades. By virtue of the functions they perform, these enjoy special forms of independence from the Government and political power in general. There is nevertheless a need for linkage and co-ordination with the representative institutions capable of bringing even the independent branches of administration back into the overall system that implements the democracy principle.

### **III. *Reform Trends affecting Administrative Activity and Relations with Citizens***

It is the change of perspective both in the law governing administrative activity and in relations with citizens and affected parties that constitutes the core trend in the reforms currently in progress, however.

The institutional and organisational transformations achieved or under way are, in a certain sense, instrumental. Of themselves and with the exception of the social subsidiarity principle, they are not enough to implement the new perspective of an administration structured to serve society as it had been envisaged by the Constitution.

Indeed, it may be noted that decentralisation of both governmental and administrative functions (achieved very belatedly, in itself) has had only a minimal impact on the relations between the administration, citizens and society. This despite all the good intentions enunciated during the 1970s, in the newly established Regions’ Charters, in particular. That certainly contributed to bringing the institutions of government significantly closer to the general public and to changing “who” ran the administration, but not “how” it was run.

The need to lay down new general rules governing the administration’s decision-making and provision of services in such a way as to guarantee citizens the expected result (i.e. the administrative act or the service) rapidly, simply and economically, whilst better ensuring the impartiality of such decisions and services, has long remained essentially unmet.

Yet the Constitution had not limited itself to reasserting and reinforcing the legality principle by entrusting the task of establishing the precise boundaries between authority and freedom to legislation. On the contrary, it had laid down principles binding the legislator and thus setting the parameters for the

constitutional legitimacy of legislation governing not only the administration's organisation but also, and above all, its activities.

As far as the activities are concerned, by referring both to good functioning and impartiality, the Constitution required administration to be governed by a general principle of functional responsibility when pursuing legally established goals of general interest and meeting citizens' corresponding expectations.

This meant, in particular, that the administration's traditionally privileged position of superiority over citizens was no longer acceptable. What was needed was a regime governing decision-making activities that contemplated precise administrative duties and corresponding rights for citizens and affected parties, in implementation of that functional responsibility principle.

Prior to the 1990s, the principles of good functioning and impartiality (which, under the Constitution, should have been pervading administrative activity) did not catch on in legislation, save in isolated instances of sectoral reform. Implementation of such principles was almost entirely entrusted to constitutional and administrative case law. The former was nevertheless extremely slow to make the most of the innovative and binding effect of article 97's provisions on the legislator. The latter, acting as a substitute for the legislator, certainly contributed to enriching and refining the substantive rules that should have guaranteed the impartial exercise of administrative discretionary power. It was, however, unable to help implement the good functioning requirements or, more generally, alter the basic connotations of the citizen/administration relationship.

The turning point came during the mid-1980s when the government began studying new rules primarily intended to improve relations between citizens and the administration. This was to remedy the evils that were being denounced, at that time, as "the inscrutability, groundless delays and outdated authoritarianism of administrative behaviour". To such end, "precise rights for citizens *vis-à-vis* the administration" were to be identified. The reform initiative then made particular reference to the need to simplify and democratise administrative procedures.

As may be noted, the listing of the evils to be tackled (evils typical of an administration that persisted in its confrontational dissociation from its citizens) was already accompanied by an initial, precise recommendation as to how to go about it. Jointly implementing the principles of good functioning and impartiality by laying down new general rules for administration was not enough to make the latter an effective instrument for serving individuals and society, however. Such a transformation had to be effected through the identification of citizens' rights *vis-à-vis* the administration and, therefore, of the latter's corresponding duties to them.

The initiative was to find its opening in Law no. 241 of 1990. Formally intended to lay down new rules on administrative procedure, it actually contained a catalogue of new citizens' rights, some of which regarded relations with the administration more generally.

In order to remedy the "inscrutability" complained of, the Act introduced the brand new right of access to administrative documents (albeit limited to affected parties and not extending to citizens as such). This right applied to every form of administrative activity, whether decision-making or service-providing, and could be exercised against any public or private party in charge of such activity.

In order to remedy the "groundless delays", it introduced measures simplifying, concentrating and accelerating procedures. Of these, the creation of the duty to conclude every procedure within a fixed timeframe and the extended application of the "*silenzio-assenso*" institution (a mechanism by which the

administration's silence is, after a certain period, to be equated with the grant of an application) enjoy a central importance. Of equally central importance was the introduction of the "procedure manager" (*responsabile del procedimento*) as the unitary guide to the expedited conduct of a procedure itself and the institution of the "*conferenza di servizi*", a meeting that co-ordinates the decision-making of several administrative bodies, thereby concentrating procedures. In addition to its procedure-simplifying measures, the Act also provided for the substitution of administrative authorisations with "self-certification" by interested parties.

In order to remedy the "outdated authoritarianism", the Act then introduced (at least, in relation to administrative acts affecting individuals) the fundamental rights of access to information, of anticipatory participation and to the statement of reasons that are normally associated with the principle of fair administrative procedure or due process. It further provided that discretionary acts could be substituted by agreements between the administration and private parties, in conformity with models existing in other countries.

The change in perspective that the Act sought to interpret was well received by the Council of State. When advising on the bill, it stated that the latter expressed "the search for a procedural (and organisational) framework capable of meeting the needs of a new Society that conceives the relations between the general public and public power in terms that differ from those of the past".

It may easily be observed that the new rules introduced in 1990 sought to implement the Constitution's two requirements of good functioning and impartiality. On the one hand, they simplified procedures and imposed duties permitting interested parties to obtain the awaited result quickly and, on the other, they introduced the instrumental guarantees necessitated by the requirement that administrative powers be exercised impartially. In themselves, these two constitutional requirements are conflicting and hard to reconcile. The law has broadly favoured the requirements of good functioning, simplification and the acceleration of administrative activity over those relating to procedural "democratisation". Proof of this lies in the fact that the Act's final draft restricted the anticipatory participation of interested parties to the presentation of documents and written arguments and that the procedures relating to instruments of a general content are not covered. The Act's subsequent amendments and integrating additions have generally followed the same line.

The result is a legislative framework in which result-oriented rules and guarantee-oriented rules have perhaps remained more juxtaposed than integrated. This may be the result of the Act's extremely general nature and its failure to provide for different kinds of procedure allowing the "good functioning" and "impartiality" dosages to be varied.

What should nevertheless be emphasised is that what may be defined as a "Charter of Citizens' Rights" has, for the first time, been ratified in relation to the administration when exercising its authoritative powers. Furthermore, the right of access to the documents relating to any administrative activity whatsoever has been introduced. In other words, the attitude necessitating a reform of the law governing relations between citizens and the administration has been overturned. Such fact is confirmed by subsequent legislation. Law no. 212 of 2000 provides that rules similar to those in Law no. 241 are to be applied in the field of fiscal administration (to which the general law was not applicable). Significantly, it contains the wording "Charter of taxpayers' rights".

Law no. 241 has been followed by other measures. In the field of public services or services of general interest managed either by public structures or by private parties, legislation has ratified the right of

customers to require observance of the governing criteria, modes and standards of service established in

special Service Charters, in accordance with the principles of universality and equal access that govern the provision and quality of the services themselves.

Thus the Act has had a paradigmatic, policy-setting or trend-setting value for subsequent legislation, for which it has remained a point of reference (see, most recently, the so-called “Code on Public Contracts” contained in Legislative Decree no. 163 of 2006). Even the repeated adjustments and amendments the Act has undergone during the relatively few years since it came into force have not altered its basic structure but have, rather, developed it further. In this sense, the rule added by section 1- *bis* of Law no. 15 of 2005 is significant. Under this rule, save in the case of acts of an intrinsically authoritative nature and where the law does not provide otherwise, administrative activity is to be deemed governed by private law (although the principles normally governing every administrative activity must always be held to apply, in any event).

Attempts to limit or reduce the force of the Act’s provisions have not been lacking even recently, nonetheless. For example, on the occasion of the constitutional reform in 2001 (which granted greater legislative autonomy to the Regions and Local Authorities), an attempt was made to argue that the scope of its application was limited to the national administration and that it could not be applied directly to regional or local administration.

Despite such attempts, first Law no. 15 of 2005 (reforming Law no. 241) and then the more organic and very recent reform provided for by section 10 of Law no. 69 this year have specifically stated that the public administration’s main duties as established by Law no. 241 pertain to “the essential levels of service corresponding to the civil and social rights that must be guaranteed throughout the national territory” (the determination of which is reserved to the State, pursuant to article 117(2)(m) of the Constitution, and the mandatory nature of which therefore extends to administration in general). The Regions and Local Authorities are therefore bound to respect the rights and duties established by the Act, without prejudice to their entitlement to provide for higher levels of protection for citizens and affected parties. Curiously, in its list of duties, the above-cited section 10 does not mention the duty to state reasons (which must nevertheless be deemed implicitly included) whereas the “self-certification” and the “*silenzio- assenso*” (“silence equals grant”) institutions are expressly included.

On the other hand, it should not be forgotten that the body of rights ratified by Law no. 241 is linked to the right to good administration and the right of access to documents established at a Community level as two of the rights pertaining to European citizenship. In the version reformed by the above-cited Law no. 15 of 2005, Law no. 241 itself provides that “the principles governing the Community legal order” shall apply to all national administrative activity. It should further be remembered that in recent judgements such as those referred to (judgement nos. 103 and 104 of 2007), the Constitutional Court itself has come to recognise that the principle of procedural fairness must be deemed a constitutional principle under article 97 of the Constitution.

All in all, it must therefore be considered that the rules contained in Law no. 241 comprise the mandatory, constitutionally protected, common core of what are recognised as genuine rights for citizens and affected parties *vis-à-vis* the administration. Possible new judgements from the Court ought to confirm their description as such, as contained in the very recent Law no. 69 of 2009.

Such fact does not mean that there is no need nowadays to continue the journey that Law no. 241 began. In terms of good functioning, efforts to improve the relations between citizens and the administration still further have not been lacking. Several variform legislative and organisational measures directed at liberalising the conduct of activities previously governed by administrative law, at reducing

administrative duties for natural persons and enterprises, at concentrating decisions relating to the same

activity or result, at reducing decision-making timeframes and at computerising the administration's operations increasingly extensively both internally and in its relations with citizens have been adopted and are continuing to be adopted.

A provision added to the Act in 2005 and modelled on the corresponding rule in the German law governing administrative procedure moves in the same direction. Under the German provision, administrative acts with a content pre-established by law cannot be quashed on grounds of formal or procedural defects in cases where it is ascertained that their prescriptive content could not have been other than that actually adopted. Nor can discretionary acts be quashed when adopted without prior communication, if the administration can prove at trial that the content of the act could not have been other than that actually adopted (section 21-*octies*).

The rule has been the object of particular criticism. In this respect, it may be remembered however that the Community law on the right to good administration also structures such right first and foremost as the right to a fair and reasonable administrative act. It is in relation to the fairness and reasonableness of the act that the Community provision then incorporates the right to the procedural guarantees regarding information, anticipatory participation and the statement of reasons. The rule's primary function is therefore to guarantee a substantive result and the procedural guarantees are seen as instrumental to that primary objective. Similarly, under the rule contained in section 21-*octies*, the fact that an act's content has already been pre-defined by law means that formal or procedural defects no longer have the power to vitiate lawfulness.

Parliament has paid less attention to the need to complete and integrate Law no. 241's rules regarding impartiality and implementation of the procedural fairness principle. As far as the procedures relating to acts affecting individuals are concerned, the modes of anticipatory participation have recently been reinforced with regard to applications by interested parties, thereby allowing the latter to make themselves heard before an application is rejected (section 10-*bis*, added by Law no. 15 of 2005).

The need to introduce adequate modes of participation into the procedures relating to instruments of a general nature or, in any event, having a particular social impact still remains unmet, on the other hand. These were excluded from the general Act's provisions, being left to possible special sectoral legislation in the future. The need to fill the existing lacuna and introduce forms of "participatory democracy" like the ones that have long been present in other countries has rightly been highlighted in relation to such procedures ever since the Act came into force. The particular nature and complexity of the individual and collective interests affected by such instruments require it.

It should nevertheless be remembered that, in certain areas, the legislator has already intervened to regulate procedures involving widespread participation that could appropriately be generalised. For example, action has been taken with regard to the regulatory activities of independent authorities (including, in particular, the authorities working to protect credit and savings – Law no. 262 of 2005) and in implementation of Community provisions governing environmental protection (Legislative Decree no. 152 of 2006).

#### IV. *Reform Trends affecting Judicial Protection*

If one now considers the new conception of the citizen/administration relationship in terms of its implications for judicial protection, it is not difficult to perceive the vistas it has opened. At the same time, the difficulties deriving from Italy's unusual jurisdictional approach to the public administration should be emphasised.

The formulation adopted by Law no. 241 (and taken up by subsequent legislation) shows that genuine rights for interested parties or customers and corresponding duties for the administration are being created in every sphere of administrative activity. Legal relationships based on rights and duties creating equality between the administration and affected parties have now been defined even in the area of decision-making activities.

A relationship of rights and duties creating equality between the administration and affected parties is now also emerging in relation to observance of the fundamental principles governing such decision-making activities and deriving jointly from the national legal order and the Community one (i.e. reasonableness, proportionality, legitimate expectation, non-discrimination, equal treatment and the duty of care).

Such fact has thrown what was a traditional postulate of Italian administrative law into crisis. According to this postulate, in every case where an administrative power exists and is exercised, nothing more than a "legitimate interest" will arise: a "subjective right" can only arise in cases where no administrative power exists. When compared with the postulates of this previous conception of the administration, the profound novelty of the constitutional position adopted under Law no. 241 becomes clear. According to the previous conception (inspired by the authority/freedom conflict), it was only when the administration acted without any authoritative power that affected parties enjoyed genuine rights (defendable in the ordinary courts) against it. When, on the other hand, an authoritative power existed, the only right of action was to have the administrative act quashed for breach of the law determining how that power was to be exercised. Such "right" was the "legitimate interest", defendable before special administrative judges. In other words, relations between the administration and citizens were in the past built on the postulate that administrative power and the rights of citizens and affected parties were mutually exclusive. Such postulate has now been confuted by the way in which the legal order has evolved.

It should nevertheless be borne in mind that in its rules concerning judicial protection of citizens against the public administration, the Constitution itself transposed the dual system of subjective rights and legitimate interests and their related jurisdictions. It did provide, however, that in certain areas the administrative judge might also try issues involving the infringement of subjective rights (under what is known as the "exclusive jurisdiction"). In this respect, the provisions clearly reflect the previous vision of the citizen/administration relationship. And yet precisely the Constitution, in its basic conception, had intended that even when exercising its authoritative powers, the administration was to be directed both at achieving constitutionally identified goals of general interest and at honouring the corresponding individual rights, whilst respecting the canons of good functioning and impartiality.

As a result and as may be observed, citizens and affected parties have been recognised as enjoying genuine subjective rights against the administration for the purposes of ensuring its good functioning and impartiality, even when authoritative powers are being exercised.

It can be seen that there is a need, nowadays, to distinguish between two broad categories of rules creating “right/duty” relationships. On the one hand, there are the rules of a finalistic or substantive nature. These are result-oriented in that they are intended to guarantee an affected party’s right to obtain a final result i.e. an administrative act, the provision of a service or the direct honouring of a substantive interest in accordance with the law (here one may think of the general application of the “*silenzio - assenso*” [“silence equals grant”] rule relating to measures issued further to individual applications). On the other hand and in addition to the substantive rules and principles mentioned, there are the classical procedural rules or “instrumental guarantees”. These pertain to the execution of administrative action. They are intended to ensure its impartiality (especially when discretionary powers are being exercised) and the achievement of a lawful (i.e. fair and reasonable) result through the participation of affected parties.

Both categories of rules and relationships are the expression of a single responsibility principle, however. Nowadays, the administration finds itself in a relationship that creates a general responsibility towards third parties both when it is bound to ensure results and when it must ensure the above-mentioned instrumental guarantees.

Traditionally, administrative responsibility was perceived primarily in a vertical sense. It was in relation to the top political echelons in government institutions that the responsibility of a manager or official mattered. This is still the case today. The role of politico-administrative policy-setting and monitoring enjoyed by government organs is flanked by so-called “managerial accountability”, particularly with regard to the achievement of results that have been pre-established in programmes, directives and other instruments of policy-setting.

Nowadays, however, a relationship creating responsibility in the horizontal sense is coming to the fore. This in the sense of rights and duties regarding both achievement of a result (i.e. an administrative act or service) and observance of the procedural guarantees when performing administrative duties. Such fact is quite consistent with the administration’s function of social integration i.e. the integration of individual and collective living conditions.

It may therefore be observed that the very status of “legitimate interest” is being transformed into a collection of rights of a substantive or procedural nature. This is partly in accordance with article 117(2)(m) of the Constitution, which refers to “services corresponding to the civil and social rights that must be guaranteed throughout the national territory”.

Logically, transformation of the status of legitimate interest into a collection of rights of a substantive or procedural nature should have resulted in a transformation of the related forms of judicial protection. The peculiar dualistic jurisdictional framework has made the transformation highly problematic, however. There would have been no particular problems with a single jurisdiction but adaptation of the remedies has been complicated by the presence both of an *ordinary* jurisdiction over rights relating to administrative activity carried out in the absence of authoritative powers and of an *administrative* jurisdiction ordinarily enjoying competence over legitimate interests that have been transformed into subjective rights.

Initially, an attempt was made to get round the need for new forms of protection through repeated recourse to the administrative judge’s exclusive jurisdiction. The latter could not be extended indefinitely, however, owing to constitutional restrictions imposed by the Constitutional Court in its judgement no. 204 of 2004. It was therefore subsequently considered preferable to extend the administrative judge’s jurisdiction beyond the traditional power to quash administrative acts, although such extension did not go as far as restructuring the forms of protection in an organic manner.

In particular, the legislator has accorded the administrative judge adjudicatory powers capable of guaranteeing that the new, result-oriented rights and duties be positively honoured. As already mentioned, administrative judicial protection was traditionally a protection operating through instrumental guarantees. It essentially ended in the nullifying moment when the administrative act was quashed, without the interested party achieving the result sought. This approach generally proved increasingly unsatisfactory as the administration became more involved in regulating economic and social life and as a vision of the administration as the means of properly honouring individual and collective rights (or, in the case of independent administrations, of regulating relations between private parties) became established.

It had already been necessary in Law no. 241 itself (and its subsequent amendments) to provide for new forms of protection capable of ensuring that both the right of access to documents and the right to obtain an act (in cases of silence) were duly honoured. Nowadays, the law provides that, in the first case, the administrative judge can order the production of the document and, in the second, that the judge can not only verify the duty to issue the act but also “try the substantive claim” i.e. establish the very contents of such act, when the circumstances so allow.

As regards the provision of public services, on the other hand, the fact that parent Act no. 15 of 2009 provides for the possibility of customers and consumers proceeding against service providers before the administrative judge in a sort of class action is particularly interesting. Such action is to be permitted for the purposes of obtaining provision of the service in accordance with the duties and standards established by the regulatory authorities or Service Charters.

The areas in which the administration may be sued for damages have also grown. The administrative judge has become a judge determining liability in the cases falling under the exclusive jurisdiction and, more generally, in the context of his usual jurisdiction for determining lawfulness. A century’s worth of case law had denied compensation for loss or damage caused by unlawful acts committed during the exercise of administrative powers. The basis for this was the assumption that affected parties had a legitimate interest rather than a subjective right. The Court of Cassation’s fundamental judgement no. 500/99 nevertheless confirmed the compensable nature of legitimate interests, effectively according them the same status as subjective rights for this purpose.

Subsequently, Law no. 2005 of 2000 accorded the administrative judge competence also to try disputes regarding liability following the quashing of administrative acts. In its later judgement no. 204 of 2004, the Constitutional Court stated that compensation is an “additional form of protection of a legitimate interest” and ruled that administrative judges have jurisdiction to make compensation orders.

In any case, there is now the possibility of compensating the damage deriving from breach of both result-oriented duties and guarantee-related ones, even when authoritative powers are exercised. In particular, by adding section 2-*bis* to Law no. 241, the very recent Law no. 69 of 2009 has ratified the compensable nature of damage caused by the administration’s procedural delays, confirming that affected parties have a genuine right that the procedural time limits be respected.

Where administration serves society and individuals and may be carried out both by public structures and by private parties, availing itself of authoritative powers and private-law powers alike according to common principles and rules governing conduct of the activity, then judicial protection must always be capable of ensuring that both the guarantee-related and the result-related duties are discharged and that damage caused by their breach is compensated according to the rules generally applicable to inter-party relations.

Such fact of itself presupposes that the distinction between subjective rights and legitimate interests be abandoned and the jurisdictional dualism still existing and enshrined by the Constitution be left behind.

Whoever the administering party may be and whatever instruments may be employed, administration is an activity that, all in all, is defined by the public goals it has to achieve. Such goals have corresponding subjective legal positions that can no longer be divided into rights or legitimate interests but are to be seen solely as substantive or procedural expectations constituting as many rights. If the courts are to protect subjective legal positions within a relationship creating equality with the administering party, the only feasible goal is that of realising a unitary jurisdiction as regards the administration.

Pending an improbable constitutional reform, jurisdiction remains divided between the ordinary judges and the administrative ones. Administrative judges' adjudicatory powers are nevertheless increasing and diversifying. The above-mentioned parent Act no. 69 of 2009 heralds a reform of administrative trial procedure. Amongst the guiding principles the enabling statute contains is the provision that judges are to be given the possibility of making various kinds of "rulings that are appropriate for honouring the victorious party's claim", including declaratory judgements, liability rulings, injunctions and orders quashing, suspending or modifying administrative acts.

In this respect, the parent Act's implementation may provide the opportunity to give a more organic structure to the forms of protection resulting from the new substantive reality of relations between citizens and the administration, at least as regards the administrative jurisdiction.

#### V. *The Administration's Transformation and the Service Ethic*

If the conception of administration is being transformed in the manner briefly described above, it should be noted in ending that such transformation needs to influence the spirit and behaviour of the people working in administration. As stated in the OECD reports, there is a need for the three "Es" in today's administration (effectiveness, efficiency and economy of action) to be accompanied by a fourth, namely the "E" for ethics, and a service ethic, in particular.

An administration conceived as the manifestation of government and authoritative power has often generated a bureaucratic and authoritarian ethos in the people who have worked in it and continue to work in it. Instead, the rule-oriented ethos of administrative employees needs to become a goal-oriented one directed at results, thereby creating an egalitarian democratic ethos or service ethic.

Combined with the new technology of the computer era, the most recent administrative reforms have contributed to making the administration autonomous of the political moment. They have also contributed both to the introduction of management rules geared to a transparent and efficient functioning and to the development of a relationship creating responsibility towards the public. All this must now become concrete in a service ethic that can allow the administration to be lived as what a French author has happily defined as "everyday democracy".

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# Santi Romano and the Perception of the Public Law Complexity

Aldo Sandulli

*Abstract:* Santi Romano, the major Italian scholar of Public Law, was protagonist of the «most extraordinary intellectual adventure that any twentieth-century Italian jurist ever lived»: he was the architecture of the complexity of Public Law. In the Italian legal field, he first and most clearly perceived the crisis of the State and the surfacing of social and corporate forces with interests that conflicted with those of the municipal legal order. In 1917, after a gestation period lasting almost a decade, he developed, adopting a realist perspective, his theory of the institutions in an essay entitled *L'ordinamento giuridico*. The article shows Romano's contradictory personality and analyses the four periods of this complex and prismatic figure: the first, a five-year period of intense scientific activity - from 1897 to the beginning of the 20<sup>th</sup> Century - is mostly dedicated to the production of monographs, consistent with legal method approach; in the second stage - up to the coming of Fascism - Santi Romano gradually distanced from this ideas, by writing fundamental essays on institutionalism; the third period - ending with the Second World War - is mainly dedicated to a system re-construction, by means of publishing mostly manuals; at the end of his life, there is the last stage, during which he drew up his scientific will, the "*Fragments*".

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## I. *Orlando's Legacy*

The construction of the Italian Administrative Law was achieved in the late 19<sup>th</sup> and early 20<sup>th</sup> Century by a group of young scholars, led by Vittorio Emanuele Orlando<sup>1</sup>, the Sicilian academic, who had already founded the so-called Italian school of Public Law.

Before Orlando, Administrative Law studies were typically characterized by a strong eclecticism and poor theoretical strictness, which followed the French blueprint (on the contrary, his legal method involved a split between law and other social sciences, as well as a systematic and dogmatic elaboration of legal analysis, based on the pandectist and Private Law paradigms)<sup>2</sup>. Previous studies were usually carried out by attempting legal systematization, but there were only few monographs and no specialized reviews or treatise writings. Therefore, before Orlando the science of Administrative Law was lacking in solid construction and methodological foundation.

Orlando distanced himself from the French tradition and drew his inspiration from Savigny's Historical School and the German science of Public Law: he was especially interested in the State doctrines of Gerber and Laband. The legal approach developed by Orlando aimed at two main purposes, both related to a specific time in Italian history. The first was a social policy objective, regarding the preservation of State unity and the leading role of the upper middle class; the second looked at the policy of law, regarding the development of an independent branch in legal science, by means of an increasing definition and simplification in related studies, so that a new awareness of its specialty could be achieved. Indeed, the definition of the field of studies was the foundation of the entire construction to be built by the Sicilian jurist. Consequently, Orlando's theories were a "political tool" of reaction and fulfilment of a specific project for the preservation of national unity. The so-called "legal method" allowed the jurist to rapidly develop a legal knowledge on public administration, but inevitably isolated it from the other social sciences. This implied the greatness of legal studies in the late 19<sup>th</sup> and early 20<sup>th</sup> Century, but was also the main reason of the decline of the Italian legal science in the following part of the Twentieth Century.

Unlike his predecessors in Administrative Law studies, Orlando had a clear purpose: to claim the primary role of both the jurist and the Public Law science in building and safeguarding the unity of the Liberal State. Orlando also had a clear idea of the course of action to achieve the goal of a central position for Public Law science in safeguarding the unity of the Liberal State: that is elaborating a five-phase program for cultural change, to be completed in the space of a decade (the elaboration of a methodological manifesto; the foundation of a school; the provision of groundwork for developing a manual-writing system; the publication of a new specialized review; to start a widespread treatise writing). In other words, Orlando was a great organizer of juridical culture.

In the field of Public Law, the most relevant contribution from Orlando came from two different manuals: the "*The Principles of Constitutional Law*"<sup>3</sup> and "*The Principles of Administrative Law*"<sup>4</sup>, a caesura with

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<sup>1</sup> V.E. Orlando (1860-1952) was a Professor in Modena, Messina, Palermo and, above all, in Rome. Also, he was a deputy for more than a quarter of a Century, as well as the Premier, the Minister of Justice (Grace and Religion), the Minister of the Interior, the President of the Chamber of Deputies and a senator of the Italian Parliament.

<sup>2</sup> V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico*, in *Arch. giur.*, 1889, See also Id., *Diritto pubblico generale: scritti vari (1881-1940), coordinati in sistema*, Giuffrè, Milan, 1940, 17 ss.

<sup>3</sup> V.E. Orlando, *Principii di diritto costituzionale*, Barbera, Florence, 1889.

<sup>4</sup> V.E. Orlando, *Principii di diritto amministrativo*, Barbera, Florence, 1891.

the past. The volume was characterized by three underlying criteria: a systematic approach, the unity and system-wide coherence of the scheme, an exclusively legal analysis.

Since 1897, he directed the publication of the *First Complete Treatise of Administrative Law*, which pursued the ambitious objective of meticulously cultivating the whole field of Administrative Law for the first time. All the main representatives of the late 19th and early 20th Century scholars generation, who had joined the legal method, were called upon for collaboration in drafting the monographs by which this impressive (yet still unfinished) work is made up of. Moreover, Orlando founded and directed many major Public Law reviews.

In conclusion, when in 1987 Orlando became a newly elected member of the Parliament, at the age of only thirty-seven (from then on, devoting himself entirely to politics), he had already completely changed the Italian studies of Public Law.

The Italian jurist's footsteps were followed by a group of young scholars: standing out among them were Oreste Ranelletti, Federico Cammeo and Santi Romano, who burdened themselves with building up the Italian Administrative Law.

Oreste Ranelletti <sup>5</sup> came from the study of Roman Law and was the pupil of a renowned Romanist, Vittorio Scialoja. Just as he did for Scialoja's teaching (he was a follower of the Historical School, even if bereft of any sociological influence), he accurately implemented the legal method and faithfully worshipped the State as a legal entity <sup>6</sup>. Ranelletti (who published relevant studies on the administrative act and the public goods) was the greatest representative of the "*contenutistica*" tendency, aiming at emphasizing content, rather than form, in Administrative Law studies. His approach consisted in the analysis of administrative matters by following their inherent and natural content, and going back from statute laws up to systematized general principles. Although he had only few direct "disciples", Ranelletti had many followers and his approach was the most followed in the first half of the 19<sup>th</sup> Century.

Federico Cammeo <sup>7</sup> came from the study of civil procedure and was one of the pupils of the expert on Civil Law Lodovico Mortara. Although he came from the German tradition, as most of his contemporary scholars, he was very cultivated in English and had a deep knowledge of the public sector in the Common Law systems. Cammeo (who was the author of a famous publication, the "*Administrative Law Course*" <sup>8</sup>) used and introduced typical pandectist concepts into the Italian Administrative Law, at times just by means of a transplant, but more often by turning Private Law concepts into Public Law patterns. The use of Pandects was instrumental and directed towards the discovery of the Public Law features of the institutions, following quasi-deductive method, in search of the limits on public power, relating to individual liberties and rights.

Orlando, Ranelletti and Cammeo produced their best works during this first stage of development, between the end of the 19<sup>th</sup> Century and the beginning of the 20<sup>th</sup>. Although their following scientific work

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<sup>5</sup> Oreste Ranelletti (1868-1956) was a Professor in Camerino, Macerata, Pavia, Naples and, above all, in Milan.

<sup>6</sup> To Ranelletti "the starting point is not liberty, but the State", which is the only "creator of the right to liberty" and "the guardian of all liberties". Without the State there was no law nor liberty: as a consequence, any exposure of risks to the liberal State's stability had to be necessarily prevented. From the methodological point of view, Ranelletti transferred the pandectist approach and method to the Public Law: he used a rigorous juridical approach (without even considering the possibility that there might be others), consisting of: examining the norms of positive law regarding those matters: drawing inferences from them by means of abstraction and a generalization of those "legal principles" pervading the norms; reconstructing the "legal institutions" by means of relating those principles and systematizing the "institutions" (O. Ranelletti, *Oreste Ranelletti nell'opera sua*, 31 dicembre 1955, in Id., *Scritti giuridici scelti*, vol. I, supra, 630)

<sup>7</sup> Federico Cammeo (1872-1939) was a Professor in Cagliari, Padua and, above all, in Bologna and Florence.

<sup>8</sup> F. Cammeo, *Corso di diritto amministrativo*, Milani, Padua, 1914.

was successful, and eventually brought them honours in the entire space of the first half the 20<sup>th</sup> Century), their contribution is mainly related to those years of foundation of the Italian Public Law.

## II. *Santi Romano: a Complex Scholar*

The scientific path and fortune of Santi Romano <sup>9</sup>, a complex and prismatic figure, were very different.

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<sup>9</sup> In this brief bibliographical note, I am particularly grateful to G. Melis, *Romano, Santi*, in G. Melis (editor), *Il Consiglio di Stato nella Storia d'Italia. Le biografie dei magistrati (1861-1948)*, vol. II, Giuffrè, Milan, 2006, 1518 ss. Santi Romano was born in Palermo on the 31<sup>st</sup> January of 1875, by Salvatore and Carmela Perez. His course of studies was initially undertaken in Palermo, where he started a collaboration when he was still a student with the law firm of Vittorio Emanuele Orlando, and the *Public Law Archive* review, in which he published his first writing in 1894. He graduated in Administrative Law in 1896, supervised by Orlando (with Orlando as supervisor), and the following year published his dissertation as a monographic work on public rights, in the first volume of Orlando's treatise.

In 1898, he qualified as a university teacher in Administrative Law. The following year, after honorably losing an open competition at the University of Macerata (in this competition, won by Ranelletti, Cammeo, Brondi, Armani and Pacinotti also participated) Santi Romano obtained a full-time temporary position in Constitutional Law at the private University of Camerino. In the next year he was placed equal second with Cammeo in an open competition at the University of Cagliari.

In 1900, his two monographs on administrative justice came out (appeared /were issued/ were published), still within Orlando's treatise; the following year, besides his celebrated book on "*The Principles of Administrative Law*", his fundamental essay on the "*De Facto Institution of a Constitutional Legal Order and its Legitimization*" saw the light of day.

At the beginning of the new Century he married Silvia Faraone, by whom he had two children, Salvatore (born in 1904, who became a full professor in private law) and Silvio (1907). In 1902 Santi Romano moved to the University of Modena as a temporary professor of International Law, and of Constitutional Law in 1905. There he gave the well-known opening lecture on "*The Constitutional Law and the other Legal Sciences*". In 1906, still in Modena, he became a full professor. In 1908, his monograph on "*The Commune*" was published in the treatise of Orlando.

In the same year, he moved to the University of Pisa, holding the chair of Constitutional Law and delivering the famous inaugural speech for the academic year on the *Modern State and its crisis*. He stayed there for about fifteen years, also filling the position of Law Faculty Dean in the period 1923-24 (he also was appointed to the teaching of comparative colonial law at the Cesare Alfieri Institute of Florence). In 1914, he wrote "*The Italian Public Law*" (*Italienisches Staatsrechts*), for the German-speaking readers, which was published posthumously in 1988, due to war events. In 1917 he published on the "*Annals of the Tuscany Universities*" review and, the following year, his most famous and significant monographic contribution, "*The Legal Order*".

From 1917 to 1921 he was a member of the High Council for Education. In 1924, he was appointed to the first 15-member commission established by the fascist Government for the constitutional reform. In 1926 he was appointed member of the council for diplomatic legal affairs. In 1924 he had also moved to the State University of Milan, still in the chair of Constitutional Law, where he was appointed both member of the University academic board (1925-1928) and Dean of the Law Faculty (1927-28). Between 1918 and 1926 he had a fervid production of manuals (handbooks): "*Colonial Law Course*" in 1918, "*Lectures in Ecclesiastical Law*" in 1918, "*Constitutional Law Course*" in 1926 and "*International Law Course*" in the same year.

In 1928, he joined the Fascist Party. In the same year, Mussolini appointed him President of the Italian Administrative High Court (*Consiglio di Stato*): this is the only case of nomination of a total outsider in the whole Court's history. His influential presence contributed to keeping the Court's independent view. Moreover, he did not drop University, keeping his academic teaching at the University of Rome "La Sapienza", where he gave courses of Administrative Law and Organization from 1929 to 1931, as well as Constitutional Law from 1932 to 1942. In 1931he

published the first volume of an "*Administrative Law Course*", concerning the *General Principles*.

During the foundation period, he was of the same importance as the other three scholars, but he was also the one who paved the way for a new concept of the law: on the methodological side, this (concept) was defined by Giannini as “post-pandectist”, because it was aimed at mitigating the legal purism by opening it to facts and social reality (therefore, the use of dogmatics was not an end in itself, but a means for understanding the surrounding reality: as observed by Miele: « *his sharp comprehension of reality is always present in his mind when he expounds the Law: he does not let the schemes and theories grasp him, nor the “turbid mixture” of reality drive him while expounding and describing legal institutions*»<sup>10</sup>); as for legal reconstruction, it aimed at overcoming the simplifying pattern of the relationship between the State and individuals, by means of a rediscovery of the civil society based on the institutional theory.

Compared to the other founding fathers, his different path is also probably due to his peculiar legal education and the different perspective from which he approached legal issues and the study of Law. Romano, the first and most famous of Vittorio Emanuele Orlando’s pupils, “was born” as a Public Law scholar and did not arrive there from Private Law studies (as Ranalletti and Cammeo).

Moreover, he mainly concentrated in that field of study which nowadays would be defined as legal theory - while Orlando used to define it as “general public law” - with a strong interest in the International Law. Not by chance Santi Romano has been the most famous and translated Italian scholar of Public Law outside the national boundaries.<sup>11</sup> It should be also noted that, even if Romano had an eminently “German

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In those years Santi Romano also occupied two important positions: he was appointed member of the Senate (1934-1944) and president of the central commission for local finance (in the same year). He was a member of many ministerial commissions, such as the commission for the national historic and artistic heritage reform bill.

In 1935, (and up to 1946, when the casting vote of Benedetto Croce drove him out) he was a member in the legal section of the *Accademia dei Lincei* (besides being an associate agent of other Academies in the field of sciences, literature and arts, operating in the cities of Turin, Palermo and Modena). Santi Romano was decorated with many honors during his lifetime: The Grand Cross of the Italian Crown Order in 1930, the Grand Cross of the Mauriziano Order in 1933, the designation as a knight of the Savoia’s Crown Civil Order. In 1938 he wrote a famous and controversial opinion on “*The Marshall of the Empire*”, in which he declared himself in favor of simultaneously conferring this rank both to the King and Mussolini by statute law. He asserted the legitimacy of this act by assuming that such a designation would not have derogated from the current Constitution (the “*Statuto Albertino*”), by which the King is the Commander-in-chief of the Army.

After the political turnover of September 8, 1943 in Italy, Santi Romano adopted provisions for transferring the personnel of the *Consiglio di Stato* to the North (After the armistice, Italy was divided in two parts: the South was on the side of the Allies and in the North there was a fascist puppet-state named Repubblica di Salò created by Hitler and Mussolini). Nevertheless, when he was asked to move to the city of Cremona, the new seat of the Administrative High Court, he preferred to retire. After the liberation of Italy he re-entered the chair, but in September 1944 he was remitted to the High Court of Justice and was subjected to a purge trial at the *Consiglio di Stato* “purge commission” of primary jurisdiction. Stubbornly defending himself and denying all the accusations against him, Santi Romano asked for and obtained retirement in October 1944. In the last few years of his life, he lived a life of sadness and loneliness, he devoted himself to his last and celebrated work: the “*Fragments of a legal dictionary*”. He died in Rome, on the 3<sup>rd</sup> of November 1947.

<sup>10</sup> G. Miele, *Stile e metodo nell’opera di Santi Romano*, in *Arch. studi corp.*, 1941, anche in Id., *Scritti giuridici*, vol. I, Giuffrè, Milan, 1987, 340. Miele goes on, “There is in him the awareness of the social substance hiding behind them, but this is counterbalanced by the knowledge of law: harmony between them, not the one absorbing the other, least of all the separation, which could be equivalent to the reciprocal ignorance between each other. This is the same quality which I found in another great public law scholar, Orlando, who was not even causally his Master. All that allows him to be always acquainted with new legal phenomena, to study them without prejudice and with a “realistic” mind (the latter being a very fashionable adjective at the time), to constantly revising and testing his ideas, ready to modify them if they turned out to be insufficient or inadequate in respect to new legal entities” (pp. 340-341)

<sup>11</sup> The most celebrated work by Santi Romano (*L’ordinamento giuridico*, Mariotti, Pisa, 1918) is translated in German, French, Spanish and Portuguese: S. Romano, *Die Rechtsordnung*, Duncker & Humblot, Berlin, 1975; Id., *L’ordre juridique*, Dalloz, Paris, 1975; Id., *El ordinamento juridico*, Instituto de Estudios Politicos, Madrid, 1963; Id., *O ordenamento*

*juridico*, Boiteux, Florianopolis, 2008.

education”, his main points of reference were Gierke and, most of all, Georg Jellinek, instead of Laband and Gerber.<sup>12</sup>

Contrary to his master, Romano was reserved and taciturn: he didn't talk much, letting his written works speak on his behalf, in a direct and sharp manner<sup>13</sup>; « the style is as moderate, clear, straightforward as the man. There is a very good combination of accuracy and simplicity »<sup>14</sup>.

Orlando held the scholar in a very high esteem, as can be inferred from a private letter of the 1<sup>st</sup> February 1933 to Carlo Alberto Biggini, where it is stated that: «Romano would be excellent, but his lack of demonstrativeness makes him fail in one of the most important qualities to be a master».<sup>15</sup> Such a fault was nevertheless compensated by an outstanding capacity for concentration in the study, as is demonstrated by the high quality and degree of accuracy in his work, and also by the exceptional number of monographs published during the first years of his scientific activity: ten long and original monographic studies were published in the first four years following his graduation (besides the three writings within Orlando's treatise, the solid essays on administrative decentralization, State's constitutional bodies, disciplinary powers, administrative decisions on state-ownership, approval laws, *de facto* establishment of a constitutional system, to finish with an handbook publication, the “Administrative Law Principles”), full of

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<sup>12</sup> On this point, see A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”* (A proposito di: Santi Romano, *Il diritto pubblico italiano*, Milan, Giuffrè, 1988, pp. LXIV-447 (with an introduction by Alberto Romano), Quaderni Fiorentini, 1989, 623.

<sup>13</sup> From this point of view, it should be pointed out that Santi Romano was not only wonderful with the pen but, if necessary, also very harsh and biting. A sound example of this can be found in the letter written to the Minister of Justice, Pietro De Francisci, on the 12<sup>th</sup> January 1934 (now edited by G. Melis, *La giurisdizione sui rapporti di impiego negli enti pubblici. Nuovi documenti e quattro lettere inedite di Santi Romano (1933-34)*, to be published on the *Rivista Trimestrale di Diritto Pubblico*, 2008) as well as in some of the headings edited by di S. Romano in his “Fragments of a legal dictionary” (*Frammenti di un dizionario giuridico*, Giuffrè, Milan, 1947, see for example the headings “Giurisprudenza scolastica” (Case law in the field of education); *Giuristi* (Jurists); *Glissez, mortels, n'appuyez pas* (Sartre's expression “Gently, mortals, be discrete”); *Mitologia giuridica* (Legal Mythology); *Uomo della strada, uomo qualunque* (the “John Hancock”, the “commonplace kind of man”).

<sup>14</sup> According to G. Miele ( *Stile e metodo nell'opera di Santi Romano*, supra, 340): «In his works his hand is so light that all efforts are hidden by the writing: and also, there is no sign of frills, superfluous words, but always a search for the essential, for what can be the necessary minimum to achieve the purpose of making it understandable (...) his reasoning is straightforward, consistent, effective in its concise expression, from which comes the sense of strictness which impresses the reader.

A. Amorth (*Il diritto amministrativo*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche e l'insegnamento di Santi Romano*, Giuffrè, Milan, 1977, 2070) also defines the scientific works of Santi Romano as « a model of style for exposing concepts in a clear and simple manner, even if pregnant: in other words, limpid, yet still deep water. »

<sup>15</sup> The full text of the letter is available in L. Garibaldi, *Mussolini e il professore. Vita e diari di Carlo Alberto Biggini*, Milan, Mursia, 1983, 391. As for Romano as a teacher, see also the records from A.E. Cammarata, in his booklet on “The Modern State and its crisis. Essays in Constitutional Law” (*Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*, Giuffrè, Milan, 1969): «While the first sentences of his lectures were apparently cold and distant (in comparison with, I daresay, the volcanic incandescence of the lecture given by Giovanni Gentile which I attended in the morning), as the lectures went by he gradually warmed up, even if still in total decorum, up to make us (the students) “feel” his

scrupulousness and passion in elaborating the expounded theory».

new ideas<sup>16</sup> and insights, which reveal a unique and almost foreseeing capacity to read between the lines of the present and forestall the events.<sup>17</sup>

The complexity of Romano's figure calls for a subdivision of the analysis to split up his scientific bequest into related stages: the first, a five-year period of intense scientific activity - from 1897 to the beginning of the 20<sup>th</sup> Century - is mostly dedicated to the production of monographs, consistent with Orlando's approach; in the second stage - up to the coming of Fascism - Santi Romano gradually distanced from Orlando's ideas, by writing fundamental essays on institutionalism; the third period - ending with the Second World War - is mainly dedicated to a system re-construction, by means of publishing mostly manuals; at the end of his life, there is the last stage, during which he drew up his scientific will, the "Fragments".

### III. *The Early Works and the "Principles"*

Romano was as a precocious talent as Orlando. He was only seventeen when he started practicing law in his master's office<sup>18</sup>, and only eighteen when he first published, still as an undergraduate, his first

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<sup>16</sup> G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 339, «Romano has a taste for discovery and innovation: when he deals with a new topic, no side is left unexplored: his written works are remarkable for the number of inferences, comparisons, explanations, which reveal an uncommon ability for observation and insight. The reader is impressed by his wealth of ideas, definitions, opinions, inferences, found spread here and there with a certain elegant carelessness, which often contain the starting point for new researches, and always offered the opportunity for reflection on apparently warned-out topics. From this point of view, it should be probably stated that Romano writes for a range of experts, rather than for the reading public. He loves the shades of meaning, the hints, and we can imagine him sometimes suggesting new solutions to long standing challenges in a few, but set, words: and all this without emphasis or care, just as if it was a natural thing.

<sup>17</sup> G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 341, «as well as he argued the necessity for a second level interpretation of public law provisions, he can immediately become aware of the identifiable legal developments underlying the complex and blurred social reality. He has the gift of second sight, the best gift of a jurist, which makes the latter as the augur who omens by observing the flight of birds or by examining the victim's entrails.

<sup>18</sup> It is Orlando himself who remembers this period (the last decade of the 19<sup>th</sup> Century) on two occasions. The first occasion arose from the publication of the "*Scritti in onore di Santi Romano*" (Writings in honour of Santi Romano) in 1940. See V.E. Orlando, *Ancora del metodo in diritto pubblico con particolare riguardo all'opera di Santi Romano*, in *Scritti giuridici in onore di Santi Romano*, Cedam, Padua, 1939, and also Id., *Diritto pubblico generale. Scritti varii (1881-1940) coordinati in sistema*, Giuffrè, Milan, 1940, 41: « ... around the turn of the last Century, Santi Romano had been apprenticed to one of those "legal craftsman's workshops" (as to say very little, quite amateurish, law firms) in Palermo, which was held by the author of these pages, and he rapidly became a Master, together with Salvatore di Marzo and other capable young fellows. A workshop where we used to do a bit of everything: from the heated debates on the most difficult legal matters *in apicibus juris*, to the most simple investigations on the best way to commence a garnishee proceeding brought in a magistrate's court».

The second occasion was the commemoration of Santi Romano in 1948. On that occasion V.E. Orlando (*Santi Romano e la scuola italiana di diritto pubblico*, in S. Romano, *Scritti minori*, vol. I, Giuffrè, Milan, 1950, VII-VIII) dwells longer upon the memory of the "conventual life" in his Sicilian (lawyer's) office. « We all know what kind of mutual aid is established between a "Master" university teacher and his student. You give and receive at the same time, as this is the usual relationship between any speaker and any listener, but it is incomparably more intense when it happens in such an idea-provoking school as the University. Now, if we consider the cosy little room of an homelike office rather than a lecture hall, then this relationship will certainly lose its splendour and extent, but will gain in deepness and intensity.

Collaboration here is developed not only within theoretical discussions, but also in practising research; it is a

complete and total kind of collaboration, determined in a sort of “conventual life”. So, in that office of mine, which was

work on “The Concept of Public Charitable Institution”, dedicated to the legal character of prisoners’ aid societies.<sup>19</sup>

What is impressive about this brief work, halfway between a comment on a court decision and an article, is the determined way and the influential personality with which he deals with the subject matter. Indeed, he dismisses both arguments upheld by the Italian Administrative High Court (*Consiglio di Stato*), which had been drawn in the form of an advisory opinion and a judicial decision, respectively, by stating that: « ...I became convinced that right and wrong are on both sides, and it couldn’t be otherwise given that, as I will demonstrate in a moment, (the Court) gave a an over-simplified answer to a very complex question, while this problem has many facets.»<sup>20</sup>). In this way he also afforded himself the luxury of criticizing such a renowned leading figure, although in his early forties, as the Romanist scholar Carlo Fadda.

His graduation thesis on public rights (a revised version of which was included in the first volume of the Orlando’s Treatise and published in 1897) also has some characteristics which often recur in subsequent publications by Romano. This work shows, in fact, that Romano possessed three fundamental capacities. First of all, the gift of the greatest jurists that is to say a very well-structured, mature legal mind from a young age. Secondly, the capacity of keeping an independent view and the inclination to debate different opinions, by confronting the most renewed scholars’ views (even the foreign ones, such as Gerber and, obviously, Georg Jellinek), without compromises but always keeping a critical attitude. The third is the disposition to investigate public law from a legal theory point of view, especially by a systematic approach, with accuracy and exceptional capacity for dogmatic analysis. («Our analysis shall be limited to general theories aiming at an exclusively scientific and systematic approach; a work with the aim of conducting mostly technical legal analysis, and addressed to provide simple systematic definitions»<sup>21</sup>).

Along with these “invariant” characteristics, there are some “temporary” features following Romano’s works especially during the first ten years of his career, which thereafter fade. Firstly, there is a strict use of the legal method, in a faithful compliance with his Master’s dictates. Nevertheless, the use of systematic and legal theory analysis contributed from the beginning to some openings which can be defined as gaps in the organization of his scientific criteria. Secondly, within legal relationship analysis, he used to narrow the focus on the “State-individual” dualism, which was a typical approach used by Orlando, and more generally by legal science in the liberal State, even if with embryonic signs of diversity<sup>22</sup>.

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completely unpretentious, its size included, I gathered six or seven young fellows to work together. Besides Santi Romano, there was another future jurist who would become a member of our Law Faculty in Rome, Salvatore di Marzo; and others, even if in a limited manner, also contributed to “pure” science, although their core business would turn out to be the legal profession or magistrature.

In that community life of work, we used to, sometimes, do a bit of everything. So, for example, after a debate on the highest matters of law, as a “pure theory” arising from some lecture I gave or had to give, we suddenly had to undertake difficult investigations on a more or less complex case to be brought before the Supreme Court from a lower court of appeal, with the consequent need for a search of legal materials (i.e. authorities and case law). Nevertheless, we modestly turned into typists when, in the absence of a minor collaborator, it was necessary to promptly serve a summons, the terms of which were to expire. » Orlando also remembered that it was just Santi Romano who catalogued the public law volumes in his legal office and, in conclusion, recalled his collaboration in the making of the *Public Law Archive* (*Archivio di Diritto Pubblico*).

<sup>19</sup> S. Romano, *Il concetto di istituzione di pubblica beneficenza. A proposito delle società di patronato pei liberati dal carcere*, in *Arch. dir. pubbl.*, 1894, anche in S. Romano, *Scritti minori*, vol. II, *Diritto amministrativo*, ristampa dell’edizione del 1950, Giuffrè, Milan, 1990, 1 ss.

<sup>20</sup> *Op. e loc. ult. Supra* *Supra* note 32.

<sup>21</sup> S. Romano, *La teoria dei diritti pubblici subbiettivi*, in V.E. Orlando (a cura di), *Primo Trattato completo di diritto amministrativo italiano*, vol. I, *supra*. See also S. Romano, *Gli scritti nel Trattato Orlando*, Giuffrè, Milan, 2003, 4.

<sup>22</sup> A. Romano, *Santi Romano nel Trattato Orlando*, in S. Romano, *Gli scritti nel Trattato Orlando*, *supra*, X, noted

that ever since this first work there is an implied distinction between the « “the State as an artificial person”, that is a

The long essay on administrative decentralization published in 1897 is also a monograph, although it was edited as a heading of the "Italian Legal Encyclopedia" (*Encyclopedia giuridica italiana*). Here Romano, after having purified the subject-matter from non-legal approaches, as required by the legal method, identifies the focal point of the analysis in the decentralization as « the most effective tool for a suitable implementation of that "State of Rights" (*Rechtsstaat*), which should be the ultimate goal for lawmakers and scholars. »<sup>23</sup>.

From this work some elements emerge as the pieces of a mosaic to be eventually completed. In a brief passage the author prefigures the arguments he was to develop further: in spite of municipal corporations being political subdivision of a State (which perform certain state functions on a local level, and possess such powers as are conferred upon them by the State) «non-territorial self-governing bodies (...) can be conceived as separated by the State - even if only limited to some events including, above all, their rise and lapse - and, consequently, as regards these bodies, the theory of decentralization results in a relation to the doctrine of restrictions on individual freedom»<sup>24</sup>.

As for the "bureaucratic decentralization", the author stigmatizes the institution of Provinces in Italy as sly and unnatural, defining « the Region as the only local government district of a general scope which, as well as the Commune, has a very solid legal basis»<sup>25</sup>. Nevertheless, he likes to make it clear that « administrative (local) districts of the national government ("directly" deriving their powers from the State/central state administration) are never to be considered as legal right-holders ("subjects of law") neither as public nor private legal persons. »<sup>26</sup>.

Then, the author analyzes the concept of self-government and the operation of self-governing bodies, by debating against the German jurists and recalling some of the arguments of Vacchelli (self-government « is something more than a liberty right, is a State's activity set against other state activities, which is not purely individual »), so as to come to the appealing conclusion of the distinction between "direct" and "indirect" State's administration<sup>27</sup>.

He finally closes with some remarks on the « institutional decentralization», which include bashful premises, at an embryonic stage, of future theoretical developments.

Here he cited the regular religious orders of the Catholic Church («these, which make up autonomous institutions, responsible for their own administration, goals, distinct ancient traditions, demonstrate how desirable it would be if also the State could rely on the contribution of such institutions, not necessarily the same, but similar in its substantial organization»<sup>28</sup>) in order to auspicate the rise of public

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subject of the legal order defined as the State's legal order; and "the state legal order" of which the State-artificial person is a legal entity: only one of the existing legal entities, even if the most important, the major, the dominant one; but not completely, since these are self-limitations imposed by the State itself. ». Thus, an early hint can be found about the fundamental matter of the relationship between the legal order and the State, along with all the contradictions implied by Romano's approach to this issue, between innovation and tradition.

<sup>23</sup> S. Romano, *Scritti minori*, vol. II, *Diritto amministrativo*, supra, 24. And in fact Romano mainly questions about the need for decentralization, as well as the suitable public functions to be decentralized, so that the different types of decentralization could be consequently examined: bureaucratic, self-governing, territorial, institutional.

<sup>24</sup> S. Romano, *op. ult. supra*, 26.

<sup>25</sup> S. Romano, *op. ult. supra*, 41.

<sup>26</sup> S. Romano, *op. ult. supra*, 43.

<sup>27</sup> S. Romano, *op. ult. supra*, 57, «we can thus conclude: self-government means indirect administration of the State, conducted by a legal person by virtue of *subjective rights*\* and in its own interest, as well as in the interest of the State. ». \* This expression is used by the author although, among the majority of the European Continental writers, the description of rights as being "subjective" appears not to extend to such rights as those of a government agency which, in the given example, seems to be operating under "delegated powers" rather than "subjective rights".

<sup>28</sup> S. Romano, *op. ult. supra*, 74.

institutions, even if in the framework of the State's indirect administration paradigm, and with the remark that: «in the entire topic of institutional decentralization every change should be initiated by individuals, so that it could be eventually recognized by the State, while the reverse would never be effective. »<sup>29</sup>.

The strict application of the legal method – following a merely systematic approach («so, there is only one another way : to suppose that any possible analytical study has already been completed and therefore make a systematic synthesis out of the resulting outcomes in order to draw up a general theory »<sup>30</sup> - is a constant factor in these works by Romano: furthermore, on the essay on disciplinary power of 1898, this is present in the two monographs on the topic of administrative justice, within which he demonstrated a rare speculative ability, by structuring the thesis of the administrative character of the decision issued by the Fourth Division of the *Consiglio di Stato*.<sup>31</sup>.

By the end of this first, but very work-intensive, period of his scientific activity, Romano was now ready to undertake the difficult task of writing his first manual, the “Administrative Law Principles” (*Principi di diritto amministrativo*)<sup>32</sup>.

This work has been correctly considered as one of the most significant works by the Sicilian jurist, a volume symbolizing the “dogmatic” tendency of which, according to Giannini, Romano himself was the major representative: this tendency « divided the matter of administrative law into general theories to which all the legal institutions (concepts, categories) related to the same principles and were traced back, without consideration to which branch of administrative activity was practically involved by the application of those principles<sup>33</sup>.

The “Principles” by Romano were «the most significant attempt of our science to construct an independent conceptual framework»<sup>34</sup>, by dividing Administrative Law into nine legal theories. He dedicated the introduction to the definition of “Administrative Law” (mostly based on the distinction between Constitutional Law and Science of Administration) and “sources of law” (laws, regulations, customs, indirect norms), while the theories regarded:

#### 1. *Administrative-Law relationships*

*the subjects*: public and private legal persons;

*the relationships*: supremacy, liberty, civil and patrimonial rights; the distinction between rights and interests as well as between different species of interests; the creation, modification and extinction of legal relationships.

#### 2. *Administrative acts*

definition, classification, validity and forms.

#### 3. *Administrative liability*

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<sup>29</sup> S. Romano, *op. ult. supra*, 81.

<sup>30</sup> S. Romano, *Le giurisdizioni speciali amministrative*, in V.E. Orlando (a cura di), *Primo Trattato completo di diritto amministrativo italiano*, vol. III, Società editrice libraria, Milan, , anche in S. Romano, *Gli scritti nel Trattato Orlando*, 139.

<sup>31</sup> S. Romano, *Le giurisdizioni speciali amministrative*, *supra*, 139 ss.; Id., *I giudizi sui conflitti delle competenze amministrative*, in V.E. Orlando (edited by), *Primo Trattato completo di diritto amministrativo italiano*, vol. III, *supra*, see also S. Romano, *Gli scritti nel Trattato Orlando*, *supra*, 293 ss.

<sup>32</sup> S. Romano, *Principi di diritto amministrativo italiano*, Società editrice libraria, Milan, 1901.

<sup>33</sup> M.S. Giannini, *Profili storici della scienza del diritto amministrativo*, in *Studi sassaresi*, 1940, anche in *Quaderni fiorentini*, 1973 (ed ora in Id., *Scritti*, vol. II, Giuffrè, Milan, 2002), 151-152.

<sup>34</sup> M.S. Giannini, *Profili storici*, supra, 160.

liability of administrative bodies and against administrative bodies.

4. *The organization*

hierarchy; the joint nature of decisions functionaries and officers; the State's direct administration at the national and local level; self-government or, rather, institutional bodies; the exercise of administrative duties by private institutions.

5. *Legal protection against public authorities*

general and special jurisdiction, special administrative jurisdictions, administrative justice, dispute resolution regarding conflicts of competence between administrative authorities.

6. *Administrative restrictions to individual rights*

police, monopolies.

7. *The provision of services to the public sector*

public works contracts, duties, special taxes and taxes.

8. *The supply of administrative benefits and public services*

common principles, public welfare and charity, state education, public transport services, railway service, administration of the healthcare system.

9. *Public property*

public ownership, public roads, State maritime property, public water, state military property

*regulation of public property:* Public-Law restrictions, Public-Law servitudes, other public real rights, expropriation for public utilities, communal use rights;

*Private-Law relationships of public bodies:* public ownership of goods taken for private use, Private-Law obligations of public bodies.

The general outline of this book was destined to leave a mark on the manuals to be published in the following half Century, although the work was also severely criticized for its excessively dogmatic and theoretical approach. Nevertheless, the project was of undeniable strength and wide-comprehension: it entirely covered the yet unexplored territory of Administrative Law, without dwelling upon descriptive analysis.

The system's view, on the other hand, was stated by the author himself in the preface to the second edition, in 1905:«I only wanted to demonstrate that our branch of law has now overcome its early stages, when it could only be itemized by describing every single activity undertaken by administrative bodies. On the contrary, now it is possible, rather, necessary to organize the textbooks by theoretical categories, regarding the fragile, but fundamental, connections gradually discovered through legal research, which

allow a classification of the different legal relationships arising from the public administration. After all, this is the ultimate purpose of every (branch of) legal science »<sup>35</sup>.

Thanks to this work the Italian Administrative Law and its science took a huge step forward.

#### IV. *The Crisis of the Modern State and the Two Souls of Santi Romano*

This first period of very intense scientific production alone would have been enough to make the Sicilian jurist one of the most influential scholars on Public Law of his age.

Moreover, it was the following period, dedicated to the elaboration of his institutional argument, which allowed him to be listed among the greatest theorists of the 20<sup>th</sup> Century <sup>36</sup>.

Romano drew up the theory of the plurality of legal orders in the space of a twenty year period <sup>37</sup>, during which he carried out a step-by-step systematic study (which, from the stylistic point of view, it has been correctly noted « the extreme constancy of his writing and how his work proceeded by subsequent additions rather than changes»: this remark can be considered as appropriate also from the methodological point of view.

It was a stream of research that started at the end of the 19<sup>th</sup> Century with his essay on the approval laws in 1897 (*Saggio di una teoria delle leggi di approvazione*), and another on the construction of public law statutes in 1899 (*L'interpretazione delle leggi di diritto pubblico*), then continued with the speeches and lectures published in the first ten years of the XX<sup>th</sup> Century: in 1901, the essay on the *de facto* institution of a constitutional legal order and its legitimization (*L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*), and then, in 1902, the preliminary remarks for a theory on the limitations upon the legislative function in the Italian Law (*Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto*

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<sup>35</sup> S. Romano, *Principi di diritto amministrativo italiano*, supra

<sup>36</sup> M. Fioravanti (*Stato di diritto e Stato amministrativo nell'opera giuridica di Santi Romano*, in Id., *La scienza del diritto pubblico*, supra, 405 ss.) also underlined how central the administrative matter was to Santi Romano, even within those scientific works regarded in a more proper sense, as "legal theory". Moreover, it should be recalled that one of his most important works, the complex monograph on the Commune (S. Romano, *Il Comune*, Società editrice libraria, Milan, 1908), dates back to that period « a work that could be defined as "perfect" for: the completeness of its subject-matter and especially for the in-depth identification of the Commune within the category of "political communities"; the research and focus on its distinctive characteristics in comparison with the State; the (definition of) the Commune's legal status within an entirely-structural notion of self-government; the analysis of the Commune's constituent elements, namely the territory and the communal people; the creation, modification and the growth of Communes. Still now, this is the only high-level scientific work on the subject matter, and has been widely plagiarized, not so much for the expounded theories – always following a strict legal method – as for the numerous general definitions given by Santi Romano, such as: the political community; the clear distinction between self-government and the definitions of autonomy and freedom of government; the territory, territorial powers and so on» (A. Amorth, *Il diritto amministrativo*, supra note 25, 2076-2077).

<sup>37</sup> As for the relevance of Santi Romano's juvenile works for the publication of his *L'ordinamento giuridico*, see above all M. Fioravanti, *Per l'interpretazione dell'opera giuridica di Santi Romano: nuove prospettive della ricerca*, in *Quad. fior.*, 1981, 169 ss., recently re-edited with the title "*Stato giuridico*" e diritto costituzionale negli scritti giovanili di Santi Romano

(1897-1909), in Id., *Scienza del diritto pubblico*, supra, 277 ss.

*italiano*), followed by the essays on the first constitutional charters in 1907 (*Le prime carte costituzionali*), as well as the Law and the constitutional correctness in 1909 (*Diritto e correttezza costituzionale*)<sup>38</sup>.

But it is only with the famous essay of 1909 on the “Modern State and its Crisis” (*Lo Stato moderno e la sua crisi*) that he achieved a first significant step towards a new understanding of the legal systems. From this essay one may find some of the main contents of his following analysis, even if, at times, mingled with an apologetic vision of the State. The resulting effect, as has been very well described, « was of an extraordinary resonance and as if it were a big stone launched into the calm waters pond of the legal science »<sup>39</sup>. And, considering his acumen, it should be also noted that Santi Romano was still very young at only thirty-four years old<sup>40</sup>.

It seems therefore useful, in dealing with Romano’s institutionalism, to start from the inaugural speech for the 1909-10 academic year at the Royal University of Pisa.

As in the best tradition of the Italian school of Public Law, the essay opens with a profession of faith in the legal status of the State, « wonderful creation by the law »<sup>41</sup>.

However, the author very soon moved on from this subject to notice the first signs of crisis in the modern State: «But this luminous concept of the State - the developments and applications of which cannot be described in detail here - for the time being appears to be more and more eclipsed, so that taking it as a bad omen would not be completely superstitious »<sup>42</sup>.

A key factor of the crisis was produced by the circumstance that, within the modern State «and often (...), even against it, there is a series of organizations and societies, thriving and flourishing with an actual power, which tend, in their turn, to join and associate amongst themselves.

They may pursue the most diverse objectives, but share a common feature: that is to group the individuals based on the criteria of their occupation or, rather, their economic interest. (...)

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<sup>38</sup> All the quoted essays are now available in S. Romano, *Scritti minori*, vol. I, Giuffrè, Milan, 1950 (edited by G. Zanobini, and reprinted in 1990, in a new edition by A. Romano).

<sup>39</sup> P. GROSSI, *Santi Romano: un messaggio da ripensare nell’odierna crisi delle fonti*, in Id., *Società, Diritto, Stato. Un recupero per il diritto*, Giuffrè, Milan, 2006, 148. Grossi points out that his message also « was basically suppressed by a silent majority, lazily sleeping in the shade of a “comfortable” statism ».

<sup>40</sup>As it is emphasized by P. Grossi, *Il diritto tra potere e ordinamento*, in Id., *Società, Diritto, Stato*, supra note 69, 180, « the sharp glance of this young Constitutional Law scholar, armed with youthful courage, has the same cold-heartedness as a doctor towards a very serious patient. And from this, it clearly emerges that there were truths, impotences, deafnesses, which the official propaganda of the regime managed to hyde thanks to the Italian Risorgimento fireworks and the jingoist rhetoric »

<sup>41</sup> S. Romano, *Lo Stato moderno e la sua crisi*, in Id., *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*, supra, 8:

«The impersonal nature of public power or, rather, the personification of the power by means of the State, conceived as a person itself: here is the basic principle of modern Public Law: an immaterial person, even if real; a non - fictitious nor imaginary entity which, even if it has no body, nevertheless can manage to develop, express and impose its will, through delicate and marvellous devices.; it is not shade nor spectre, but a true life principle, operating, if not by an actual organism, with the support of a set of institutions displayed and coordinated for this purpose.

A wonderful creation by the law which, according to easy criticism, appeared to be not more substantial than a poetic fantasy; instead, as the result of a long and steady historical process, it gave life to such a social eagerness which, so at least to express ourselves, is bigger than an thing else as well as more active and powerful. We owe to this fact that individuals and boards, de facto exercising sovereignty, don’t act as right-holders but as the State’s agents or bodies, the supreme will of which they implement, as do impersonal offices ».

<sup>42</sup> S. Romano, supra note 68, 9.

As a matter of fact, within this emerging trend towards new corporative systems based on professional specialization, which were once so flourished and then almost disappeared due to the rise of the modern State, we assisted in the greatest occurrence in contemporary history» .<sup>43</sup>

This has laid bare the original sin of the legal order, which followed the French revolution: an oversimplified conceptualization of the relationship between the State and individuals, conceived as if it were exclusive. So, society developed on its own line, independently, or even against, the influence of the legal rules.

It can thus be inferred that the crisis « of the contemporary State can be considered as the result of the convergence of these two trends, which reciprocally worsen each other: the gradual build-up of society based on specific social interests is ever more in the process of losing its atomistic character, and the lack of legal or institutional tools, which can be found in society itself , as a means of manifesting and imposing its organization within the State's one. This lack can explain the reason why there is sometimes a sharing of causes and purposes between those societies and groups of individuals which, by their nature and interests, are not supposed to rally in opposition to the State and those which pursue a radical and revolutionary change in public powers»<sup>44</sup>. Moreover, once the situation has been analyzed and the reasons for the crisis have been identified,: « it seems to us that an action principle is more and more required and necessary: that is to establish an upper organization which can comprise, reconcile and harmonize minor organizations into which the first organization is subdivided. This upper organization can and will be the modern State which, for a long time, can keep its present features almost intact. (...) It has the potential to assert itself as an organization overcoming partial and contingent interests and enforce its will, which can be definitely defined as general. However, the State is the only known institution that, until now, has been able to produce such a political system so as to prevent the future corporative society from coming back to a feudal-like structure. (...) The State will not be only the symbol, but also the actual body within which this principle will be increasingly applied. It will become even more powerful and active, a real personification of that large and comprehensive community which can be shaded by a passing crisis, yet is destined to gain more and more consistency and coherence » <sup>45</sup>.

This essay sets out some of the premises for the institutional theory, even if only to a certain extent. Santi Romani is perfectly capable of catching the signs of the change in progress, that is to say the mismatch between the legal construction and the economic and social developments, the antinomy between the so-called Age of Giolitti<sup>46</sup> and the former period, as well as the footprints of the irrepressible social complexity which corresponds to the legal universe complexity and which is going to wear away, from the inside, the State as a legal entity : he completely understands that the political sphere is going to prevail over the legal one. Nevertheless, because of his legal education and political inclination, he couldn't do anything but stay linked to that «wonderful creature of the Law » that is the modern State.

It follows that the essential problem for him was how the State could reabsorb the corporative tendencies, rather than the possible role for intermediate bodies within the legal order. The same problem had to be faced, at the beginning of the Fascist twenty-year period, by Alfredo Rocco, the architect of the

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<sup>43</sup> S. Romano, *supra*, 12.

<sup>44</sup> S. Romano, *op. ult. supra*, 23.

<sup>45</sup> S. Romano, *supra*, 24-25.

<sup>46</sup> Giovanni Giolitti was five times premier in Italy. The period 1901-14 is often called the Age of Giolitti, characterized by a significant change in the organization of labor, social and agrarian reforms, the introduction (1912) of

universal male suffrage and Italy's first colonialism through the conquest of Libya in 1911.

new State<sup>47</sup>, who then solved it in 1926 by establishing the corporative system (this was the statist face – prevailing in the Fascist regime – of Santi Romano’s arguments, compared to the pluralist one expressed by Sergio Panunzio)<sup>48</sup>.

« The corporative system, as it is regarded in its ordinary course, rather than degeneration, (...) can serve (...) not to overwhelm the State, as it has developed under the modern Law, but in filling in its gaps and make up for its lacks»: these could have certainly been the words of a famous essay by Rocco of 1920<sup>49</sup>, but instead it was Santi Romano in 1910<sup>50</sup>.

So, it can be inferred that the organicistic and anti-individualistic vision emerging from this essay (edited in Pisa) aimed at reassembling minor organizations into the State and «was the opposite of pluralism»; that « to unify, to reconcile and harmonize (this is the magic formula of Romano’s writing) eventually implies an elimination of the pluralism (which the fascist corporativism attempted to put into practice some years later);«that there is an alternative, made of competition and conflict, regulated by the legal order»<sup>51</sup>. According to Roberto Ruffilli, Romano succeeded at the attempt to apply Hegel’s «Ethical State» pattern as «unification of society as an organic whole based on classes»<sup>52</sup>. Nevertheless, Ruffilli points out that it is exactly «the identification of more and more “abstract” solutions by Romano», as to say «the statist version of political, social and legal pluralism», that shall contribute to determining «his following support in favour of the dictatorial Fascist State»<sup>53</sup>.

The idea that the increasing complexity of society implies legal fragmentation is registered by Romano also in his essay on the State’s interests and those of self-governmental entities (“*Gli interessi dello Stato e gli interessi degli enti autarchici*”)<sup>54</sup>, another crucial example of his foresight. In this work, through the auxiliary bodies formula, Romano points out the institutional clash of public interests, thus undermines, from its foundations, the construction of the administration as a unitary and monolithic body. Still, even here, the contradictions of Romano’s institutionalism emerge, since it is incapable to come out « of the compromise according to which the creative power of the legal order is recognized as well as the State’s supremacy is accepted »<sup>55</sup>.

On the other hand, Paolo Grossi wonderfully described the two souls of Santi Romano in a meaningful passage of his book on the “Italian Legal Science” (*La scienza giuridica italiana*), which is appropriate to quote in full: « this Romano, who examines the State thoroughly, going deeply into the subject, but also scanning its horizons and even beyond the State, is not in contrast with the constructor of a state system, the State as a legal entity. Simply, he sits alongside, with a completely different subject-matter, on a completely different level.

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<sup>47</sup> Referring to the title of Chapter V in the volume by E. GENTILE, *Il mito dello Stato nuovo*, Roma-Bari, Laterza, 1999.

<sup>48</sup> Although there are numerous writings on this topic, it is sufficient to recall the very clear passages by P. Grossi, *Scienza giuridica italiana*, supra, 171 ss.

<sup>49</sup> A. Rocco, *Crisi dello Stato e sindacati*, in Id., *Scritti e discorsi politici*, vol. II, *La lotta contro la reazione antinazionale (1919-1924)*, Milan, Giuffrè, 1938, 631 ss.

<sup>50</sup> S. Romano, supra note, 26.

<sup>51</sup> S. Cassese, *Lo Stato*, «stupenda creazione del diritto» e «vero principio e vita», nei primi anni della *Rivista di diritto pubblico (1909-1911)*, in *Quad. fior.*, 1987, 507.

<sup>52</sup> R. Ruffilli, *Santi Romano e la «crisi dello Stato» agli inizi dell’età contemporanea*, supra, 319.

<sup>53</sup> R. Ruffilli, supra note, 314.

<sup>54</sup> S. Romano, *Gli interessi dei soggetti autarchici e gli interessi dello Stato*, in *Studi di diritto pubblico in onore di Oreste Ranelletti*, Cedam, Padua, 1930, see also Id., *Scritti minori*, vol. II, supra, 351 ss.

<sup>55</sup> S. Cassese, *Cultura e politica del diritto amministrativo*, Il Mulino, Bologna, 1971, 44.

In Romano recurs the same beneficial splitting which already occurred in his first master, Orlando, between the structure-analyst of a given legal entity (that is to say, historically defined, this State or that one which, in the case of Orlando and Romano, was the Unitary Kingdom of Italy arising from the national independence wars) and the expert of “General Public Law” (as Orlando used to call it), in whose observatory the specific State’s figure is complicated and rarefies in an extraordinarily wide and various landscape»<sup>56</sup>.

## V. Romano’s Institutionalism

So, since the first decade of the 20<sup>th</sup> Century, Santi Romano perfectly understood the complexity of the legal universe and the crisis of a fragile and vacillating State.

But there is certainly a gap, a caesura, as Sabino Cassese noted, between the Romano in the first decade of the 20<sup>th</sup> Century, and the one who published, in the immediate post-war period, the booklet on the “Legal Order” (*L’ordinamento giuridico*).<sup>57</sup> In this work the institutional theory is completely accomplished (and it should also be pointed out, as Giannini did<sup>58</sup>, that especially during his period of teaching in Pisa, Romano had the possibility of deepening his knowledge of both Canon and International Law, which probably provided Romano’s theory with crucial elements and points).

In this work the Sicilian jurist goes beyond the recording of the modern State’s crisis, since he prefigures its overcoming. The structure of *L’ordinamento giuridico* is quite simple. The work is divided in two parts: the first is dedicated to the concept of legal order, the second to the plurality of legal orders and their relationships. According to Romano, the legal order as a set of norms is a restricted interpretation, because « the process of objectification, which gives rise to the legal phenomenon, doesn’t start from the issuing of rules, but from a previous time; norms are merely a display of the legal order, one of various displays»<sup>59</sup>. Rather than a set of norms, Law is first of all «organization, structure, position in society itself»<sup>60</sup>. On the contrary, the legal order should be identified, within an objective law system, with the institution, which indicates every kind of entities or social bodies. An institution is «not a need of the reason, an abstract principle, an ideal-something, but it is rather an actual and effective entity»<sup>61</sup>. Such a conception

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<sup>56</sup> P. Grossi, *Scienza giuridica italiana*, supra, 110. It is to be reminded also the definition by N. Bobbio, *Teoria e ideologia nella dottrina di Santi Romano*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche di oggi e l’insegnamento di Santi Romano*, Giuffrè, Milan, 1977, 41, according to whom the Sicilian jurist is to be considered as « a pluralist from the theoretical point of view, and a monist from the idealogical point of view ». In the same volume, moreover, Uberto Scarpelli underlined the conflict between conservatism and progressivism in Santi Romano. And A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”*, supra, 631, noted that the « the different attitude of the Sicilian jurist, now as the Author of the “legal-institutional discontinuity”, and then as the Author of the “legal-constructural continuity” ». P. Costa, *Lo Stato immaginario*, Giuffrè, Milan, 1986, finally, registered the paradox of pluralism in Romano, which is achieved through a State-centred model. Moreover, A. Massera, *op. ult. supra*, 632, in Romano’s mind there is not only this, but also the consideration that the present powers in the legal order, and their relationships, have an intrinsic legal significance. Most of all, there is the firm belief that it is necessary to equate the State and the public power and that a new pluralism of public and administrative powers is emerging, which is the foundation of that *État au pluriel* we have to face nowadays».

<sup>57</sup>The following quotations are made from the reprint, S. Romano, *L’ordinamento giuridico*, Sansoni, Florence, 1946. The work was first published in 1917, in two issues, on the *Annali delle Università toscane* and came out in a single volume in Pisa, in 1918.

<sup>58</sup> M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, in *Riv. dir. sport.*, 1949, 10 ss.

<sup>59</sup> S. Romano, *L’ordinamento giuridico*, supra note 102, 19.

<sup>60</sup> S. Romano, *L’ordinamento giuridico*, supra note 102, 27.

<sup>61</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 96.

of the legal order is very important for Administrative Law, where « before regulating the relationships arising from administrative functions, there is the Law which establishes the organization of those entities called upon their implementation»<sup>62</sup>.

Institutions and norms are considered as two distinct elements in law, both are necessary , «but those who can't understand why there is such a necessity, and thus assume only the norms to be the real essentials of law, are driven to a state of uneasiness by their belief. Therefore, they tend to leave out of their works, or nearly always limit, the treatment of other subjects. So, especially among the German scholars, Administrative Law experts often skip the theory of administrative organization and, in the field of Procedure Law, also the Italian jurists overlook the so-called "judicature" (the system of courts) and reduce it to a small number of preliminary concepts. These are intrinsic, indirect and often unobserved consequences, yet indicative of a one-sided conception of law»<sup>63</sup>.

From the conception of the legal order as the equivalent to an institution derives the corollary that there are as many legal orders as there are institutions. So, there is a plurality of legal orders, not at all referable to the State's law only , because otherwise «there would be no other actual legal orders but the State and the Interstate ones» and «law would be nothing but power or will, irradiating from the State (and, within the International Community, from many different States). There is no necessary connection between law and State. The first does not exclusively result from the second, and the State is also a species of the genus "law". One legal order can be significant for another and there are different degrees of significance implied in them, but also could be completely insignificant, just as there are many fields of human activities which are irrelevant for the State's law. Some legal orders can be "inner" to others, for example several legal orders are included within the State's one: they are inside the State, but separated by it. These are, in short, the main contents of the volume.

First of all, an observation has to be made. What is impressive regarding his approach to the topic is Romano's ability to deal with what he considered to be an extremely "border" topic for legal studies (on the conflict between politics and juridical systems). As for the logical path, his method never diverges from the dogmatic framework, which always distinguished his works. The terminology, legal techniques and reasoning used are all typical of the dogmatic approach: his style but for the substance completely recalls the legal method. In this specific case, in fact, he uses the sophisticated techniques of legal dogmatics in order to draw on one of its fundamentals: the role of the State as a legal entity in the law universe.

Further, on the methodological issue, the breakdown with the past is still disruptive and open to radical changes, especially in the field of Administrative Law. If there is a logical *prius* with respect to the *juris* role, here is where a jurist has to look at the social reality in order to seize it. The world of (legal) facts falls within (or returns to) the law studies through the attention paid to society, rejecting that abstruse formalism. Social complexity removes the simplifying and reductionist construction arising from the French Revolution and shows the plurality and fragmentariness of the legal universe.

Before giving an opinion on the significance of the social dimension in *L'ordinamento giuridico*, some attention has to be paid to the author's educational and ideological background. He was certainly still a Conservative from the political point of view (so, we cannot expect him to see the contingent social circumstances in a contemporary sight, nor that he could go too far in the way of drawing up the State legal

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<sup>62</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 98.

<sup>63</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 98-99.

order<sup>64</sup>). As for his philosophical references, he was an anti-individualist and an opponent to the Enlightenment.<sup>65</sup> On the social side, he was a representative (and supporter) of that upper agrarian bourgeoisie typical of Southern Italy (and, therefore, his social position can be associated with those of Orlando, Salandra, as well as of Ranelletti himself<sup>66</sup>). Nevertheless, in the conclusions of this work we can't find the same reconciling return to the State's comforting embrace, as it happened in the case of *Lo Stato moderno e la sua crisi*.

The State as a legal person is by this time like a king without his crown, it is « only one of the various forms of human societies, even if the most developed, and there is no reason to acknowledge its divinity»<sup>67</sup>.

In other words, one agrees with the opinion expressed by Sabino Cassese in his article on “*A theory on the formation of L'ordinamento giuridico by Santi Romano*” (“*Ipotesi sulla formazione de L'ordinamento giuridico di Romano*”<sup>68</sup>). According to Cassese, this work is an attempt to reconstruct, based on a legal ground, the liberal-democratic State, in a partly different way from the previous writings by Romano (and also from the following ones, as it will be demonstrated further on): « this was the first and most consistent - if not the only - response to the needs of the new institutions».

The reported elements of innovation in legal theory could have resulted in a radical change in the fundamental concepts of Administrative Law studies. And it is yet common knowledge that this did not happen, since the implications of the institutional theory were fully understood only several decades later: what are the reasons for this sort of “soundproofing” of the Sicilian jurist's message, which instead should have made a lot of noise?

One first reason could be traced back to the eternal mingling of innovation and tradition, so it is always easier for science to settle into tradition, rather than to attempt catching the change. Conservatism usually acts as strong counterbalance to the innovation forces. Time only rewards reforming insights which, at that point, become new mythologies to remove, following to new changes have been metabolized. In this specific case, there two other factors to be taken into account.

On the one hand, as it has been pointed out, according to Orlando, Ranelletti, and other liberal scholars in Public Law of that time, the dogma of the State as a legal person was related to the defense of the state unity, but also to a sort of political and social *status quo*. Consequently, not only the recognition of the legal existence of such “social coagulators” as the so-called intermediate bodies, but also the very possibility

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<sup>64</sup> From this perspective, it can be argued that the “realistic” reading of *L'ordinamento giuridico* by D'albergo is overdone. See S. D'Albergo, *Riflessioni sulla storicità degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl.*, 1974, 451 ss. On the other hand, it seems that the merely ideological interpretation given by Tarello also remains ungenerous. See G. Tarello, *La dottrina dell'ordinamento e la figura pubblica di Santi Romano*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano*, supra, 245 ss.; Id., *Prospetto per la voce “Ordinamento giuridico” di una enciclopedia*, in *Pol. dir.*, 1975, 73 ss.

<sup>65</sup> On this point, see the very sharp analysis by G. Falcon, *Gli “scritti minori” di Santi Romano*, supra, 667 ss. As for Romano's opposition to the Enlightenment ideas, Falcon points out that «it is not just a purely aristocratic attitude, which was also present in Romano, but rather a defensive necessity which, as well as leads to statement of a necessary unattainability for the sources of the law, is at the same time functional to the stability of the State».

<sup>66</sup> Not by chance, all the above mentioned scholars were attracted by the fascist ideology, especially in its first stages. The rise and success of Fascism was indeed considered as instrumental to the restoration of the social order, and to the appeasement of social class conflicts by means of corporatism. Therefore, it was seen as the only possible remedy against the social and political adversities in the first post-World War. See also, G. Falcon, *Gli “scritti minori” di Santi Romano*, supra, 673.

<sup>67</sup> S. Romano, *L'ordinamento giuridico*, supra, 111.

<sup>68</sup> S. Cassese, *Ipotesi sulla formazione de L'ordinamento giuridico di Romano*, in *Quad. fior.*, 1972, 243 ss. (the quotation can be found in p. 246). See also S. Cassese, *L'amministrazione dello Stato liberale-democratico*, in *Quad. storici*,

1972, anche in Id., *La formazione dello Stato amministrativo*, Giuffrè, Milan, 1974, 11 ss.

of their independent organization as legal orders separated by the State, even if included in it, was considered as an attack on the social order, against to which they offered a fierce resistance.

On the other hand, the historical factor should also be taken into account, namely that Romano published his work in 1917-18, only five years earlier than the rise of fascism. The gradual concentration of power in the state government and in the Fascist National Party ended by hiding any trace of the changes reported by Romano, through a sort of forced subsumption of the social complexity into the totalitarian State.

The point is that the Italian science of Public Law (and especially that of Administrative Law) remained guiltily unreceptive to Romano's theories and only in the period after the Second World War was it able to reap the fruits (particularly in the specific field of Administrative Law it was above all with Giannini, and also with Miele, Bachelet Ottaviano, Bassi, Silvestri). Romano, besides, continued on his way, basically a lonely path towards institutionalism.

Another step forward in this direction was the short, but sharp, essay on the completeness of the state order, recalling an idea just mentioned in "*The legal order*", which inflicted hard blow on the theory of the gaps in the law shown by Donato Donati (furthermore, it should be noticed that Romano presented his argument in Modena, which was the town he had just left to move to Pisa and which was also Donati's hometown, with whom he was however on very good terms).

In this essay, the reasoning is as convincing and almost mathematical as in the typical style of Donati's writings. Here Romano argues that the absence of a norm is not to be considered as a gap in the legal order, but just the sign of its indifference with respect to the subject matter to rule; also, that the presence of a legal norm does not excludes all possibilities of institutional gaps. On these premises, he infers that « the problem of gaps in the legal order can be seen in different ways, depending on whether the law is considered as a set of rules or rather an institutional system: these two points of view are not mutually exclusive, in fact they are combined, even if they are different and thus request different solutions. At the same time, there remains further evidence of the impossibility of reducing the whole legal order to its normative aspect »<sup>69</sup>.

The analysis of the institutional period can be closed with a mention of the lecture given at the Istituto di Scienze Sociali in Florence, bearing the title of "*Beyond the State*" (*Oltre lo Stato*<sup>70</sup>), where, in fact, there seems to be a halt in the development of very eye-opening and innovative reflections.

Starting from the recurring remark that «God or devil, true reality or false idol, salvation or perdition, the State has become the first, if not the only, actor in world science » Romano assumes that it cannot be simply « excluded that States, or even only some of them, under certain conditions, shall eventually remain, rather than develop, included and perhaps absorbed in wider organizations, which are not state-like in the strict sense »<sup>71</sup>.

But, at this point, before making any ultimate conclusions, the Sicilian jurist comes to a halt, going backwards to the *dominus*-State, which abandons its bellicose expansionism and colonizing imperialism in order to become a *primus inter pares*. A conclusion which leaves us so perplexed that we are led to raise doubts, even on how to interpret his arguments in L'ordinamento giuridico.

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<sup>69</sup> S. Romano, *Osservazioni sulla completezza dell'ordinamento statale*, in Id., *Lo Stato moderno e la sua crisi*, supra, 184.

<sup>70</sup> S. Romano, *Oltre lo Stato*, in Id., *Scritti minori*, vol. I, supra, 419 ss.

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In this regard, it has been asserted that « the theory of the legal order is to some extent an overcoming of the arguments for the state nature of law, but in the author's perspective its position is nevertheless prior to the State, both on the structural (because the relationship between the system and the State is of the genus-species type) and historical side (because the state organization is a different progress from the pluralistic one, in the sense of particularism, as it actually was in the Middle Age); it doesn't seem accidental that in the same year of 1919, looking for horizons to his "Beyond the State", Romano found them in the hegemonic expansion of the State»<sup>72</sup>.

## VI. *Santi Romano and the Fascist regime*

The third stage of Romano's scientific path, at the end of his teaching period in Pisa and during the one in Milan, is almost completely filled with handbook arrangements. Romano even worked on seven handbooks and, what's more, regarding seven different branches of law, in the space of fifteen years, from 1914 to 1930. It should be also recognized that most of them had a didactic purpose, except the "Italian Public Law" (*Il diritto pubblico italiano*) and the "Constitutional Law Course" (which were more ambitious, complex and inspired works<sup>73</sup>). Apart from the book on "The Italian Public Law", which is worth analyzing in more details, these works are listed below, in order of their publication date: the "Colonial Law Course" in 1918 (*Corso di diritto coloniale*<sup>74</sup>), the "Lectures in Ecclesiastical Law" firstly edited in 1912 and secondly in 1923 (*Lezioni di diritto ecclesiastico*<sup>75</sup>), the "Constitutional Law Course" in 1926 (*Corso di diritto costituzionale*, which was even reprinted eight times), the "International Law Course" in 1926 (*Corso di diritto internazionale*<sup>76</sup>) and the first, practical and essential handbook on the general principles for an "Administrative Law Course", which was published in 1930 and reprinted for the third time, in a revised and increased version, in 1937, when Romano had just become the President of the Supreme Administrative Court (*Corso di diritto amministrativo*<sup>77</sup>).

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<sup>72</sup> G. Falcon, *Gli "scritti minori" di Santi Romano*, supra, 674.

<sup>73</sup> The writing by G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 341, was edited just on the occasion of the publication of the fifth edition of S. Romano, *Corso di diritto costituzionale*, Cedam, Padua, 1928 (1 ed.), defined as « one of the most significant works by Santi Romano, among those which better represent a scholar personality. The topic itself requests various attitudes, not always present in the same author: the jurist skills, historical education, political sense, a deep knowledge of positive law, system capacity to organize and arrange the numerous subject matters, a solid background in legal theory; but those attitudes are submitted to a creative and well estimated effort, which makes the book a living organism, that is to say eurythmic, original, full of sharp remarks, where topics are often seen under a new and unexpected light».

<sup>74</sup> S. Romano, *Corso di diritto coloniale*, Athenaeum, Roma, 1918.

<sup>75</sup> S. Romano, *Lezioni di diritto ecclesiastico*, 2 ed. adjusted and increased, Pisa-Palermo, Juventus, 1923.

<sup>76</sup> S. Romano, *Corso di diritto internazionale*, Cedam, Padua, 1926.

<sup>77</sup> S. Romano, *Corso di diritto amministrativo. Principi generali*, Cedam, Padua, 1930 (3 ed. revised, Cedam, Padua, 1937). There are differing opinions on this work. Some authors emphasized its merely didactic purpose and the absence of a deep reconstructive reflection, although they recognize his usual clearness of mind. However, there is also someone (Amorth, *Il diritto amministrativo*, supra, 2077) who considered it as «the "summa" of Romano's Administrative Law, referring back to his renowned *Principles*, of which it represents the transcription of some "partitions" of his theories in more refined terms, the development of their foresights. Therefore, just as general theory work, this book makes only few references to positive law, so it is probably not by chance that it includes only a brief description of the administrative organization, since this topic necessarily implies reference to the positive law in force at the time of the

“Course” edition and revision».

A special mention is to be given to “*The Italian Public Law*”, which was finished in 1914 and intended for the German audience, but remained unpublished until 1988.<sup>78</sup> At first, it was the outbreak of the first World War that kept the author from delivering the work to the publisher. Successively, the institutional changes determined by the coming of fascism most likely made the book’s framework outdated and led Romano to give up its publication: as regards this event, there is no need to dwell upon it further, since it was already described in details by Sabino Cassese<sup>79</sup> and Alberto Romano<sup>80</sup>. What is to be pointed out here is that, in all likelihood, the draft of this work - an actual treatise on the *Staatsrecht* - proceeded at the same rate as the one of *L’ordinamento giuridico*. Since this was probably the last work edited by Romano before “*The Italian Public Law*”, it was therefore also its theoretical and systematic basis<sup>81</sup>.

This is the only period of time during which Romano, as already mentioned, held very high positions in government.

Differently from Orlando, Romano devoted himself exclusively to research and never practiced law. He avoided political contests and refused full-time positions outside academia until that morning of December 8<sup>th</sup> 1928, when a university porter rushed into the lecture hall of the University of Milan and, interrupting his lecture on Constitutional Law, announced a phone call from the Premier. Here Mussolini offered him the appointment as the President of the *Consiglio di Stato*, in a manner that was a breach of the usual procedure for appointments followed by the Italian Supreme Administrative Court till then (and thereafter)<sup>82</sup>.

Hence it follows the controversial issue of Romano’s relationship with Fascism, (a subject ) on which many wrote. But we won’t dwell upon this subject too much, also because, oddly, there are extreme opinions which do not properly consider that the reality of facts is often more shaded than its sharp interpretations (and this remark is especially appropriate in the case of the Sicilian jurist, because of his contradictory personality). In the previous paragraphs we already emphasized Santi Romano’s conservative ideological positions, and we also noticed that, most likely, he didn’t look at Fascism with a hostile attitude. In fact, it is probable that Romano (as the majority of the jurists of the liberal age) cherished the hope, at least initially, that the Fascist State would have developed by integrating the traditional principles of liberalism and, in the meantime, by accomplishing the renewed needs of that complex society, so that remedies could be found for the State’s crisis as well as for the ongoing strikes, assaults, ravages of private property.

There is abundant evidence that Romano, on the occasion of formal celebrations and annual reports, bestowed great honours upon Mussolini in compliance with the typical language and style of the fascist

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For sure, Romano decided not to edit further volumes of this work. For one thing, it seems that he was also very pleased with the first volumes of the *Administrative Law Course* edited by Zanobini, to whom he left the task of drawing up abstract legal arguments by means of a systematic and constructive approach, while he preferred to devote himself almost entirely to Constitutional Law .

<sup>78</sup> S. Romano, *Il diritto pubblico italiano*, 1914, Giuffrè, Milan, 1988. Besides Alberto Romano and Sabino Cassese (also mentioned in the following footnotes), an in depth study of this work was made by A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”*, supra, 617 ss., who carefully compared this book with the rest of Romano’s manuals/handbooks editions.

<sup>79</sup> S. Cassese, *Ipotesi sulla formazione de L’ordinamento giuridico di Romano*, supra, 260.

<sup>80</sup> A. Romano, *Presentazione*, in S. Romano, *Il diritto pubblico italiano*, 1914, supra, XVII ss.; see also A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”*, supra, 628 ss.

<sup>81</sup>In this perspective, see the very interesting remarks in the above mentioned writings by Sabino Cassese and Alberto Romano.

<sup>82</sup> On this point see G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, in *La giustizia amministrativa ai tempi di Santi Romano Presidente del Consiglio di Stato*, Giappichelli, Turin, 2004, 39 ss. The author also reminds an episode regarding Carlo Schanzer who was the favourite to be appointed after former president Raffaele Perla and was firstly

appointed, but then all of a sudden removed.

speeches and it is also unquestionable that his opinion “Marshall of the Empire” favoured, in the end, Mussolini’s plans<sup>83</sup>.

However, Santi Romano asked for and obtained the Fascist Party membership card only in October 1928 (so quite late and, anyhow, in order to be appointed at the *Consiglio di Stato*). Recent studies by Guido Melis demonstrate that Romano played his role as the President of the *Consiglio di Stato* with a great dignity, and his appointment did not imply at all a “fascistization” of the Court<sup>84</sup>. There are certainly traces, in Romano’s works of the late Twenties and the beginning of Thirties, of a reversal from his previous positions of the immediate post-First World War years. Above all, it can be seen in his review of the book on *La trasformazione dello Stato* edited by Alfredo Rocco, which was besides published just before his appointment as the President of the *Consiglio di Stato*<sup>85</sup>. According to Romano, there is a profound antithesis between the Liberal State and the Fascist one, since the first «is opened to all kinds of ideals and plans; this is the reason why it is incapable of controlling the existing forces in the Country, but is controlled by them». Romano agrees with Rocco that the Fascist State, in contrast, accepted and implemented «until the extreme consequences » the teaching of the modern school of Public Law, according to which «sovereignty does not lie in the people, but in the State, (...) provided with its own legal status, which is different from that of individuals and asserted its authority over them as a superior entity ».

After only ten years from the publication of *L’ordinamento giuridico*, it seems as if we are dealing with a completely different Romano who, from one side, steps back from his opening to pluralism, so that the stress is on the State rather than on institutions. On the other side, he prefigures a continuity between the conception of State derived from the legal school of Public Law and the totalitarian drifts of the Fascist regime. Just as if these theorizations on the sovereign and authoritarian power of the State as a legal person were, in a latent way, the premises for achieving a full “consubstantiality” between fascism and the State.

## VII. *The late Romano: the “Fragments”*

The last period of the Sicilian jurist’s life – after he was subjected to a purge trial and retired – was marked by sadness and resentment. Nevertheless, even during these tormented years, Santi Romano found the strength to enrich science with such important works as the “Principles of General Constitutional Law” (*Principi di diritto costituzionale generale*<sup>86</sup>) and, most of all, the “Fragments of a legal dictionary” (*Frammenti di un dizionario giuridico*). The latter is a sort of scientific testament which is worth dwelling upon.

Apart from the entry on “Clipperton” (written in 1930, with only few additions in March 1944), which is however unconnected with the rest of the work,<sup>87</sup> the other items listed in the “Fragments” were written in

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<sup>83</sup> On this matter, see also the very interesting the historical reconstruction by A. Romano, *Santi Romano, la giuspubblicistica italiana: temi e tendenze*, in *I giuristi nella crisi dello Stato liberale*, Venice, 2000.

<sup>84</sup> G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, in *La giustizia amministrativa ai tempi di Santi Romano Presidente del Consiglio di Stato*, Giappichelli, Turin, 2004, 42 ss.

<sup>85</sup> S. Romano, *Recensione ad Alfredo Rocco, Le trasformazioni dello Stato. Dallo Stato liberale allo Stato fascista*, in *Arch. giur.*, 1928, pag. 3 dell’estratto.

<sup>86</sup> S. Romano, *Principi di diritto costituzionale generale*, Giuffrè, Milan, 1945.

<sup>87</sup> Considering the dating, which was probably the author’s starting point for drafting the booklet: this could

also explain the placing of such an item within the work.

the space of three years, from the beginning of 1944 (the entry "*Law and Ethics*" was completed in March 1944) and the end of 1946 (the entry "*Legal Mythology*" is dated December 1946).

On the whole, the writings in the book can be divided in three different groups.

The first, consisting of quite long and articulate entries, aims at critically re-interpreting legal relationships and, in doing so, Romano returns to one of the key issues of his dogmatics. Such a re-reading of legal relationships is carried out by the author both on the "organizational" side and on the side of the subjective legal situation. An example of the first category can be found in the entry "*Organ*", a meticulous reading of the public organs theory, which aimed at excluding all possibility of legal personality for administrative bodies. As for the second, one might look at "*Absolute Rights*" and "*Duties, Obligations*", which are closely related to one another from the writing viewpoint (although the basic argument in both entries is really that there is an asymmetry between rights and duties), but also at the entry "*Power, Authority*". The outline is the same: the settling of an issue, a description of the arguments expressed by other legal scientists, the identification of the main critical problems arising from those arguments, their classification in different categories, a proposal for a new theory, the analysis of possible consequences arising from the implementation of the proposed theory into the system.

The Santi Romano emerging from these pages of the "*Fragments*" is somehow a quite familiar one. The same is the author emerging from the second group of entries, mostly medium-sized writings, in which he returns to the institutional theory. He feels that this is probably his last chance to embark on the unexplored, or yet unclear, territory of the *L'ordinamento giuridico*<sup>88</sup>. The Sicilian jurist does it through his typical reasoning, a strict legal logic, just as if it were mathematics; although with a different tone of voice, compared to the entries of the first category, because what is different is in fact the subject-matter<sup>89</sup>.

As an example of this group of entries we can refer to "*Autonomy*" (actually, this is a sort of "halfway-house" between the first and the second group), "*Custom*", "*Law and Ethics*", "*Law (the function of)*", "*Evolutionary Interpretation*", "*Legal Norms (addressees of)*", "*Legal Reality*", "*Revolution and the Law*". Hence, he returns to deal with the primary question for a jurist, that is "what is the law", which is examined from different angles, through the institutional approach, by demonstrating the explanatory capacity of the legal order argument.

First of all, as for the borders of law (it should be pointed out that the meaning used here is that of « positive » law, therefore a different concept from justice and natural law), Romano explains that « if the conflict with moral principles is not sufficient to deprive the whole institutions (or single parts of them) of their legal nature, there is decisive evidence of the groundlessness of those arguments that, in one sense or another, equate law and ethics, rather than distinguish between them. This does not necessarily imply (...) that the law shall not, as far as possible, comply with ethics or, at least, deviate from it »<sup>90</sup>.

Secondly, with regard to the function of law, the author asserts that (based on the assumption that law is different from ethics and economics) such a function can be fully understood only from the institutional viewpoint, rather than from the normativist one (because norms are only one of the possible

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<sup>88</sup> From that time, it was considered as a sort of key work within the Italian legal writing of the first half of the 20<sup>th</sup> Century, although for this very reason often misunderstood and, anyhow, fiercely opposed, controversial and widely criticized, both in the philosophical and legal field, ever since the publication of the "*Fragments*".

<sup>89</sup> It is quite similar to *L'ordinamento giuridico*, where we can find the typical style of Romano, although more direct, or less pompous, compared to other works by the same author.

<sup>90</sup> S. Romano, *Frammenti di un dizionario giuridico, supra*, 73-74.

means): the function of law is to order and stabilize institutions, by means of a specific relationship between such a function and the structure of the body which performs it <sup>91</sup>.

Thirdly, as for how to interpret the law, he insists on the point that « the so-called evolution of interpretation, which is nothing but the evolution of the legal order itself, as it is interpreted, is only possible as far as the interpretation focuses on the close relationship between norms and institutional developments, rather than on the legal norms by themselves. Indeed, if we look at the essence of an institution, we can see that institutional development has a strong impact on the norms and, therefore, on the whole legal order on which such norms depend. » <sup>92</sup>. Finally, Romano deals with the way in which facts influence legal phenomena and, with specific regard to such traumatic events as political disturbances, he examines the relations between a revolutionary organization and the surviving State's institution, leaving out the relationship established between the previous and new legal orders, a subject-matter which was instead discussed in *L'ordinamento giuridico*. On the first matter, Romano reveals that « revolution is an unlawful fact in the light of the positive law of the State against which it occurs, but it does not mean that, from a different perspective, where it qualifies by itself, revolution is a well-structured movement governed by its own law » consequently, it is an independent legal order, in so far as it is a legally organized power <sup>93</sup>.

However in the "Fragments" there is an unexpected and unusual Romano who indulges in considerations involving his personal situation or, even, in polemical remarks on what he can see around him and lets us read his heart much more than usual. In short, here appears a more deeply human Romano, compared to the dogmatic scholar who enunciated theories and "built cathedrals", even if more exposed and less protected by the veil of formality. As it was stated before, the evidence of this can be especially found in the third group of entries, the short ones, as well as in some parts of the longer items.

As an example of the first feature identified in this kind of entries, we may refer to the last paragraph of "*Revolution and the Law*" (*Rivoluzione e diritto*): legal orders arising from revolutions in progress are technically inferior, makeshift, lacking in competence and experience. Nevertheless «they distrust collaboration from all those involved with the regime they are trying to abolish, even when they are dealing with people who are outside politics, impartial and expert.(...) Until the new construction is completed, it may, however, be necessary to make use of the remaining parts of the previous legal order. The progressive adaptation of the new legal system by integrating to the previous order, while the latter is gradually dying out, is a very hard task which can seldom be successfully completed if those who are undertaking it are not sufficiently aware that this is a difficult and delicate question» <sup>94</sup>. How could we not infer from these words, a reference to his personal condition?

As for the second feature, we may consider the last sentence in "*The "John Doe", the ordinary man*" : « one should wish that a man "of the people" shall not become "vulgar"; that the "ordinary" man shall not behave as if he was a skilled, a learned one, and expect to command when he should obey; that, in short, the good-natured and quiet "*John Doe*" shall not take on the attitude of a "man of the crowds" and, in doing so, cause a deterioration of democracy into "holocracy" » <sup>95</sup>.

If we look at the heading "*Education Case-Law*", this feature can also be found in the severe criticism of the courts («heavy, pedantic and abstruse logomachies, useless quibbles, show exhibitions of learning and virtuosity, aimless analysis resulting in an end in themselves, complicated arguments which keep the reader

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<sup>91</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 82-83.

<sup>92</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 121.

<sup>93</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 224.

<sup>94</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 232.

<sup>95</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 235.

from understanding or getting in the way of a correct perception of the reality. In other words, an exaggeration of that “concept jurisprudence”, which had already been criticized, not always fairly, but is now more and more evidently going to extremes»<sup>96</sup>).

Similarly, Romano criticizes the scholars in the entry on “*Jurists*” (it is not always easy to make a distinction between the actual jurists and (...) those to whom such a quality is attributed, sometimes even officially. As there are Chinese or Roman pearls which appear authentic, and even more beautiful than the authentic ones, to those who are not connoisseurs, so there are false jurists, who have only a (superficial and) faint semblance of the authentic jurists. (...)

But, more than the completely and shamelessly false “jurists”, we should worry about those half-jurists who (...) can be compared to cultivated pearls. (...) Their lack of legal mind is hidden by veneers of politics, sociology, philosophy or pseudo-philosophy, limited and obscured historical learning, often in such a good disguise that it is difficult to notice»<sup>97</sup>). The result is an idea of legal science which is closed to any exchange with other human sciences.

Above all, this last entry – together with the following (*Glissez, mortels, n'appuyez pas*), is also important for its methodological implications. What are, according to Romano, the qualities of the real jurist?

The capacity to dominate and carefully scan the horizon of the whole social phenomena, managing to identify what is legally significant; to have complete mastery of analytical tools and the ability to be concise, that is to have a legal mind which is an innate faculty rather than a learned behavior, although it can be improved with practice and experience; the use of such a strict reasoning as, at least potentially, the one used by mathematicians, even if is aimed at solving practical problems<sup>98</sup>; accuracy and precision but without becoming entrenched; the ability to comprehensively analyze events, so that they might be understood as a whole and appear in their real essence, without being smashed into smithereens<sup>99</sup>.

Furthermore, what is the role of a real jurist in the society? He « usually ends up outstanding and win the elevated place he deserves, so that he can accomplish his noble task, and which should be granted to him in the name of the public good. A society which denies such a place to him is either primitive or degenerate or, as it often happened during certain revolutions, is going through a more or less serious crisis which, if still latent, could lead to great upheavals»<sup>100</sup>.

In these sentences we can probably see, besides the aristocratic approach referring to the leading role of jurists in society, also the need for justifying his appointments during the Fascist period as the natural result of a process by which the technical authoritativeness of a real jurist is recognized within a given legal order. With respect to such a process, it seems inferable that he considered himself bound not to draw back.

On the whole, the “*Fragments*” is a work on the border between the juridical and non-juridical, seeking for what can be defined as juridical or outside the legal phenomena, in search of how a jurist might deal with such topics: in this perspective, as stated above, the volume might be considered as a sort of appendix, or late continuation of *L'ordinamento giuridico*. This kind of works (dedicated to the study of « the last territory where we can find a legal atmosphere») is particularly congenial to the Sicilian jurist. Although he reveals an enviable cultural background in several fields of human sciences, Romano succeeds in

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<sup>96</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 112.

<sup>97</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 113.

<sup>98</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 115.

<sup>99</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 117.

<sup>100</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 116.

convincing the reader that he remains within the borders of his adopted territory, the legal studies, while the basic problem is that social complexity, by penetrating the legal system, makes the jurist's task much more hybrid with respect to his attempt at maintaining "purity" of legal knowledge. The question to ask should be: assuming this complexity, could it really be possible for a jurist, even with the strongest cultural tools for a wide comprehensive approach, to split substances as if he was a chemist, so that he can distinguish between juridical and non-juridical? In regard to this question, the answer given by Romano, although advanced for those times, doesn't seem convincing.

Moreover, in the "*Fragments*" we perceive a contradictory feature in the work of Romano, which recurs also in other writings, previous or subsequent to *L'ordinamento giuridico*, and which eventually contributed to the criticism to the institutional theory.

We intentionally kept last the entry "*Legal Mythology*" which, besides being among the most relevant of the volume, was also written last in chronological order, and was finished less than a year before the author's death .

In about ten limpid pages, Romano highlights how real legal myths had been invented in every age and often caused many harms. However, the Sicilian jurist argues that there are also beneficial myths, because they meet practical needs of which there is no clear awareness, arising from « vague intuitions which also have hints of truth, obscure instincts even if deep-rooted». In these cases, it is the myth which contributes to gradually creating reality, «not only by discovering, but also by making it». «Law owes much to these myths and (...) and many of the contemporary legal realities originated just from them: like this, the assertions of human and citizen's fundamental rights, the concept of State legal personality, the provision of a structure by which it is capable of will and actions, no longer through some representative other than its own organs, etc. It does not mean that other myths, in contrast, still are « useless shades, apart from their appearance» and, in the misleading beliefs of philosophers or jurists, they can cause serious mistakes and dangerous utopias<sup>101</sup>.

By describing the "State-legal person" as a mythology, Romano expressly recognizes, for the first time after scoffing it on many occasions, the reasons for the "realist" arguments - mainly those with their origins in the French legal theory - which, half a Century before, had already defined the State anthropomorphism as a superfluous legal fiction.

### VIII. *The «most extraordinary intellectual adventure»*

We are dealing with the umpteenth element of contradiction in the very impressive and prismatic scientific production of Santi Romano<sup>102</sup>. In these terms, it seems that here we find the foundation for those remarks according to which the Italian institutionalism was « more apparent than real, insofar as from the

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<sup>101</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 134.

<sup>102</sup> M. Galizia (*Profili storico-comparativi della scienza del diritto costituzionale*, in *Arch. giur.*, 1963, 100 ss.) and S. Cassese (*Cultura e politica del diritto amministrativo*, supra, 184) present quite similar readings of the contradictions and second thoughts of Santi Romano as an example of his attempt at compromise between the authoritarian ideology, inspiring the Italian Public Law school, and those pluralist drives existing in the society, but also in the scientific

production within the field of human sciences .

asserted plurality of legal orders often drifts onto the more or less explicit argument that there is an order which is more “legal” (and organized) than others, which is precisely the State »<sup>103</sup>. Therefore, it remained on the grounds of an incomplete pluralism, which «recognizes the presence of organized interests and their “juridical character”, but puts them in the framework of the general system of the State, which dominates them »<sup>104</sup>. It can consequently be argued that there are two possible readings of *L'ordinamento giuridico*: the first, out of the context of (the rest of) Romano’s scientific production, the second in connection with it. If the first allows to cover a wide range of insights, the other partially close on them, reminding the idea of compromise, aimed at harmonizing Hauriou’s institutionalist theory with the dogmatic tradition.

The point is that the institutionalist theory, even in its “purely” legal version as it was developed by Romano, was basically rejected or translated into normativistic terms by the contemporary and subsequent science of Public Law. So, those incredibly sharp intuitions, resulting from « the most extraordinary adventure ever lived by an Italian jurist in the 20<sup>th</sup> Century »<sup>105</sup>, had to wait for several decades before being gathered, developed and converted in a significant progress in legal science, during the second half of the 20<sup>th</sup> Century. Legal science, and particularly the science of Administrative Law, adjusted its path, as it is common knowledge, according to Giannini’s angle of complexity. A complexity which had been perfectly understood by Romano, for one thing it was congenital to the controversial spirit of the Sicilian scholar, as a jurist and man, moved by an imperative need to reach « a complete view and, one would say, almost panoptical of the legal life»<sup>106</sup>.

Notwithstanding these contradictions, Santi Romano is to be considered as the major Italian scholar of Public Law and, maybe, the major jurist our country has ever produced.

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<sup>103</sup> N. Matteucci, *Positivismo giuridico e costituzionalismo*, in *Riv. trim. dir. proc. civ.*, 1963, 1030.

<sup>104</sup> S. Cassese-B. Dente, *Una discussione del primo ventennio del secolo: lo Stato sindacale*, in *Quad. stor.*, 1971, 961.

<sup>105</sup> P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950*, Giuffrè, Milan, 2000, 109.

<sup>106</sup> G. Capograssi, *L'ultimo libro di Santi Romano*, 1951, in Id., *Opere*, vol. V, Giuffrè, Milan, 1959, 226.

# “CODIFICATION” AND THE ENVIRONMENT

Fabrizio Fracchia \*

*Abstract:* This article examines the problem of “codifying” the environment in the context of the Italian system, where a specific source (Legislative Decree no. 152/2006) has recently been approved. Given that codes do not enjoy a specific “régime” as such, the paper suggests that it is not worth answering the question as to whether the decree is truly a code, since it is more important to assess whether the final product of the codification (i.e. the said Legislative Decree) is a “good” one. This article lists the Italian “code’s” shortcomings but also emphasizes the fact that it has introduced the principle of sustainable development as “hard” law, rendering it applicable to all administrative activities, not just those in the environmental sector. As a consequence, the “code” has become the instrument through which the main principle it established (sustainable development) has emerged and been promoted to the status of “general principle”. Being the expression of a responsibility towards future generations, this principle is closely related to the notion that the environment must be considered the object of a duty rather than a right.

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## I. *Codification and the Environment in the Italian system*

The history of Western institutions has been marked by experiences of “codification” and this is especially true of Europe <sup>107</sup>. Indeed, some specific periods (such as that of the French revolution, for example) have particularly felt its influence.

The desire to codify has recently been re-emerging in Italy <sup>108</sup>, as elsewhere, and one of the areas to attract attention has been the environment.

More specifically, Italy’s enabling statute, Law no. 308/2004, has led to the issue of Legislative Decree no. 152/2006, governing environmental issues. The process resulting in the final version of the decree was not exactly a smooth one, however. Such fact is demonstrated by the numerous criticisms made by the legislation’s many opponents, both during the law-making process and afterwards. In particular, it was observed that the decree vested too many functions in the State. Indeed, the President of the Republic initially refused to promulgate it and requested that the text be re-considered. This is not all. The original decree has frequently been amended, thereby confirming that the “codification” was a sort of progressive adaptation of the initial “project”.

Some of the amendments changed the decree’s content quite considerably. The most recent one, in particular, is important because it appears to have transformed the original decree into a genuine code. Indeed, the advice given by the Council of State on 5<sup>th</sup> November 2007 (opinion no. 3887) emphasized that the proposing Ministry’s intention was to change the nature of the decree, thereby creating a systematic code based upon general principles.

Such fact raises a fundamental question: is the decree truly a code? <sup>109</sup>

Although the decree’s title does not include the word “code”, a theoretical definition of the term is needed before this question may be answered.

This paper seeks to provide such a definition and to show how this process will require a reformulation of the question.

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<sup>107</sup> See M.E. Viora, *Consolidazioni e codificazioni. Contributo alla storia della codificazione*, Giappichelli, Turin, 1956; C. Ghisalberti, *La codificazione del diritto in Italia 1865-1942*, Laterza, Rome-Bari, 1997, and G. Tarello, *Storia della cultura giuridica moderna*, I, *Assolutismo e codificazione del diritto*, Il Mulino, Bologna, 1981.

<sup>108</sup> In general, see G. Tarello, *Codificazione*, ad vocem *Dig. disc. pubbl.*, Utet, Turin, III, 1989, 465 et seq.; R. Sacco, *Codice. I. Teoria generale*, ad vocem, *Enciclopedia giuridica*, Treccani, Rome, 1988; Id., *Codificare: modo superato di legiferare?*, in *Riv. dir. civ.*, 1983, I, 117 et seq., and A. Gambaro, *Codice civile*, ad vocem, *Dig. IV, disc. priv.*, II, Utet, Turin, 1988, 462 et seq.

<sup>109</sup> According to G. Rossi, *Diritto dell’ambiente*, Giappichelli, Turin, 2008, 47, for instance, the answer must be in the negative.

## II. *The Italian Code's Shortcomings*

The ultimate goal of “codifying” environmental law is not easily achievable.

A focus on the result of the codification (rather than the process itself) reveals some inherent shortcomings <sup>110</sup>, although it should be noted that some of them stem from the enabling act providing the juridical basis of the decree.

The decree's first shortcoming is that it does not encompass all areas of environmental law. Many important aspects, such as noise pollution, electromagnetic pollution and light pollution, remain uncovered by the text.

Furthermore, even within the confines of the code, some important legal institutions have been addressed only very superficially. Consider the so-called “procedural participation”, for example. The right to take part in decision-making processes is an aspect that is emphasized at an international level <sup>111</sup>, yet the decree deals with it only incidentally. Equally significant is the lack of focus on “market tools” that could be used to improve the environmental performance of firms. The latter point is highly relevant, given that the voluntary approach is acquiring ever-increasing importance within the legal framework of environmental protection.

A third shortcoming lies in the lack of consistency marking the whole “codification” process. Indeed, it was only by way of amendments contained in Legislative Decree no. 4/2008 that general principles were established i.e. well after specific provisions regulating the area in detail had already been enacted. Thus an evident logical inversion of the codification process devalued the function of principles despite the fact that, as the etymology of the word makes clear, principles do not constitute the goal but, rather, the starting point of a process.

## III. *The Difficulties of Codifying Environmental Law*

Leaving specific features of the “code” actually produced to one side and considering the question in the abstract, any attempt to codify environmental law will be fraught with difficulty.

First of all, the fact that the code under consideration is a state one raises the issue of the scope of the state's legislative competence. On the face of it, given that in Italy the subject-matter in question falls under the state's exclusive competence, no regional interference should be allowed. More precisely, art. 117 of the

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<sup>110</sup> See N. Olivetti Rason, *La disciplina dell'ambiente nella pluralità degli ordinamenti giuridici*, in S. Crosetti, R. Ferrara, F. Fracchia and N. Olivetti Rason, *Diritto dell'ambiente*, Laterza, Rome-Bari, 2008, 82.

<sup>111</sup> See the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark, on

June 25, 1998.

Italian Constitution (as amended in 2001) declares that the State enjoys exclusive competence in the area of, *inter alia*, “protection of the environment, the ecosystem and cultural assets”.

Of course, the scope of such competence depends entirely on how “protection of the environment” is interpreted. In any event, since its fundamental decision no. 407/2002<sup>112</sup> (qualifying the environment as a sort of transversal subject-matter unsuitable for attribution to the State’s exclusive competence), the Constitutional Court has consistently ruled that significant room for regional legislative power does exist. Thus the Court has legitimated the regions’ law-making as regards the environment, allowing the related law to govern the area alongside that of the State, particularly when regional law introduces stricter forms of protection.

Legislative Decree no. 156/2006 nevertheless shows some signs of the frequently difficult relationship between state and regional sources. For example, Art. 268 (regarding air pollution) establishes that the “competent [administrative] authority” must be the one identified by regional law as the entity charged with the responsibility of monitoring compliance with licence conditions. As far as environmental impact assessment (EIA) is concerned, section 7 lays down the rule for the division of administrative competences, basing it on two criteria: competence to authorize the plant and the scale of the intervention. As regards the latter, only some projects are subjected to state EIA (one of the most significant legal institutions introduced by the environmental legislation, directed at checking the possible positive or negative impact a project might have on the environment). Others, listed separately, are subjected to a regional EIA.

Finally, section 2 *quinquies* establishes that regions can provide for stricter forms of legal protection of the environment when specific situations within their territory so require. This so long as such provision does not cause arbitrary discrimination (including that of unjustifiably complicated procedures).

Returning to the regional competence for environmental legislation recognized by the Constitutional Court, it should be noted that the decree is also a tool deployed to “stabilize” and reinforce state competence in a field characterized by a “clash of competences”. As a matter of fact, this problem arises fairly frequently in the Italian legal system. Legislative Decree 163/2006 (the “Code on Public Contracts”) could also be considered the result of an attempt to establish state regulation in an area where both state and regional legislative competences are involved. Be that as it may, in its decision no. 401/2007, the Constitutional Court endorsed the role of state law in that particular field. *En passant*, a comparison of the two cases suggests that, in that case, the concept of “transversal subject-matter” was invoked by the Court for the purposes of strengthening the position of the state, whereas, in the context of the environment, the same concept was used to rule in favour of regional competence.

Another of the “difficulties” posed by codification is linked to the problem of establishing precisely where the subject of the environment begins and ends and defining the proper relationship between the latter and some closely connected topics, such as landscape, health and planning law.

Furthermore, the codification under consideration regards a sector that is particularly affected by EU law. Indeed, the latter is becoming increasingly relevant in the environmental field. In this respect, it is sufficient to mention waste regulation: the important framework directive 2008/98/EC has very recently been approved, thereby requiring the national legislator to intervene promptly in this sensitive area, by amending the existing legislation.

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<sup>112</sup> *Foro it.*, 2003, I, 688.

In truth, European law seems also to have provided an “opportunity” to reorganise environmental legislation in the form of a “code”. For instance, section 1(8) of Law no. 304/2004 (the enabling statute providing for the delegated legislation that became the “code”) includes among the criteria binding the government, the “full and consistent implementation of the European directives for the purposes both of guaranteeing high levels of environmental protection and of contributing to the competitiveness of undertakings and territorial systems, thereby avoiding distortion of competition”. This motivation is fairly frequent in the Italian system. The above-cited Code on Public Contracts (Legislative Decree 163/2006) was also issued on the “occasion” of the implementation of some European directives. This aspect may be summarized by stating that the relationship between Italian “codes” and European law is somewhat troubled. European law is often invoked as a justification for codifying the national law governing a sector that is thought to merit “stabilization”, especially when infringement of the former has moved the Commission to take legal action against Italy. Codification can nevertheless lead to an “unstable” framework, owing to shifts that may or may not occur at the European level. From this point of view, the environmental code and the public contract code share the same destiny.

These difficulties are accompanied by more general ones disturbing the codification process in its function as a rationalization of the law and a concentration of sources. The crisis experienced by this technique is well expressed by the term “decodification” which is used to indicate the emergence of specific regulations (laid down by legal sources other than the “code”) even in areas traditionally covered by the Civil Code.

#### IV. *A General Assessment of the Code*

The next (and intermediate) step is to consider what is, perhaps, the most important question in this paper: is the final product of the codification (i.e. the “code”) a “good” product?

Several criteria might be applied when seeking to answer this question. As these are linked to different aspects of the work of codification, they naturally reflect different perspectives.

a) First of all, the “code” must be assessed in terms of its completeness. As already stated, various criticisms have been raised in relation to the overall structure of the code in that it appears incomplete.

b) Another yardstick is the “degree” of simplification that the code guarantees. This aspect is very important in an environmental context, given the subject’s intrinsic complexity.

In this context, simplification means the reduction of procedures or the elimination of unnecessary steps in them. As far as coordination between different procedures is concerned, some provisions are worth mentioning. Under section 9, for instance, the forms of participation provided for by the law regulating environmental impact assessment meet the requirements established by Law no. 241/1990 (the general legislation governing administrative procedures). Furthermore, if considered useful, the authority can convene a so-called “conference of services” (*conferenza di servizi*) which, for decision-taking purposes, gathers together all the public bodies involved in the same matter. This is not all. As long as the timeframes provided for public consultation during the EIA are respected, the competent authority can enter into an agreement with private applicants and other bodies for the purposes both of regulating the way in which the

authorizing power must be exercised and of achieving simpler and more effective procedures. In addition, a Government regulation (*"regolamento"*), providing for delegification regarding technical activities, should also ensure that procedures are simplified.

c) Another side of the simplification issue and a highly relevant yardstick in its own right is the coordination/concentration of different elements of public administration. In this respect, the so-called "integrated environmental licence", provided for by the Integrated Pollution Prevention and Control Law, should be mentioned. Under the code, if an intervention is subject both to IPPC regulation and to the state EIA rules, then the final EIA decree "takes the place" of the IPPC licence, the latter being "substituted or coordinated" by the EIA. A similar rule applies when competence for the EIA is enjoyed by the regions. The rules governing the permit required for waste treatment installations offer another example; while the previous regulations provided for two different licences, only one permit is now needed for the purposes of realizing and managing such infrastructures. These efforts to concentrate and reduce licensing competences and related administrative acts certainly merit a positive mention. Nevertheless, many other sectors theoretically needing similar rules (town planning, in particular) have been ignored by the code in practice.

d) The balance between "central" and "local" is another criterion. In this respect, it is sufficient to remember the criticisms raised in relation to the code's concentration of power in the State. The Ministry appears as the real protagonist in the main environmental situations (ranging from the EIA to liability for environmental damage) and only pretty limited room has been left to the regions.

e) The balance between Acts of Parliament and government regulations (*"regolamenti"*) constitutes another relevant point of reference for understanding the basic choices the code reflects. Although some of the code's provisions delegate the regulation of certain specific subjects to government regulations, the overall impression is that the code shows a clear preference for Acts of Parliament. It is worth noting that the code does not make use of a specific tool provided for by the Italian Constitution. In cases of exclusive state competence (such as the subject-matter of the environment), Article 117 allows delegation to the regions of the power to pass regulations. In other words, the code could have increased the regions' role in environmental protection by focusing on their competence to issue regulations instead of recognizing their genuine legislative powers but, ultimately and as stated earlier, it decided otherwise.

f) Another possible criterion for evaluating the code is the balance it strikes between procedures and organisation. Although some provisions do address organisational aspects, there is no doubt that the code appears to focus on activities and procedures. Once again, the final image is of a code that is incomplete because it neglects certain important aspects. More specifically, the rules governing the Ministry's structure are wholly excluded, as are those governing the organisation of the national environmental protection agency. Moreover, the code fails to resolve the most sensitive issue on the table: the relationship between politicians, those in charge of the administration and the technical experts. Here, a symbolic example may be found in the EIA and, more particularly, the cases of "silence" and dissent. Section 26 deals with silence by providing that expiry of the deadline without any express provision issued by the authority will lead to the Government's exercise of a substituted power that allows it to intervene by issuing an injunction against the inactive authority. Hence, the pre-eminence of the political level is ensured, despite the somewhat curious fact that a political body might act without considering any technical elements (the premise is that it is the technical body which has remained silent). It is, however, likely that the authority's old practice of issuing acts after expiry of the deadline will continue. It should in any case be noted that, under the general law governing administrative procedures (L. 241/1990), technical bodies are supposed to enjoy a sort of protected special competence. This "guaranteed" sphere of competence is protected against administrative interference in that the administration cannot intervene without the technical body's evaluation, where such

evaluation is required by law. In other words, the administrative body responsible for the procedure cannot decide cases when technical bodies involved in environmental matters remain silent, since that silence constitutes an insuperable bar. Such is the general rule set by the general law. Nevertheless and as already stated, under the code, the special technical competence has no protection against political interference in one of the most important legal institutions established within the environmental field (the EIA): when a conflict arises, it is the politicians who have the last word.

The code remains silent, on the other hand, on the equally paradigmatic subject of “dissent” during the EIA procedure. As regards the political body’s disagreement with the findings of the technical body (a Commission), it would appear (in the light of the code’s solution to the previous sensitive problem of inaction) that the Environment Minister has the power to reverse the technical body’s final decision. The code remains equally silent in relation to disagreement on the part of the Minister with competence for the realization of infrastructures (who might insist on overriding opposition from the Minister of the Environment). Once again, it would seem preferable to confer final decision-making power on the Government, entitling it to solve the conflict and have the final word. This solution is partly based on a consideration of similar cases regulated by Italian law. In particular, when a negative EIA is issued at the end of a “conference of services” (*conferenza di servizi*), section 14-*quater*, para. 5 of Law no. 241/1990 provides that this obstacle can be overcome and identifies the Government as the body entitled to adopt the final decision, after taking account of the various interests involved. It is worth noting that, in this case, the power to overturn a negative decision emerging from the conference is conferred not only on the individual Ministry, but on the whole Government, thereby increasing the possibility that the previous assessment will be reversed.

Given the highly sensitive nature of the issue, a clear rule established by the code would have been preferable, as would a general division of competences between political figures, administrative structures and technical bodies. The latter should avoid any interference in the evaluation of general interests since they have no specific legitimacy in that field. On the other hand, it would have been helpful to establish what kind of exigency might entitle the politicians to override the technical bodies’ evaluations.

g) Another possible criterion for assessing the code is the “quality” of its rules.

In this respect, the assessment is not very positive. Notwithstanding the fact that the task of “pinning down” environmental issues in a well-structured framework law is truly complex, greater care should have been taken in drafting the provisions. Some of them appear confused (for instance, section 278, regarding air pollution, qualifies as “orders” acts which, from a theoretical point of view, are sanctions). The language used is sometimes very technical, almost a “code” within the code. In other instances, the code does not express clearly the specific rule it is establishing (in particular, in the context of the public selection process intended to identify the firm to be accorded the right to provide waste-collection services, it is not clear if the “in-house provision” system is eligible). Sometimes it forgets to deal with an important stage of the procedure (e.g. the phase relating to the execution of measures that the authority might require the liable party to take in cases of environmental damage). These flaws and lack of comprehensiveness are quite remarkable, considering that one of the most important functions traditionally assigned to codes is that of helping lawyers find the rule clearly applying to a specific case.

h) Sectoral stabilization is another of a code’s tasks. It offers a separate yardstick that can be helpful in assessing the quality of a code. Legislative Decree no. 152 has not achieved this goal since the existence of the code has not prevented tensions or states of flux stemming from amendments occurring at a European level and thus the need for “maintenance” through legislative intervention. The constant amendments are

the most significant proof of the code's failure as an instrument intended to stabilize the law for once and for all. In a way, they seem to turn the codification exercise into a complex process whereby the first version of the code appears as a peculiar kind of draft law endowed with immediate effect. The most that can be said is that the code achieves a "stabilization" understood in a wholly different sense from that used above for our evaluation purposes: in actual fact, the law has been stabilized through subsequent legislative stages which form part of the same codification experience and reflect (or should reflect) one and the same project. Even if this perspective is adopted, however, it must be said that the final code (i.e. the original text plus amendments) has not been placed beyond all danger of future modification. Indeed, section 12 of Law no. 69 dated 18 June 2009 confers power on the government to issue further legislative decrees for the purposes of amending and integrating the existing legislation on the environment (the "code", most particularly).

i) A comparison of the environmental code with the most traditional experiences of codification can provide other important and appropriate criteria for evaluation. Traditionally, codification was linked to deep-rooted historical and social change. Such fact is demonstrated by the most famous example, carried out at the end of the French Revolution (although, on a closer analysis, it was not the product of the revolution itself, but the result of the genius of Napoleon, the man who assumed power after it). The first in the modern era, it is considered a sort of "model" for those that followed. However, most recent forms of codification have lacked its particular social impetus and are also much less ambitious than that fundamental experience. As a consequence, given that the two cases in point are so dissimilar, it seems useless to pursue this line of analysis. At most, it might be observed that, instead of codifying the law governing a sector, the Italian legislator has "reinforced" or "consolidated"<sup>113</sup> it, without aspiring to set up a new legal system. On the other hand, greater transformations are impeded not only by the European influence but also by the structure of the Italian system and the complexity of the plural sources involved in environmental matters.

j) A different and more interesting analysis focuses on another of the traditional tasks of codification: depoliticization (by laying down clear rules), in favour of neutralization. In this respect, it must be observed that Italian environmental law often swings from extreme technicality to over-politicization. The "code" has not affected the relationship between the two poles: policy continues to dominate.

k) Traditionally, codes set out a law that was basically complete, thereby excluding any need for integration by way of external sources. Taken as a whole, the "code" has failed in this task, too. Indeed, the very important "dimension" of market dynamics (also relevant from a juridical point of view) has not been "captured" by the code. Consideration of this dimension is essential for outlining the current environmental protection system and understanding the behaviour of the various players involved. Although it is true to say that it is very difficult to intervene by way of a code with regard to market dynamics (an area in which legislatures are often plagued by informational asymmetries), this aspect is nevertheless one of the most significant in the environmental sector and is totally neglected by the code.

l) Very interesting elements emerge from a consideration of one of the traditional rationales for codification, namely, the need to reduce legislative chaos and confusion. Incidentally, such reduction might be seen as a measure favouring both citizens and firms, who prefer a very clear legal framework within which to act. This objective is also relevant to environmental codification, given that the laws dealing with this matter are particularly fragmented. Nevertheless, the task has not been achieved owing to uncertainties generated by internal factors (shortcomings in the code) as well as external ones (e.g. crises caused both by European law and by judicial decisions).

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<sup>113</sup> See M. E. Viora, *Consolidazioni e codificazioni*, cit., 42 et seq. on this subject.

Finally and as we will see at the end of the analysis, the absence of a code does not necessarily imply for one moment that the law is unclear.

### V. *The Issue of Disciplinary Boundaries*

The traditional concept of a code was closely related to the need to construct an exhaustive legal *régime* for the purposes of allowing the boundaries between disciplines to be easily identified.

A closer consideration of this point is helpful to our enquiry.

A study of environmental law's evolution into the current "code" can give the impression that the legislator has simply echoed the surfacing and consolidation of environmental awareness, so far without succeeding in hastening its development in any useful way.

In actual fact and unlike other cases of codification, a specific feature of Legislative Decree no. 152/2006 is its effort to meet society's demand for certainty by providing a unitary legal framework, thereby according the environment the dignity of an autonomous disciplinary subject.

This observation is closely connected to the subject of legal principles.

Indeed, the presence of general principles marks the breakthrough from a code having the sole function of "identifying" and "declaring" the pre-existing law (with the exception of the EIA and the environmental liability regulation) to a legal source reflecting deeper transformations occurring within the legal order.

Although the principles governing the environmental sector may have been drawn from European law (which prevails over Italian law) prior to the "code" as well, their express statement in the latter's initial provisions confers *locus standi* on citizens, who now have the right to "trigger" them directly, including before a court. It should be added that, at least in the Italian juridical tradition, it is precisely through the clear identification of principles that a legal system becomes autonomous.

The same may be said of the environment, as an academic subject, in relation to the position it occupies within administrative legal science as a whole<sup>114</sup>.

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<sup>114</sup> See V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico*, 1889, R. Università di Modena, Modena, 1925, 16. For a more recent appraisal, see M. Mazzamuto, *Il riparto di giurisdizione. Apologia del diritto amministrativo e del suo giudice*,

Editoriale scientifica, Naples, 2008.

## VI. *Is Legislative Decree no. 152/2006 truly a Code? The Wrong Question*

Returning to the starting point of this analysis, it may now be said that there is little point in asking whether Legislative Decree no. 152/2006 is an authentic code (rather than the fruit of a consolidation, for instance) since the answer depends on the preliminary and “troublesome” definition of “code”. Furthermore, the decree’s qualification as a code would be legally significant only were it to have certain clear consequences. This is not the case in the Italian system: codes do not enjoy a specific “*régime*” as such. It is therefore worth taking the trouble to try and answer the question raised earlier regarding the nature of code only if it helps to focus on the basic issue of the internal “quality” of text as a whole and to offer new criteria for assessment.

This is precisely what the previous pages have sought to do and we now have quite a complete checklist for a final evaluation.

There emerges the picture of a code that:

- is not complete;
- does not stabilize the sector;
- neither reduces the importance attached to policy nor considers the role of the market properly;
- concentrates power in central government;
- fails to modify the previous normative framework, except in some areas such as EIA and environmental liability;
- does not deal with the organizational aspects; and
- lays down rules that are often unclear.

In short, the code appears to be a text deserving a negative assessment overall, being at most a tool facilitating the search for the relevant provision on a specific point.

In addition, it must be observed that not only is the code incomplete, but it also reaches beyond the subject matter of the environment to some extent.

This observation may sound paradoxical but should become more comprehensible after analysing the element that has been subjected to the “experience” of codification i.e. the environment.

Codification requires that an autonomous “subject” or area of the law, with its own specific features, already exists and can be identified.

The “code” does not provide an unequivocal definition of “environment”. It does, however, lay down the main principles embodying the environment’s primary features from a juridical point of view.

For instance, section 2-*bis* establishes the principles governing environmental law-making and clarifies that they stem from articles 2, 3, 9, 32, 41, 42, 44 and 117 of the Constitution and from the EU Treaty.

Moreover, section 3-*ter* makes all private and public bodies and persons subject to the duty to protect the environment, the ecosystems and cultural assets. The provision cites article 174 of the EU Treaty as the source of the precautionary principle, the preventive action principle, the principle that “the polluter pays” and the principle that environmental damage should be rectified at source, as a matter of priority. These principles therefore bind administrative action.

Lastly, section 3-*quater* lays down that any human activity which is legally relevant under the code must comply with the sustainable development principle, so as to guarantee that satisfaction of the present generation's needs does not compromise the quality of life and opportunities of future generations.

The sustainable development principle is the true keystone of the duty of solidarity <sup>115</sup>. Underpinning the whole of environmental law, it is the expression of the latter's rationale: responsibility towards future generations <sup>116</sup>. It thus supports a definition of "environment" that focuses on solidarity.

Such fact merits attention as it is frequently asserted that the principle belongs to the category of "soft law" and lacks concrete legal effect, since it is up to States to translate it into binding provisions or "hard law". Indeed, it has also been widely criticised on the ground that it appears vague and that its normative status is ambiguous.

It should be remembered that the concept of sustainable development was introduced explicitly in the 1980s <sup>117</sup>. More specifically, the first important stage in the development of the concept at an international legal level was the occasion of the independent Commission set up by the UN in 1984 (the World Commission on Environment and Development, or "WCED") <sup>118</sup>. In 1987, the so-called Brundtland Commission (named after its chairperson, the Prime Minister of Norway) published its Report "*Our Common Future*", defining sustainable development as follows: "development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs". It is worth noting that this first and very famous definition does not refer to the environment <sup>119</sup> but focusses, rather, on the needs of future generations. As a matter of fact, the road to a clear implementation of the principle subsequently proved to be extremely difficult. Partly for this reason, a significant attempt was made to turn it into an international agreement. The second stage in the concept's development was therefore the Rio de Janeiro Conference (the United Nations "Conference on Environment and Development", also known as "UNCED" or the Earth Summit). The title of the Conference is highly significant in its own right. Although it contains no explicit definition of sustainable development, it links the term "development" to "environment" by a conjunction, thereby demonstrating the need to use an integrated pattern of analysis.

The Rio Declaration comprises 27 principles. The third principle declares that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations", whilst the fourth provides that "in order to achieve sustainable development,

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<sup>115</sup> It was shaped by the UN Brundtland Commission's final Report (*Our Common Future*), which was issued in 1987 and coined the definition ("development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs"). It was subsequently emphasized during the Rio de Janeiro Conference (1992).

<sup>116</sup> In general, see the Declaration on the Responsibilities of the Present Generations Towards Future Generations, Unesco, 1997.

<sup>117</sup> See R. Allen, *How to Save the World*, Totowa, NJ, Barnes & Noble Books, 1980; L. R. Brown, *Building a Sustainable Society*, New York, W. W. Norton, 1981, and J.G. Robinson, *The Limits to Caring: Sustainable Living and the Loss of Biodiversity*, in *Conservation Biology*, 1984, 20.

<sup>118</sup> In general, see Philippe Sands, *International Law in the Field of Sustainable Development*, *Brit. Y.B. Int'l. L.*, 1994, 303 et seq.

<sup>119</sup> S. Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, in *Geo. Int'l Envtl. L. Rev.* 2001, 271.

environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". A "plan of action" (Agenda XXI) was issued in Rio along with the declaration. By identifying the action to be taken for "Global Sustainable Development for the XXI Century" and thereby helping to clarify the object of the principle, the plan expressed the need to guarantee not only environmental protection, but also social development, human rights and social justice.

The principle has subsequently been mentioned in numerous conventions. For instance, art. 3 of the U.N. Framework Convention on Climate Change (1992) provides that "the Parties have a right to, and should, promote sustainable development" and the Convention on Biological Diversity (1992) declares that "States are responsible for conserving their biological diversity and using their biological resources in a sustainable manner". In 2002, exactly ten years after Rio, the World Summit on Sustainable Development ("WSSD") took place in Johannesburg and led to a Declaration on Sustainable Development and a Plan of Implementation.

The sustainable development principle has also been adopted at a European level.

Art. 2 of the EU Treaty states "the Community shall have as its task ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment...". In addition, art. 6 refers to our concept while laying down the principle of integration: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development". The Charter of Fundamental Rights of the European Union also deals with sustainable development. Indeed, under Chapter IV (significantly entitled "Solidarity"), article 37 ("Environmental protection") provides that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

Returning to the Italian context, however, the principle may now be considered "hard law" and has become binding.

It is significant that section 3(3) of Legislative Decree 152/2006 emphasises solidarity. It states that the sustainable development principle must ensure that the solidarity principle be taken into account in the dynamics of consumption and production, in order to protect and improve the quality of the environment, including that of the future. As a matter of fact, the provision creates some uncertainty in that the duty appears to apply not only to the activities carried out by authorities, but also to every other human activity, thus including private ones. Such an interpretation could either result in the provision being downsized to the status of a declamatory (and useless) statement or in very serious restrictions being imposed on private parties who would find themselves obliged to respect the environment generally, in addition to meeting specific legal requirements. It should, however, be noted that there is a difference between section 3-ter and section 3-*quater*. The former establishes a general duty of protection extending to individuals, without further defining such duty's parameters, whereas the latter circumscribes the duty to respect the sustainable development principle within precise legal confines, given that it refers only to the activities that are "relevant" under the code.

This frame seems to be compatible with the concept of “environment” which, elsewhere, I have suggested should be formulated in terms of duties and solidarity<sup>120</sup>, rather than rights (the object of which is often equated with a “healthy environment”)<sup>121</sup>.

In my view, occurrences such as natural disasters demonstrate that it is profoundly misguided to put man at the centre of the world as a sort of “master”. This form of anthropocentrism leads, in legal terms, to the qualification of human beings as the “protagonists” of rights and thus entitled to demand a particular kind of nature. Yet man cannot compel the environment to be configured in a specific way (still less a “healthy” one) for the simple reason that nature does not conform to human rules, but shapes and follows its own. Very often, mankind appears to be the victim, rather than the aggressor.

From another angle, elements of nature (habitat, fauna, vegetation and so on) traditionally included both within the general concept of “environment” and within what we perceive as being our environment, cannot enjoy the legal protection ensured by a right. From a legal point of view, only man can enjoy rights: non-human elements, *per se*, have no right to legal protection.

Furthermore, this “rights-based” approach does not ensure any safeguards for those dangerous species that endanger human life (e.g. poisonous snakes or crocodiles). Although they would fall foul of any human right that were to have a “healthy environment” as its sole object, it seems unfair to deny them legal protection.

It also does not fit the current features of the legal system. The law takes the environment into account when setting targets or standards for firms, for example, and when conferring certain public competences on authorities, limiting the actions of citizens and preventing dangerous activities etc. Technically speaking, there is no evidence of a right in such cases and when, on closer analysis, a genuine right does exist, its object is not the environment, but health.

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<sup>120</sup> F. Fracchia, *The Legal Definition of Environment: From Rights to Duties*, in *ICFAI Journal of Environmental Law* (IJEL), April 2006, 17-37.

<sup>121</sup> Italian scholars have developed several definitions. For instance, according to M.S. Giannini, “*Ambiente*”: *saggio sui suoi diversi aspetti giuridici*, in *Riv. trim. dir. pubbl.*, 1973, 23, environmental law comprises three other specific and individual areas of law: planning law, pollution law (relating to the protection of water, soil and air), and “natural beauty” law (he consequently denied the existence of a unitarian legal concept). Alberto Predieri, on the other hand, included the environment within the concept of natural beauty (*Paesaggio*, ad vocem, *Enc. dir.*, XXXI, Giuffrè, Milan, 1981, 503 et seq.) In contrast, judges (i.e. the Court of Cassation, sitting in joined divisions, Judgements 1979/5172 and 1979/1463, reported in *Foro it.*, 1979, I, 2302 and 902) have often qualified the environment as a right (or, more specifically, “a right to a healthy environment”) based on art. 32 of the Constitution (which deals with health) and one protected by the ordinary judge. The idea of a unitarian right is also endorsed by A. Postiglione, *Ambiente: suo significato giuridico unitario*, in *Riv. trim. dir. pubbl.*, 1985, 35, and F. Giampietro, *Diritto alla salubrità dell’ambiente*, Giuffrè, Milan, 1980. It should, however, be remembered that these theories were developed before the environmental issue was recognized under the Italian Constitution; it was only through the amendment of 2001 (Constitutional Law No. 3 of 10 October 2001, *Gazz. Uff.* 2001, October 24, No. 248 (It.)), that protection of the environment was added to the State’s legislative powers.

Preserving a unitary concept of the environment, however, the approach here suggested also focuses on ethical considerations. Broadly speaking, once a sort of “anti-ecological” attitude has been overcome<sup>122</sup>, the environment must be seen as one of the objects of man’s moral responsibility. More specifically, philosophers have made huge efforts to identify man’s moral duties and have progressively expanded the area of what is considered morally relevant, overcoming a series of obstacles in the process. These efforts have shed light on new kinds of moral commitment, ranging from those towards other men or society to duties relating to the environment. In a way, this result is closely connected to the ethic of respect for what is “other”, such ethic being enriched by the idea that the “other” might not only be a human being, but also the environment. In other words, even when man is seen as an aggressor, his position *vis à vis* the environment should correctly be defined in terms of solidarity, duties and responsibility. This concept also appears significant in the context of a legal analysis.

It is worth observing that the theory suggested here stresses the need for an “anthropocentric” legal perspective. Nevertheless, a clear difference between this kind of anthropology and the traditional one must be emphasized. This kind of anthropology does not refer to rights but to duties. Indeed, when dealing with man (whether as “aggressor” or as “victim”), the legal system establishes his responsibility to respect and protect the environment by laying down a list of obligations. Consequently, environmental law must embrace the provisions that are devoted to establishing and regulating those human actions that trigger an obligation to respect and protect nature.

Thus defined, environmental law manifests specific principles. These are precisely the ones mentioned above, namely, the principle that “the polluter pays”, the “preventive action” principle, the precautionary principle and the principle that environmental damage be rectified at source. They might easily be translated into concepts of duty, solidarity and responsibility. The common thread running through them all is the sustainable development principle. This, too, might be conceived in terms of duties and responsibilities.

To conclude, the “right” to live in a specific environment can be vested in humanity as a whole only by adopting a philosophical approach. Nevertheless, this right of “humanity’s” can only be guaranteed by imposing concrete “duties” on mankind.

## VII. *Sustainable Development: a now General Principle*

For the purposes of this analysis, the “code’s” most important provision is section 3-*quater*, para. 2, since this qualifies the sustainable development principle as a rule that is applicable to all administrative

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<sup>122</sup> R. Carson, *Silent Spring*, Boston, Houghton Mifflin, 1962; A. Leopold, *A Sound Country Almanac*, The New York Times Book Review, 1949; E. Hargrove, *Foundation of Environmental Ethics*, Englewood Cliffs, NJ, Prentice-Hall, (1989); K.M. Sayre, *An Alternative View of Environmental Ethics*, in *Envntl. Ethics*, 1991, 195 et seq.; J. R. Desjardins, *Environmental Ethics* Wadsworth, Belmont, 1993, 13 et seq.; D.G. Dallmeyer, Albert F. Ike and A. Young (eds.), *Environmental Ethics and the Global Marketplace*, Athens, University of Georgia P., 1998, passim and A. C. Flournoy, *In Search of an Environmental Ethic*, in *Colum.*

*J. Envtl L*, 2003 et seq.

activities and therefore even when administrative power is not being exercised to defend an environmental “interest”. Under this provision, therefore, any activity carried out by a public authority must respect the principle. This for the purposes of ensuring that, when an authority takes public and private interests into account in the exercise of a discretionary power, the environmental ones are given priority.

In this way, the sustainable development principle, true foundation of environmental law as a whole and basis of the other environmental principles referred to above, seems to have reached beyond its own boundaries (including those of scientific study), being now a general principle of administrative law *tout court*.

It seems a sort of Hegelian dialectic, not only because “development” has been able to absorb its opposite (the environment), but also because the environmental principle has expanded beyond its original confines, becoming the synthesis and thereby assuming a new role.

In other words, Legislative Decree no. 152 has carried out its mission as a code by laying down clear principles in a specific sector but it has also turned these into constraints applicable to any kind of administrative decision. Thus, in accordance with the principle of integration (likewise established by the EC Treaty), the sustainable development principle now influences any discretionary choice that might be made by the authorities and thus renders it even more open to judicial review.

If the original version of the “code” could be criticised for its lack of general principles, the most recent amendment marked a real breakthrough in the evolution of environmental law. Moreover, the fact that these principles are also based on international and European law means that they assume a special significance. Incidentally, as regards the importance the code attaches to environmental regulation, it should be mentioned that section 3 provides “the provisions of the present decree can only be amended, departed from or repealed by way of express declaration”. In this way, the role of the code has been reinforced.

Returning to the principles the code contains, it is precisely the sustainable development principle that permits us to imagine the code’s future.

Any prediction of its fate must consider that codification failures can depend on various factors. These include incompetence on the part of the legislator and legal academics’ inability to guide the law-makers adequately.

In the past, the Italian science of administrative law has been pretty active and attentive. Nevertheless, it failed to guide or inspire those responsible for shaping the code in any significant way. Now that the code has been issued, however, scholars of administrative law can take responsibility for “lighting the path” that must be followed to enforce the code.

The sustainable development principle still needs to be clearly defined and constitutes the acid test of legal academics’ ability to contribute valuably to the evolution of environmental law. The fact that the principle has a significantly long-term relevance will necessitate continuous adjustments that cannot be left solely to the judges or to “maintenance activities” carried out by Parliament.

### VIII. *Some Final Remarks regarding Man's Role: from Gamekeeper to Hunter*

The codification of environmental law “within” the legal system has turned into a statement of principles governing “the” legal system.

As soon as it had fulfilled its task of rendering environmental law autonomous, the code faded - as “code” - and became the instrument through which the main principle it had established has emerged and been promoted to the status of “general principle”.

In conclusion, we can say that the decree does not appear to be a true code but, rather, the result of a “strengthening” experience or consolidation (although it should be noted that the term is used here not in its traditional sense but with reference to the sustainable development principle, which appears stronger than before and consequently a sort of solid cultural “structure” within our system).

In his book *Liquid Modernity*<sup>123</sup>, Z. Bauman maintains that society’s traditionally solid structures are going to dissolve into an “endless sea”. Partly due to globalization, the long-term perspective is fading and being replaced by a terrifying insecurity.

This thesis offers food for thought on the subject of the environment. In particular, globalization shares with the force of nature the characteristic of being (at least to some extent) beyond an individual’s control; the dissolution of rigid structures might be compared with the dissolving of traditional command and forms of control, as well as of “hard” laws and codes, and insecurity is the feeling often used to describe not only the mood of the individual plunged into the “liquid world”, but also that of man scanning the world’s future and consequently his own fate.

Nevertheless, there is an important difference between Baumann’s picture and the environmental context, since it is only in the liquid world that man turns out to be no longer a gamekeeper or gardener, but a hunter (as the author maintains in the final part of his book). As far as the environment is concerned (at least as it has appeared recently), man ought to adopt a different kind of behaviour and one that is characterised by his duties. These duties are precisely the elements upon which I have suggested basing a new definition of “environment”.

From this point of view, however, the idea of the “intelligent” hunter<sup>124</sup> might also be usefully employed. Were man not to respect the environment, he would run the risk of extinguishing himself. Indeed, the human species might disappear along with the natural resources in a landscape affected by an extreme exploitation that lacks a sense of responsibility. Once again, the concepts of duty, responsibility and solidarity are more appropriate for sketching a profile of man and his relationship with looming natural problems.

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<sup>123</sup> Blackwell, UK, 2000.

<sup>124</sup> As a matter of fact, there are those who assert that, rather than controlling nature, man is more like a bee that is used by nature. Indeed, just as a flower’s beauty attracts a bee that is “used” for pollination purposes, so the species that most appeal to us are the ones most protected by ourselves (thus turning *us* into *their* prey, in some sense) and the ones that therefore have the best chances of survival (M. Pollan, *The Botany of Desire: a Plant’s-Eye view of the World*, New York, Random House, 2001).

In this perspective, the code appears as the ultimate version of a rigid structure in a liquid world, devoted to conferring certainty on an unstable situation. Incidentally, as observed earlier, the lack of a code does not for one moment imply a situation of uncertainty in the legal context. Indeed, there are legal systems very different from the Italian one (e.g. the common law ones), where legal academics and judges are able to develop and guarantee a stable legal framework.

Nevertheless, coming back to the Italian system, the final message that can be drawn from the Italian experience and its effort to highlight the concept of solidarity contained within the principle of sustainable development, is this: environmental law's "codification" is one of the factors that can help us to bear in mind that, when managing nature, we must emphasise our duties rather than thinking only of our rights.

# Gaetano Mosca's Political Theories: a Key to Interpret the Dynamics of the Power

Claudio Martinelli

*Abstract:* Gaetano Mosca is generally regarded as one of the founders of the Political science. His thought has been analysed, exalted and also criticised, for over a century now, by a lot of researchers in the world. And nevertheless the challenges that modernity poses to those who engage in the study of political processes may perhaps give meaning to the attempt to reread that theoretical framework, both to establish the current soundness and to measure the prospective usefulness in order to understand better and face these challenges. There is no doubt that many democratic systems present great difficulties in finding the right mechanism of selection of the political classes and, more in general, the correct relationship between governors and governed. Mosca's disenchanted, realistic and relativist views of democracy can be used as a useful guide to understand the problems of this political system and even as a good antidote against any populist regression, a recurrent temptation for many political classes. This article tries to analyse how power is at the centre of Mosca's thought: the formation, organisation and consequences of power. Of course, even in Mosca's work, like that of any social science scholar, there are some gaps, weak points and aspects which have been surpassed with the passing of time. So, the most important target of this article is to separate as much as possible the aspects which still are of considerable significance today, from those that are inevitably and irremediably covered by the patina of age.

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## I. *Short Biographical Notes*

Gaetano Mosca is not only one of the leaders of his philosophy but he is generally proclaimed to be the founder, at least as far as Italian doctrine is concerned, of a whole discipline: political science<sup>125</sup>. First with the *Teorica dei governi e governo parlamentare (Theoretics of Governments and Parliamentary Government)* in 1884<sup>126</sup> and subsequently with the three editions of the *Elementi di Scienza politica (Elements of Political Science)* in 1896, 1923 and 1939<sup>127</sup>, he proposed a new, valuable range of ideas through which political phenomena could be interpreted, using an approach and with objectives which were different from those of both the jurist and the historian<sup>128</sup>. This intellectual Sicilian, university professor in Turin and then in Rome, Member of Parliament and Senator of the Kingdom<sup>129</sup>, is one of the few examples of Italian scholars of social sciences whose work is known and discussed all over the world<sup>130</sup>. His influence is found clearly in the scientific production of numerous authors, as is typical of those who are defined, with good reason, as being among the classics of a particular discipline.

Born in Palermo, April first, 1858, Gaetano Mosca belonged to a middle class wealthy family. Since he was a young boy he set his life looking for firm cultural basis; he matured a great passion for reading and as a young man he opted for historical and juridical studies. He attended profitably the Faculty of Law in his town (together with his friend Vittorio Emanuele Orlando) and he graduated in 1881 with distinction. Immediately after his graduation, in order to gain his economic independence, he started teaching History and Geography in a high school in Palermo and in the mean time he started his academic career which brought, in a few years, to obtain the chair in Constitutional Law at the Universities in Palermo and Rome, where he moved in 1887 to work as the particular secretary and political advisor of the Mps' Di Rudinì (who was Sicilian himself and became Head of the Government later). At the end of 1896 he moved to Turin (together with his wife and their three children), where he was appointed Associate Professor in Constitutional Law at the Faculty of Law. This University had just established some Social Sciences courses and Mosca taught for many years History of Political Sciences. The following years, besides winning the open competition to become Professor, he embedded himself in the Italian cultural and academic world: he established firm relationships with the most important academics of his time, as Einaudi, Ferrero, Lombroso and Michels. He also held important conferences and presided over various cultural associations. Since 1901 he even increased his influence on the Italian political debate, thanks to his regular collaboration with Luigi Alberini's *Corriere della Sera*. In 1902 he was appointed Professor in Constitutional and Administrative Law in the new-born Bocconi University in Milan. He kept this chair until 1918 when he accepted to teach Political Science. In 1909 he was elected in a Sicilian constituency. Being a Member of the elective House of

<sup>125</sup> For an analysis of Mosca's work regarding the birth of modern political Science in Italy see. A. Lombardo, *Sociologia e scienza politica in Gaetano Mosca*, in *Riv. It. sc. Pol.*, n. 2/1971., 297-323.

<sup>126</sup> See G. Mosca, *Teorica dei governi e governo parlamentare*, now in G. Sola (edited by), *Scritti politici di Gaetano Mosca*, Vol. I, UTET, Turin, 1982.

<sup>127</sup> See. G. Mosca, *Elementi di Scienza Politica*, now in G. Sola (edited by), *Scritti politici di Gaetano Mosca*, Vol. 2, UTET, Turin, 1982.

<sup>128</sup> On the relationship between politological, historical and juridical studies see the exhaustive opinions of N. Bobbio, *Saggi sulla scienza politica in Italia*, Laterza, Rome-Bari, 1996., 3-13.

<sup>129</sup> Extensive biographical notes regarding Gaetano Mosca are provided by E. A. Albertoni, *Gaetano Mosca. Storia di una dottrina politica. Formazione e interpretazione*, Giuffrè, Milan, 1978., 3, as well as in G. Sola, *Gaetano Mosca. Profilo biografico*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali. Primo seminario internazionale Gaetano Mosca. Palermo 27-29 November 1980*, Giuffrè - Società Siciliana per la storia Patria di Palermo, Palermo, 1982, 17-52. For an accurate bibliography of Mosca's work and about Mosca, see G. Sola, *Nota bibliografica*, in G. Sola (edited by), *Scritti politici di Gaetano Mosca*, Vol. 1, cit., 93-173.

<sup>130</sup> To fully appreciate the international dimension of the awareness and diffusion of his works see AA.VV., *La dottrina della classe politica e la sua diffusione internazionale. Orientamenti informativi e temi di riflessione critica*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 189-283, AA.VV., *Documentazione internazionale*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, Giuffrè, Milan, 1983, 391-493, as well as W. Abbondanti, *La fortuna nel mondo anglofono*, and R. Ghiringhelli, *Mosca transalpino*, in E. A. Albertoni, *Gaetano Mosca. Storia di una dottrina politica*, cit., respectively and 511-535.

the Parliament, where he collocates himself with the Right in a liberal-conservative position, plus thanks to his work at *Corriere*, he led passionate debates, often clearly contrasting Giolitti's positions, against both the universal suffrage and the introduction of the proportional electoral law. In 1914 he joined Salandra's government in the role of parliamentary secretary of the Colonies. In 1919 he was nominated Senator of the Kingdom thanks to his work as a Member of the Parliament in the last two terms and as a Member of the Public Instruction Superior Council ( qualifications expressly foreseen at the Art. 33 of the Albertine Statue). As a Senator he mostly took care both of the agricultural and alimentation issue and the colony and emigration problem. In 1924 he went back to Rome where the Faculty of Law appointed him Professor of Internal Public Law, a chair that had been previously held by his friend Vittorio Emanuele Orlando who became Professor in Constitutional Law. When Mosca left the University of Turin, Piero Gobetti highlighted Mosca's love for both research and a free way of thinking. In 1925 he signed Benedetto Croce's antifascist manifesto and joined the Liberal Party established by Croce himself together with Giolitti, Orlando, Ruffini and Fortunato. At the end of the same year, he made the most important and well known speech of his parliamentary life against the bill, imposed by Mussolini, about the attributions and the prerogatives to the Head of the Government. In the following years he edited a number of other important publications (including the last edition of *Elementi*) and was awarded several honorary degrees, as well as the nomination at the Accademia dei Lincei as a national member. He died in Rome, November 8, 1941.

So, it may seem quite pleonastic to return to contemplate the thought of this Maestro, who has been analysed, exalted and also criticised, for over a century now, by a vast literature. And nevertheless the challenges that modernity poses to those who engage in the study of political processes, from the crisis of the Nation State to the multifarious problems that democratic systems are called upon to face as regards political representation, the relationship between pluralism and decision-making, the authenticity of consensus, right up to the changes ensuing from new technology may perhaps give meaning to the attempt to reread that theoretical framework, both to establish the current soundness and to measure the prospective usefulness in order to understand better and face these challenges. Of course, the quest is to separate as much as possible the aspects which still are of considerable significance today, from those that are inevitably and irremediably covered by the patina of age.

## II. *The Theory of the Political Class*

At the centre of Mosca's analysis there is the Power: in point of fact who holds it, for what reasons, on the basis of which mechanisms of justification and the end to which it is wielded. To all intents and purposes, we could say, the formation, organisation and consequences of Power<sup>131</sup>.

The theory of the political class is traditionally considered the major contribution brought by Gaetano Mosca to the theory of the élites<sup>132</sup>.

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<sup>131</sup> See N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., p. 168.

<sup>132</sup> International literature that has thoroughly dissected the theory of the élites is so full and composite that it would be impossible to point to even one single part of those works. Among the most important contributions of the last thirty years recommended reading could be A. Zuckerman, *The Concept "Political Elite": Lessons from Mosca and Pareto*, in *The Journal of Politics*, n. 2/1977, 324-344; L. Hamon, *A propos de la théorie des élites: les formes de la prépondérance et leurs variations*, in *Revue européenne des sciences sociales*, 1985, 77-90; G. Busino, *Elites et bureaucratie*, Droz, Genève, 1988; S. J. Eldersveld, *Political Elites in Modern Societies*, University of Michigan Press, 1989; P. Cammack, *A critical assessment of the New Elite Paradigm*, in *American Sociological Review*, 1990, 415-420 and J. Higley, M. G. Burton, L. G. Field, *In Defence of Elite Paradigm: a Replay to Cammack*, in *American Sociological Review*, 1990, 421-426. As far as Italian literature is concerned apart from the by now superseded AA.VV., *Le élites politiche*, Laterza, Bari, 1961, which collects the acts of an important congress that was held between Milan and Stresa in September 1959, the IVth World Congress of Sociology, and the classic E. Ripepe, *Gli elitisti italiani, I, Mosca - Pareto - Michels*, Pacini, Pisa, 1974, the more recent G. Sola, *La teoria delle élites*, Il Mulino, Bologna, 2000, is recommended probably being the most complete and organic contribution on the history of world elitist thought that

has ever appeared in Italy.

Contrary to what is commonly believed, élitism is not a trend that can be traced back exclusively to a handful of authors whose scientific production is collocated at the turn of the 19th and 20th centuries: Mosca, Pareto, Michels and Weber. There were 18<sup>th</sup> and 19<sup>th</sup> century precursors like Saint-Simon, Comte, Tocqueville and Taine, who often in their respective socio-political and historic-political analyses had the occasion to use the concepts of élites and managerial classes as an indispensable key for interpreting epoch-making phenomena such as revolutions and the attempts for restoration, the imposition of the bourgeoisie and the class struggle<sup>133</sup>. There are also those authors who continue to use the contribution provided by the classic élitistes to enhance their own analyses. Suffice to think of, among others, Ortega y Gasset, Schumpeter, Aron e Dahrendorf.

Nevertheless, there can be no doubt that the theory of the élites finds a definition and organic systemisation thanks to the work of those exponents of Italian and German sociology and politology. What their theories have in common, in many ways different and not overlapping at all<sup>134</sup>, is the realistic acknowledgement that irrespective of the form of state that characterises a particular historical period and the form of government expressed by the legal system, in any national society there will always be the presence of a more or less restricted organised elite holding and wielding power. There will be a majority of subjects who will see their own existence conditioned by the practical methods with which this power is exerted by the élite in command. To all extents and purposes, every political régime is governed by organised minorities (as Mosca wrote in the passage quoted in the introduction), to the detriment or on behalf of a disorganised majority.

In this scenario the significance taken on by Mosca's scientific contribution is due not only to the possibility of laying claim to primogeniture over the other exponents of this doctrine<sup>135</sup>, but above all to the fact that it gave form and substance to some concepts, such as for example "political class", which other authors had already used in the past (his forerunners) but without ever making them rise to the level of systematic interpretation of the dynamics of power. Mosca's specific theory on the élites should be sought in his capacity to subject the traditional methods by which the political systems had been classified since Aristotle's day<sup>136</sup> and in the incisive way with which the decisive importance that the subject of organisation assumes is underlined, this being the real tool of justification for the élites in command<sup>137</sup>.

In Mosca's élitism the "political class" assumes a central role. What does it consist of exactly? It is a concept of apparently simple intuition, but is in fact difficult to define with precise outlines. Mosca himself many a time comes up against hurdles in his definitive work, as bears witness a certain imprecise terminology which compromises the explanatory quality<sup>138</sup>. His attempt to formulate an organic interpretation of the political class derives from the assumption that *"in every properly established government the effective distribution of political power does not always tally with the power of law"*<sup>139</sup>. In other words, this means that alongside the holders of institutional roles expressly foreseen by the public law (the Crown, Republican President, Heads of government, members of the cabinet, members of the elected assemblies,

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<sup>133</sup> See G. Sola, *La teoria delle élites*, cit., 48.

<sup>134</sup> On the controversial interweaving relationships between the classical elitists see. G. Eisermann, *Nuovi elementi sulle relazioni tra Mosca, Pareto e Max Weber*, in *Prassi e teoria*, n. 2/1977, 207-221; G. Sola, *La teoria delle élites*, cit., 65-67; D. Fiorot, *Potere, governo e governabilità in Mosca e Pareto*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 79-102, not to mention S. Segre, *Mosca e Weber: rapporti intellettuali ed analisi comparata delle sociologie politiche*, *Idem.*, 103-120. We shall see all these topics deeper later on.

<sup>135</sup> At the beginning of the twentieth century there was a famous controversy with Vilfredo Pareto on which of them had theorized first on the principle of the organised minorities. The details of this diatribe are described well by D. Fiorot, *Potere, governo e governabilità in Mosca e Pareto*, cit., 87-92.

<sup>136</sup> See R. Sereno, *The Anti-Aristotelianism of Gaetano Mosca and its Fate*, in *Ethics*, n. 4/1938, 509-518.

<sup>137</sup> See G. Sola, *La teoria delle élites*, cit., 65-66.

<sup>138</sup> As shown by G. Sola, *La teoria delle élites*, cit., p. 18 and E. Rippepe, *Intellettuali, classe-politica e consenso nel pensiero di Gaetano Mosca*, in *Il Politico*, 1981, 550-552. The term *élite* is analysed thoroughly in AA.VV., *Le élites politiche*, cit., in particular in the contributions by G.E.G. Catlin, *Le élites politiche*, 59-67; G. Lavau, *Nota sulle élites politiche*, 80-87; G. Sartori, *I significati del termine élites*, 94-99.

<sup>139</sup> See *Teorica dei governi*, cit., 365-366.

besides the uppermost positions in the bureaucratic and judicial systems and those responsible for public order and defence), those who exert formal power endorsed by constitutional and legislative rules, there are the holders of a social power no less important than those who hold legal power, prerogative of all those who have significant positions from an economic point of view (industrialists, bankers, financiers), in the world of the professions, intellectuals and even in the religious field (ecclesiastical hierarchies). In short, all those who, while not holding offices foreseen by the order, have a significant ability to influence the course of public life and so the conditions in the existence of individuals belonging to a particular society. Mosca tends to define the first category of people as the *political class* in the strict or special sense of the term, while the group of all those who hold formal or “social” power he calls the *managerial class*, consisting of a sum of all the holders of *effective* power as regards the management of a country. So, the managerial class of a nation, the one that has the ability to take the various kinds of decisions in order to lead it, has a heterogeneous structure and it is possible to distinguish the component called upon to take on a strictly political definition, precisely *political class*, as opposed to those economic, cultural and religious, which are no less important as regards the reality of power.

Once the political class has been defined, even if not completely satisfactory from the lexical point of view, Mosca questions the reasons for the legitimation of power by the political class. Indeed, it is not a concern that takes up too much of his time. He does in fact only dedicate a few pages of his works to this topic, preferring to concentrate, as we will see, on the processes of development and organisational methods of the political class which, consistent with his own pragmatic and realistic attitude, he considered to be a priority to explain the relationships of power within a national society<sup>140</sup>. However, he does not evade the need to identify the general principles on the basis of which an organised minority legitimates its power in the eyes of those being governed. To this end he defines *political formula* those abstract principles through which the political élite justifies its own power<sup>141</sup>, building around it a moral and legal structure<sup>142</sup>. Two examples, while opposites from the rational point of view, of political formulas that have contributed to guaranteeing and consolidating the power of a political class are the divine right of Kings and the principle of popular sovereignty. According to Mosca these formulas carry out their function of consolidating the echelons of the system and social cohesion, independent of the degree of plausibility and reasonableness that is encapsulated within, but simply to the extent to which they are perceived as real and acceptable by those who are not part of the political class or, more extensively, the managerial class. The existence of a political formula is necessary from the point of view of social psychology.<sup>143</sup>, since the need to obey great principles is inherent in human nature, rather than to individuals or groups that hold virtual power<sup>144</sup>. Following this line of thought, Mosca adds that “*it is not the political formula that determines the way the political class is structured. On the contrary, it is the latter that always adopts the formula that suits it best*”<sup>145</sup>. This statement is so radical and disillusioned as regards any political ideal as to border on cynicism and exaggeration, but it perhaps

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<sup>140</sup> See F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, ESI, Naples, 1999, 118.

<sup>141</sup> See *Teorica dei governi*, cit., 226-229.

<sup>142</sup> On the concept of *political formula* see also par. I, chap. III, Parte Prima, of *Elementi di Scienza Politica*, cit., 633-635, as well as *Storia delle dottrine politiche*, Laterza, Bari, IV ed., 1945,

341-342. For an analysis of this subject of Mosca’s see M. Delle Piane, *Gaetano Mosca. Classe politica e liberalismo*, ESI, Naples, 1952, 194 and following. In Aldo Bardusco’s opinion “*Basically Gaetano Mosca seems to claim that the legitimation of power is a political operation where the class or élite that succeeds best is the one that upholds those values that are most suitable to founding the power of that same class*” (See A. Bardusco, *Legittimazione del potere e partiti politici nel pensiero di Gaetano Mosca e Guglielmo Ferrero*, in *Dir. Soc.*, n. 3/1982, 540).

<sup>143</sup> For an analysis of the relationship between psychology and politics in Mosca’s work see F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., 74 ff.

<sup>144</sup> A deep alarm for the devastating consequences that the disappearance of ideologies and also any form of idealism in the political struggle, to the benefit of a pragmatism incapable of defining a cultural horizon towards which public power could aim, has recently been raised by N. Irti, *La tenaglia. In difesa dell’ideologia politica*, Laterza, Rome-Bari, 2008. Also interesting, even if short, are the considerations on the study of “*political ideology*” in twentieth century political science and on how these studies were influenced by the works of the founders of the discipline like, for example, Mosca, are found in G. Miglio, *Mosca e la scienza politica*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 15-17.

<sup>145</sup> See *Teorica dei governi*, cit., 227.

contributes to clarify the reasons for which in the course of History there have often been changes contemporarily in the structure of the managerial class and in the ideal reasons that justify the holding of power on the part of the new groups. The relationship of cause and effect between these two elements in many cases cannot be described so calmly, only from the point of view of strict principles; suffice to think of the destiny of many revolutionary regimes which became quickly authoritarian and despotic. Or, on the contrary, it helps to understand the reasons why an élite manages to hold on to political power for a long time despite the fact that it has lost, or is losing its real social supremacy<sup>146</sup>.

### III. *Forms of Government and Mixed Government*

From the theory of the political class and in particular of the role played by the political formula, it is not acceptable to draw the impression that Mosca is inspired by an attitude of indifference as regards the good nature or not of a political regime. The fact that any political system is characterised by the presence of a political class that wields power and legitimates this by means of a series of principles functional to its own existence, does not mean for Mosca that all regimes are equal. Far from it. The whole formulation of the theory of the political class shows how he refuses a conception of politics based on mere power<sup>147</sup>. His attitude is, if anything, yet again the need for the scientist to make the realism of experience prevail over the idealism of the spirit, in order to propound an analysis of phenomena that corresponds better to reality or, at least is closest to it. Of course, the simple call for healthy realism does not imply a reduction in the level of disputableness of Mosca's reconstructions, given that the themes dealt with do not constitute proper subject-matter for one of the "exact" sciences and that by their nature lend themselves to continual subjective and relative interpretation. Despite this, the effort that Mosca makes every time he takes on one of the cardinal points in his own theory of power takes him beyond the facade or commonplaces, in order to search for the dynamics that *really* manage to explain political phenomena, above all the less obvious ones. It is, however, acceptable to claim that in some cases this attempt has misfired as is perhaps inevitable for any social scientist.

This is the thread that ties Mosca's whole work together, both in the domain of an internal evolution and on particular subjects that we will see are quite noticeable. It was inevitable that this stance would condition also his own interpretation, or rather his critical re-reading of the traditional classifications of forms of government.

In the history of Western thought there are basically three traditional classifications that have conditioned the theory of the forms of government (understood, just, in this vast meaning): those of Aristotle, Machiavelli and Montesquieu<sup>148</sup>.

According to Gaetano Mosca none of these classifications captures in full the essence of the phenomena because of their formalism, all being based exclusively on the criteria of the number of those who hold power, and so they were not able to describe the reality thoroughly, remaining only on the surface of what can be seen, that is, the number of governors. However, for the theoretician of the political class all regimes cannot be anything but oligarchic (or aristocratic, if one wishes to assign the term a more positive connotation), since in all of them there is an élite in command, more or less widespread and organised, and a majority of governed. From this perspective it is obvious that numeric distinction is insufficient and in the final analysis deceptive. The approach to these themes should be different and there should be other criteria to distinguish and classify political regimes.

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<sup>146</sup> As G. Sola suitably points out in *La teoria delle élites*, cit., 76 "is the exemplification of the rise to power of the bourgeoisie and the persistence of the political formula of the Ancien Régime".

<sup>147</sup> See note N. Bobbio, *Introduzione*, cit., XX.

<sup>148</sup> Discussed by N. Bobbio, *Stato, governo, società. Frammenti di un dizionario politico*, Einaudi, Turin, 95 and following.

So, he proposes a classification model based on completely different logic and parameters.

Keeping firmly at the centre of his analysis the political class, the only interesting key for interpretation to describe and judge political systems, he highlights two concepts tied to them which he calls respectively the *organisation* and *formation* of the political class<sup>149</sup>.

On the one hand he claims that the types of organisation of the political class can be limited to two: the one in which authority is transmitted from the top to the bottom<sup>150</sup>, which he calls *autocratic*, and the one in which there is the opposite transmission of delegation of power from the bottom to the top, which he calls *liberal*.<sup>151</sup>

As regards the latter, he believes that it is expedient to distinguish between two opposite trends: that of the renewal of the existing political class in a particular moment through the total substitution by elements coming from the classes which up until that moment had been governed or, at least its completion thanks to the contribution of these elements which he defines *democratic*; the second trend aims at the crystallisation of the social management through the hereditary transmission of power and this he calls *aristocratic*.

As can be seen, while using terminology which is by and large traditional, Mosca shuffles the cards completely creating a quadrille of concepts that he needs as a starting block in order to analyse the different political systems that have historically been created in function of the co-presence, or not, of all these elements<sup>152</sup>.

Accordingly, the spectrum of these combinations will bring forth four possible forms of government: 1) aristocratic-autocratic; 2) aristocratic-liberal; 3) democratic-autocratic; 4) democratic-liberal<sup>153</sup>. In Mosca's opinion it is only through the use of these new categories, which are able to identify the really crucial points that act as a watershed, that the observer of political phenomena is able to understand completely the characteristics of the different regimes, of their ability to organise themselves, of real relationships that are established between the subjects that hold the interest.

The judgement on a particular political system, on its capacity for self conservation and at the same time to make itself accepted calmly by those who are governed, in Mosca's construction would not be complete if a further notion that he develops were not considered: *juridical defence*.

By this expression, which is in fact rather cryptic, Mosca means the complex of the "social mechanisms that regulate this discipline in the moral sense"<sup>154</sup>. As can be seen, a definition that has nothing juridical about it is of little use to understand the real meaning of the concept. By analysing the chapter from *Elementi di Scienza Politica* which is dedicated to this, it is understood, however, that with this element Mosca intends to highlight the importance for political systems to put a check on individual or collective instincts which are able to threaten the foundations. In order to face these dangers it is necessary that a moral sense is developed and consolidated in the associates of the group; we could say in contemporary language, that a *public ethic* is consolidated which is able to put checks on deviant behaviour. So this constitutes an essential parameter to judge the effectiveness or not of a form of government. Without wishing to make any a priori

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<sup>149</sup> For a thorough analysis of these two concepts see G. Sola, *Introduzione*, G. Sola (edited by), *Scritti politici di Gaetano Mosca*, Vol. primo, cit., 66-75.

<sup>150</sup> "... in such a way as to leave the choice of the lower-ranking functionary to his superior, until the top hierarch is reached who chooses his immediate assistants, as should happen in the typical absolute monarchy" (See par. I, chapt. IV, Part 2 of *Elementi di Scienza Politica*, cit., 1003-1004).

<sup>151</sup> Explaining that this name "seems so much more appropriate in that the use of believing that those peoples are free prevails, where the governors should be chosen by all or even by a part of those governed and the law itself should be an enactment of the general will (*idem*, 1004).

<sup>152</sup> "...bearing in mind that it is extremely difficult to find a political regime in which it can be claimed there is the absolute exclusion of one of the two principles, or of one of the two tendencies, it seems certain that the strong predominance of autocracy or liberalism, of aristocratic or democratic tendencies can provide an unfailing and crucial criteria to determine the type of political organisation of a given people in a given period" (*idem*, 1005).

<sup>153</sup> On the importance in Mosca's work of this combination of elements see N. Bobbio, *Introduzione*, cit., XVII; G. Sola, *Introduzione*, cit., 68; A. Panebianco, *Gaetano Mosca, studioso e uomo politico*, in Gaetano Mosca, *Discorsi parlamentari*, Il Mulino, Bologna, 2003, 17.

<sup>154</sup> See par. III, cap. V, Part 1, in *Elementi di Scienza Politica*, cit., 679.

judgement or judgement based on an abstract conception of good and evil, right and wrong, he tends to evaluate political systems on the basis of their capacity to nourish mainly these ethical antibodies aimed at avoiding the bullying of one social group over others and thus, in the final analysis, aimed at pursuing a basic harmony in the social body upon which the life of a state is founded.

To this end, the best guarantee against destructive alterations of the delicate balance on which public life rests is that the social groups that are the bearers of legitimate interest, strong and worthy of protection, are the most numerical possible, so as to create a beneficial dialectic between social forces whose strength tends to correspond and thus leads to cancelling out the elements which are potentially destructive. It is perfectly obvious how in these steps the teaching of the classics of liberalism emerges forcefully in Mosca's thought and in particular Montesquieu's thoughts, even if, yet again, he leads the discussion from a strictly institutional level to one which is more concerned with the concrete social dynamics that lie under the grid of reciprocal relationships between the constitutional organs<sup>155</sup>. An obvious consequence from all these considerations is his declared liking for those forms of mixed government in which there is neither the predominant presence of one type of organisation nor the trend around the processes of formation of the political class<sup>156</sup>, but rather that prove to be more capable of tempering principles and different tendencies<sup>157</sup>. Only mixed governments are able to temper liberty and authority, continuity and renewal, stability of power but also the capacity to adapt to the changing times without the risk of running into destructive crises or dangerous revolutionary directions.

#### IV. *Representative Democracy and Parliamentarianism*

Can Gaetano Mosca be defined an anti-democratic author? Can his works be laid alongside those of the classic reactionary thinker, first and foremost Joseph De Maistre? Perhaps after a first superficial reading of some passage or other, above all from the *Theoretics of Government*, the answer may be quietly affirmative. A more thorough analysis of his thoughts, however, cannot but lead us to doubt the collocation of him within those categories and to highlight also a considerable evolution in his thought as regards subjects like representative democracy and parliamentarianism<sup>158</sup>, an evolution demonstrated also by his taking a stand when called upon to carry out political-parliamentarian positions.

But what is democracy for Mosca and what are his opinions about this political regime? Mosca dedicates many pages to democracy right from his very first work. The analysis that he carries out in the *Theoretics* is extremely polemic and ruthless. He sees in the democratic idea an illusion and an internal contradiction. The illusion consists of the belief and claim that with the application of the democratic idea the people governs itself. The political decisions, that is, are made by the people. The role of the political class loses its distinctive features of organised minority holding the *leadership* of the political system taking on the role of pure interpreter of the collective interest to be translated into juridical measures. To all intents and purposes, the governors and the governed would, for the first time in history, overlap, basically putting nowhere the function that the traditionally political elites have played in other regimes. The contradiction would be a logical consequence of this inaccurate formulation: the mechanisms of parliamentary representation and the application of the majority principle can only lead to the practical negation of the

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<sup>155</sup> See F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., 155. For a historical and theoretical *excursus* on European liberal constitutionalism see E. Di Salvatore, *Appunti per uno studio sulla libertà nella tradizione costituzionale europea*, in *Teoria del Diritto e dello Stato*, n. 1-2-3 of 2006, 85-147.

<sup>156</sup> For a survey of the features of mixed government in Mosca's thought, and a comparison with Montesquieu's doctrine on the separation of powers, see N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., 210-219.

<sup>157</sup> See par. VII, cap. IV, Part 2 in *Elementi di Scienza Politica*, cit., 1041.

<sup>158</sup> On the main elements that show Mosca's thought process see G. Sola, *Introduzione*, cit., 70 and following; S. Sicardi, *Il regime parlamentare: Gaetano Mosca davanti ai costituzionalisti del suo tempo*, in *Politica del diritto*, n. 4/1998, 570-572, as well as F. Mancuso,

*Gaetano Mosca e la tradizione del costituzionalismo*, cit., 83 and following.

utopian identity between popular will and the entitlement to make decisions. The élites come powerfully into the game again in the concrete institutional mechanisms through which consensus is aggregated and decisions are made.

It is clear that his basic target is essentially a particular vision of democracy, that is the theories of “pure democracy” or “radical democracy”, void of mediation and co-mingling with other tendencies which, in the perspective of a mixed government know how to stem potential keeling. In short, it is Rousseau’s conception of democracy which, being founded on the belief of an abstract and mythical (and so, in reality, non-existent) *volonté générale* inevitably ends up turning into its opposite, and that is into a non-egalitarian and illiberal regression, as would demonstrate, in Mosca’s opinion, the complex parable of the French Revolution<sup>159</sup>.

Nevertheless, his initial aversion towards democracy is so radical that it ends up ruining not only that resolute vision that can be traced back to the thinker from Geneva, but in general democratic systems that have been created, even if of different inspiration, and consequently a large part of the institutions that animate life, beginning with Parliament.

He describes almost entirely negatively the course of representative democracy. The nucleus around which the parliamentary system rotates consists of the close relationship between Cabinet and the elective chamber<sup>160</sup>. These two bodies have progressively eroded the political role of the King and the Upper Chamber.

It must be acknowledged that from the writings of this “*tenacious, stubborn and incorrigible conservative*”<sup>161</sup>, even from those more heavily soaked with youthful controversy, such as in the *Theoretics of Governments*, there is never an inkling of nostalgia for an epoch in which the Monarch, vested with authority by divine right, incarnated power on the basis of a principle which was purely authoritarian. Mosca limits himself to take cognizance of the irreversible sunset of that concept which had already exhausted its historical function of aggregation in the great Nation States. The liberal states that kept the monarchic form had undoubtedly some reckoning to do, above all from the point of view of logical coherence, with the new means of legitimation of the figure of the sovereign. Formulas like “*by the grace of God and the will of the Nation, King of Italy*”<sup>162</sup> were laden with obscurity and vagueness<sup>163</sup>. Nevertheless, Mosca himself recognises that this potential aporia in the order does not necessarily bring with it excessively negative consequences from the practical point of view, precisely because the essence of power has passed to other constitutional

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<sup>159</sup> On Rousseau’s role in the formulation of democratic theory, which Mosca considered the foundation for the degeneration of the French Revolution, he was fiercely criticised by his friend Guglielmo Ferrero who, generally, accused him of highlighting excessively the importance of the doctrine on the course of History and, more specifically, of magnifying disproportionately Rousseau’s influence on the French Revolution. On this point see F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., 85, note 190. For a comparison between Mosca and Ferrero on the question of the legitimation of power see A. Bardusco, *Legittimazione del potere e partiti politici nel pensiero di Gaetano Mosca and Guglielmo Ferrero*, cit., 536-547. On the relationship of intellectual exchange and personal habit between the two authors see G. Ferrero – G. Mosca, *Carteggio*, Giuffrè, Milan, 1980.

This disliking, for these aspects, permits Mosca’s thoughts to be laid alongside the basic canons that have characterised the works of different exponents of the Austrian School, like Ludwig von Mises and Friedrich A. von Hayek. To give an example, some of the most ferocious pages against social constructivism written by Hayek can be seen in F. A. von Hayek, *The Mistakes of Constructivism*, in Id., *New studies in Philosophy, Politics, Economics and the History of Ideas*, Armando, 1988., 11 and following, and a reconstruction of the criticisms raised by Mises of the mathematical and econometric methods used often in the economic analysis of human action in M. N. Rothbard, *The fundamental contribution of Ludwig von Mises*, in L. von Mises, *Libertà e proprietà*, Rubbettino, Soveria Mannelli – Treviglio, 2007, 93 ff. The typical concepts on which Rousseau’s theoretical ideas are based like the social contract, general will or the representation of the nation could not find refuge in Mosca’s vision of things. The same can be said for the conception of human nature. On this point the contrast between the two authors could not be more obvious: “[<the reader will have noticed that our way of thinking is contrary to that of Rousseau, i.e. that man, is naturally good but that society makes him bad and perverse. We, however, believe that social organisation having as a consequence the reciprocal brake of human individuals, improves them, not by destroying the evil instincts but by making the individual master them” (see paragraph III, cap.V, Part 1, note h, of the *Elementi di Scienza Politica*, cit., 681). On the other hand, from reading G. Mosca, *Storia delle dottrine politiche*, cit., 222-236 it can be seen how aware Mosca was of the life and works of Rousseau and the importance that he attributed to it, albeit holding a contrasting opinion in the history of Western political thought.

<sup>160</sup> See *Teorica dei governi*, cit., 373.

<sup>161</sup> As defined by N. Bobbio, *Introduzione*, cit., XXV.

<sup>162</sup> This formulation was contained in the law on the headings of government acts approved by Parliament in 1861.

<sup>163</sup> “but this constant union of divine grace and popular will, that converge on one sole individual, is a thing that in the times

like these where faith is in short supply, it is hard to believe and no-one knows how to understand" (See *Teorica dei governi*, cit., 368).

bodies and the King can at the most carry out a role of what we would call today *moral suasion*, played not so much on the use of powers that the Charters still formally attribute to the Sovereign, rather than on the specific qualities of the individual who sits on the throne<sup>164</sup>.

The new architrave in the political system is, thus, made up of the binominal parliamentary majority - Government. Which dynamics determine the centrality of the binomial and what are the features that distinguish the action? Here Mosca identifies a large part of the criticality of the parliamentary system. He reveals that normally the leader of the parliamentary majority is called upon to hold the office of head of Government; the choice of the ministers and the government's programme depend on the internal balance within the parliamentary majority; the designation of certain forces like the parliamentary majority depends on the free expression of the consensus by the electorate. Accordingly, in the theoretical construction of representative democracy, the source of legitimation of the power of the Executive depends on the choice of the representatives determined by those represented. In Mosca's opinion this reconstruction smacks of formalism and does not consider the concrete reality of things. Faithful to his attitude whereby there is always an exclusive organised élite determining the will of the disorganised majority and not the other way round, he contests radically that political representation really has those characteristics. The choice of a member of parliament does not depend at all on the free expression of an electoral preference on the part of the individual voter, but rather on the organisational capacity with which a political force or an electoral committee are able to assert themselves on the electoral market<sup>165</sup>. It is pointless to be under the delusion as to the political sovereignty of the voter: his freedom of choice is limited to a confined field prepared by the organised minority who select the candidates not on the basis of criteria attentive to the greatest representative capacity of the electorate, but rather according to the guarantees that he offers regarding the consolidation of power at the head of the same minority that has put him forward as a candidate. There is a famous, apparently paradoxical passage that expresses perfectly Mosca's thoughts on this point: "*Whoever has witnessed an election knows full well that it is not the voters who elect the Members but the candidate who gets himself elected by the electorate: if this is not to our liking we could replace it with the other one which is that it is his friends who get him elected. In any case it is sure that a candidature is always the work of a group of people joined together for a common purpose, an organised minority which, as always, fatally and necessarily imposes itself on the disorganised majority*"<sup>166</sup>. Now, since the whole rising stage of the system is founded on a utopian ideal that does not take into consideration the decisive role of some constant factors in the political classes in every political regime, the goodness of the whole democratic structure can only prove to be invalidated and suffer from irremediable defects. On one hand the Government will be embroiled in an exhausting job of mediation between the parliamentary forces that support it. The members of the Government in order to respond to these strains and remain in power are obliged to succumb to "*favouritism and arbitrary acts*"<sup>167</sup>, to the great advantage of the most influential social groups and to the detriment of those who cannot count on the necessary support and protection. He underlines that this crookedness does not depend on the degree of personal morality of those that hold certain positions, such as Ministers, rather than the way the political system is set up<sup>168</sup>. On the other hand, if the Government, managing wisely this symmetry, is able to equip itself with a firm stability, it inevitably manages to gather into its own hands a considerable amount of power (defined in fact as "*indeterminate and monstrous accumulation of power*"<sup>169</sup>), creating an imbalance which

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<sup>164</sup> See *Teorica dei governi*, cit., 370.

<sup>165</sup> "Now the elements that in Italy ordinarily direct the elections and members of parliament can be classified so: 1) prefects; 2) large isolated voters; 3) political and workers' associations in all their myriad subdivisions and varieties (see *Teorica dei governi*, cit., 479).

<sup>166</sup> See *Teorica dei governi*, cit., 476.

<sup>167</sup> See *Teorica dei governi*, cit., 378.

<sup>168</sup> See *Teorica dei governi*, cit., 379.

<sup>169</sup> See G. Mosca, *Le Costituzioni moderne*, Amenta, Palermo, 1887, now in Id., *Ciò che la storia potrebbe insegnare. Scritti di scienza*

*politica*, Giuffrè, Milan, 1958, 481.

the system attempts to remedy with the possibility for Parliament to induce the end of the Government's life, maybe even with one single majority vote: this is a measure that he deems much too drastic and arbitrary<sup>170</sup>.

It is interesting to note that these accusatory statements regarding the parliamentary system were developed in the 1880s when the evolution of the form of government had not yet produced either an acceptable stability of the Cabinet, nor had there been the emergence of the institutional figure of the Premier as undisputed leader of the parliamentary majority for the whole duration of the legislature. Elements which were already part of the heritage of other more consolidated democracies like, for example, in Great Britain. Besides, the political life in the first decades of life of the Italian State is remembered for its continual periods of agitation and moments of instability caused also by the basic absence of well-rooted and well-organised political parties; their role was played by what goes down in history as the system of the notables. If this is true for the years of supremacy of the historical Right, it is all the more true for the balance that emerged after the electoral victory of the historical Left in 1876, with the establishment of the practice of shifting parliamentary alliances to carry on workable policies (a practice named *trasformismo*) as a tool to create parliamentary majorities, maybe hotchpotch and heterogeneous<sup>171</sup>, able to ensure votes for the support of the government. But in those years the same figure of the King had not totally lost all importance of a political nature, something which maybe will never happen in the whole duration of the Italian liberal State, and which is thus difficult to see as an entity of solely symbolic value, totally estranged from the internal games between the Lower House and the Cabinet.

Nevertheless, it is at this point that we glimpse a detail in Mosca's thought and that is the fact that some forced interpretations in the analyses of the conditions of the parliamentary system that catalysed his interest in particular, that is, in Italy, permit him to anticipate some trends and problematic areas of parliamentarianism which will subsequently be found in the Twentieth century democracies, when the large parties of the masses play a determining role: the predominance of the Executive over legislature, but also policies of favouritism and party-hegemony.

This consideration allows us to interpret Mosca's antiparliamentarianism and anti-democraticism from a more complete and current point of view. It has been written that it could be argued with sound reasons that "*parliamentarianism, the ills of which are denounced by Mosca, was to the statutory representative of the regime, as partitocracy was to the Constitution of the Republic*"<sup>172</sup>. The comparison may seem audacious but probably catches effectively the need to separate in the interpretation of Mosca's thinking the criticism of a false idealisation of Parliament as a place where the range of interests, aspirations and legitimate requests coming from the electorate are genuinely represented, from a negation which was never substantiated for the necessity that a well-balanced political system must equip itself with a legislative assembly<sup>173</sup>. Mosca's idea summons us to reflect on the delicacy of the idea of political representation too often turned into a myth and thus distorted. Popular participation in political life, even if with limited suffrage, is never fully aware and free as the theoreticians of radical democracy would like to make us believe, but it always and inevitably

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<sup>170</sup> So much so that Mosca compares the vote of confidence as a deterrent for the omnipotence of the Executive to the regicide of the Sovereign: worse remedies than the evils against which they are struggling.

<sup>171</sup> For an original reassessment of transformism as a practice on which Italian politics has historically been based, and perhaps on which it continues to be based see G. Sabbatucci, *Il trasformismo come sistema*, Laterza, Rome-Bari, 2003.

<sup>172</sup> See L. Borsi, *Classe politica e costituzionalismo. Mosca Arcoleo Maranini*, Giuffrè, Milan, 2000, 45.

<sup>173</sup> Far more modest and of poor efficacy compared to the pregnancy of the analysis is what may be defined the *pars construens* of Mosca's thought as regards parliamentarianism. In some parts of his works he tries to identify some hypothetical remedies for the defects and distortions of the parliamentary system. For example, by predicting that ministers would come from technocratic rather than political origin, or else claiming that "*the Senate should be chosen by a class of officials independent of government nomination and popular election, and it should comprise the most highly educated and independent components of the nation; this group should at the same time be entrusted with all provincial administration and play an important role in provincial bureaucracy*" (See *Teorica dei governi*, cit., 493). As can be seen, they are rather vague proposals but above all, they are outdated, as observed appropriately by R. Salvo, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 346. On the *pars construens* of Mosca's theories see also F. Cammarano, *Storia politica dell'Italia*

*liberale. 1861-1901*, Laterza, Rome-Bari, 1999, 421.

collides with the supremacy of the interests of the organised minority<sup>174</sup>. In consequence, the representative mandate in politics can never be assimilated to that disciplined by private law. In private relationships, “the delegation of power and entitlement always presupposes the widest form of freedom in the mandate and in the choice of the mandatary. Now, indeed, this freedom of choice, considered very broad in theory, necessarily becomes almost non-existent and irrelevant in the practice of political elections”<sup>175</sup>.

If all these observations are considered with due attention, it is perhaps easier to face the subject of Mosca’s universally-renowned aversion towards the principle of universal suffrage and towards any legislation which in statutory Italy may be proposed to extend the right to vote<sup>176</sup>, both to the less well-off classes and to women<sup>177</sup>.

If, in Mosca’s view, the moment of elections does not record the will of the disorganised majority, but rather sanctions the dominion of the organised minorities, the renunciation of limited suffrage on the basis of census would result in the concession of the participation to vote not so much to citizens belonging to classes and social ranks which up until now were excluded from determining national politics, maybe even through electoral success of political parties bringing new interests, aspirations and ideals, but rather to those citizens who are lacking the necessary cultural or economic tools to make conscious and discerning choices. Mosca expresses his fear that in the backward, farming Italy of the era, extending suffrage would only result in increasing the number of easily manipulated, impressionable people. So, paradoxically, the vote which is easily manoeuvrable by the organised élites would end up crystallising even further the already existing relationships of power and on the contrary would supply the dominant political classes with a further reason for legitimising their own power. If we concur that this worry is genuine and not instrumental, Mosca’s proverbial dislike for universal suffrage is not traced back to blindly conservative motivations regarding the privileges of the dominating class in the liberal state, but rather to a reasoning of systematic logic, in the sense that only preserving the principle of limited suffrage, those defects, however rooted in the parliamentary system would not unfurl the effects that would be even more devastating as regards the correct management of the “public thing”. Any opening in that direction would have to follow and not precede a social development, albeit slow and gradual, thanks to which extensive levels of the population would be able to acquire the political awareness necessary to thus avoid becoming the tools for the interests of others<sup>178</sup>.

It is necessary to give due attention to the fact that the juridical culture of the time tended to match the argument of the vote as an innate right (we would say today perhaps as a basic human right) to universal suffrage and that of the vote not as a right but as a public function to limited suffrage<sup>179</sup>. Consistent

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<sup>174</sup> For these remarks, see L. Gambino, *Introduzione*, in L. Gambino (edited by), *Il realismo politico di Gaetano Mosca. Critica del sistema parlamentare e teoria della classe politica*, Giappichelli, Turin, 2005, XVI.

<sup>175</sup> See Mosca’s *Elementi di Scienza Politica*, cit., 712.

<sup>176</sup> On the development of electoral legislation in statutory Italy see A. Colombo, *Zanardelli, La riforma elettorale e la lunga marcia della democrazia italiana*, in *Il Politico*, n. 4/1982, 649-659.

<sup>177</sup> See the speeches made by Mosca to the Lower House on 7 and 14 May 1912 in the discussion on the bill regarding the “Reform of the political electoral law”, republished now in *Gaetano Mosca, studioso e uomo politico*, cit., 89-102. The subject of the right to vote in Mosca’s thought is dealt with, among others, in C. Pinelli, *La questione del diritto di voto in Gaetano Mosca e nei costituzionalisti italiani*, in *Materiali per una storia della cultura giuridica*, n. 2/1998, 433-454, as well as Id., “Un errore quasi necessario”. *Il suffragio universale nel pensiero di Gaetano Mosca*, in *Quad. cost.*, n. 1/2001, 155-166. On the question of women’s suffrage see, instead, M. T. Sillano, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 503-516.

<sup>178</sup> In the pages dedicated specifically to the aversion towards conceding the right to vote to women, he lets himself wander into almost “anthropological” considerations on the fact that women are naturally led to take care of other things rather than the affairs of the state and so they are far more impressionable in their prospective expressions of vote because they are unable to evaluate their own critical opinion of political events. These are ideas that when read today can only seem extremely irritating which, however, in the context of the time in which they were written may be considered less astonishing. On these topics see G. Mosca, *Il suffragio femminile in Italia*, in *Il corriere della Sera* of 18 March 1907, 3, as well as Id., *Effetti pratici del suffragio universale in Italia*, in *Il corriere della Sera* of 16 June 1911, 1. Follow the main features of Mosca’s co-operation with the big daily Milanese newspaper in A. Colombo, *L’intellettuale Mosca e la classe politica dalla tribuna del <<Corriere della Sera>>*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 183-208.

<sup>179</sup> As reminded by C. Pinelli, *La questione del diritto di voto in Gaetano Mosca e nei costituzionalisti italiani*, cit., 442. On the subject

of the juridical nature of the right to vote see G. Mosca, *Il suffragio femminile in Italia*, cit.

with his own arguments, Mosca sides with the second view, since it seems to him the only way that respects the need for a free awareness of the expression of the vote as the only way to execute the public function.

In truth, this subject of juridical nature regarding the right to vote is enlightening in order to see the differences that exist between a mature and solid liberal state that is on the way to becoming a modern liberal democracy, and a state that is perpetually poised between democratic openings and conservative regression. While in Italy the functionalist argument supplies a theoretical basis for limited suffrage, in the United Kingdom John Stuart Mill fights the argument of the public function of the vote precisely to encourage the opening to suffrage<sup>180</sup>, in the sense that to confer layers of the population with this function, which had up to that moment been excluded, would have an educative and inclusive effect, thus contributing to strengthening the foundations of the State. For the Italian, on the contrary, the fear prevails that in the long term this prospect would end up undermining the strength of the institutions. It was certainly a short-sighted attitude highlighted in remorseless comparison, but perhaps contains great foresight if we think *mutatis mutandis* of the significance that the conditioning of opinions and the manipulation of political consensus by means of an unscrupulous use of the means of mass communication has assumed in the current debate on the crisis of democracy; the more effective the method, the less well-equipped culturally the subjects that are submit to it.

## V. *The Role of Political Parties in the Constitutional System*

As is obvious in this mixture of analyses and criticisms on parliamentary democracy proposed by Mosca, there is no particular underlining of an element that is to characterise a large part of political science in the second half of the twentieth century: the role of the political parties<sup>181, 182</sup>

Mosca does not go as far as to negate or fail to acknowledge their function<sup>183</sup>, but there is no doubt that the parties do not play a central role in his reconstruction of the mechanisms that govern the democratic game. There are numerous reasons for this undervaluation and they help to explain what would seem to be an obvious contradiction to the tendency towards the "Party State" that some institutional realities, like the British one, had already highlighted and contemporary authors of his were preparing to study, making it the central point of their analyses<sup>184</sup>.

The first perhaps needs to be sought in the peculiarity of the Italian liberal State<sup>185</sup>. As has been said, the limitedness of suffrage, the basic ideological homogeneity of all the post-unitary parliamentary managerial classes, not to mention the evolutionary predisposition of the internal dynamics of the elected

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<sup>180</sup> See C. Pinelli, *La questione del diritto di voto in Gaetano Mosca e nei costituzionalisti italiani*, cit., 444.

<sup>181</sup> On the subject see G. Sola, *L'analisi dei partiti politici in Gaetano Mosca*, G. Galli, *Gaetano Mosca ed il sistema dei partiti*, L. Compagna, *Il costituzionalismo senza partiti di Gaetano Mosca*, found in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., respectively. 271-295., 297-313, 315-330; as well as S. Sicardi, *Il regime parlamentare: Gaetano Mosca davanti ai costituzionalisti del suo tempo*, cit., 569-570 e F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., 227-254.

<sup>182</sup> If the function of the parties in the democratic system is so underestimated, that of the trade unions is viewed with great fear, not because he has an aversion in principle towards the fact that the defence of the workers' interests, in particular factory workers, would require the establishment of associations with this sole aim, but because he dreaded the transformation of the trade unions into political elements able to transform the State from a "Constitutional" to a "unionised State", as noted by A. Panebianco, *Gaetano Mosca, studioso e uomo politico*, cit., 18. On this no less trivial idea of Mosca's see G. Cavallari, *Gaetano Mosca e il sindacalismo rivoluzionario*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 225 and following; M. Ortolani, *Gaetano Mosca and an analysis of the trade union phenomenon*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 517- 522, as well as G. Sola, *Introduzione*, cit., 72 and following.

<sup>183</sup> As recalled by S. Sicardi, *Il regime parlamentare: Gaetano Mosca davanti ai costituzionalisti del suo tempo*, cit., 569.

<sup>184</sup> Suffice to think of *Sociologia del partito politico* by Robert Michels in 1911. See D. Fisichella, *Robert Michels, il partito di massa e il problema della democrazia*, in *Dilemmi della modernità nel pensiero sociale*, Bologna, 1993, cit., 49-58 and F. J. Cook, *Robert Michels's Political Parties in Perspective*, in *The Journal of Politics*, n. 3/1971, 773-796.

<sup>185</sup> For an analysis of the historical context in which Mosca's "anti-party" ideas mature see, among others, M. Delle Piane, *Liberalismo e parlamentarismo*, Macri, Bari, 1946; E. Cuomo, *Critica e crisi del parlamentarismo*, Giappichelli, Turin, 1996; F. Rossi, *Saggio sul sistema politico dell'Italia liberale*, Rubbettino, Soveria Mannelli, 2001, as well as F. Cammarano, *Storia politica dell'Italia liberale. 1861-1901*,

cit.

Chamber, had certainly not encouraged stable formations to take root both from the organisational and ideal points of view; on the contrary they had contributed to encouraging the emergence of the role of a few notables, around whose prestige the choices of the electorate and the elected rotated. Mosca sets about analysing parliamentary democracy from its foundations and its rules which were tendentially valid in all the systems that had adopted it. Despite this, there is no doubt that the peculiarities of the Italian case were the most important benchmarks for him and his speculations and it was perhaps inevitable that these speculations showed the consequences of these intrinsic characteristics in the political situation of statutory Italy, even if in this way his thoughts end up suffering from some inaccuracies and inadequacies in the diagnosis of those systems in which the role of the parties had already been greatly consolidated<sup>186</sup>.

It is likely that there is something more profound to explain Mosca's attitude towards the parties, something that can be traced back yet again to an underlying mistrust of those phenomena that put themselves forward with certain qualities but which, in his eyes, hide very different features. So, in Mosca's view parties are none other than the modern representation of medieval factions, whose constitutive reasons do not derive from a free manifestation of associative spirit in order to seek and strive for the good of the State, but from an instinct of reciprocal confrontation, tools to make one élite prevail over another in the fight for Power. Mosca will never see in the "party" an element that is indispensable of political representation, above all in an era in which the masses are facing democratic sharing in the management of the State. In this regard it is symptomatic that in the *Elementi di Scienza Politica* he deals with political parties in the same chapter dedicated to the historical analysis of the role of the Church and sects<sup>187</sup>, as if the distortions of the associative phenomenon were constant factors which in the course of history represent themselves with partially different characters, but still risky for the interests of the State. Because of their nature, exactly like the old factions of medieval times, they cannot be but dominated by cliques committed to the pursuit of particular interests, and as such always inclined to occupy the fundamental positions in the life of the State for the prime interest of the perpetuation of his own influence in the management of collective affairs. It is clear how such a pessimistic vision as this can be linked so logically to Mosca's mistrust in the formulation of ideologies. We have already seen how he overturns the relationship between political formula and the representation of interests. Normally one is led to believe that the division into parties depends, more or less directly, on a different *Weltanschauung* of the relationship between State and citizen, socio-economic relations, the structure and the ends of the State etc. With Mosca, however, the disenchantment towards abstract and doctrinaire constructions leads him to deem these aspects instrumental for the acquisition and conservation of power on the part of the organised minorities. From this standpoint it was inevitable that a radical mistrust would set in, a mistrust in the capacity of the parties to make themselves the champions of the common good and so represent a fundamental junction in a decent constitutional system.

Is this "constitutionalism without parties"<sup>188</sup> a distinguishing trait and unavoidable by any liberal constitutionalism? Of course not, and this can be seen even more clearly yet again in the comparison between Mosca's view and those of some stalwarts of British constitutionalism. Some of these had, on the other hand, been instrumental in his intellectual development, such as Burke, Hume and Tocqueville. In the liberalism of these authors the political party assumes the character and the function of a modern tool to gain consensus, indispensable for the workings of constitutional systems in virtue of the elements of patchiness that it shows as regards the old factions. It also substitutes the role that the Church used to have in other eras in the management of public life. Mosca does not challenge the fact that in other forms of government, like in Britain or America, the parties may take on these functions, despite the intrinsic defects that even in these contexts could be expected to be found due to the nature of parties, but since he claims that a form of government is not exportable because of the particular historical implications that have contributed to

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<sup>186</sup> S. Sicardi, *Il regime parlamentare: Gaetano Mosca davanti ai costituzionalisti del suo tempo*, cit., 569.

<sup>187</sup> Chapter 7, Part 1, degli *Elementi di Scienza Politica*, cit., 738-776, entitled *Chiese, partiti e sette*.

<sup>188</sup> Discussed by L. Compagna, *Il costituzionalismo senza partiti di Gaetano Mosca*, cit.

establishing it, so he also believes that parties cannot take on the same role in those realities where the tendency towards cliques and factionalism is more pronounced, as in, for example, Italy.

Perhaps this position of Mosca's on the impossibility of the entrenchment of a unitary spirit can be repeated regarding what was said before on universal suffrage. His vision of things is so disenchanting as to prevent him from grasping fully the spirit of the times that loomed ahead. The invasion, so feared by him, of the masses in the political battlefield could not but take place if not through the tool of the party, the only element able to organise and channel the drive and aspirations, even those which were potentially subversive within the system, as, indeed, a skilled and far-seeing statesman like Giolitti had understood. If the liberal State wanted to safeguard its structures and its deepest aspirations, from a certain moment on, more or less coinciding with the turn of the 19th and 20th centuries, it would have to reckon with the new actors that were arriving on the Italian and international political stage: the popular masses and their parties of reference. Mosca even this time tends to see first of all the degeneration of the processes rather than the reasons for their establishment, to highlight the dangers without pausing to consider the needs. And, however, yet again, this position leads him to anticipate some criticisms of the distortions of the "Party State" that influence a not insignificant part of the Italian doctrine in the second half of the 20<sup>th</sup> century<sup>189</sup>.

## VI. *Evolutionary Directions in Mosca's Thought*

All these aspects in Mosca's thought concerning parliamentary democracy and political parties are at the root of his theoretical development. His disliking for ideological abstractions, the deceit inherent in radical democracy (*in primis* the principle of universal suffrage), the defects of parliamentarianism and the fear of subversive and destabilising impulses in favour of one power group and the subsequent imbalance of the institutions that aim to preserve the *juridical defence*, will always be the guidelines for his way of being realistic and diffident.

Nevertheless, an analysis of Mosca's thought would be incomplete if it did not properly reveal the development that this thinking was subjected to over the decades and what Mosca achieved (when his own parable of scholar and politician was drawing to an end) both as regards a greater capacity of being topical in his interpretation of phenomena, and as regards the curbing of the *juvenile vis polemica*, to the advantage of the effectiveness of the evaluation of the controversial aspects that characterise any political system. This is true above all as regards his reflections on the parliamentary system<sup>190</sup>. While unwavering in his perplexity regarding the lack of relationship between theoretical formulations and the concrete fulfilment of this system of government, the more mature Mosca, in particular the one of the second edition of *Elementi di Scienza Politica* (1923), perceives and underlines its strong points and the functional elements which up until that moment he had left in the shade. In this phase he acknowledges that only a system founded on the principles of parliamentary democracy is able, in the modern era, to generate the antibodies and counterweights capable of preserving precisely those values that he concealed in the expression *juridical defence*, otherwise at the mercy of more anachronistic and tribal forms in the struggle for power. Basically, he understands that the only form of "mixed government" that is realistically feasible is indeed that so contemptible democracy<sup>191</sup>, of course not of the Jacobin and radical kind, but a liberal democracy able

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<sup>189</sup> The reference is obviously primarily to Giuseppe Maranini, to whom we owe the term "partitocracy" along with his criticisms of the party system in post-war Italy. A comprehensive intellectual profile is laid out by L. Borsi, *Classe politica e costituzionalismo. Mosca Arcoleo Maranini*, cit., 347-487.

<sup>190</sup> The need to assess fully the importance of Mosca's development of thought as inescapable in order to make a correct reproduction and interpretation is underlined by G. Bedeschi, *Storia del pensiero liberale*, Laterza, Rome-Bari, 1999, pp. 303 and following. He speaks of a reassessment, in softer terms, of the criticisms against parliamentarianism T. E. Frosini, *L'antiparlamentarismo e suoi interpreti*, in a speech held at the "Day of Rights and Constitutional History", on 4 July 2008, at the University of Teramo, now published in [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it), 6 October 2008, 6-7.

<sup>191</sup> See N. Bobbio, *Introduzione*, cit., XXVII

through the tool of parliamentary discussion at the institutional level and the free game of interests at the socio-political level to settle the multifarious conflicts that inevitably agitate contemporary societies, which are ever increasingly complex and fragmented<sup>192</sup>. Mosca recognises how a system founded on a theory which in many ways is erroneous can in any case produce results the advantages of which outweigh the disadvantages. That is, a system in which the opportunities are preferable to the criticisms no matter how obvious. He acknowledges the superiority of democracy as regards the formation and turnover of the political class, with the subsequent reduction of the risk of an entrenchment of power on the part of one sole political force, an expression of the same social interests. And he admits the advantages also as regards the controlling of power, both by means of the tendential respect of its division, and through the freedom of expression of thought first and foremost as regards those that govern<sup>193</sup>.

As Luigi Einaudi wrote: *“Forty years of observation and experience of the defects of human nature have persuaded the author that perfection is not attainable in the subject of politics and that the representative government perhaps offers the continuation which is feasibly better in a system of counterweights and compromise, so that supreme power is not free to act in its place, but there are many powers each one of which controls and limits the others and the better it controls and limits them, the more the different powers will represent different and opposing factions of the political class”*<sup>194</sup>. Thus, it can be observed that the same realism that had animated Mosca’s most critical pages on the theoretical structure of democracy and the role of parliament, will later on permit the author to see the concrete advantages tied to that form of government and, with clear intellectual honesty, to highlight them even at the cost of partially contradicting some previous statements of his own.

So, in the final part of his intellectual and political journey he acknowledges that while the basically deceitful nature of the democratic formula holds true, the “practical effects”<sup>195</sup> of mature democracies regarding juridical defence cannot be ignored and despised, above all the comparisons with the negations of freedom and the pernicious centralisation of power by regimes founded exclusively on the authoritarian principle<sup>196</sup>.

The greatest demonstration of this evolution can be seen in the famous speech given to the Senate on 19th December 1925<sup>197</sup> against the bill desired by Mussolini regarding the strengthening of the powers of the Head of Government, one of the most significant blows from the symbolic and concrete points of view struck by Fascism that led to the destruction of the liberal-democratic State. Well, Mosca’s speech immediately seems to be a sort of political testament of that form of state<sup>198</sup>, a testimony given (and it does not seem paradoxical) by he who had not skimmed with his quite ferocious criticisms of that system, but who, in the face of the barbarianism of dictatorship, takes up the cause of a dying democracy and a constitutional order which are about to be substituted by a political regime that will destroy all aspirations for a sharing of power, a mixed government and the balance of the socio-political trends, the pursuit of which Mosca had dedicated his long lifetime’s work of academic. Here are some particularly important passages<sup>199</sup>: *“I have already hinted that this time I am speaking with a certain amount of emotion, since we are witnessing, let’s be frank, the funeral rites of a form of government; I would never have believed that I would be the only one to give a funeral oration of the parliamentary regime [...] I who have always been severely critical of the*

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<sup>192</sup> See G. Mosca, *Le Costituzioni moderne*, 482-483.

<sup>193</sup> See G. Sola, *Introduzione*, 70-71.

<sup>194</sup> See L. Einaudi, *Parlamenti e classe politica*, in *Cronache economiche e politiche di un trentennio*, Einaudi, Turin, 1965, 266.

<sup>195</sup> This eloquent expression used by F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., 86.

<sup>196</sup> See *Elementi di Scienza Politica*, cit., 1105 and following, where Mosca reviews the features of possible alternative regimes to the parliamentary democracy (proletarian dictatorship, bureaucratic absolutism and trade unionism), that is the substitution in the structure of the legislative assemblies of individual representation with that of class, explaining the reasons why they would be far worse than the system they were substituting.

<sup>197</sup> For a profile of Mosca the parliamentarian and politician see E. A. Albertoni, *Gaetano Mosca. Storia di una dottrina politica*, cit., 107-206, as well as A. Panebianco, *Gaetano Mosca, studioso e uomo politico*, cit., pp. 18-28 and the subsequent note, 29-30.

<sup>198</sup> A. Panebianco, cit., 28.

<sup>199</sup> The speech is published in its entirety in G. Mosca, *Discorsi parlamentari*, cit., 359-363 and in C. Ocone and N. Urbinati

(edited by), *La libertà e i suoi limiti. Antologia del pensiero liberale da Filangeri a Bobbio*, Laterza, Rome-Bari, 2006., 48-53.

parliamentary government must now almost mourn for its fall. [...] To judge a form of government there is but one possible system and that is to compare it to the form of government that precedes or follows it. It would be premature today to make use of the second form of comparison, but as regards the first, the forms of government immediately preceding the parliamentary regime were such that frankly it must be said that this system was better than those [...] But let us think of the journey that was made between 1848 and 1914, the eve of war and we see a little of what was Italy in 1948 and what it was in 1914 and so we should recognise the enormous progress made by the country in that period. It will be said that it is not only the form of government but also other circumstances that contributed to this progress mentioned. Yes, but a form of government is meritorious, when it does not hinder the development and progress of a nation, this is enough to be able to affirm that the moment has not yet come for its radical transformation.. [...] These are the good wishes that the old generation give to the new, but at the same time we aged have the duty to warn and not to approve those changes that we deem inopportune. On my part, if they approved them I would vote against my conscience, against my inner convictions, and so I am obliged to vote against the proposals that are brought before us”.

## VII. Mosca and the Other Elitists

In the light of this analysis of the organisation of power in Gaetano Mosca’s thought, an attempt can be made to express an opinion on the importance that this author has had in the political-juridical culture of the time, and not exclusively in Italy.

First of all, in order to comprehend the cultural context in which Mosca’s theories were born, it is necessary to understand his relationships with the other scholars and in particular with those have been described as the classic elitists<sup>200</sup>. This definition comes from the fact that they all analyzed, from similar point of views, the correlation between society and political power. Those conceptual bases will represent a challenge for those who wanted to engage the same subject, even just to confute those theories from a scientific point of view.

It is also essential to understand why such important studies arose at the turn of the 19th and 20th centuries. As seen before, there have been other scholars, forerunners of the classic élitistes, who faced the social analysis giving grand relevance to the managerial classes, but it was only later that this attitude will gain a descriptive strength, able to interpret the dynamics of the power through the individuation of “constant laws” irrespective of the specific quality of the contexts involved<sup>201</sup>. The cultural context, pushed by the incredible strength of the scientific positivism<sup>202</sup>, was for sure the key factor which allowed this acceleration. Analyzing the classic elitists’ works their will to build theories with an intrinsic value is undoubtedly detectable, theories able to resist experimental tests and to describe phenomena as evaluative as possible. All that, in the human sciences realm, which for its own nature can neither be as objective as the “exact” Sciences, nor as verifiable as knowledge based on reproducible experimentation. Nevertheless, the idea more or less declared, was indeed to supply a systematic and rational contribution based on the

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<sup>200</sup> G. Sola, *La teoria delle élites*, cit., 65 and following uses this expression to qualify Mosca, Pareto, Michels and Weber as the founders of this research trend.

<sup>201</sup> According to G. Sola, Mosca had “the ambition not only to formulate a general theory about the distribution of the power in the society, but also to found a new political science able to explain how the States arises, consolidate, develop and die” (see G. Sola, *La teoria delle élites*, cit. 65).

<sup>202</sup> Mosca’s positivism consisted in his declared awareness that social sciences, in order to achieve real and useful results, should have made treasure of the methodological rigour used by the natural sciences since they have already demonstrated to be able to achieve excellent results in the comprehension of natural phenomena, even thanks to their scientific precision. As Norberto Bobbio explains “When we talk about positivism in the social sciences, we never distinguish enough between the more rigorous methodology used by the social sciences – which has already demonstrated to be fertile – and the a-critical extension of theories formulated only to explain phenomena belonging to the natural world to the society, as social Darwinism did. Mosca was a positivist in the former sense, not in the latter.” (cit. N. Bobbio,

*Introduzione, XI).*

explanation of how the relationships of power represent, somehow, the formation and organization of the States<sup>203</sup>.

In this field we can without doubt assert that the first and more relevant term of comparison with Mosca's theory is Vilfredo Pareto's work.

Foremost, we should confirm that the personal relationships between these two scholars were not good at all, as they blame each other for unfair competition. As a matter of fact, during the opening relation (which was *Il principio aristocratico ed il democratico nel passato e nell'avvenire*) of the academic year 1902-1903 at the University of Turin, Mosca claimed that in Pareto's work *Systèmes socialistes* the author didn't recognize Mosca the primogeniture of the political class theory<sup>204</sup>. Pareto on the other hand, affirmed many times, as for example in the edition of 1906 of his well-know work *Manuale di economia politica con un'introduzione alla scienza sociale*, that Mosca's theory wasn't actually unique in the scenery of the elites studies<sup>205</sup>. The diatribe carried on many years after that; nevertheless what is actually significant is to ask ourselves whether that was just a personal disputation or it veiled something else, something more intellectually relevant. According both to those who deeply studied this fact and to those who outlined a scientific comparison between Mosca and Pareto, the quarrel hid their different attitude, on a doctrinaire level, towards the élite theory<sup>206</sup>. We already saw how Mosca's theories arose from historical-political analysis which weld themselves with assessments on the juridical-institutional level. And it was in this context that he placed the élitarian phenomenon. On the contrary, Pareto underlined the importance of the sociological elements and in particular the function of the social utility. And it's indeed starting from this point that he built up and described the élite role in the social and political realm. However, a part from contrasts and different attitudes, we're clearly investigating two scholars whose contributions highlighted the reasons and the mechanism why the organized minorities are actually the ones who impose the way the social and the political power must work.

We can spot the same historical function in Robert Michels', with whom Mosca had instead a relationship based on mutual respect and esteem<sup>207</sup>. Michels published the original edition of his main work *Sociologia del partito politico*, only in 1911 (it will be translated in Italian in 1912) that is when Mosca is already considered a reliable author. Moreover, Michels acknowledged that the Sicilian Maestro was the founder of the doctrine Michels himself was giving a precious contribution to. And furthermore, a part from the good personal relation they had (they actually had the chance to meet each other quite often in the cultural cafés in Turin) there is another and more important reason which explains why Mosca had a completely different relationship with Michels compared with the one he had with Pareto. Michels made the political party the

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<sup>203</sup> Mosca's methodological rigour consisted in his opinion that only a deep knowledge of the historical subjects (ancient, modern and contemporary history plus the political disciplines) allowed the political studies to become science in the fullest sense of the term, that is a theory which face the facts from which it draws confirmations, confutations, or modifications. See cit. by D. Fisichella, in *Gaetano Mosca epistemologo*, in *Dilemmi della modernità nel pensiero sociale*, 28.

<sup>204</sup> See G. Sola, *Gaetano Mosca. Profilo biografico*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 29.

<sup>205</sup> See D. Fiorot, *Potere, governo e governabilità in Mosca e Pareto*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 89-90.

<sup>206</sup> D. Fiorot, *op. cit.*, 92: "If we want to compare these two theories about the minorities organization, we should confirm what has been said elsewhere. These are two different theories, even though they share the same object. Mosca's theory bases itself essentially on both juridical-constitutional and historical-political considerations; on the contrary, Pareto's theory founds on an original sociological context, not concerning Mosca's cultural interests; two different attitudes which lead one to look at the same things from different viewpoints. Because of their touchy way to behave they could not or better didn't want to face arguments that could be interesting for both of them, but also for the development of the studies." According to E. A. Albertoni, *Il pensiero politico di Gaetano Mosca*, Cisalpino-Goliardica, Milan, 1973, 156-157, an evaluation as a whole of their works highlights the differences: Mosca's interests about the political and constitutional world led him to formulate a political theory of the political class. On the contrary, in Pareto the philosophical and economics interests prevail and drive him to reflect about the danger coming from the middle class's decline to the advantage of other social actors. N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., 276: "[...] Mosca and Pareto's approach were totally different: the former made the political class the centre of his analysis; the latter was more attracted by the elected classes, including each person that in his/her field had achieved the top. Mosca's interest about the political class concerned more the reason of its power and the way to exert it while Pareto wanted to identify the necessary qualities to be part of it (the theory of "residues") and the causes that bring to its development and decline (the theory of the circulation of Elites)".

<sup>207</sup> As observed by E. A. Albertoni , *Il pensiero politico di Gaetano Mosca*, cit., 153.

centre of his interests. Through what he called *legge ferrea dell'oligarchia*<sup>208</sup>, Michels showed how oligarchies, in order to enhance their own organization and maintain the power inside the party, tend to turn the leadership into an oligarchy which found in itself its own references. This idea is to be considered particularly important in the scenario of the theory of the elites since starting from the German social-democratic features, Michels laid the foundations to interpret the political parties internal dynamics, which will have great importance in the second half of 20<sup>th</sup> century. Nevertheless, as we have already seen, Mosca's analysis of the role of the political parties in the democratic systems is not that relevant, therefore there was no risk of overlapping or concurrency between their ideas. Suffice to think that Mosca himself reviewed Michels' work of 1912, granting with pleasure his ideas.

As we have seen, Mosca's relations with Pareto and Michels are easy to reconstruct while his relationship with Weber is subjected to historical disputations and the hypothesis that have been suggested are very complicated to verify<sup>209</sup>. What we know for sure is that they could never meet each other but since 1909 Weber had the chance to read Mosca's *Elementi* and thanks to Michels we also know that among Italian politologists Mosca was the one Weber studied and indeed respected. Nevertheless, it is difficult to outline mutual influences in their works, since they didn't explicitly quote each other<sup>210</sup> and plus Mosca didn't know the German language so that it seems possible that Mosca had a few notions about Weber's work just thanks to his friendship with Michels. In this scenario, it is clear that it is only possible to verify whether in Weber's works there is any echo of Mosca's theories. This operation is not that simple since, as we have already said, not only are there no express quotations, but it is also difficult to verify the nature of the notions we can find in Weber's works and which are certainly drawn by Mosca's theories. As a matter of fact they could either be the result of a specific intellectual influence (as for ex. the notion of organized minority)<sup>211</sup> or more in general, the elaboration of notions that were already part of the cultural context in which Weber worked. In addition, we should forget that Weber was interested in discovering how the social and political power legitimize itself more than in how the authority exerts this power. The relationship between governed and governors, which is a main aspect also in Weber's theories, is studied looking how these two fundamental social actors legitimize their power relationship: a very different prospective, as it is clear, compared to Mosca's one.

### VIII. *Mosca and the Most Important Italian Jurists of his Time*

In order to deeply understand how Mosca gained such an important role in the foundation of the Political Sciences we should also consider his relationship with the Italian jurists of his time.

In particular it is interesting to see the relationship that is outlined with the most neighbouring juridical discipline that is constitutional law<sup>212</sup>. This proximity is so close that in one of his first works *Studi ausiliari del diritto costituzionale* (1886)<sup>213</sup> political science tends to overlap with constitutional law, the latter being attributed the functions that should be attributed to the former<sup>214</sup>. Subsequently, however, the different realms will take on greater clarity, as does the conviction that the two subjects must interact in order to explain political phenomena in a comprehensive way. Because it is true that these two worlds are

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<sup>208</sup> See G. Sola, *La teoria delle élites*, cit., 95-101.

<sup>209</sup> According to G. Eisermann, *Nuovi elementi sulle relazioni tra Mosca, Pareto e Max Weber*, cit., Weber was influenced by Mosca's works while S. Segre, in *Mosca e Weber: rapporti intellettuali ed analisi comparata delle sociologie politiche*, cit., affirms that there is no biographical information able to support this argument.

<sup>210</sup> As S. Segre himself affirms, *op. cit.*, 105-106.

<sup>211</sup> Called by Weber as *superiorità del piccolo numero* (see M. Weber, *Wirtschaft und Gesellschaft*, 1922, It. transl. *Economia e società*, Ed. di Comunità, Milan, 1974, vol. II, 257).

<sup>212</sup> On this subject see G. Negri, *Gaetano Mosca e il diritto costituzionale*, in *St. Parl. Pol. Cost.*, 1991, n. 92-93, 5-11.

<sup>213</sup> Now published in G. Mosca, *Ciò che la Storia potrebbe insegnare. Scritti di scienza politica*, cit., 1958.

<sup>214</sup> As observed by N. Bobbio, *Introduzione*, IX.

observed from two very different points of view<sup>215</sup>, but here “difference” means, to a great extent complementariness and reciprocal enhancement. Indeed, it can be said that the young Mosca, inspired by sound juridical studies, dedicates himself to the study of political processes seen from the angle of social relationships, since he detects a certain insufficiency in the institutionalism and juridical formalism that were prevalent at the turn of the 19th and 20th centuries in the Italian doctrine, above all due to the authoritativeness of V. E. Orlando and Santi Romano.

As we have already seen, Mosca and V. E. Orlando were very good friends; a relationship that it is not just due to their Palermitan common origins: in fact it is possible to trace this friendship back since the second elementary school days<sup>216</sup>. As far as Santi Romano, Orlando’s pupil, is concerned, their relationship was based on mutual esteem. Yet, Mosca’s personal relations with the two most important jurists of his time, balanced, since the beginning, their different approach to the analysis of the problems concerning the State<sup>217</sup>.

Since Mosca graduated in Law, his formation was juridical. He dedicated himself to the unitarian State analysis and his scientific studies logically addressed the Constitutional Law. At the time the Italian constitutionalists faced a schism: those who considered that this discipline should embed to mere juridical canons, suggesting a technical-formal way of studying the structures of the State versus those who suggested a historical-political approach<sup>218</sup>, focused on the relationship between the law and the social conditions which creates it and assure its efficiency<sup>219</sup>. Mosca noticeably supported the latter of these positions, while Orlando in the same years was laying the basis of the methodological formalism, which led him to gain quickly the role of Master of public law disciplines<sup>220</sup>. Since then, an irretrievable distance was created: Mosca stressed always more his detachment from a discipline he didn’t consider as independent. Accordingly to him, the Constitutional Law to accomplish its task should open up to social dynamics analysis, which held power relationships, as the basis of the institutions. This approach led him to found a brand new discipline, which was closer to political phenomena: the Political Science, indeed<sup>221</sup>. This position shouldn’t be considered as his reaction to Orlando’s approach but rather an attempt to explore new paths

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<sup>215</sup> See N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., 8.

<sup>216</sup> According to G. Sola, *Gaetano Mosca. Profilo biografico*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 18, we could say that between Mosca and Orlando there was a “peculiar symmetry of life, scholastic before and intellectual, political and spiritual then”.

<sup>217</sup> As observed by M. Fioravanti, *Gaetano Mosca e Vittorio Emanuele Orlando: due itinerari paralleli (1881-1897)*, in AA.VV., *La dottrina della classe politica ed i suoi sviluppi internazionali*, cit., 350, analyzing Mosca and Orlando’s works, on a scientific level “it is possible to affirm that it existed a state of mutual incomprehension or maybe even a latent conflict”. This opinion is shared by E. A. Albertoni, *Gaetano Mosca. Storia di una dottrina politica. Formazione e interpretazione*, cit., 66. On the same topic see also the articulate opinions of F. Mancuso, *Gaetano Mosca e la tradizione del costituzionalismo*, cit., pp. 129 and following.

<sup>218</sup> As shown by S. Sicardi, *La scienza costituzionalistica italiana nella seconda metà del XIX secolo*, in *Diritto e società*, n. 4/1999, 648-654.

<sup>219</sup> Mosca himself tent to consider these differences as an abstract and theoretical elaboration more than as an approach which could be taught in Constitutional Law. As affirmed by M. Galizia, *Diritto costituzionale (profili storici)*, in *Enc. Dir.*, 973 and by S. Sicardi, *La scienza costituzionalistica italiana nella seconda metà del XIX secolo*, cit., 655-656, Mosca thought that basis of the Constitutional Law were commun in all the different approaches.

<sup>220</sup> For a résumé of Orlando’s speech about the “juridical method” see M. Galizia, *Profili storico-comparativi della scienza del diritto costituzionale*, Società tip. modenese, Modena, 1963, pp. 84-89. The same considerations about the great distance between Mosca and Orlando’s theories can be done about Santi Romano’s institutionalist theory of the juridical rules which is more careful in considering the importance of the social conflict but it is still close to the idea of the State-person as the subject of sovereignty, as in Orlando’s hypothesis. This aspect is highlighted by C. Magnani, *Stato e rappresentanza politica nel pensiero giuridico di Orlando e Romano*, in *Materiali per uno studio della cultura giuridica*, n. 2/2000, 349-386. More in general, to see a synthesis of S. Romano’s contribution to the Italian Public Law and his thought of the crisis of the Liberal State see A. Romano, *Santi Romano, la giuspubblicistica italiana: temi e tendenze*, in *Diritto e società*, n. 1/2004, 7-36 e R. Ruffilli, *Santi Romano e la “crisi dello Stato” agli inizi dell’età contemporanea*, in *Riv. Trim. Dir. Pubbl.*, n. 1/1977, 311-325.

<sup>221</sup> According to M. Fioravanti, *op. cit.*, 352-353, the conflict between “Mosca and Orlando could be drawn through the following general terms: Gaetano Mosca’s realism of the <<political science>> versus Orlando’s formalism of the <<juridical method>>. From this point of view –which is the more interesting for us –the history of the relationship between these two scholars becomes a piece of the Italian history. And in particular, their theoretical path from the beginning of the ‘80 until the end of the century, could be described as on one side the progressive acquisition of a mere juridical prospective and therefore “formalistic” and the study of the structures of the political power – as much as Orlando is concerned -, and on the other side Mosca’s brave attempt to cut loose by the scientia juris logics, so much as to increase to a “realistic” prospective of

*investigation: from the public law science to the political science”.*

which allow for study of the structures of the State and the basis of the power from a different point of view compared to the mere technical-juridical one. That's why Mosca can't be considered as a constitutionalist in the strict meaning of the term, even though in his scientific production we can appreciate many precious works in this field<sup>222</sup>. Mosca is, if anything, a scholar with a sound juridical base (besides then historical) who exploited this knowledge to launch a brand new scientific trend. Accordingly, trying to homologate him with the juridical science tout court would just reduce his role as the founder of an independent discipline: political science. So, the fact that he taught Public and Constitutional Law for many years shouldn't be misunderstood: it was just a natural and inevitable opening since the object of the analysis is the same: the State and the power. We should also remember that it was only in that period, thanks to Mosca's works indeed, that Political Science was winning an independent scientific dignity.

Moreover, Orlando and Romano themselves recognized this distinction between political science and juridical science: consequently we can say they agreed about the distinction between Mosca and the other jurists. Romano, while commemorating Mosca as an eminent scholar in 1942, at the Italian Royal Academy, declared that Orlando and Mosca had "*cultivated not the same science with different approaches but two different sciences which while being strictly correlated, deeply different from one another*"<sup>223</sup>, thus rejecting the chance to identify a Sicilian school (Arcoleo, Scaduto, Majorana, and Romano himself would be hypothetically part of this school). As a matter of fact, even though they came from the same region, their approaches were totally different<sup>224</sup>.

For decades, this divergence, that was at the border with a sort of scientific incommunicability, played an important role in the development of these two disciplines, restricting their potentialities<sup>225</sup>.

Nevertheless, we have to remember that some great masters of Italian constitutional law from the subsequent generation to that of the two prominent figures in the first part of the century, the 1930s and 40s (Mortati and Esposito, but also, among others, Crisafulli, Pierandrei, Chiarelli and Giannini), began to reassess the importance of the pre-juridical factor, dwelling "*on the importance of the political powers, on one hand, and the principles of value brought forward by these forces on the other*"<sup>226</sup>. Moreover, the most obvious demonstration of this necessary permeation will only reveal itself with one of the most important contributions offered by the Italian juridical culture to the international debate on the nature of constitutional regulations: the Theory of the material Constitution by Costantino Mortati<sup>227</sup>. The tribute that this work owes to the work of the founder of Italian political science is obvious from its approach and in its own interpretation of the Constitution, and it can be usefully summarised in this quotation from Mortati himself: "*[...] the jurist cannot consider the examination regarding the unwritten constitution irrelevant to his own task, considering not only the function that he carries out, as regards sources and guarantees, which we have already seen, but also because of the fact that this selfsame constitution provides the necessary elements to interpret and integrate the system of laws systematically, both to identify the form of the State and establish together the limits within which it is possible to make modifications to the constitution, without the essential structure being altered. Fulfilling this task, the jurist is not a sociologist because he does not search for the factors that have determined the source of the strength and ideologies that lie at the basis of the State, nor does he pass judgement on the selfsame; but rather, returning to the characteristics necessary in order to confer legality to behaviour and social relationships, enucleates*

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<sup>222</sup> As *Appunti di diritto costituzionale, Le Costituzioni moderne or Questioni di diritto costituzionale*, collected today in G. Mosca, *Ciò che la Storia potrebbe insegnare. Scritti di scienza politica*, cit., texts (specifically the first one) which, according to P. Biscaretti di Ruffia, *Gaetano Mosca docente di diritto costituzionale*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 130-131, is to be recommended "*because of its clarity, fluency and its ability to face in a few pages very complex problems*".

<sup>223</sup> Quotation drawn from G. Negri, *Gaetano Mosca e il diritto costituzionale*, cit., 9-10.

<sup>224</sup> As underlined by M. Fioravanti, *op. cit.*, 349-350.

<sup>225</sup> As claimed by N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., 257.

<sup>226</sup> As claimed recently remembering the figure of Leopoldo Elia by F. Lanchester, *Il legato di Leopoldo Elia*, in *federalismi.it*, n. 19/2008, 2.

<sup>227</sup> See G. Negri, *Gaetano Mosca e il diritto costituzionale*, cit., 7.

from the facts that emerged from the observation of the effective unfurling of the relationships themselves in a given order, those that are to be considered part of the real constitution " <sup>228</sup>.

## IX. Mosca as a Liberal Thinker

Mosca's elitism was born within liberal thinking. There are various confirmations in his work of the crucial influence that the great classics of liberalism played on his development. The socio-political themes that are to be the subjects of his studies and purpose that the State in his opinion should be called upon to pursue, show how his cultural perspective has always been liberalism, moderate in its methods and conservative as regards the defence of certain values that he considered essential for proper social organisation<sup>229</sup>. His conviction that only healthy capitalism of the bourgeois kind founded on the work ethic, on free competition and on the tendential abstention of the State<sup>230</sup>, could guarantee a balanced economic development able in due time to extend a dignified level of wellbeing also to the less well-off classes. His disliking for all hasty changes both from the point of view of economic and institutional structure. The necessary divisions of individual levels, both social and state, for which the state structures should operate with the necessary detachment as regards the particular interests of individuals or groups, and thus the law should preserve those characteristics of generalisation and abstract nature which, until the early years in which he was writing had begun to be threatened by the multifarious requests to which the legislator was subjected. As well as the necessary separation of Church and State, the cornerstone of a laity that allows for anyone to profess freely his own belief without undue mingling with the State structures. And again his defence for legality as a necessary condition to strive for the common good, contrasting all those attempts to crush and substitute it<sup>231</sup>.

All these principles along with other traditional formulations of liberal thought that he makes his own are practical, in Mosca's view, in order to pursue the objective of defending individual freedom in the scenario of a social unity that preserves order and maintains a balance between the powers at be, whose interests are always potentially conflictual and so harbingers of danger for the stability of the institutions.

If this is Mosca's cultural horizon, where does his position differ or, at least, where do his theories lead in the long and composite train of liberal thought to which he belongs?

It could be said that his works are born from a deep feeling of dissatisfaction. In order to reach those objectives, to build that kind of society, to preserve that kind of State from risks, the classical recipes of liberal constitutionalism are not enough, which he claims are not sufficient because they are so awash with excessive formalism and optimism. Locke and Montesquieu, who place an excessive trust in the salvific virtues of the division of powers, are not enough for him; Tocqueville, who describes the virtues of a democracy like that in America, which is too conditioned by its own specific history to be an exportable

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<sup>228</sup> See C. Mortati, *Costituzione*, in *Enc. Dir.*, 1962; now also in C. Mortati, *"una e indivisibile"*, Giuffrè, Milan, 2007, 128.

<sup>229</sup> On the particular features of Mosca's conservatism see the sharp comments, in many ways against the mainstream literature that would like to reduce Mosca to the role of a custodian of the constituted order and in defence of determined privileges see P. Pastori, *Aspetti del conservatorismo politico di Gaetano Mosca*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 365-377, according to whom "the targets of his criticism are [...] the utilitarianism of the most aggressive bourgeois classes, that introduce unbridgeable and unjust inequalities, and revolutionary radicalism, an inexhausted source of collectivist illusion, for which along with the unjust differences in the possession of wealth, also eliminate the capacity to fight against the natural shortage of material goods and political tyranny" (See 366-367).

<sup>230</sup> Even if he never in ideologically liberal positions, acknowledging the need for State intervention when the situations request it.

<sup>231</sup> In this regard a lecture on the "mafia" given at a conference held at the beginning of the twentieth century in Turin and Milan and published in *Giornale degli economisti* can be considered important even today. Recently the text from the conference was published again in G. Mosca, *Che cosa è la mafia*, Laterza, Rome-Bari, 2002, accompanied by an introductory essay by G. C. Caselli and A. Ingroia, *Mafia di ieri, mafia di oggi: ovvero cambia, ma si ripete...*, V-XLII. On the same subject see also V. Frosini, *Mafia e politica nel pensiero*

*di Gaetano Mosca, in E. A. Albertoni (edited by), Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca, cit., 333 ff.*

and valid model elsewhere, is not enough for him, and in the same way Burke and Hume, whose institutional analyses are too tied to the peculiarities of British history are not enough for him.

So, Mosca tries to impose an interpretation of the political phenomena that goes beyond juridical-institutional formalism and the particularities tied to the different traditions of different peoples. In some ways he tries to change the observation point searching for the constant factors that characterise the formation of power, its conduction and its real possession. That is why before reasoning around the mechanisms thanks to which the limitation of power is possible, the great cornerstone of liberal constitutionalism, he reminds us of the need to consider that power is always managed by an organised minority, no matter what political regime it may be, including those regimes like democracy that propose to create a system of government in which this constant evidence ceases to exist.

Mosca's real characteristic does not lie in any way in his being a champion of a narrow-minded, conservative, if not reactionary, thinking all aimed at supplying a theory upon which to found the conservation of the economic and political power in the hands of the political class which held it at the time, as is claimed by some theoreticians of democracy of the twentieth century<sup>232</sup>. If his statements are kept at face value and are not examined in more depth separating the vehemence of his contentious reasoning from the incessant search for the real reasons which, to his mind, lie underneath the workings of power, it is impossible to capture that original contribution to the analysis of political phenomena that he brings to the attention of scholars of this subject.

It is possible to summarise this contribution with his continual reminder of the need for the scholar to investigate into the concrete mechanisms that characterise the relationships of power, to a constant search for the effective balances and counterbalances above and beyond all formalism and all appearances.

Moreover, the fact that Mosca's thoughts cannot be classified simply as an insignificant defence of a time which was irretrievably lost can be seen by the great influence that he in turn has had on many political thinkers who, in the twentieth century, had great influence themselves. The tribute that authors such as J. Schumpeter<sup>233</sup>, J. Ortega y Gasset<sup>234</sup>, R. Aron<sup>235</sup> R. Dahrendorf<sup>236</sup> owe to the theoretical and methodological position of Mosca is obvious from the interpretation of their works. But to limit ourselves to Italian culture, the link between some purely and typically Moschian ideas is very strong and some certainly non-conservative currents that are to play an important part in the democratic rebirth of the country and the compilation of the Constitution<sup>237</sup>. From this point of view it is interesting to observe how an intellectual who sided with progressive and optimistic liberalism like Gobetti, despite his different opinions, praises Mosca's inclination towards realism in his political analysis<sup>238</sup>, an indispensable tool to avoid falling into the trap of the irrelevancy of pure abstraction and to enter effectively into the quick of the socio-political systems with the aim to transform them<sup>239</sup>. In the same way also other authors traceable to the current of the liberal Left like Gaetano Salvemini, Ernesto Rossi<sup>240</sup>, Guido Dorso or Filippo Burzio have often acknowledged the possibility of interpreting the theory of the élites from the democratic viewpoint, above all because it had the advantage of supplying the theoretical structure thanks to which a new political class could be identified

<sup>232</sup> Like R. Dahl, *La democrazia e i suoi critici*, Editori Riuniti, Rome, 1990, or A. O. Hirschman, *Retoriche dell'intransigenza. Perversità, futilità, messa a repentaglio*, Il Mulino, Bologna, 1991, according for whom Mosca is the champion of the "futility" of democracy because he claims, in this author's opinion, that every attempt to change society would be in vain.

<sup>233</sup> See M. Stoppino, *Democrazia e classe politica*, in *Studi in onore di Carlo Emilio Ferri*, vol. I, Giuffrè, Milan, 1973, 560; G. Sola, *La teoria delle élites*, cit., 142-147.

<sup>234</sup> See M. Maldonado-Denis, *Ortega y Gasset and the Theory of the Masses*, in *The Western Political Quarterly*, n. 3/1961, 676-690.

<sup>235</sup> See G. Sola, *La teoria delle élites*, cit., 168-171.

<sup>236</sup> See A. Lombardo, *Sociologia e scienza politica in Gaetano Mosca*, cit., 297-302; G. Sola, *La teoria delle élites*, cit., 172-174.

<sup>237</sup> As underlined by N. Bobbio, *La teoria della classe politica negli scrittori democratici in Italia*, in AA.VV., *Le élites politiche*, cit., 54-58.

<sup>238</sup> See G. Lombardi, *Costituzione e diritto costituzionale nel pensiero di Piero Gobetti*, in *Dir. soc.*, n. 2/1984, 198.

<sup>239</sup> See P. Gobetti, *La Rivoluzione Liberale. Saggi sulla lotta politica in Italia*, Einaudi, Turin, 1995 (as is known the first edition dates back to 1924).

<sup>240</sup> See A. Giordano, *Elites, Mercato e democrazia: la teoria politica di Panfilo Gentile*, in *Quaderni di Scienza Politica*, Terza serie, I -



(compared, of course, to the one that had imposed the authoritarian state, but also compared to the one that had not known how to oppose it effectively), that made its “moral superiority” the guide with which to bring the nation to recover the dignity that had been lost with Fascism<sup>241</sup>. Mosca’s positions have always made a great impact on other exponents of the multifarious galaxy of liberal intellectuals in post-war Italy. The echo of Mosca’s criticisms can be heard clearly in the pages against the degeneration of the party system written by Giuseppe Maranini and Panfilo Gentile<sup>242</sup>. And a philosopher, in many ways in the antipodes ideologically speaking compared to Mosca, like Antonio Gramsci, while criticising him harshly, cannot, however, avoid calculating the conceptual and methodological tools of his adversary, recognising his importance more or less explicitly<sup>243</sup>.

The most interesting comparison in the Italian arena is certainly the one with Luigi Einaudi. Einaudi agrees with Mosca on the importance of the role of the political class and on the need to overcome the myth of the majority. He provides, however, an interpretation in the liberal-democratic meaning of the theory of the élites, in the sense that for this great Italian economist the legitimation of a modern political class cannot come from any other channel of legitimation if not through popular vote. Popular sovereignty certainly is a myth, but it is just as sure that it is a necessary myth. What counts to prevent this myth from being revealed as the harbinger of danger and culminating in the destruction of liberty is that it is supported and balanced by counterweights and social ties<sup>244</sup>. So, it can be said that Einaudi’s opinions are the natural adaptation of Mosca’s élitism to the conditions and epoch-making events of the second half of the twentieth century, a development in the liberal-democratic sense, better able to reconcile some basic elements of the elitist theory with the evolution towards the participation of the masses in the life of democratic states.

But Mosca’s same anti-democraticism takes on more defined contours if it is compared with Carl Schmitt’s. We find ourselves faced with two conceptions that seem to be based on the same kind of criticism of democracy but which, in fact, correspond to very different if not opposing logic and objectives.

Schmitt’s real contention is not democracy but liberalism, of which liberal democracy is just the legitimate child. His real enemy is liberalism because this doctrine, through the tools of representative democracy, intends to anaesthetize politics, directing the conflicts between the confines of dialectics and not confrontation<sup>245</sup>. In order to regain the essence of politics it is necessary to substitute liberal democracy with forms of *identitarian* democracy, in which there is a sort of identification of the people in the figure of the decision-maker, precisely because the function of the State is to preserve the political unity of the people<sup>246</sup>. As is obvious this perspective echoes some aspects of integral democracy of the Rousseau kind and of other philosophical currents of various natures, but all associated with a statist and organicist idea of power<sup>247</sup>. It

<sup>241</sup> See E. Rippepe, *Gli elitisti italiani. Gobetti, Burzio, Dorso*, Il vol., Pacini, Pisa, 1974; G. Sola, *Introduzione*, cit., 58-59; F. Invernici, *Mosca e il socialismo liberale*, in E. A. Albertoni (edited by), *Governo e governabilità nel sistema politico e giuridico di Gaetano Mosca*, cit., 249-268, even if this search for moral superiority is to be the main reason for the élitism of the Party of Action, his main weak point, which is shortly to be the cause of its disappearance, despite the fundamental role played by the Resistance and in the history of Nazi-Fascism.

<sup>242</sup> See P. Gentile, *L’idea liberale*, Rubbettino, Soveria Mannelli, 2002 (the first edition dates back to 1955 and was published by Garzanti), not to mention Id., *Democrazie mafiose*, Ponte alle Grazie, Milan, 2005 (first edition 1969), including a remarkable essay about this author by Sergio Romano. Panfilo Gentile’s political thinking is pieced together by A. Giordano, *Elites, Mercato e democrazia: la teoria politica di Panfilo Gentile*, cit., 419-451.

<sup>243</sup> As observed by M. A. Finocchiaro, *Gramsci, Mosca, e la Massoneria*, in *Teoria politica*, n. 2/1993, 135-161, who also highlights the similar opinions that the two authors had on a perhaps marginal, but no less important, question: the aversion for the law on the massonic associationism wanted by Fascism at the beginning of 1925.

<sup>244</sup> See A. Giordano, *Il mito della sovranità popolare. Luigi Einaudi, la democrazia e la teoria della classe politica*, in *Materiali per una storia della cultura giuridica*, n. 1/2004, 139-141.

<sup>245</sup> See D. Fisichella, *Carl Schmitt: Politica e liberalismo tra amicizia e inimicizia*, in *Dilemmi della modernità nel pensiero sociale*, cit., 59-72.

<sup>246</sup> See G. Azzariti, *Critica della democrazia identitaria*, Laterza, Rome-Bari, 2005, 22-24 e L. Albanese, *Schmitt*, Laterza, Rome-Bari, 1996, 5, According to whom “The organic community, according to Schmitt, is the nucleus of the <<real>> democracy, which should not be mistaken for that hybrid represented by liberal democracy, whose main characteristic is parliamentarianism. The democracy of *Gemeinschaft* and the clear distinction between liberalism are the pieces de résistance in Schmitt’s political thought, and explain his success not only on the Right but also on the Left”.

<sup>247</sup> As claimed by L. Albanese, in Schmitt’s thought the concept of *Gemeinschaft* is central and completely absorbs the individual. “This notion originates from different sources: Rousseau, the corporative tradition of the *Stände* [classes, states in the sense of <<third

clearly contrasts at bottom with Mosca's position. Indeed, it could be said that Schmitt attacks liberalism exactly on the terrain that induces Mosca to extol it, that is, for the capacity to build rules and balances that are able to institutionalise conflicts<sup>248</sup>.

## X. *Final Remarks*

On the basis of this assessment it would seem that Gaetano Mosca's theory that the political class is intrinsically a conservative doctrine can be excluded. The fact that it was formulated by an intellectual whose ideals were awash with strongly conservative notions, in the meaning and limits outlined here, need not hamper an evaluation of the results of his studies which are certainly full of light and shade, in the most objective way possible. As a beacon of Italian progressive culture in the second half of the twentieth century like Norberto Bobbio has done, indeed, even quite recently he wrote: "*It is an illusion that the spreading of direct democracy, made possible by the improvement in the various forms of long distance communication, reduces the power of the political class, or even eliminates it. Direct democracy increases the power of the individual citizens to take decisions that concern him, but it will always be a group of professionals from politics who will have the prime task of articulating the proposals*"<sup>249</sup>.

Of course, even in Mosca's work, like that of any social science scholar, there are some gaps, weak points and aspects which have been surpassed with the passing of time.

Among the most obvious shortcomings that have emerged from our analysis perhaps two stand out most conspicuously.

From the methodological point of view he is inspired by an excessive faith in the applicative power of political science. Basically, he claimed that politology founded on analytical criteria which was scientifically valid would in the future be the decisive tool available to statesmen and politicians in general, to guide their choices and prevent them from making the mistakes that History has often highlighted. Indeed, this was a glaring mistake both because of the overestimation of the possibility to found a humanistic science that held the criteria of an "exact" science, and as regards the educational point of view for those who are called upon to exercise politics in a concrete way as unfortunately the whole history of the twentieth century takes it upon itself to prove. A contradictory optimism in the power of discipline, to the point of transgressing into an inapt determinism: a misinterpretation that would be understandably unexpected from a realist of such pessimistic nature as Mosca.

From the point of view of content, there is no doubt that the biggest shortcoming in his theoretical production lies in the sin Mosca commits in underestimating the subject of political representation. That is, he does not perceive the basic importance of the citizen's impression that he is represented in a modern, advanced society, such as those that had been founded on more dynamic socio-economic systems were already heading for at the end of the XIX century.

Mosca puts a utopia into crisis at exactly the right moment, the utopia of parliamentary representation, often founded on misleading mechanisms, we could even say on a sham, the one innate in the electoral mandate. And, nevertheless he does not realise that beyond the authenticity of the collection of electoral consensus, the division into political parties, the exploitation with which the political class tries to

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state>>], present both in Hegel and in the Catholic thinking of the Restoration, and finally some not unimportant tendencies of the <<conservative revolution>> that is of the political culture and movements of the Right which in post-war Germany elaborate an ideology which radically opposes Marxism, but which is, in many ways, similar" (See L. Albanese, Schmitt, cit., 4).

<sup>248</sup> Also by virtue of these considerations those attempts that were made by a certain publicist in the Fascist era to liken Mosca's doctrine with the ideological structure of the authoritarian state, seem totally outdated nowadays, as did, for example, R. De Mattei, *La dottrina della classe politica e il fascismo*, in *Educazione fascista*, n. 8/1931, 675-686. Just as the opinions of those who defined the theory of the political class *the reactionary concept par excellence*" appear irremediably outdated and isolated, in the light of the most recent research on his work like P. Biondi, *Potere e classe politica*, in *Studi politici*, n. 1/1952, 13.

<sup>249</sup> See N. Bobbio, *Saggi sulla scienza politica in Italia*, cit., IX.

remain in power instead of thinking of the common good, political representation offers the citizen the “feeling” that he is part of a process that leads to political decision-making. There is the feeling of belonging, perhaps even mistaken or overestimated, that disregards the authenticity of the relationship of representation. The inclusive value of this feeling is far more relevant than the undoubted defects that democracy founded on universal suffrage suffers from, and indeed, precisely when this perception of being part *pro quota* of the political decision-making dies, when the division between governors and governed is too pronounced, far worse problems emerge than those generated by typical defects of democratic representation as regards the internal balances in the political classes and the mechanisms of conservation of the *juridical defence*.

And despite this, Gaetano Mosca still has something to say to us<sup>250</sup>. His disenchanting, realistic and relativist views of Democracy can be used as a useful antidote against any populist regression, a recurrent temptation for many political classes.

Suffice to think of the changing of the political class. An impartial look at the Italian reality leads necessarily to the idea that the Parliament is going through an evident decline. This situation is made worse by the recent electoral law which was created with the purpose of giving the leaders of the political parties the power to decide about the changing of the Members of the Parliament. In this way the quality of the Parliament is humiliated as well as its authority weakened. This state of emergency seems so obvious that it is fair to ask ourselves whether our Chambers are still representative Assemblies or have they turned into easily manageable ratification centers of decisions taken somewhere else. The doubt is legitimate since the only activities our Parliament seems to be engaged in are the conversions of decree-laws, in voting the confidence to the Government and giving proxy laws almost always demanded by the government itself. Can a democratic system do without a representative and weighty Parliament? A great democracy like France acknowledged a deficit of its Parliament's role and made an attempt, through a constitutional reform (maybe incomplete) to find a countermeasure. This should persuade us to start a reform path which could give back reliability to our Representative Assemblies. It would be worth it also in order to avoid that governed people lose what is left of their feeling that they are part of a process through which political decisions are taken.

There is no doubt that our difficulties in finding the right mechanism of selection of the political classes are even more evident if we think about the capability of other forms of government to transfer from their managing classes to the political class people able to suggest ideas, enthusiasm and representativeness as just happened in the last U.S. election.

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<sup>250</sup> According to P. Serra, *Diritto costituzionale e scienza politica*, in *Dem. Dir.*, n. 1/1999, 252 “Indeed, only today does Gaetano Mosca's work become fully comprehensible to us, and enlightens decisive features in our difficult and extremely complicated

*present*".

# The Italian Road to Fiscal Federalism

Luca Antonini - Andrea Pin

*Abstract:* .The recent law on fiscal federalism opens the path to the real introduction of federalism in Italy. The Italian State's evolution towards federalism began in the 1990s and led to constitutional reform in 2001. Nevertheless, for the following years regions and local bodies have hardly been able to profit from the new powers they were endowed with, since they have continued to rely on the previous model of financing expenditures. This model was very centralistic, because it accorded regions state grants rather than powers to levy taxes. This system has fostered, in a concrete way, political and financial unaccountability; because the regions that did not tailor their expenses according to the state funding were given extra grants by the State. Moreover, it has not provided equal public services throughout the country, because the regions in deficit often offered worse services than those provided in the regions that complied with the budget they were allocated. This model was finally substituted with the new one this year. The new model attributes to regions and local bodies real tax powers, together with moderate grants to ensure basic social right. It aims at achieving greater accountability at regional and local levels, through a system of innovative incentives, disincentives, and sanctions.

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I. *The Italian Issue: the Separation between Taxing Power and Spending Power. Fiscal Federalism as the Remedy*

The Act regulating fiscal federalism, which was recently delivered by the Italian parliament (l. n. 42/2009) and that delegates vast powers to the executive, is of great importance for both the institutional and political life of Italy. Italy has seen a meaningful process of empowerment of regional and local bodies which started in the 1990s. However, the financial resources of regional and local governments still rely on the old system of state grants. In reality, with the “third decentralization”, in 1997, many administrative functions were transferred from state to regional and local authorities (municipalities and provinces). The constitutional reform carried out in 2001 (constitutional law n. 1/2001) completed the process, strongly increasing, in particular, the legislative competences attributed to the regions. Despite this development, the financing model for regions and local authorities remains that introduced one year earlier by delegated legislation (decree n. 56/00). Due to defects both of drafting and application, such delegated legislation left the state grants system untouched. It thus did not put an end to the lack of regional and local accountability.

In this sense, the Italian issue is very similar to the situation of Spain in the 1980s; the Spanish Constitution gave important legislative and administrative functions to the *Comunidades Autonomas* but did not entrust them with the power of levying taxes. This separation between spending power and levying power damaged Spanish public finances. This trend was created by the post-Franchist federalist process, which began with the 1978 constitution: the *Comunidades* were not restrained in their spending, because was the state who was actually paying. The successful remedy for Spain came from fiscal federalism, which was introduced over a relatively short time span. The Spanish evolution during the 1980s closely reflects the present Italian situation; Italian public expenditure is equally shared by the state on one hand, and local and regional authorities on the other. However, the latter have only 18% of tax raising powers. If the state remains the only real payer of public expenditure, the budget will remain out of control and the taxpayer will not be able to understand who is responsible for the deficit and for the scarce level of the services delivered by the Italian welfare state.

The new law of fiscal federalism enacted in 2009 brings in many innovative solutions, which were largely inspired by a variety of studies and official reports carried out during recent years. Between 2003 and 2006 a High Commission on Fiscal Federalism provided documents and opinions on this subject. In the two years that followed many workshops were held. Eventually, in Summer 2007 the government delivered a draft bill on fiscal federalism that was abandoned because of the parliamentary elections from which a different political majority emerged. However, the ideas and remedies debated during this period were largely shared by the different political forces. It could be argued, therefore, that a common opinion was reached with regard to some critical points and this is confirmed by an official document delivered by the Conference of Regions Presidents. In particular, the act of parliament owes much to the previous government’s draft bill which was also based on the equalization theme. However, it simplifies some measures which aim to achieve decentralization and strengthen regional autonomy. In short, the act largely reflects both the regions’ document and the proposals shared by many of the studies which focus on fiscal federalism, whilst at the same time introducing some innovative solutions which were proposed in other recent draft bills. These premises explain the successful path of the bill and the large parliamentary consensus which it obtained. Last but not least, it is the first piece of legislation which implements the new Article 119 of the Constitution, as modified in 2001, and carries out a true state reform led by fiscal federalism and focusing on the principles of responsibility and accountability.

This point is increasingly reflected in public opinion. In contrast, until a few years ago, when fiscal federalism was mentioned many different concerns were expressed. People feared that fiscal federalism may give rise either to further growth of the public deficit, or to an large increase of tax rates, or, even worse, to the disintegration of Italy. These prejudices prevented institutions from giving a final solution to the lack of a real fiscal federalism. Moreover, it is now very clear that the lack of fiscal federalism caused the decline in Italian competitiveness, threatened the unity of the state, and was one of the main causes of the steady growth of the public deficit. Without fiscal federalism, the state's bureaucracy does not diminish, notwithstanding the decentralization of many legislative and administrative powers. Nor can regions and local authorities become accountable, although they received new functions with the third decentralization as well as with the 2001 Constitutional reform.

Even the Constitutional Court had repeatedly affirmed the urgent need of implementing art. 119 Cost. In particular, in a recent judgment, the Court expressed the view that "It has become evident that the application of the Constitutional article n. 119 is urgent in order to make the provisions of the new Constitutional Title V a reality"<sup>251</sup>. Thus, the Court was also in no doubt that the new constitutional framework required a fiscal process and that without it, it would have been useless. However, several years had passed without reaching the goal of fiscal federalism. This produced several negative consequences. Although the Constitutional reform of 2001 entrusted all regions with much greater legislative competences, the system of equalization through state grants was left unchanged. All this created a dangerous habit, as the tax levying power was separated from the spending power. Not only was the improvement of the public budget impossible, but a duplication of administrative offices occurred, worsening the problems of inefficiency and unaccountability.

Evidence of this may easily be gathered through the analysis of both the regional and state budget performances. From the point of view of the state, some simple data can be cited. First, recently the expenses for ministerial executives have increased by 97.9%<sup>252</sup>. Second, the number of state employees has increased by one hundred thousand. Consequently, state bureaucracy has increased precisely when legislative, administrative federalism and horizontal subsidiarity should have expanded, according to the constitutional reform of 2001. As far as the regions are concerned, other elements confirm the persistent lack of accountability, especially the fact that the law decree of 2007, n. 23, and the budget law for 2008 transferred 12.1 billions of euro in order to cover the debt of some regions (Abruzzo, Campania, Lazio, Molise, Sicily). The total amount is the equivalent of 250 Euros for each Italian. It is worth specifying that 78% of health debts have been created by the regions of Lazio, Campania and Sicily. Although health pertains exclusively to the regions, after the constitutional reform, the state intervened recovering the debt at its own expense, as it had done during the 1980s. The question which thus arises is, if the regions which accrue debts are rewarded by the state, why should other regions and local authorities rise their own taxes instead of getting into debt (by spending money on popular policies) and leave to the state the task of collecting taxes from the entire country in order to recover their debts?

A system made of state grants and state interventions aimed at recovering the budget deficit of the more inefficient bodies inevitably, and paradoxically, rewards the administrations which are less efficient and which created the deficit and that same inefficiency. The same happens if the system of fiscal federalism awards each body with grants which are proportionate with its previous expenditures. Such a system

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<sup>251</sup> Constitutional Court, judgment 23 December 2003, n. 370, available on the site [www.cortecostituzionale.it](http://www.cortecostituzionale.it) (our translation).

<sup>252</sup> *La Pubblica Amministrazione in Italia*, Roma, Eurispes, 2007.

implies that those administrators who spent more than they could are enabled not to modify their conduct and thus to produce further deficit, while those administrators who were more efficient and spent less are obliged to maintain a low level of expenditure. It can be argued, therefore, that either this dynamic is reversed by way of incentives and sanctions, or no improvement of public expenditure is likely to occur. The experience of health services is very meaningful from this point of view. During the last ten years the costs of health have almost doubled, increasing from 55.1 billions in 1998 to 101.4 billions in 2008, notwithstanding the measures which have been introduced by the financial laws in order to reduce expenditure. Only recently has this set of problems been dealt with by the legislation which is characterized, as was noted earlier, by a large consensus within Parliament.

Before considering the act in greater depth, a last point must be mentioned. The reform of fiscal federalism aims to modify radically the habit that all actors (state, regions and local authorities) have of blaming each other, which has become very common in recent years. The mayor blames the region for local deficit because the region has not transferred the money for kindergartens and public transportation; the region blames the state for not according the funds for health services, and so on. The result of this phenomenon can be seen in the Naples garbage affair, where no one seemed to be responsible. This is but an example, of course. Some regional deficits are entirely unreasonable, as anyone can see from the Court of Auditors dossiers: it is inconceivable that in Calabria a blood bag costs four times more than in Emilia Romagna, or that the cost of a CAT scan may vary between 500 and 800 Euros, or that the cost of a place in a kindergarten in Rome amounts to 16,000 Euros, while in Modena the cost is 7,000 Euros. The difference is even more incomprehensible because Modena has a kindergarten model that is internationally recognized. Anyone can see that these differences do not depend on the richness or on the morphology of the territories: they are simply unjust gaps, which all Italian tax payers are called to support. The reform of fiscal federalism will enable institutions and public opinion to understand who is responsible for what. All citizens and taxpayers will know why and how their money is spent, and can judge politicians through elections.

## **II. The New Legislative Framework: the Fundamental Principles**

Let us now consider the contents of the reform. To begin with, it is worth emphasizing that fiscal equalization must overcome the criteria of historical expenditure and introduce the new criteria of standard regional expenditure for health, social security and education. This choice seems very appropriate. As a matter of fact, all studies and reports concerning fiscal federalism have agreed on this point. The criteria of historical expenditure is influenced by the real needs, as well as by inefficient management. Real needs must be socially and financially sustained, but bad management cannot be supported. For the other regional expenses – which are not essential and represent a small part of the regional budget – the act contemplates a partial equalization based on fiscal capacity. These latter functions do not have a primary importance from a social and political point of view, so the standard expenditure parameters, as well as complete equalization, do not fit. A simple partial equalization, based on the fiscal ability of each territory, guarantees a reasonable difference in resources between the territories. Finally, local public transportation is financed according to the standard expenditure criteria and according to the needs of a good level of service, which must be delivered in the whole country: equalization is also based on fiscal capacity in the transportation field.

This model completely supports the basic services pertaining to social and civil rights (health,

education and social security) on a standard basis and, in part, local public transportation. Resources are

collected through the IRAP tax (which is levied on corporations and professional people), until this tax is substituted with a surtax on the personal income tax (IRPEF), a sharing on the VAT, a part of the equalization fund and full regional taxes. Those taxes will be defined by the executive by way of legislative decrees, and according to the principle of “correlation”. As a result, any territorial authority has the power to tax only those subjects that are affected by its functions, intended in a broad sense. The remaining expenditure will be financed by regional tax income and by equalization, in open accordance with the principle of fiscal ability. Finally, the systems of state aids, the aim of which is to support those expenses, will be abolished.

According to this system, health, social security and education, on which the state must define the “essential level of the service” in order to grant a uniform minimum standard across the country, are accorded an appropriate level of protection throughout the country. As regards the remaining services, a unique national standard is not necessary. On the contrary, it seems better to leave regional and local authorities the autonomy to carry out their own policies according to the specific needs they have identified. Thus, for this kind of function equalization must have a lower impact.

In addition to this new conception of fiscal equalization, other innovative principles are introduced. First, equalization cannot modify the classification of fiscal abilities. As a consequence of this, a richer region cannot become poorer than a poor one, by way of the equalization. It is worth mentioning that the German Constitutional Court introduced the same principle in a judgment on November 11<sup>th</sup>, 1999, which formed the basis of the German fiscal federalism’s reform.

Second, the act modifies tax powers, by prescribing that each region will receive the true income yielded on its territory, and not only a virtual one. To clarify this point, it may be observed that currently VAT income, for example, is quantified on a statistical basis of exchange, with the consequence that territories with high tax evasion are rewarded.

Last but not least, “revolutionary” (in comparison with the Italian tradition) principles are introduced with regard to the accountability of public institutions. Not only are incentives provided, with a view to rewarding good management, but new measures are introduced, aimed at sanctioning inefficient administrations, even by reducing their autonomy. It is particularly important, in this respect, that the sanction of “political failure” has been introduced for those politicians who have led their institutions to bankruptcy. There is a clear analogy with the market, in the sense that, as the failed entrepreneur cannot go back to his business immediately, a “failed” mayor cannot be elected immediately as a member of either the Italian or the European Parliament.

### **III. Reconsidering Regional and Local Power to Levy Taxes**

Other relevant provisions regard the regional power to levy taxes. The act adopts the expression “autonomous tax” (*tributo proprio autonomo*), to designate those taxes which are introduced by regional law. It follows, therefore, the logic of the Constitutional Court. Another expression, that of “derived taxes” (*tributi propri derivati*), is instead used to designate the taxes that are created by state law and the income of which goes to the regions.

It ought to be clarified, at this stage, that the financial support of the regions is basically formed by derived taxes and sharing of state taxes. The sharing should guarantee a good part of the income, but should

also keep the level of income quite flexible; the derived taxes and surtaxes should make the budget even more flexible, and are aimed at making the managers and politicians really responsible for the finances. Autonomous taxes play a minor role, because they can only be introduced where the state does not levy taxes, but this is also common abroad - e.g. in Spain.

Regions are also entrusted with important tax powers. They are able to develop specific tax policies shaped on their social and economical characteristics because they can introduce exemptions, allowances and deductions on derived taxes. They can define true regional tax policies by introducing incentives for no profit corporations or environmentally sensitive initiatives. This would give regional taxation a propulsive role in economy and society. Regions will be able to create their own tax policies and introduce deductions for investments, family expenses and horizontal subsidiarity (this latter principle is mentioned in art. 2 of the bill). However, if a region is not able to manage its own budget like others, to keep the expenditure within the standards and overcome its inefficient management, it will be obliged to raise taxes. This system should bring autonomy and accountability together in order to limit expenditure and make politicians and managers accountable before the electors.

As far as provinces and municipalities are concerned, the new act aims to give them a certain amount of autonomy, while at the same time placing them under the power of coordination, which regions share with the state, according to the constitution. More precisely, the act creates an equilibrated balance between regional and local powers. In each territory, regional and local bodies will discuss decisions regarding equalization: regions will be able to define expenditure and the standard income of local entities, within limits that will be fixed by the state. If one region does not distribute the equalization funds among the local bodies, the state will take this role, assuming its substitutive powers.

According to the scheme that has been conceived for regions, the resources of local authorities are classified as follows: a) expenses for fundamental functions (art. 117 Cost., par. 2, lett. *p*); b) expenses for other functions; c) expenses that are financed through special contributions, European contributions or national co-financing measures. This scheme of local finances follows the constitutional provisions: municipal and provincial taxes will receive state taxes (a part of them, or for their whole income), flexible surtaxes (which they can vary according to their dimensions), sharing of state and regional taxes. Delegated legislation will have to specify the autonomous taxes of local bodies, fixing their objects, taxable bases, payers, standard rates.

Finally, the act confers on both municipalities and provinces the power to raise taxes which have the aim of raising money for a specific purpose. It also introduces rewards for unions or fusions of townships, thus replicating a successful measure that has been implemented in other countries, such as France which was able to encourage little townships join together. Regions have the power to create new townships and province taxes within their territory, according them defined powers, provided that the new taxes do not touch state taxable bases. Consequently, some regions may decide to introduce local green taxes. The resources of local bodies for their fundamental functions and for the essential level of their services are calculated on a standard basis. This local entities' power to levy taxes will include flexible rates and allowances, provided that the regional law fixes the fundamental elements of the taxes, in accordance with art. 23 Cost.

To evaluate the aspects of the legislative framework concerning regional and local tax powers, the various factors that play a role in the relationship between the regions and local bodies must be considered. This prospective has not been clarified enough by the constitutional reform of 2001. Indeed, such reform did not resolve the old conflict between the regional and the local polarization of powers, which is highly

relevant to the federalizing process. This issue also touches on fiscal federalism and demonstrates how delicate such an institutional equilibrium is, given that it can be endangered by state interventions: the elimination of the local land tax in 2008 is the clearest example of how the state can influence the whole national budget equilibrium.

The new legislative framework regulating fiscal federalism relies to a great extent on the contribution of the Constitutional Court. With regard to local taxation, its jurisprudence underlined that two different models are conceivable: one working at three levels, which are composed of a state law intervention, a regional law intervention, and local by-laws, and another one working at two levels - regional law and local by-laws, or state law and local by-laws. The Court also highlighted the need to define the relationship between region and state in making the legal frame of local taxes on one hand, and, on the other hand, to defining the limits of the local bodies' autonomy. Both these issues must accommodate the need for ample room for local bodies' powers, as well as for the constitutional need of law provisions to create taxes

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Moreover, the autonomy in collecting resources must go along with other principles and values, like the unity of the national tax system, the need to simplify the number of taxes, and the aim to maintain and even to reduce the general level of taxation.

It is reasonable to believe that autonomous local tax powers will be exercised by varying the rates of the taxes set by the state and to introduce allowances within limits that the state law fixes. But this implies that the state should leave ample room to autonomous local decision-making.

The taxes that the local bodies may want to introduce within the limits and the provisions of state and regional laws (since local authorities are not entrusted with the power to create new taxes, due to the lack of legislative powers) will probably play a major role in shaping a proper, distinctive local tax policy. However, the system conceived by the act gives an essential power to state and regions, which must define the elements of local taxes. The majority of these taxes will come from the state, while the regions will have a little part in setting taxes in provinces and municipalities: this depends on the state, which has given local entities virtually all the imposition powers they own, and probably will want to keep their important role in local taxes.

The structure and the level of flexibility of local taxations will depend much more on the contents of delegated legislation, enacted by the executive, than on regional law. For example, the bill does not exclude the possibility that some local sharing on regional taxes may exist. However, this would be the least "federalist" option, although it is quite simple and adequate in order to assure the simplification and the coordination between various government levels.

If one considers the resources and the functions of the local bodies, the following hypothesis may be advanced:

- a) the income of the taxes accorded by the state, as well as the sharing on state taxes can finance the standard expenditure for the essential local functions;
- b) sharing on regional taxes, as well as local taxes created by the regions (mainly having a specific purpose or created to compensate some public service) can finance, instead, the fundamental functions that

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<sup>253</sup> Constitutional court, judgment n. 12 January 2005, n. 30, available at the site

[www.cortecostituzionale.it](http://www.cortecostituzionale.it)

arise over standards, as well as other local functions (mostly the functions that the regions delegate to the local bodies).

Such a structure of taxation could provide local authorities with an adequate degree of flexibility that allows the creation of tax policies focused on the attraction of investments and on the compensation of environmental effects of industry. Two further elements support this view. First, although Article 23 of the Constitution lays down a “*reserve de loi*” with regard to the power to tax, the Constitutional Court has traditionally carried out a less strict scrutiny, when it concerns taxes which have a specific purpose or are intended to compensate some public service. Second, the institutions of the European Union seem more inclined to be tolerant when considering state aids, as it will be argued in the following paragraph.

#### **IV. The Use of Taxation to Attract Investments**

Another important effect of the new boost that the act gives to the fiscal autonomy of both regional and local authorities consists in creating the conditions which allow them to use their power to tax in order to attract investments, corporations and exchanges. This can modify the whole system of public subsidies : public tenders aimed at distributing public money would be substituted with lower regional tax rates for corporations and families.

In this context, several provisions of the act are worth considering briefly. First, Article 8, paragraph 1, *f*), establishes that state aids to regions will be substituted with taxes, whose income will go to regions, which will also have the power to modify the rates. Second, Article 7, paragraph 1, rules that the derived taxes (like IRAP) and a part of state taxes (like a part of the personal income tax and/or the income surtax) will be at the disposal of regions, which will have the power to diminish the rate, or to introduce deductions and allowances (another relevant provision in this respect is Article 7, paragraph 1 *c*)). Third, their income will be spent without any limit of purpose (Article 7, paragraph 1, *e*)). These provisions should overcome the bureaucratic regime of state aids and lead to the adoption of a new kind of measure which is actually helpful for the economy of each region.

However, the question arises whether this use of the power to tax is coherent with other limits, stemming from the Treaty of Rome, as it has been interpreted by the Court of Justice (ECJ). For too long, in the European Community, the need of a tax benefit policy has been frustrated by a very rigid interpretation of the provisions of the treaty which govern state aids. The ECJ, in particular, has interpreted in a very strict manner the fundamental rule which prohibits state aids if they distort competition and trade within the European market. According to both the Court and the Commission “territorial selective measures” have been included among the measures that are incompatible with the treaty. This interpretation is controversial, however, since it has deprived the member states of powers to contrast extra-European and East-European tax concurrences, including the new members of the EU, which could keep lower tax rates. The larger European states have also been damaged by such a strict conception of the state aid ban, in comparison to small European states. Special tax policies in single regions, like Lombardy or Campania, would have been considered as violations of the ban, because of their derogatory regime with respect to national tax rates. This was, therefore, an anachronistic trend, which did not go along with the federalizing process that has involved many European Countries.

Fortunately, more recently, a new trend has emerged in the case-law of the ECJ. The most outstanding example of this new approach can be seen in the Judgment of September 11th 2008<sup>254</sup>. It openly admitted a regional benefit taxation within a federalist environment (such as the reformed Italian one) after the introduction of fiscal federalism. The famous judgment of September 6th 2006 on Azores had already mentioned the necessary conditions which exclude the possibility that a regional measure might be considered as selective and therefore against the ban of state aids<sup>255</sup>. However, the requisites on the basis of which a derogation would be admissible had to be made more precise. In its judgment on Azores the Court considered three such requisites: a) institutional autonomy: the body must have a proper political and administrative autonomy, which is distinct from the state one; b) autonomy of decision: the state cannot influence the contents of the regional tax measures; c) budget autonomy: tax measures must not be compensated by the state through aids.

This *révirement* was confirmed and specified by the judgment of 2008, concerning some Basque Provinces' provisions. Such provisions introduced a lower tax rate for corporations and special tax deductions for investments, energy savings and pro-environment measures. When considering whether such measures were compatible with the Treaty of Rome, the ECJ did not simply repeat that regional differences in corporation taxes are in accordance with the Article 87 of the Treaty. The Court took the chance to clarify some aspects. It held that solidarity and fiscal equilibrium between the different government levels did not contrast with institutional autonomy. Moreover, the Court explained that the autonomy of decisions can be consistent with agreements that aim to prevent conflicts. Finally, according to the Court, budgetary autonomy can coexist with state aids. This latter point is of primary importance, because it clearly states that fiscal equalization is not a state aid. Conversely, the Court insists that regional and local authorities cannot be refunded by the state for the tax benefits they introduce: there must not be any cause-effect relation between the regional or local benefit and state aids. All these authorities must be responsible for the "political and financial consequences of such a measure", so there cannot be any hidden state compensation. The judgment adds that the subjects who must verify that there is no such hidden compensation are the national Courts, which make judgements according to national laws.

Thus, the Court of Justice implements the Azores' judgment and makes clear that a regional benefit taxation is possible within fiscal federalism. Actually, the Italian reform of 2009 contemplates equalization forms in order to safeguard fundamental rights, whilst at the same time giving regions the power to introduce their own policies on benefit taxation. Stimulating commerce and industries through tax benefits seems to be a better way to improve economy and social welfare, as opposed to bureaucratic tenders. In this context, it is worth mentioning that the act also contemplates state tax benefit measures, the aim of which is to stimulate the poorest parts of the country. Article 14 has precisely the purpose of specifying the measures provided by the last paragraph of Article 119 of the constitution. It gives delegated legislation the power to define interventions which aim to promote economic development where this is needed most.

Thus, the state will also be able to introduce local tax benefits, which has already happened in the case of the law on competitiveness which was fully accepted by the European Commission (Article 11-ter of law n. 80/2005). This bill introduced measures favouring new recruitments and deductions on IRAP for the creation of new job places. A bigger deduction was introduced for corporations working in certain poor areas: for corporations established in places for which the Treaty makes exceptions (like Article 87, paragraph 3, a)), the general deduction is two or four times larger.

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<sup>254</sup> ECJ, Joined Cases C-428/06 to 434/06, *Rioja et al.*, available at <http://curia.europa.eu>.

<sup>255</sup> ECJ, Case C- 88/03, *Portugal v. Commission*. available at <http://curia.europa.eu>.

To summarize, the EU's position now allows tax benefits and the Italian bill on fiscal federalism takes account of this opportunity, which appears to be important in order to attract corporations to operate in Southern territories. It is a real chance to leave behind the old tradition of state aids and to gain a new mentality, focused on solidarity and accountability. Subsidies are normally contaminated with politics and bureaucracy, and they risk feeding unjustified royalties or even illegal economy; on the contrary, de-taxation rewards the real economy. Only the real economic protagonists are rewarded. A strong decrease of taxes for Southern corporations would have good effects on the whole country. The South would have the same chances that Ireland has been enjoying for ten years: the Irish economic growth has been three times higher than the European average. Moreover, the tax benefits would avoid tax evasion, stimulate national production, and prevent corporations from moving their factories abroad - as Italian companies have done in East Europe where the corporations tax is 50% lower than in Italy. Northern Italy could also take advantage of this development thanks to the increase of national gross production.

## V. The Coordination of Public Finances

A final, though by no means less relevant point, must be considered, regarding the coordination of public finances. In this respect, the act set up a specific body, the Permanent Conference for the Coordination of Public Finance. Its aim is to systematically coordinate the various governmental levels in this matter. More specifically, the Conference plays a role in defining the budget targets for each level of government, promoting the measures which are necessary to succeed. It has the power to make proposals for an index of the health of budgets, as well as for the most efficient and transparent form of equalization. It monitors rewarding and sanctioning measures for regional and local authorities, as well as monitoring the new regional and local budgets and the financial relations between the different levels of government. Finally, it controls the financial and fiscal databases in the territory.

When considering all these powers, it soon becomes evident that the Conference could control the fluxes of equalization and their use. Since the Conference is also composed of representatives of the regions, and the interests of the regions financing the equalization is the opposite of those of the regions being financed, the aim of monitoring the equalization is efficiently pursued. The regions contributing to the equalization want that, in the least, financial resources are used efficiently. If the equalization funds are well distributed, this would increase national production and even the richest regions would take advantage of it.

A specific authority, with the aim of coordinating the different political bodies, is quite common in federal systems: in such systems, it is usual to introduce institutional co-ordinations, room for confrontations on political targets and instruments, and monitoring procedures. A comparative analysis of these solutions may be helpful to understand the Italian approach. In Spain, a relevant role is played by the Council of Fiscal and Financial Policy. In Germany, the Council for Financial Programming (*Finanzplanungsrat*), which is disciplined by Article 51 of the German Law on Budget Principles (*Haushaltsgrundsatzgesetz*), is a body that coordinates the Federation, the Länder, the Municipalities and the latter's Unions. The *Finanzplanungsrat* is relevant in counselling the budget policies of the different institutional levels, because it considers the impact of social and economical factors on the public finance. It specifically pursues the respect of the European bonds (Article 104 of the Treaty), as well as the European Stability and Growth Pact, and gives its contribution in defining the program of stability, monitoring the budgets and giving advice on expenditure

policies. *Finanzplanungsrat's* advice is not compulsory, but it is very influential on parliamentary debates, on European institutions and on markets.

The huge case-load before the Italian Constitutional Court, and the tensions between state, regions and local bodies, which have lately recurred each time the state presents its annual financial law, seem to demonstrate how fundamental such an authority is in our country, as it has been in Spain and in Germany.

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# Legitimate expectations in European and Italian law

Giacinto della Cananea \*

Sandra Antoniazzi, *La tutela del legittimo affidamento del privato nei confronti della pubblica amministrazione* (Giappichelli, Turin, 2006); Cristina Fraenkel-Haberle, *Poteri di autotutela e legittimo affidamento. Il caso tedesco* (Università di Trento, Trento, 2008); Federico Gaffuri, *L'acquiescenza al provvedimento amministrativo e la tutela dell'affidamento* (Giuffrè, Milan, 2006); Marina Gigante, *Mutamenti nella regolazione dei rapporti giuridici e legittimo affidamento. Tra diritto comunitario e diritto interno* (Giuffrè, Milan, 2008).

I. As Paul Craig observed some years ago in a seminal article on legitimate expectations, the role played by this concept has been the subject of much comment in Europe. This does not regard only the literature dealing with the concept of legitimate expectations in the European Community, but also that of Germany, where the concept was elaborated (an accurate analysis was carried out by Hermann-Josef Blanke, *Vertrauensschutz in deutschen und europäischen Verwaltungsrecht*, 2005). It regards, too, other countries such as Italy and the United Kingdom, where an equivalent principle did not exist. In the UK, it was only after the accession to the EC that such a concept was elaborated by the courts. Initially it was translated as “protection of legitimate confidence”, similarly to the French concept of “confiance légitime”. This term was later regarded as imprecise. Accordingly, it was replaced with the term “expectation”.

As far as Italy is concerned, the influence of the EC was still limited at the beginning of the 1970's, when Fabio Merusi published his seminal essay (*L'affidamento del cittadino*, 1970). This essay was important for at least two reasons. First, Merusi pointed out the importance of judge-made law and tried to rationalize it from the point of view of the general principles of law. Second, although he devoted considerable attention to the analysis of the German doctrine of *Vertrauensschutz*, coherently with the dominant tradition of public law thought in Italy, Merusi argued that in our legal order the protection of legitimate expectations was not the same rationale. He considered legitimate expectations to be an expression, rather, of the principle of law of good faith. This idea was only in part based on the work of earlier writers, generally inclined to emphasize the divide between private law and public law. Retrospectively, it can be said that Merusi formulated in general terms the assumptions on which the study of legitimate expectations was developed in the following years, though this pioneering work was followed only by very few specific studies.

For this reason, the simple fact that four monographs were recently dedicated to the protection of legitimate expectations is at the same time important and intriguing. It is important, because it shows the interest of national lawyers for another general principle of EC law, ten years after the studies which Sandulli and Galetta devoted to the principle of proportionality. It is intriguing, since in the Italian legal culture much greater importance has traditionally been given to monographs than to articles. The question thus arises whether this fact reveals that a change has occurred within our legal culture. Provided that a change occurred, one may also wonder whether it derived either from an endeavour to understand better certain phenomena of which lawyers were already aware or from the emergence of new legal phenomena. Whether the change reveals some kind of convergence with other European legal cultures is still another question. The object of this short review article, therefore, is neither to provide a general overview of the

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topic, nor to describe and discuss analytically the contents of the four books. The aim is, rather, to focus more closely upon the extent to which these books are expression of continuity or, instead, of change.

II. When considering the four books analytically, it soon becomes evident that their objects, aims, and methods are largely different. Let us begin with Marina Gigante's book, which is divided into two parts. In the first, though Gigante distinguishes between such concepts as the protection of legitimate expectations and the principle of non-retroactivity, she illustrates "legal certainty" cases involving retroactivity in the case-law of the ECJ. She then considers a different set of situations, concerning the application of a new piece of legislation to existing legal relationship (*jus superveniens*). Finally, she examines expectations beyond the sphere of retroactivity, for example those which are generated either by the guidelines adopted by a public authority or by its consolidated practice. Interestingly, while this is probably the set of questions more frequently debated in the UK, it is often neglected in Italy, where such questions are frequently examined within the framework of the criteria of coherence and consequentiality. In earlier works, moreover, a much greater attention has been devoted to the analysis of the questions arising from the annulment of an unlawful act, and these are the questions considered in the second part of the book.

There are some similarities between this book and Sandra Antoniazzi's book. The latter illustrates several connections between EC law and national law. Antoniazzi does not hesitate to affirm that the EC principle of legitimate expectation produces effects even outside the areas of direct and indirect administration of EC policies. Such effects, she argues, inevitably impinge on the different solutions adopted by national administrative law (p. 2). Following Merusi explicitly, Antoniazzi devotes the first chapter to a broad analysis of the expectations generated by legislation, especially the field of tax law is still dominated by frequent, sudden and often irrational changes. The following chapters concern the traditional problem of the protection against the annulment and revocation of administrative acts. Some more recent issues, such as the expectations deriving from contractual activities of public bodies are considered, too.

The other two books are quite different. The analysis carried out by Fraenkel-Haberle focuses on the scope and meaning of *Vertrauensschutz* in German law. This does not only offer her the possibility to make some interesting remarks about the analogies and differences between German and Italian law. It also provides her with sufficient empirical evidence to affirm that the German concept of *Vertrauensschutz* does not coincide with the guidelines followed by the ECJ. A sharp contrast emerged, in particular, in the *Alkan* saga with regard to the importance of the time between the moment in which private undertakings received State aids and the moment in which the Commission ordered the recovery of such aids. In other and clearer words, the German preoccupation for the stability of the effects of public action was in contrast with the EC preoccupation to prevent such stability if those effects were incompatible with EC law.

Finally, Gaffuri focuses on the situation in which a private party *de facto* accepts (*acquiescenza*) the effects of an administrative decision and to provide a more satisfying intellectual foundation for it. He argues that the courts do not consider more systematic aspects (p. XI). However, it is even too well known that the courts are not concerned with such aspects, but with the more concrete problems which they are requested to solve. It should be noted also that, although Gaffuri's main interest lies in the factual acceptance by private parties of the decisions taken by public administrations, he adds a further dimension. This regards the possibility to extend to private parties the duty to act coherently with the expectation they have generated in their relationships with public administrations. Such a duty may be coherent with the conception of legitimate expectations which is founded on the broader principle of good faith, seen as a fundamental value of the legal order (p. 139). However, the question arises whether it is correct to bring so far the assimilation of private parties to public authorities.

III. After describing briefly the four books, we may ask whether, considered as a whole, they confirm

that a change has occurred within Italian public law. In this respect, a twofold change emerges.

First, all the authors observe that European courts have increasingly referred to the principle of the protection of legitimate expectations. However, Gigante argues that EC courts are much more willing to affirm this principle than to enforce it. In other words, most of the times EC courts refrain from annulling measures which violate the legitimate expectations of private parties, for example if an overriding matter of public interest exists. The least that can be said is that this is a considerable limitation to its value a limit to the exercise of power. Whatever its limits, the principle according to which legitimate expectations must be protected has a greater relevance within the national legal order since it is included by the courts within the principles of which they must ensure the respect.

Meanwhile, a broader change occurred. The constitutional reform of 2001 explicitly included the “legal order of the EC”, in addition to the Constitution itself and to international obligations, among the source of limits to the legislation enacted by both the States and the Regions. Moreover, the law of 1990 regulating administrative procedures has been amended in 2005, to the effect, among others, of referring to the “general principles of EC law” as legal sources. Even a strict positivist, therefore, might agree that an accurate knowledge of such principles, including those forged by the ECJ, is now necessary in order to identify the general principles of law, though sometimes their importance is still not fully perceived. Consider, for example, Gaffuri’s book. Unlike the other three books, it does not consider the effects of EC law since the beginning, but only after three fourths of the book (more precisely, at the end of the third chapter), and only for a dozen of pages. This choice can only partially be explained by the object of this research. Moreover, the least that can be said is that the author should have clarified this choice much better than he did.

IV. Closely connected with the awareness of a change in the law as it is applied by the courts, is the question whether there is some discontinuity also with regard to the positions adopted within public law by commentators, advocates and judges. Such positions are always rooted, more or less clearly, in certain categories of thought and they are often influenced by certain ideologies. It is hardly surprising that such ideologies are neither evident nor fixed. They are constantly adapted in the light of changing requirements and circumstances. However, their *noyveau dur* is more stable.

On this issue, it can be argued that a discontinuity emerges from the wider use of the principle of the protection of legitimate interests. Traditionally, Italian judges and scholars focused almost exclusively on the principle of legality. Only more recently was this focus, almost an obsession, attenuated. The Constitution of 1948 laid down the principles of impartiality and sound administration, later specified by legislation. More recently, the courts increasingly referred the principle of proportionality. In this respect, Gigante makes an interesting point with regard to the theoretical foundation of the protection of legitimate expectation, and one that is very similar to the line of reasoning exposed by Paul Craig. If the issue is conceived of only in terms of legality, it becomes difficult to grasp the meaning of legitimate expectations. Such a conception, she argues, fails to take account of another value acknowledged in our system, as well as by both other European legal orders and that of the Community. This is the principle of legal certainty. It implies that, when ascertaining whether the authority has correctly exercised its powers, we should not consider only whether it respected the rules conferring such powers, as it was traditionally done in the past. We should also recognize that another value is at stake. Among the implications of this value, one deserves particular attention, the fundamental idea that those who have relied on a policy followed by that authority have a valid claim for some protection when that policy is modified or replaced by another. When this claim arises and whether it implies that the authority has some duty to consult or at least to inform all interested actors before changing its policy is of course debatable and may not considered in detail here. What matters, for our purposes, is that there are further limits to the exercise of power by the public authority.

A more important point, for our purposes, is whether legitimate expectations may still be

conceptualised in the light of the broader principle of good faith, as Merusi suggested forty years ago. This is

still, as I noted earlier, the starting point of all recent research. In particular, Antoniazzi and Gaffuri explicitly acknowledge the persistent validity of this conceptual framework, while Gigante suggests that this is not the only possible source. However, despite showing some sympathy with the other view, that is to say that legitimate expectations are connected rather with legal certainty, she does not engage in a systematic analysis. Whilst affirming that the theoretical foundation of the principle ought to be reconsidered, she argues pragmatically that referring to the principle of good faith, to say so, paved the way for a more specific studies. As a result, the reader is left with the impression that the protection of legitimate expectations has at least two quite distinct meanings. We might refer to these as the national and the Community conceptions. The national conception, which can be attributed to Merusi, focuses on good faith. The Community conception emphasizes, rather, the importance of legal certainty, though with some distinctive features with regard to Germany.

V. The impression that there is some reluctance to acknowledge fully the implications of this principle for legal theories emerges also from another point view. Like Gigante, Antoniazzi affirms that the protection of legitimate expectations now has a constitutional status, although the principle has a variety of different implications. She argues, more specifically, that one of such implications is the protection of the specific expectations of certain individuals. While this view is convincing from the point of view of the law as it now stands, it is not clear why legitimate expectations should be considered, as Antoniazzi suggests, in the traditional terms of the distinction between subjective rights and legitimate interests. A first question is why should a general principle of law give rise to a specific type of individual "position". A broader question is whether EC law simply adds new legal materials which lawyers may conceptualise on the basis of their traditional theoretical categories or, rather, obliges them to reconsider both those categories and the underlying values. In my view, the new phenomena can be fully understood only by questioning the validity of the old categories, though I would concede that in several cases the old concepts may still be useful.

It remains to be seen, finally, whether a better understanding of the changes which derive, either directly or indirectly, from EC law requires a different approach to national doctrines. The case of legitimate expectations is particularly helpful in this context. We have seen earlier that the concept has been elaborated mainly, though not only, in Germany, where it has a variety of meanings and foundations. Such foundations include legal certainty, but during the process of cross-fertilization from Germany to the EC and from the latter to the other national legal orders some elements of the concept were accentuated while others were attenuated. The difficult problem of delineating an appropriate set of rationales for protecting legitimate expectations cannot be avoided simply by noting that there are several rationales. It should be seen whether the decisions taken by national courts offer a persuasive case for affirming that a certain rationale is more or less considered by the judges.

Precisely in view of the process of cross-fertilization, moreover, it is very important to look at the other national legal cultures. In this respect, with the notable exception of the book by Fraenkel-Haberle, where considerable attention is devoted to the various approaches to the study of legitimate expectations, a gap emerges. Even a quick glance to the bibliographical apparatuses of the other books shows that limited, or none, attention was paid to Paul Craig's seminal essays, as well as to Blanke's dense monograph mentioned earlier. A key to understand this was proposed some time ago by Sabino Cassese, according to whom EC law is a powerful instrument to de-nationalize public law, but it is re-nationalized when it is applied within the Member States. This largely depends on the distinctive features of each national legal order. However, the role of legal scholarship is not irrelevant and too often it is influenced - as Martin Loughlin has argued with regard to Dicey's version of normativism - by old national approaches that still live in the minds of lawyers. Although legal theories evolve by accumulation rather than by drastic changes,

European scholars should at least show a better awareness of other approaches to the study of public law.

This would be quite useful, too, in order to consider critically the belief that public law is concerned with the "order of things", while the influence of legal doctrines and political ideologies should not be ignored.

# Interest Representation in Administrative Proceedings

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Roberto Caranta (ed.), *Interest Representation in Administrative Proceedings* (University of Turin Press, Turin, 2008).

One of the central challenges facing public decision-makers at the national and supranational levels in Europe is how to maximise citizen participation in processes that lead to determinations with legal effects. In classic political and public law theory, the challenge has typically been analysed with reference to models of representative democracy (for instance, as relate to exercises of legislative power) or due process guarantees (as apply to those to be directly affected by administrative decisions). However, while such models may previously have provided a sufficient intellectual framework for critiquing levels of participation, the issue of citizen engagement is now regarded as markedly more complex. This is because power is no longer exercised solely by the State and its administrative bodies, but also by a range of other national, international and supranational actors who may not easily (or at all) be viewed through the prism of delegation theory. Of these actors, the most influential are the EU institutions, and it has become commonplace to doubt whether the exercise of public power at the European level can ever be attributed to the legitimating repository of “the public”. Traditional democratic discourse has thus reached its terminus, and something new is required.

It is the search for that revised framework that provides the starting point for this collection of essays. Each of the essays – there are 4 longer ones and 2 discussion pieces – originate from a seminar held in Torino in 2006, and they seek to explore “a different avenue for the legitimisation of public powers, namely participative democracy” (p 3). While there is, of course, already a large body of literature on the potentialities of, and the problems with, participative democracy, the book still makes a novel contribution to the extant debates. This is because the essays offer a rich mix of legal doctrine and political theory that is complemented by comparative case studies spanning the experience of national (France, Italy, US, UK) and supranational/international legal orders (EU and ECHR). The result is an important and informative collection that does much to further understandings of the topic at hand.

The opening essay, by Prof Roberto Caranta, provides an overview of the collection as well as some more general – and thought-provoking – comments on the wider question of participation. In positioning the collection around the theme of participative democracy, Caranta notes how representative models of democracy have long exhibited shortcomings at the national level and that there are, moreover, institutional realities that limit their applicability at the European level (p 2). This, in turn, is said to be one consequence of the sheer scale of States and the EU, and he suggests that the key to legitimating decision-making in Europe rests with realising the full promise of the subsidiarity principle. Much of the emphasis here is on the need to engage with and empower regional and local entities, and Caranta argues that, in the absence of such efforts, the EU will continue to “pay the price of being much more an Union of (nation) States than a Union of peoples” (p 7). While such arguments inevitably beg the question whether national governments would wish to be disempowered by a shift away from EU law’s historically State-centred origins, Prof Caranta makes clear that a new paradigm is needed if ideas of participation are to retain meaning within the

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modern polity. As he puts it: "Direct democracy and participation are possible within small scale entities (p 7) ... Involvement of civil society and stakeholders needs to become more systematic, consistent and deeper if European institutions want to bridge the gap that separates them from the people of Europe" (p 18).

The other essays and the comment pieces build upon these themes. Simona Rodriguez's paper - 'Representative Democracy vs Participatory Democracy' - provides a highly engaging account of governance patterns in the EU and US; while Prof Carol Harlow's corresponding comment piece cautions that the EU still has a distance to go before participation in its processes can be described as meaningful. Margherita Poto's paper - rightly described in Prof Tony Prosser's comment piece as "excellent" - then uses network theory and Habermas' model of deliberative democracy to analyse 'Participatory Rights in the Independent Administrative System' in the EU and Italy. As with Prof Caranta, Poto concludes that "civil dialogue is a key factor in enhancing the European Union's democratic legitimacy" (p 214), and she too emphasises that the subsidiarity principle can provide the means to make that dialogue a reality. In the final paper - 'Protection of ECHR Rights in Administrative Proceedings' - Silvia Mirate shows how older concepts such as "due process" can retain a contemporary relevance in the modern polity, *viz* where courts are willing to adjudicate creatively on questions of participation (the larger part of the chapter considers the ECtHR's interpretation of Articles 6 & 8 ECHR).

There are two points that may be made about the book. The first concerns the format that was used throughout; that is, of linking the contributions of younger researchers to comment pieces written by more established scholars. For the reader this presents the book very much as a dialogue between its contributors and, read with Prof Caranta's editorial chapter, it gives the collection a much greater coherence than that of other collections. Of course, that is not to suggest that other collections should necessarily adopt a like format, as the "paper and response" approach was presumably one that was used at the earlier Torino seminar and then carried through to the final version. But what it is to say is that the editor and publisher have succeeded in retaining an interactive method that brings much to the final project. The book, in that sense, it is an exemplar of how seminar papers may be progressed to print.

The second point is more critical and concerns broader debates that the essays touch upon but with which they do not fully engage. Although criticisms of this kind can often be unfair - no book can address every tangential debate - one might wonder whether there was scope to make fuller references to emerging debates about global administrative law. Those debates also address questions of, among other things, representation and participation, and the corresponding literature takes it as read that traditional political and public law theory offers only limited perspectives on public power in the post-Westphalian order. Those familiar with the global administrative law debate will, moreover, know how the EU's experiences are sometimes used as a means to project what is or is not possible in global law, and it is this that might have allowed for greater cross-over between the debates. For instance, the present book's discussion of subsidiarity resonates with contributions to the global public law debate in which subsidiarity is discussed as a justiciable legal principle or as a correlate of cosmopolitanism's idea of "equivalence". Engagement with these - and other - contributions would only have added to an already excellent collection.

That, however, is only a very minor criticism. Overall, this is a valuable collection that offers many insights into some the most vexed - and perennial - problems of the modern era. For that reason, it will surely become established as an important book in the field.