OBITUARY

IN MEMORIAM ANTONIO ROMANO TASSONE

*Alberto Romano**

1. Antonio Romano (he added his mother's surname - Tassone - when he began to publish scholarly writings simply to avoid confusion with other scholars) was born of Calabrian stock in 1952 in Pisa, where his father was working as a judge.

He graduated there at twenty-two years of age, under the supervision of Franco Ledda, a pupil of Piero Bodda, who held the chair of Administrative Law at the University of Turin. Although Pisa is a small Tuscan town, it is home to a centuries-old prestigious University. And it was here, in fact, that he met his first and most influential mentor.

2. Franco Ledda was an important administrative lawyer, whose erudition extended well beyond legal studies; he was an earnest man with a deep-rooted sense of ethics - traits that he shared with Antonio Romano. A very intense relationship developed between the young scholar and his mentor that would last for decades, and Ledda took a close interest in Romano's work especially after reading his monograph on the duty to give reasons[1]. Antonio Romano made a speech at the ceremony held at the *Consiglio di Stato* in Ledda's memory, and wrote his eulogy[2]. The ramifications of this life-long relationship were profound and mutual.

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[1] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* (1987).

[2] A. Romano Tassone, *In memoria di Franco Ledda,* 2 Dir. Amm. 357 (2000).

Ledda's influence on his pupil is evident, as can be seen even in the above-mentioned monograph. The great importance that Antonio Romano gave to the term "*administrative decision*" (*provvedimento amministrativo*) emerges here - and we shall return to it later - to link it more closely to the better consolidated line of thought running through his entire academic opus: the third chapter[3], the most important for theoretical purposes, concerns, in fact, "*the moment of the decision and its dependence on the definition of the problem at hand*," with the "*consequent application of the parameters for the reasoning behind the decision*." In this respect, three fundamental concepts emerge: the decision, the reasoning behind the decision, and the substantive legality of the decision, concepts that Romano inherited from Ledda[4]. This framework would have very important consequences, and would run throughout his entire output: the decision becomes an assessment of the values which are analysed during the administrative procedure and stated in the measure. The decision therefore takes on the character of a rational decision and replaces the concept of measure: it also challenges the traditional emphasis put on the authority of the measure[5]. The essence of objective rationality, moreover, is united with the axiological theory of value, also largely inherited from Ledda, and thus becomes "*substantive legality*"[6].

Antonio Romano also found confirmation of these ideas in some fundamental positive norms. First and foremost, Article 3 of the Italian Administrative Procedure Act (Law no. 241/1990)[7] does not refer to the measure but to the reasoning behind the "decision". For Romano, programmatic adherence to a concept, that of the rational administrative decision which Ledda had envisioned, is a conscious choice. It was one that he had developed in greater depth, especially in the study of reasoning after the entry into force of this legislative provision, and returned to it, among other things, in an

[3] *Ibidem.*

[4] See, especially, F. Ledda, *La concezione dell'atto amministrativo e dei suoi caratteri,* in U. Allegretti, A. Orsi Battaglini & D. Sorace (eds.), *Diritto amministrativo e giustizia nel bilancio di un decennio di giurisprudenza* (1987).

[5] A. Romano Tassone, *Esiste l'atto autoritativo della pubblica amministrazione? In margine ad un recente convegno dell'AIPDA,* 4 Dir. Amm. 759 (2011).

[6] See A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità,* cit. at 1, 363.

[7] The original title was "*Legge sul procedimento amministrativo"*, since 2005 the title is "*Norme generali che regolano l'attività amministrativa*".

essential, but little known entry on legal reasoning[8]. When considering Ledda's approach, he said that for him it was a confirmation of "method", a "reaffirmation of value", and "culture", and essentially it was the "collective consciousness" of the jurist[9].

3. Shortly after Antonio's graduation from Pisa, his father was transferred yet again, this time to Messina, and so he too moved there with the family. He thus found himself close to Calabria, the land of his origins, once again. And it was here that he did most of his teaching.

In the meantime, he rose through all the stages of his academic career. Notably, he became associate professor in 1984 - teaching administrative law at the University of Messina from that year - and in 1990, he was awarded a chair in the same field at the Faculty of Law at the University of Reggio Calabria. He divided his teaching between the two Universities of Calabria before finally returning to Messina in 2005. As in his previous positions, here too he was always much involved in teaching in general until his health began to deteriorate. Meanwhile, he taught as *professeur invité* at the Université de Paris 1 (Sorbonne) and the University of Lyon 3 (Jean Moulin).

He also as member of the scientific committees (in some cases as one of the founders, deputy editor or co-editor) of important journals of administrative law: among others, we specifically recall, "*Administrative Law*" - where he was member of the scientific committee since its foundation (1993), and lately one of the editors of "*Diritto e Processo Amministrativo*", "*Ius publicum*" (an international network of the leading European public law journals).

Last but not least, he was a member of the Steering committee of the "*Associazione Italiana dei Professori di Diritto Amministrativo*" (AIPDA), and Vice-President of the "*Associazione Italo-Argentina di professori di diritto amministrativo*."

4. After moving to Messina, Antonio Romano maintained his strong ties with Ledda, but his new environment provided many other stimuli. His closest colleague was Nazareno Saitta, an

[8] See A Romano Tassone, *Motivazione nel diritto amministrativo,* in 13 Dig. Disc. Pubbl. 683 (1997).

[9] A. Romano Tassone, *Il contributo di Franco Ledda alla teoria del provvedimento amministrativo*, in 2 Dir. Proc. Amm. 499 (2007.

administrative lawyer with whom he built a very important and meaningful relationship from both the academic and human points of view. But the greatest influence was the cultural atmosphere at the Messina Law School, which boasted a private law school of nationwide repute.

Two scholars really stood out: Salvatore Pugliatti (1903-1976), and Angelo Falzea (1914 -). Salvatore Pugliatti was a highly cultured man in various fields, and an eminent figure in the cultural life of Messina. He was also a musicologist and taught the history of Music; he became President (*Rettor*e) of the University, and in this role contributed to the achievement of an internationally acclaimed exhibition on Antonello da Messina in the 1950s. In addition, he was an antiques collector, and so much more. And also in Angelo Falzea we find many of these characteristics. Antonio Romano soaked up many of these stimuli, being also an avid bibliophile.

As far as legal scholarship is concerned, the theories of such leading private lawyers that appear most significant for an understanding of the work of Antonio Romano concern legal facts or realities. In 1945, Salvatore Pugliatti published his fundamental essay "I fatti giuridici", later reprinted in 1996 "with revision and updates" by Angelo Falzea.[10] The main idea is that legal facts or realities are those "considered in terms of the effects they have on the sphere of a subject"[11].

The idea that a fact or reality is considered in terms of the effect it has or produces has two important implications. Firstly, such a fact or reality is distinct from the legal rule which refers to it, albeit in abstract terms. Secondly, it is assessed according to the effect arising from it. This legal effect is inherent to the legal situation of the subject involved. In Pugliatti's brief definition we already see Falzea's theory of causation, which later develops into the theory of legal effectiveness that he set out in the fifties, and then, more fully in 1965, in his entry in the *Enciclo*ped*ia del diritto*[12]. There, right from the *incipit*, he stated that the problem of legal effectiveness is the problem of jurisprudence and the law itself; and the legal effect is nothing but value, interest[13]. Once again, it is an axiological

[10] S. Pugliatti, *I fatti giuridici* (1996).

[11] *Ibidem*.

[12] A. Falzea, *Efficacia giuridica,* in 14 Enc. Dir. 432 (1965).

[13] *Ibidem*, 452 (affirming that: «Il problema dell'effetto giuridico è in ultima istanza il problema più generale della scienza del diritto, anzi… è lo stesso problema del

conception that consequently emerges, a conception drawn from analytical philosophy. Falzea brings it into the domain of the law[14], Antonio Romano Tassone applies it to administrative law.

On the other hand, Salvatore and Angelo Pugliatti Falzea, as private lawyers, were convinced legal positivists, and saw the production of effects from the perspective of a direct and immediate relationship between the law that regulates them, seen as a result of a "dispositive fact", and the effects themselves. They held that in order to produce such effects, legal acts (contracts and other transactions) were to be regarded merely as dispositive facts. These jurists had, therefore, a very different approach compared with other civil law schools, which, on the one hand, emphasized the role of the contracting parties, and, on the other hand, emphasized the importance of unilateral acts and, with regard to them, of the will of the author as a central factor in determining their content and effects. Seen from this point of view, the legal rule is not the true basis of such effects, the real factor that produces them: on the contrary, one can merely recognize them as an expression of contractual power, of the private will of those carrying out such acts - in so far as these acts prove lawful and properly formulated. In brief, the negotiating power of individuals, an alien concept especially in the sphere of private law, permeated legal studies at the Messina Law School, during the second half of the last century. Antonio Romano, it would seem, absorbed many of these cultural influences and wrote extremely well on a purely objective level about the formation of the measures, which placed great importance on values, but had no interest in seeing those same measures as the expression of the thorny question of the autonomy of the authorities.

However, this axiological perspective would always mark Romano's thinking. This is what guided his theorising on

diritto visto su piano strettamente scientifico», adding: «ciò che in termini di causalità si chiama l'effetto giuridico è in più corretti termini niente altro che un peculiare valore, il valore peculiarmente giuridico»; «Il diritto è un valore reale oggettivo… Se si conviene di chiamare interesse questo valore oggettivo reale, secondo la felice intuizione di Jhering, che opponeva interesse a volontà…è lecito dire che il fondo del diritto è interesse»).

[14] A. Falzea, *Efficacia giuridica*, cit. at 12, 432: the idea of legal value «richiedeva una non superficiale presa di contatto con la teoria filosofica dei valori, anche considerato il larghissimo impiego che se ne fa, specialmente in Germania, tanto nella filosofia del diritto quanto nella metodologia (e persino nella dogmatica) della scienza del diritto».

administrative law, adopting it as a method and developing it as dogma. And it is in the fruits of his research in this field that we can see his major original contribution to scholarship on administrative law.

In this light we can see a thread that binds together three of his favourite themes: power, validity, and subjectivity - whose importance, however, was limited by the premises mentioned above, covered in three separate works: his writings on power, the monograph and other studies on legal reasoning, and his entry on subjective legal situations[15]. Lack of space permits only a few remarks on these works here, and these remarks are not meant to summarize their content, but the connections between them, thus respecting Romano's own natural conviction. He himself often repeated that he did not want to paraphrase the works of others, because one only ends up impoverishing them, producing ugly summaries[16], so we shall focus only on the common ground running through his works.

His first work was on power[17]. He showed that the power exercised by a public authority is based on political legitimacy, and the law reflects this. He found and deepened the relationship between the political and the legal order. This is a relationship that he would not forget[18]. He used it to frame the relationship between power and the act, between the legitimacy of power and the legal validity of the act. And he did so by giving a clear direction to that relationship: it is the legitimacy of political power that conditions the positive nature of legal acts[19].

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[15] See A. Romano Tassone, *Note sul concetto di potere giuridico,* 1 Ann. Fac. Ec. Messina 442 (1981); Id., *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* (1987); Id., *Situazioni giuridiche soggettive (diritto amministrativo),* 2 Enc. Dir. 966 (1998).

[16] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 489.

[17] A. Romano Tassone, *Note sul concetto di potere giuridico*, cit. at 15, 442; also his last work was on the subject of power, but his health did not allow completion of the volume. See A. Romano Tassone, *A proposito del potere, pubblico e privato, e della sua legittimazione*, in 4 Dir. Amm. (2013), published posthumously.

[18] He had recently returned to the topic: A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri,* in P. Carta & F. Cortese (eds), *Ordine giuridico e ordine politico* (2008).

[19] A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri,* 1 Dir. Proc. Amm. 140 (2007) : «esiste invece un rapporto assai stretto che collega il concreto assetto di volta in volta assunto dal potere pubblico (più esattamente: gli effettivi principi cui si ispira la sua legittimazione politica), ed

He formulated two major theories. The first was a theory of the decision taken by a public authority, which had emerged already in discussing legal reasoning in the monograph; the second is the theory on the invalidity of acts, a recurrent theme of his works.

In the aforementioned work on legal reasoning, which is still fundamental despite the years that have passed since 1987, he rejected the traditional idea. Legal reasoning, he argued, was not a formal statement of reasons: reason is not a usable category, because it has no precise technical dimension[20]. Rather, Romano elaborated a complex approach in order to explain the nature and importance of the requirement to give reasons in the field of administrative law. For him reasoning refers to the 'decision'[21]. Decision and reasoning form a binomial. And among them there is a third element to be inserted: the judgment. The judgement is needed to highlight the distinction between fact and value; both become the object of the decision: the decision is handed down and relates to the value of the problem inherent in the fact.[22] And this decision can only be controlled in one way: through objective rationality, with parameters of reasonableness. The decision taken by the public authority is thus the result and expression of reasonableness; the same that is inherent in the basis of power, and it is here that power and decision come together in the same matrix of objective rationality[23].

We can clearly see his predilection for 'objectifying decision-making based on reason', and Romano's declared inclination for the philosophy of law inspired by the lectures of Franco Ledda[24]. So his thought is marked by an evident passion for rationalism and method; and yet there is another, almost antithetical part, the realism that characterizes any encounter with power, political legitimacy, and authority. Reason and power: for him an 'enigma', a 'human mystery'[25]. From this perspective, one could read an attempt to solve the dilemma in his entry on subjective legal situations, where he puts

il regime giuridico positivo degli atti cui le decisioni autoritative mettono infine capo, nel senso che il primo costituisce invariabilmente il sostrato assiologico- *ergo: l'humus* sistematico- in cui il secondo affonda le proprie radici».

[20] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 13-25.

[21] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 39-49.

[22] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 255.

[23] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 363.

[24] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 496.

[25] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 490.

the person before the law, its constitutive limit[26]. But perhaps, and above all, he sought to solve the dilemma in a final reflection on law and politics, almost an epigraph: 'The political order, therefore, gives historical substance to the legal order and its essential lexicon ... The legal order structures and permeates the "discourse of power": it reduces (but does not eliminate) its mythical and rhetorical character. It confers systemic substance upon its rational life-blood'[27].

[26] A. Romano Tassone, *Situazioni giuridiche soggettive,* cit. at 15, 966.

[27] See A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri*, cit. at 19, 154. A few pages before, he said: «L'ordine giuridico, in sintesi, più che alla auto rappresentazione del potere, aderisce alla sua sostanza storica, rivelandone l'intima essenza e sviluppandone … le implicazioni profonde e l'intrinseca razionalità. Si tratta dunque di un processo di rielaborazione, piuttosto che di riproduzione».