AUTHORITY VERSUS LIBERTY IN EUROPE: EVOLUTION OF A PARADIGM

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Abstract

The conflict between authority and liberty has long been considered as a way of interpreting public law. Such a paradigm seemed to have lost its relevance after the advent of contemporary constitutional democracies and the consequent acknowledgment of the individual (or the person) as the base of public power. However, the working paper aims to show how the current crisis of the rule of law, with regard to both European and global trends, has restored the importance of the authority-liberty opposition.

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1. Introduction

In many legal systems of continental Europe, courts and legal scholarship have variably contributed to laying down the foundations of administrative law. Although this continues to be the case, there is sometimes discussion about the persisting adequacy of less recent theories. Among these theories, there is the relationship between liberty and authority; that is, the state of being free from restrictions imposed by public authorities.

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For a long period of time, according to an important strand in public law, this relationship was viewed as being dialectic and was said to be at the center stage within national legal systems. The question that now arises is not only whether this is still the case within such systems. It is also whether such dialectic relationship may be used as an interpretative model of reference for EU law[1].

There are some symptoms of the persisting importance of the relationship between authority and liberty. However, this seems to be a product of the crisis of the liberal-democratic polities rather than the expression of the intrinsic features of the two terms of such relationship. This is the issue which will be examined in this short paper. It ought to be said at the outset, for the sake of clarity, that I agree neither with the strand of legal theory according to which public law is dominated by the conflict between individuals and the State and that this conflict is insuperable[2], nor with the less recent strand in public law theory which contests the excess of emphasis put on authority. According to this latter strand, at the heart of public law there is a contrast between the subjective right of the individual and the subjective right of "the State personified"; there is, rather, a series of tensions and trade-offs that are produced by social co-ordination and "co-operat[ion]"[3]. These quick remarks explain that, for a better understanding of the current relevance of the relationship between authority and liberty, we cannot ignore the ideological dimension of the various strands in public law, which exerts an influence on the interpretation of law. We must, in particular, consider two perspective which are related but distinct: while the first is about being, the other is about having to be[4].

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[1]Amongst other, B. Mattarella, *Il rapporto autorità-libertà e il diritto amministrativo europeo,* in Riv. Trim. Dir. Pubbl. (2006) 910; Id., Le funzioni, in M.P. Chiti (ed.), *Diritto amministrativo europeo* 160 (2013). L. De Lucia – B. Marchetti (eds), *L'amministrazione europea e le sue regole* (2015), p. 11, are wondering if it is possible «spiegare il diritto amministrativo dell'Unione europea in termini di relazione autorità/libertà».

[2] S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in Riv. Trim. Dir. Pubbl. (2001) 602.

[3] L. Duguit, *The Law and the State,* in 31 Harvard Law Rev. 182 (1917).

[4] On the point of view of *be*, it's also quite understandable the utilization of the relationship between authority and liberty to outline the preference given in the past and present to administrative prerogatives and privileges or to legality and

2. Authority v. Liberty: an Outdated Paradigm?

In Italian legal scholarship, the idea that the relationship between authority and liberty was a sort of paradigm found expression, in particular, in the works published by Massimo Severo Giannini in the mid Twentieth century[5]. Those works seem to refer more to the rule of law as it was conceived in the nineteenth century than to contemporary constitutional democracies. The paradigm was therefore presented in terms of a contrast born from the seeds of conflict between the nobility and the bourgeoisie[6]. It dealt with the historical moment in which the middle classes conquered the parliaments of their respective nations, and in which law assumed the status[7] of a guarantee in the face of the authority which was exercised by the monarchy.

It may be argued that the conflict between authority and liberty was overcome by constitutional democracy[8]. The main steps of this process of change may be be briefly mentioned. They include the US Declaration of Independence of 1776 and, more importantly for the old continent, the French Declaration of 1789, according to which individual rights and liberties are the core and the superior goal of the constitutional order. In particular, Article 2 provided that "the aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to oppression". As a consequence of this, it was the individual (or the person) who was at the basis of public law[9]. It was precisely on

liberties in the judicial review of administrative acts: in this way see D'Alberti, *Diritto amministrativo comparato* (2019) in particular pp. 47 ff..

[5] M.S. Giannini, *Lezioni di diritto amministrativo* (1950) 71. See also B. Russell, *Autorità e individuo* (2011; original edition 1949).

[6] Even if J.S. Mill, *Saggio sulla libertà* (1993; original edition 1859) 11, tells that the litigation between liberty and authority is just known in ancient Greece and in ancient Rome, as a conflict between subjects (servants), or classes of subjects, and government.

[7] If you prefer, the value and the strength.

[8] Without prejudice to "la concezione della protezione dei diritti essenzialmente inquadrata entro la cornice di contrappesi e di limiti del principio di maggioranza" P. Ridola, *Diritti costituzionali*, in S. Mangiameli (ed.), *Diritto costituzionale. Dizionario sistematico* (2008) 390.

[9] See, for example, G. Silvestri, *Relazione di sintesi,* in F. Manganaro - A. Romano Tassone - F. Saitta (eds.), *Sindacato giurisdizionale e sostituzione della pubblica amministrazione* (2013), where it's affirmed that the starting point of contemporary costitutional orders are individual rights, not power. See also, on

this basis that a liberal democratic strand in public law emerged and its innovative nature was emphasized by the comparison between the liberty of the ancients and that of the moderns, to borrow the words used by Benjamin Constant[10]. In brief, the liberties and freedoms of the individuals may only be interfered with under legislative authority and the essence of political authority derives from representative institutions.

Against this (increasingly important) strand, runs another strand in public law, according to which authority (or *puissance publique*) is still the "banner around which public law is ordered", as a French public lawyer, Yves Gaudemet, has recently strongly and concisely argued[11]. It would thus seem that more than a century has passed in vain since it was stated that "the logical starting point is not liberty, but the State"[12]; or that liberties and fundamental rights are not the factors that constitute public power and set limits to its exercise, but, more simply, constraints set out by the State in the exercise of its powers, given by itself to itself. Thus intended, such constraints may be viewed as limits of the supremacy of public authorities, but they do not constitute individual rights. In other words, liberties would be also rights without own object[13].

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the Italian point of view, F. Benvenuti, *Il processo costituzionale amministrativo e tributario*, now in *Scritti giuridici* (2006) 2727, who claims that "la nuova Costituzione ha fatto addirittura del cittadino il punto centrale dell'intera comunità in quanto il cittadino esprime con la propria attività, sommata a quella di tutti gli altri cittadini, il senso e il valore della collettività nazionale"; M. Fioravanti, *Art. 2. Costituzione italiana* (2017) 124, who affirms that fundamentals rights "hanno rovesciato il rapporto tra libertà e potere".

[10] B. Constant, *La libertà degli antichi, paragonata a quella dei moderni* (2005; original lecture 1819).

[11] Y. Gaudemet, *Etica e diritto: la deontologia del giurista*, in Diritto pubblico (2015) 713-722.

[12] O. Ranelletti, *Concetto e contenuto giuridico della libertà civile,* in *Scritti giuridici scelti*, I (1992; original edition 1899) 207. W. Gasparri, *"Il punto logico di partenza". Modelli contrattuali, modelli autoritativi e identità disciplinare nella dogmatica dell'espropriazione per pubblica utilità* (2004) XI, exactly says that "la differente definizione del «punto logico di partenza», il diverso equilibrio e la diversa sintesi, volta per volta, tentata tra le ragioni del diritto di libertà nelle sue varie forme e quelle del potere pubblico, determinò [nel periodo dello Stato liberale] - e continua tuttora a determinare – i diversi modelli teorici di ricostruzione della relazione tra soggetto privato e amministrazione pubblica".

[13] P. Laband, *Das Staatsrecht des deutschen Reiches* (1911; original edition 1876-1882). See also Vivien, A.F.A Vivien, (1852). *Etudes administratives*., 1852, pp. 16

This strand (which may be called authoritarian) in public law is contrasted by those who argue that "the modern state stands as a representation of the people and, in light of its democratic foundations, is placed in the service of the people"[14]. Nevertheless, others considers people as a net (a canvas or a textile). For someone this metaphor implies that people are worth more than the sum of the individuals (just as the net is not the sum of the threads)[15]. Accordingly, the relation between people and singular individual would be as the relationship between the forest and the tree. There is the forest even if a tree dies. Differently, I think that if you pull out a thread of the net, for instance a fishing net, you lose the whole net.

The doubts concerning the traditional way to conceive public authority concern also the debate about the administrative act[16]. The contrast between authority and liberty does not appear to be convincing. The reason is, that the relationship between public administration and individuals is governed by the principle of equality and must, therefore, be conceived as an equal relationship *under* the law, while discretionary power is a sort of political power related to the democratic circuit *beyond* the law[17].

3. The Persisting Usefulness of the Paradigm

For the reasons just set out, the authoritarian strand in public law is not acceptable. However, this does not necessarily imply that the paradigm focused on the relationship between public authority and individual liberty is useless. Its contemporary usefulness seems to depend on the democratic deficit inherent within current legal systems.

There are two sides of the coin: one is internal to the nation-State, while the other is external, and is related with the EU. From the first point of view, the phrase "the rule of law is in crisis" has

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ff., who claimed that the State and the Public Treasury "doivent passer avant le citoyen".

[14] M. Loughlin, *Foundations of Public Law* (2010) 435. See also D. Sorace, *Diritto delle amministrazioni pubbliche. Una introduzione* (2018) 19.

[15] P. Grossi, *Nobiltà del diritto* (2008) 82.

[16] R. Villata, – M. Ramajoli, *Il provvedimento amministrativo* (2006) 2.

[17] L. Ferrara, *Individuo e potere. In un giuoco di specchi*, in Diritto pubblico 11 (2016, supplemento).

become a recurrent, almost stale, statement[18]. From the other point of view, in the European Union especially, the rule of law is showing worrying concessions[19]. The truth is that the democratic deficit of EU is not an accident but the original program[20]. Precisely from the viewpoint of the EU, we might first consider that no process of state building can be imposed and achieved without placing the subject (the individual and/or the person) at the centre. In other words, no political unification is possible if EU law and the effectiveness of its implementation do not find their *raison d'être* in the protection of individual rights[21]. Nor could there be any social or economic cohesion without the unequivocal recognition of the principle of substantive equality. It is this principle which requires a reconsideration of monetary, banking and financial market unification to fiscal unification, as in the case of joined-up budget policies.

The conflict between authority and freedom worsens if the powers traditionally exercised by representative democracies are transferred to supranational, international and transnational organizations on which individuals have little or no control. Thus, in the context of the European Union, the persistent deficit of political-democratic representation (just downsized by the Lisbon

[18] On the law crisis, amongst many others, see M. Dogliani, *Il principio di legalità: dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima*, in Diritto pubblico 1 (2008); S. Fois, *La crisi della legalità* (2010). Recently, L. Bessenlink – K. Tuori – G. Halmai – C. Pinelli *The rule of law crisis in Europe,* in Diritto pubblico 267 (2019).

[19] L. Saltari, *Le amministrazioni europee. I piani d'azione e il regime dell'attività* in L. De Lucia - B. Marchetti (eds.), *L'amministrazione europea e le sue regole,* cit. at 1, 124.

[20] R. Bin, *Critica della teoria dei diritti* (2018) 76.

[21] The goal of guarantee, therefore, would prevail on the principle of the *effet utile* in the interpretation and enforcement of EU law. On the relationship between liberal setting and functional setting in EU law see M. Savino *I caratteri del diritto amministrativo europeo,* in L. De Lucia - B. Marchetti (eds.), *L'amministrazione europea e le sue regole*, cit. at 1, 231 ff.; M.P. Chiti, *Diritto amministrativo europeo* (2011) 530 ff. Least recently, J. Weiler, *Eurocracy and distrust: some question concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities*, in 61 Washington Law Review 1103 (1986); J. Coppel – A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, in 29 Comm. Mkt L. Rev. 669 (1992).

Treaty) is noteworthy.[22] Moreover, the influence that the lobbies exercise over decision-making processes is remarkable. Even if they are regulated, they provide a glimpse into the "dark side" of business. Occupying centre stage is the role played by technocracies, including agencies and not majoritarian institutions[23], from the moment that "technical rules also present intrinsic political value" (underlined, from the European Central Bank's perspective, by the quantitative easing program or by the case of outright monetary transactions, situated on the crossroads between monetary and political/economic decisions [24]). It's disputed and disputable that those independent or not majoritarian authorities exercise neutral powers or apply the rules of the art[25]. It's not by chance, therefore, that it may be said: "Good-bye, Montesquieu"[26].

The crisis of the rule of law is even more visible in Eastern Europe, in countries like Hungary and Poland where some measures taken by the legislative and executive branches have undermined the independence of judiciary power.[27] However,

[22] On the democracy deficit, among many others, R. Bellamy – D. Castiglione, *Il deficit democratico e il problema costituzionale*, in P. Costa - D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica* (2002). There is also who claims that "l'Unione Europea non è una democrazia" R. Dahrendorf, *Libertà attiva. Sei lezioni su un mondo instabile* (2005) 109. Researching different legitimations of European Bodies and Institutions, J. Black, *Constructing and contesting legitimacy and accountability in polycenric regulatory regimes*, in LSE Working papers (2/2008).

[23] M. Loughlin, *Foundations of Public Law,* cit. at 14.

[24] C.J.E.U. (Grand Chamber), 6/16/2015, C-62/14, as known, has thought that O.M.T. programme formed part of the monetary policy.

[25] On the political character of the same money, recently, F. Morosini, *Banche centrali e questione democratica. Il caso della Banca Centrale Europea* (2014).

[26] B. Ackerman, *Good bye, Montesquieu*, in S.R. Ackerman - P.L. Lindseth - B. Emerson (eds.), *Comparative Administrative Law* (2019) 38.

[27] See, for instance, M. Aranci, *Il Parlamento europeo ha votato: attivato l'art. 7, par. 1, TUE nei confronti dell'Ungheria,* in *www.eurojus.it* (9/17/2018); Id. *I recenti interventi della Corte di Giustizia a tutela della Rule of Law in relazione alla crisi polacca*, in European Papers (4/2019) 271; F. Casolari, *The Respect of the Rule of Law within the Legal Order of the European Union: A Drama in Two Acts*, in Diritto pubblico comparato europeo online (4/2016). See also C.J.E.U. (Grand Chamber), 6/24/2019, C-619/18; European Commission for Democracy throught Law (Venice Commission), Opinion n. 943/2018, *Hungary - Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules* www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e.

there is also much to be said about Western Europe. Suffice it to mention the changing relationships between legislative and executive, the opaque role of social medias and the rise of both populism and nationalism.

Three other recent trends should at least be mentioned. The first concerns technocracy, viewed from a different angle; that is, the role of the courts, as opposed to representative institutions, in the definition of constitutional principles[28]. The second problem, for which the traditional dialectic relationship between authority and liberty may be reconsidered is I.C.T. How can we fail to take into account the warning of Kissinger who affirms that in the internet age "individuals turn into data, and data become regnant"?[29] Even more so it is not possible to overlook on the increasing role of algorithms in the making of administrative and judicial decisions in which people have no or not enough control, so much that there is an "algorithmic authority" facing the individual[30]. Last but not least, the current relevance of the authority-liberty paradigm emerges if we consider the processes of immigration and for instance the matter of the residence permits and expulsion of foreigners (having no role in the foundation of public power)[31]. If we look at the recent events in the Mediterranean Sea, clearly individual lives are at risk.

[28] See, amongst others, C. Fusaro, *Rappresentare e governare. Da grande regola a tallone d'Achille del governo parlamentare* (2015) 51-53, who argues that "se si lascia l'attuazione dei principi costituzionali *solo* o *prevalentemente* a giudici e corti costituzionali, se si accetta […] che ogni scelta si riduca alla formulazione di ragionevoli composizioni tra principi giuridici, che ogni decisione si traduca in pur equi e ragionevoli bilanciamenti di principi e di valori affidati ai tecnici del diritto […] si rischia così di annichilire il senso stesso della rappresentanza e della sovranità popolare"); Bin, 2018. See also the array of papers published by the review *Diritto pubblico* since 2016.

[29] H.A. Kissinger, *How the Enlightenment ends*, in *www.theatlantic.com* (2018).

[30] For the expression quoted (used in a partially different meaning), C. Shirky, *A Speculative Post on the Idea of Algorithmic Authority,* in www.shirky.com/weblog/2009/11/a-speculative-post-on-the-idea-of-algorithmic-authority (2009); on the general matter, S. Civitarese, *Umano troppo umano. Decisioni amministrative automatizzate e principi di legalità*, in Diritto pubbico (1/2019) 5; G. Avanzini, *Decisioni amministrative e algoritmi informatici* (2019).

[31] In this sense, G. Rossi, *Saggi e scritti scelti di Giampaolo Rossi*, II. (2019) 890.

4. Conclusion

In sum, and in spite of the non-linearity of the remarks made concerning the authority-liberty paradigm [32], three conclusions may be drawn from them:

a) historically, the natural setting of the authority-liberty paradigm is that of the nineteenth century, that is to say the period in which peoples did not have the sovereignty;

b) during the twentieth century, within the constitutional democracy of Western States, there was really a contrast between authority and liberty, at very least in so far as the latter belongs to individuals;

c) the paradigm can nonetheless still be useful for understanding the limits of law and democracy and the new challenges of the global and technological era.

[32] Just as the story of liberties and individual rights: see R. Bin, *Critica della teoria dei diritti,* cit. at 20, 146.