Legitimate expectations in European and Italian law

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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, *Vertrauenshutz 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

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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 *Vertrauenshutz*, coherently with the dominant tradition of public law thought in Italy, Merusi argued that in our legal order the protection of legitimate expectations wad 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 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 *Vertrauenshutz* 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 *Vertrauenshutz* 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 *noyeau 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.