

A POST-MODERN ADMINISTRATIVE LAW?

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1. INTRODUCTION

In recent times, the world of the law has begun to express an interest in the paradigm of post-modernity¹.

This paradigm has been used in various legal disciplines such as philosophy of law, history of law, constitutional law, civil law, criminal law and procedural law².

¹On postmodernism as a heuristic or spiritual category cfr. U. Eco, Postille to *Il nome della rosa*, Milan, 1983, 528.

²Cfr. G. MINDA, *Postmodern Legal Movements. Law and Jurisprudence at Century's End*, New York, 1995. *Teorie postmoderne del diritto*, 2001, Bologna, 408 ff.

There is essentially one reason for this interest on the part of legal culture in the post-modern paradigm. The role it assigns to the state is fundamental: if modernity is characterised by the hegemony of the state as centre of power and as centre of law, postmodernism seeks to free itself from the “regulatory and dominating action of the state”³.

The main post-modern theories of law are born in the United States. Think of the *Law and Economics* -considered by most as a post-modern movement⁴-, the so-called CLS (*Critical legal studies*), the feminist legal theory, the *Law and Literature* movement and the theory of racial difference (*Critical race theory*)⁵.

In Italy initially two branches of the law have reflected on the concept of postmodernism: legal interpretivism and the history of law.

Legal interpretivism has a pre-legal basis that is philosophical in the widest sense. The so-called “philosophical preliminary question” has conditioned the constructive models of modern legal science. According to the paradigm of modernity: 1) each state regulatory system was designed as complete; 2) case law was not considered a source of law; 3) and lawyers were deprived of responsibility and creativity⁶.

Instead the post-modern paradigm marks a new way of operating in legal thinking; the novelty lies in abandoning “*la mistica di ogni ontologismo*” (the mystique of each

³ B. DE SOUSA SANTOS, *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, New York/London, 1995; cfr. also P. GROSSI, *Mitologie giuridiche della modernità*, Milan, 2007, III ed.

⁴ N. MERCURO and S. G. MEDEMA, *Economics and the Law: From Posner to PostModernism and Beyond*, Princeton University Press, 2006, II ed.

⁵ G. MINDA, *Teorie postmoderne del diritto*, cit., 141 ff.; D. KENNEDY, *Comportamenti strategici nell'interpretazione del diritto*, in J. DERRIDA and G. VATTIMO (editors), *Diritto, giustizia e interpretazione*, Rome-Bari, 1998, 249 ff.

⁶ R. ORESTANO, *Del “post-moderno”, della scientia iuris e di altro*, in *Foro it.*, 1982, V, pp. 8-9 of the extract.

ontology), "*gli ordinati sistemi sostanzialistici*" (the ordered substantialist systems) e "*un mondo di essenze*" (a world of essences)⁷.

The history of law has also approached postmodernism because the historical level offers the most appropriate perspective to signal certain phenomena, such as the overcoming of the legal monopoly of the state and the overcoming of law itself as the only source for a legal system⁸.

But gradually the post-modern category started to exert a fascination for all the other branches of law.

The exception to this, however, has been administrative law. Administrative law has never taken on the post-modern paradigm and, as a result, has not drawn from it any useful indications for reflecting on the contemporary.

This is the point of departure. In light of this we will attempt to demonstrate that administrative law is truly a world apart: in some respects administrative law is still pre-modern (paragraph 2); in other respects it is seeking a permanent ongoing modernisation that it never achieves (paragraph 3); and in others it is constitutively post-modern (paragraph 4).

2. PRE-MODERNITY AND ADMINISTRATIVE LAW

⁷ R. ORESTANO, *Del "post-moderno"*, cit., 11, 13. But cfr. also D. KENNEDY, *A critique of Adjudication (fin de siècle)*, Harvard Univ. Press, 1997, 346 ff., spec. 348 ff.

⁸ P. GROSSI, *Novecento giuridico: un secolo post-moderno*, in *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 3 ff.; ID., *Il diritto in Italia, oggi, tra modernità e post-modernità*, in www.associazionedeicostituzionalisti.it; ID., *Sulla odierna "incertezza" del diritto*, in *Giust.civ.*, 2014, 921 ff.

The expression “post-modern” is a slippery one and very diverse meanings have been attributed to it.

The term post-modern was originally used in 1934, in the context of poetic experimentation and referring to Latin American poetry, by the Spanish critic Federico de Onís, in his *Antología de la poesía española e hispanoamericana. 1882-1932*. Later it was used in a historical context by Arnold Toynbee, in his monumental work *A Study of History* (12 vols., 1934-1961)⁹. Since the 1950s, the term post-modern spread and was applied in various cultural fields, such as, for example, fiction, cinema and architecture¹⁰.

In any case, postmodernism cannot be understood as a synonym of contemporary. With its prefix “-post”, the term post-modern contains a sense of “afterwardness” and therefore also contains the sense of a contrast to the modern. The term post-modern, as has been acutely noted, “houses the enemy within its walls” insofar as it evokes precisely what it would like to overcome, namely modernism; consequently there are as many interpretations of the post-modern as there are of the modern¹¹.

Between modernity and post-modernity there is not only a temporal division, but also profoundly ideological and existential.

⁹For these references cfr. P. PELLEGRINO, *Introduzione alla cultura del postmodernismo giuridico*, Roma, 2012, 13.

¹⁰Cfr. G. CIANCI (editor), *Modernismo/Modernismi. Dall'avanguardia storica agli anni trenta e oltre*, Milano, 1989; F. CASETTI, *L'occhio del Novecento. Cinema, esperienza, modernità*, Milano, 2005; C. JENKCS, *Storia del Post-modernismo*, Milano, 2014.

¹¹ J. HASSAN, *The question of postmodernism*, in *Performing Arts Journal*, 16, vol. VI, no. 1, 1981, Italian translation in VARIOUS AUTHORS., *Postmoderno e letteratura: percorsi e visioni della critica in America*, Milano, 1984, 109; U. MATTEI and A. DI ROBILANT, *International style e postmoderno nell'architettura giuridica della nuova Europa*, in *Riv.crit.dir.priv.*, 2001, 90, nt. 9.

This fissure stems from antithetical visions of humanity, society, reality and science.

According to the philosopher Lyotard, who coined the term post-modern, the paradigm of modernity is characterised: by the desire to build systems, theories, all-absorbing interpretations; by the project to explain the world through the application of uniform principles; by confidence in rationality, objectivity, the positive value of science and technological intervention and all the other ideas of the Enlightenment¹².

Instead, the post-modern condition is characterised by abandoning the pretence of founding a unique sense of the world starting from metaphysical, ideological or religious principles, and by opening up to precariousness.

“Nella cultura postmoderna ... la grande narrazione ha perso credibilità ... la crisi del sapere scientifico, i cui sintomi si sono moltiplicati dalla fine del XIX secolo, non nasce da una proliferazione casuale delle discipline scientifiche che sarebbe a sua volta effetto del progresso delle tecniche e dell'espansione del capitalismo. Essa è il prodotto dell'erosione interna del principio di legittimazione" (In post-modern culture ... the grand narrative has lost its credibility ... the crisis of scientific knowledge, the symptoms of which have mushroomed since the late-nineteenth century, is not born from a random proliferation of scientific disciplines that would in turn be affected by the advancement of the techniques and expansion of capitalism. It is the product of the internal erosion of the principle of legitimacy)¹³.

In Italy these ideas spread and develop thanks to Vattimo, who elaborates the notion of "pensiero debole" to describe the abandonment of the powerful legitimacies. "Il pensiero debole" (weak thought) is "una metafora" (a metaphor) and "un paradosso" (a paradox), "è un modo di dire provvisorio, forse anche contraddittorio" (it is a provisional, perhaps even

¹² M. HORKHEIMER and T.W. ADORNO, *Dialettica dell'Illuminismo*, Italian translation, Torino, 1971, III ed.

¹³ J.-F. LYOTARD, *La condition postmoderne*, Paris, 1979, Italian translation *La condizione postmoderna. Rapporto sul sapere*, Milano, 1981, 69-72).

contradictory way of saying), "ma segna un percorso, indica un senso di percorrenza: è una via che si biforca rispetto alla ragione-dominio comunque ritradotta e camuffata" (but it marks a path, it indicates a direction: it is a road that forks in relation to reason-domain which is retranslated and disguised), "un equilibrio difficile tra la contemplazione inabissante del negativo e la cancellazione di ogni origine, la ritraduzione di tutto nelle pratiche, nei giochi, nelle tecniche localmente valide" (a difficult balance between the endless contemplation of the negative and the cancellation of every origin, the retranslation of everything in locally valid practices, games and techniques)¹⁴.

Not all the authors who have dealt with this cultural paradigm have used the specific term post-modern; for example, Anthony Giddens uses the term "late modernity"¹⁵. Ulrich Beck "reflexive modernity"¹⁶, Marc Augé "supermodernity"¹⁷, but, also in the opinion of Zygmunt Bauman, postmodernism remains the preferable definition¹⁸.

In the specific legal field, there are various concrete manifestations that can be traced to the modernity's paradigm. Of these, the best known and most important is codification¹⁹.

¹⁴ G. VATTIMO, *Filosofia al presente*, Milano, 1990, 10-11.

¹⁵ A. GIDDENS, *Le conseguenze della modernità*, Bologna, 1994.

¹⁶ U. BECK, *La società del rischio: verso una seconda modernità* (1986), Roma, 2000.

¹⁷ M. AUGE, *Non-lieux. Introduction à l'anthropologie de la surmodernité*, Parigi, 1992.

¹⁸ Z. BAUMAN, *Il disagio della postmodernità*, Milano, 2002.

¹⁹ P. CAPPELLINI, *Il codice eterno. La Forma-Codice e i suoi destinatari: morfologie e metamorfosi di un paradigma della modernità*, in *Codici. Una riflessione di fine millennio*, Milano, 2002, 11 ff., 14, 51, 53, 65; R. SACCO, *I codici civili dell'ultimo cinquantennio*, in *Riv.dir.civ.*, 1993, 311 ff.; G. TARELLO, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, 10, 20, 35.

In my opinion, codification includes every other manifestation of the paradigm of modernity: from the exclusive control of law by the state to the fulfilment of a systematic ideal. According to Reimann and Arbor, “the classical understanding of law ... displayed six characteristic features and expressed itself in the ideal of codification”; the six characteristics in question being “national uniformity, systematic structure, clear demarcations, authoritative rules, autonomous law and law as decision-making by rules”²⁰.

Codification embodies the essence of legal modernity. Codification stakes a claim to order, universality, objectivity, rationality and certainty. According to codification the interpretation model is a discovery of a pre-existing meaning and "la logica della fattispecie" dominates²¹.

Codification represents a critique to the degeneration of the law, too flattened on the peculiarities of the case. The technical form of codification has the scope to reduce complexity, strengthening institutions and personifying the core values of a certain topic²².

In this respect, according to me, Administrative law is placed before true legal modernity because it has not gone through a true process of codification²³.

Administrative law lacked the perspective of codification, in the sense that never there was a clear and general recognition of the need to put full order in a highly irrational

²⁰M. REIMANN and A. ARBOR, *The American Advantage in Global Lawyering*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 78, no. 1 (2014), 1 ff., spec. 6 ff.

²¹ P. GROSSI, *Novecento giuridico: un secolo post-moderno*, in *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 3 ff.; ID., *Il diritto in Italia, oggi, tra modernità e pos-modernità*, in www.associazionedeicostituzionalisti.it.

²² G. TARELLO, *Storia della cultura giuridica moderna*, cit., 29; P. CAPPELLINI, *Il codice eterno*, cit., 21 ss.

²³ M. RAMAJOLI, *A proposito di condificazione e modernizzazione del diritto amministrativo*, in *Riv.trim.dir.pubbl.*, 2016, 347 ff.

positive reality. In this perspective, Administrative law lacked a fundamental experience of modernity²⁴.

The only general administrative law was adopted in 1990 (law no. 241/90). It contains provisions on administrative procedure and its framework is diametrically opposed to the spirit of codification. The law states general principles -such as proportionality, legitimate expectation, impartiality- that administrative authorities and courts have to apply in the singular cases.

The numerous sectoral Administrative law codes (dealing with the environment, cultural heritage, expropriation, public contracts and so on) cannot properly be considered codes in the traditional sense, insofar as they are more comparable to simple consolidations.

According to the Consiglio di Stato, Adunanza generale, parere 25 ottobre 2004, n. 10548, in *Giorn.dir.amm.*, 2005, 73 ss., Sectoral codes can be clearly distinguished from the classic codes, because they are aimed at the realisation of “micro-sistemi legislativi, dotati di una razionalità più debole ... incentrati su logiche di settore, di matrice non esclusivamente giuridica” (legislative micro-systems, equipped with a weaker rationality ... focusing on sectoral logics, of a not exclusively legal matrix)²⁵.

²⁴ About the lack of a General Part in Administrative Law see also M. RAMAJOLI, *L'esigenza sistematica nel diritto amministrativo attuale*, in *Riv.trim.dir pubbl.*, 2010, 347 ss.

²⁵ Consiglio di Stato, Adunanza generale, parere 25 ottobre 2004, n. 10548, in *Giorn.dir.amm.*, 2005, 73 ff.; on this theme cfr. B.G. MATTARELLA, *La codificazione del diritto: riflessioni sull'esperienza francese contemporanea*, in *Riv.trim.dir pubbl.*, 1993, 1035 ff.; ID., *Codificazione e Stato di diritto*, in *Riv.trim.dir.proc.civ.*, 1998, 365 ff.; ID., *La codificazione in senso dinamico*, in *Riv.dir.dir pubbl.*, 2001, 709 ff., and the bibliography cited therein. For the distinction between codification and consolidation cf. M. E. VIORA, *Consolidazioni e codificazioni. Contributo alla storia della codificazione*, Torino, 1967, 2-42.

Also the recent Code of Administrative Procedure isn't a traditional code. It is not a closed and exclusive system, but one, which responds to a different logic, because it is not assigned a role intended to fill every gap in the legislation.

The Code of Administrative Procedure is the only code of procedure that begins in its opening articles with general principles (the principle of effectiveness of protection and the principle of due process), and the principles are "norme senza fattispecie"²⁶.

They are the result of elaboration in case law and, in a circular process, case law directly decides disputes by resorting to the general principles it created itself.

The principles have been used by case law to introduce new rules (for example, certain rules on territorial jurisdiction), or even new types of action (above all, the action of "adempimento").

Administrative law therefore has lacked a fundamental part of the experience of modernity, it has been missing a code and the systematic construction of a general part of the law. Therefore, by this logic, Administrative law is still pre-modern, as far as I'm concerned.

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²⁶ Cfr. A. PAJNO, *La giustizia amministrativa all'appuntamento con la codificazione*, in *Dir.proc.amm.*, 2010, 118 ff.; L. TORCHIA, *Il nuovo Codice del processo amministrativo. I principi generali*, in *Giorn.dir.amm.*, 2010, 1117 ff.; on the phenomenon of the case-law creation of trial rules cf. M. RAMAJOLI, *Giudice competente nel caso d'impugnazione di più atti connessi*, in *Dir.proc.amm.*, 2011, 733 ff.

However Administrative law is not at all satisfied with the pre-modern condition in which it finds itself: it is forever in search of a modernity that it is unable to attain ²⁷.

The aspiration to modernity – that is, modernisation – is particularly evident in the current legislative production of substantial Administrative law.

The most recent legislation uses the idea of the modernisation of the Public Administration as a kind of mantra. This means that modernisation is a hope, an optative, a stretching towards a goal that has still to be achieved.

The reform of the Public Administration, i.e. the complex Law no. 124 of 2015 (known as the Madia Law) and its related delegated legislative decrees, was presented by the Government as a means to modernise and strengthen the competitiveness of the country.

The reform is driven by savings and efficiency criteria. Beneath it lies the image of the Public Administration and Administrative law as scourges to be liberated from, a plague for both businesses and individuals.

The high level of regulatory and bureaucratic costs, together with the low quality of services and administrative performance, are supposedly factors in the decline of Italian competitiveness.

But this is not a new idea. It had already appeared in the reforms of the 1990s, especially in so-called Bassanini reforms (in particular in Law no. 59 of 15 March 1997, and Law no. 127 of 15 May 1997).

²⁷ On this theme cfr. S. CASSESE, *New paths for administrative law: A manifesto*, in *I.CON*, 2012, 603 ff., with a powerful emphasis on the European and global dimension of current Administrative law.

These too aimed at introducing a series of measures in order to reduce and simplify administrative rules and procedures, again with a view to achieving greater efficiency and lower public spending.

But those reforms were all abandoned or died a death and so they are constantly proposed or taken up again.

In numerous other occasions, the legislator tried to realize his aspiration to modernize administrative action, although not expressly use the term "public administration reform".

However, observing these concrete reforms or attempted reforms or failed reforms records, the impression is a series of contradictory phenomena: as we talk about the sunset of unilateral administrative power, on the one hand, contractual solutions, (such as the new agreements between administration and private bodies provided by art. 11 of law no. 241/90) are not used and, on the other hand, new models of simplification (as new article 19 of law no. 241/90) generate many issues asking for turning back to the previous authoritative models.

Moreover, the legislator strengthens the procedural rights and guarantees of public participation in order to support administrative accountability and the rule of law, but at the same time the legislator adopts provisions, according to which the infringement of procedural rules does not always lead to the unlawfulness of the adopted administrative act.

The above seems to suggest that the relationship between citizens and government can never be modernised and the ultimate reason, deeper than this, is typically post-modern.

In my opinion, looking to the relation between State, public administration and Administrative law, an ambivalence is evident: a minimal State is required, but at the same time also an innovative State, the government is perceived as an authority, but at the same time also as guarantee, Administrative law is depicted as eccentric, but also as protective special rights. The ongoing relation, therefore, cannot be reduced to a single ordering point of view.

4. POST-MODERN CONDITION AND ADMINISTRATIVE LAW

The post-modern paradigm rejects the unity and different forms of artificially imposed orders. It emphasises the ambiguous and contradictory part of rationality, it positions itself critically in terms of science and technology, and proposes a concept of knowledge without those foundations which are at the base of the modern era's project²⁸.

It represents therefore a "pensiero debole" (weak thinking) that abandons the powerful legitimacies, certainties, absolute values and "una fondazione unica, ultima, normativa" (a unique, final, normative foundation)²⁹.

As exemplified by Hassan's famous table, the dialectic between modernity and postmodernism is played out by a series of opposed pairs: purpose/play; design/chance; transcendence/immanence; universal/special; eternity/transience; continuity/discontinuity; definiteness/indefiniteness; creation/decreation; totalisation/deconstruction; centering/dispersal; genre/text; art object/happening; signified/signifier; master code/idiolect; root/rhizome; depth/surface; narrative/anti-narrative; Grande Histoire/Petit Histoire; type/mutant; strong identity/role playing; paranoia/schizophrenia; origin/difference; cause/track³⁰.

²⁸ P. SIMONETTI, *Postmoderno/Postmodernismi*, in *Status Quaestionis*, 2011, 127 ff., 138.

²⁹ G. VATTIMO, *Le avventure della differenza*, Milano, 1988, 8.

³⁰ I. HASSAN, *The Dismemberment of Orpheus: Toward a Postmodern Literature*, University of Wisconsin Press, 1982, 1 ff.

Gilles Deleuze and Félix Guattari have used, as an icon of postmodernism, the image of the rhizome, the stem of perennial herbaceous plants, which bears leaves and is divided into internodes. Therefore typical of postmodernism is a diffusive, latticed structure, with no beginning or end, no internal hierarchies, and which has infinite possibilities for expansion³¹.

Transported into the legal field, the post-modern paradigm involves the denial of objective truth (or law) and an ambivalence of values³².

In this respect, Administrative law is constitutionally post-modern: a duplicity of ordering viewpoints is intrinsic to the structure of Administrative law. These ordering viewpoints prevent any settling on a final and exclusive foundation that has a claim to absoluteness.

These two views are, on the one hand, the idea of the public interest as a higher dimension, from a qualitative point of view, than the interests of the individual; and, on the other, the idea that the rule of law should impose the guarantee of the interests of individuals as individuals, even if this goes against the public interest.

Both perspectives aspire to govern the Administrative law's logic and in every era and in some form there has been an unresolved tension between public and individual interests³³.

For this reason Administrative law is not only constitutionally post-modern, but Administrative law also needs to be conceived of with post-modern categories in the philosophical sense.

³¹ G. DELEUZE and F. GUATTARI, *Mille plateaux*, Parigi, 1980, Italian translation *Millepiani*, Roma, 1987, 645.

³² M. REIMANN and A. ARBOR, *The American Advantage*, cit., 32 ff.

³³ M. RAMAJOLI, *L'esigenza sistematica*, cit., 384 ff.

A technical detail: the categories referred to in the text belong to the heuristic dimension of postmodernism³⁴ and should not be understood in a historical sense. In the field of historiography, for Administrative law too it would be more productive to refer to the distinction between modern and contemporary, following the basic division of human history into ancient, medieval, modern and contemporary³⁵.

So, Administrative law is post-modern and needs to be conceived of with heuristic post-modern categories.

Administrative law cannot be reduced to a single ordering point of view and for this reason constantly it calls into question the interpreter's responsibility.

Every day it has to propose new balances in the relationship between citizens and Public Administration³⁶.

This highlights the legal science's central role, as well as the political sense – in a wider setting – of legal scholar's activity³⁷.

Very often Administrative law's scholars fall into a typically modern temptation: they make absolute and radicalise one side of the relationship between citizens and Public Administration, and deny any dignity to the other side of the relationship.

³⁴ Cfr. footnote 1.

³⁵ On which cfr. T. DETTI and G. GOZZINI, *Storia contemporanea: l'Ottocento*, Milano, 2000, 1-2.

³⁶ R. ORESTANO, *Del "post-moderno"*, cit., 11 ff.

³⁷ G. TARELLO, *Storia della cultura giuridica moderna*, cit., 15 ff.

Actually post-modern paradigm's best legacy is the overthrow of the traditional conceptual hierarchies. This overthrow is functional not to create new hierarchies, but to show the impossibility of any hierarchy's existence ³⁸.

The only way "per sottrarsi alla dicotomia" (to escape the dichotomy) is to "uscire dalla linea" (step out of line). As the post-modern paradigm teaches, we must not choose between "disordine o costruzione" (disorder or construction), but choose "disordine e costruzione" (disorder and construction) at the same time ³⁹.

6. WEB SITES

www.feugiat.it - Etiam eu velit

www.imperdiet.it - Morbi sapien eros

www.eleifend.it - Quisque vel nulla nisl

www.pharetra.it - Cras est odio

www.accumsan.it - Camera dei deputati

www.fringilla.it - Nam ac dui nisl

www.tristique.it - Ut lobortis consectetur

www.tincidunt.it - Fusce iaculis facilisis mollis

³⁸ G. VATTIMO, *Fare giustizia del diritto*, in *Diritto, giustizia e interpretazione*, cit., 280, and J. DERRIDA, *Force de loi*, partial translation in *Diritto, giustizia e interpretazione*, cit., 16 (complete translation Torino, 2003, cit.).

³⁹ G. GIORELLO, *Prefazione*, to M. CERUTI, *La fine dell'onniscienza*, Roma, 2014, 8.