MASSIMO SEVERO GIANNINI AND HIS RESTLESS ADMINISTRATIVE LAW

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1. LIFE AND WORKS

MASSIMO SEVERO GIANNINI has been one of the greatest legal scholars of the 20th century. He was born in 1915 and died in 2000. Therefore, he experienced almost entirely the events of the last century, its substantial breaks with the past, its contradictions and tragedies.

As an academic, he began teaching administrative law in the University of Sassari, in 1936. Then he taught in the Universities of Pisa and Perugia and finally at Sapienza University in Rome[1].

Immense is his scientific production. Among his main contributions, the following must be recalled: two monographs of 1939, the first on the interpretation of administrative acts[2], and the second on discretionary power[3]; the work written in 1940 on the history of administrative law theories[4]; his first handbook of administrative law,

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[1] For more details on Giannini's life, see S. CASSESE, Giannini, Massimo Severo, *in: Dizionario biografico degli italiani*, Roma, Istituto dell'Enciclopedia Italiana, 2012.

[2] M.S. GIANNINI, *L'interpretazione dell'atto amministrativo*, Milano, Giuffrè, 1939.

[3] M.S. GIANNINI, *Il potere discrezionale della pubblica amministrazione*, Milano, Giuffrè, 1939.

[4] M.S. GIANNINI, Profili storici della scienza del diritto amministrativo, *in: Studi sassaresi*, XVIII, 1940; and then, with an Afterword of 1973, *in: Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2/1973.

which came out in 1950[5]; various versions and editions of the handbook until the one published in 1993[6]; a book of 1977 on administrative law and economic regulation[7]; a book of 1986 on the transformations of the State and public administration[8]. His articles and essays (more than 500) have been collected in ten volumes[9].

This paper will be concerned with some of the crucial characteristics of his works.

2. METHOD

First of all, the method he used. Giannini was a pupil of Santi Romano, a very prominent Sicilian scholar who came from the school led by Vittorio Emanuele Orlando, one of the founders of the Italian theory of administrative law. Therefore, the heritage that Giannini received derived from the classic methodological approach, which was based on a rigorous dogmatic construction of the main concepts of administrative law. But there has been a crucial difference between Giannini's method and the classic one. In fact, Vittorio Emanuele Orlando had thoroughly banned the social sciences approach from administrative law theory. Santi Romano attenuated this position. Giannini refused it and opened the juridical research to the social sciences.

But he never fell in a mere descriptive attitude. On the contrary, he was successful in perfectly combining the conceptual approach with the sociological one and kept a strong legal precision in defining the organization and the activity of the administrative agencies and also the main features of judicial review of administrative

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[5] M.S. GIANNINI, *Lezioni di diritto amministrativo*, Milano, Giuffrè, 1950.

[6] M.S. GIANNINI, *Diritto amministrativo*, Milano, Giuffrè, 1993, (2 volumes).

[7] M.S. GIANNINI, *Diritto pubblico dell'economia*, Bologna, Il Mulino, 1977, last edition 1995.

[8] M.S. GIANNINI, *Il pubblico potere. Stati e amministrazioni pubbliche*, Bologna, Il Mulino, 1986.

[9] M.S. GIANNINI, *Scritti*, Milano, Giuffrè, 2000-2008.

action. Thanks to this combination, Giannini abandoned the previous wooden and abstract dogmatic and always founded his theories on a sound realism: he wrote that what is needed is "a precise analysis of the real world of public administration"[10]. Through this realistic analysis, Giannini showed, in various works, that administrative law is in continuous transformation.

For instance, he underlined the substantial change, occurred between the end of the 19th century and the beginning of the 20th century, from a State based on a unique social class, the *bourgeoisie*, to a multi-class State, mainly due to the enlargement of the right to vote and to the establishment of political parties and trade unions. This brought about that the new emerging social groups asked for a wider public intervention in the economic and social affairs in order to obtain more welfare and to limit private property and freedom of contract. The public intervention was mainly assured by public administration and administrative law that experienced - as a consequence - a substantial change: for example, with the nationalization of railways, the municipalization of local services, and tighter administrative controls on private property and enterprise.

In addition, Giannini stressed the radical change which occurred during the fascist regime in the Thirties, when a "dirigistic" State emerged and the administrative regulation of the economy reached huge dimensions. For example, substantial interventions in agriculture were put into action; enhanced supervisory powers were given to the Bank of Italy; a system of public enterprises was established after the crisis of 1929; a new regime of internal and external trade emerged.

Many other changes of administrative law have been underlined in Giannini's works, such as the enlargement of participatory guarantees for citizens and enterprises within the administrative proceedings, which took place in the second half of the 20th century.

Summing up, through his realistic method an always-in-motion administrative law appeared.

And what about conceptualization and theory? Did changes in rules and norms of administrative law entail the use of new con-

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[10] 1973 Afterword to the 1940 work above mentioned.

cepts and theories? Even concepts and theories must be revised to better understand the legislative and factual changes. For instance, Giannini - as will be more widely said afterwards - formulated a new concept of administrative discretionary power; built new theories of administrative organization; and framed many different types of administrative proceedings: declaratory or prescriptive, or leading to authorizations, concessions, takings and sanctions.

To conclude on this point: Both rules and theories are continuously changing. Giannini's administrative law is a restless law.

3. Pluralistic Conception

Coming to the main contents of Giannini's theories, his pluralistic conception of law and institutions deserves a special mention. The classic doctrine had stressed that law essentially consisted of rules stemming from legislation and judicial decisions. Therefore, law was mainly a product of the State through its Parliament and Courts of justice.

Following in part Santi Romano - particularly his book on the legal system[11] - Giannini held that law, more and earlier than in rules, resides in institutions, conceived as social entities, associations, public and private organizations. For instance, Roman law existed since the first villages of the city of Rome were established and since the kings' powers were exercised, even though rules had not been issued. The idea that law lies in institutions led to overcoming the connection between law and the State, since the State is only one of the many institutions. The conclusion was a pluralistic conception of law and institutions. Giannini developed this conception and applied it to administrative law. Hence relevant theoretical consequences derived.

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[11] S. Romano, *L'ordinamento giuridico*, [1917-1918], Firenze, Sansoni, 1946 (2nd edition with notes by the author).

4. Consequences of Pluralism: Administrative Structures; Discretionary Power; Dialogue between Public Administration and the Administered Subjects

First, in Giannini's works, public administration has been considered as consisting of various types of structures: ministries, agencies, different forms of quangos, public corporations, independent authorities. Therefore, an institutional pluralism emerged. It must be underlined that the classic doctrine had considered administrative organization as a mere factual reality, which was to be analyzed by social scientists and was not included in administrative law. Giannini has been one of the first authors that gave legal dignity to administrative organization. Sabino Cassese has deeply developed this conception.

Secondly, the pluralistic idea also brought about that there is not a single and unique public interest. Instead, there is a plurality of public and collective interests. All the interests that are relevant in a specific case must be taken into consideration by the administrative agency entitled to adopt a decision on that case. Giannini's theory of discretionary power is based on this premise. The classic doctrine - mainly in Germany and Italy - had underlined that administrative discretion consisted of a choice on whether to adopt or not an order or a rule with the aim of pursuing the public interest in the implementation of statutory provisions. Summing up, the public interest had been deemed to be unitary and the administrative decision had been considered more as a measure that executed legislative norms than as a complex evaluation.

On the contrary, Giannini - in his monograph of 1939, already mentioned - held that discretionary power consists of balancing the various and different interests that are at stake before the administrative agency which has to decide. This pluralistic idea of public interest and discretionary power was radically innovative. It gave public administration a much larger role than the previous theories: public administration was no longer seen as a mere transmission belt of legislative power, a mere executive branch, but as a widely

autonomous power which balanced complex and conflicting interests.

In the second half of the 20th century, analogous pluralistic theories of public interest and discretionary power have been developed in other legal experiences, such as the American and the British ones, even though independently of Giannini's work. The "interest representation" model, which Richard Stewart has proposed in his seminal article of 1975[12], is a clear example of a pluralistic reconstruction of the public interest in administrative law. And Denis Galligan's book of 1986 on discretionary power reaches conclusions which resemble the theory that Giannini formulated in the late Thirties[13]. This confirms the modernity of the Italian mentor.

Another consequence of pluralism must be stressed. Since administrative agencies have to take many different interests into consideration, they cannot always act with unilateral and authoritative measures, but must base their decisions on a dialogue with those who represent the various interests. This is the reason why Giannini paid much attention to the participatory guarantees granted to citizens and enterprises within the administrative decision-making process, and to public contracts and other negotiated measures. Participation and negotiation: two important tools of dialogue.

In particular, public contracts, according to Giannini, differ from the private ones only as to their object - which has to do with public goods or works or services - but not as to the rules that are applied. These rules are mainly those contained in the civil code, which lays down the ordinary law of contracts. In this respect, Giannini is quite close to the common law tradition: public administration widely applies the ordinary law of the land rather than a special set of rules. Great is the distance from the French, German, and Spanish doctrine, according to which public contracts are largely governed by special rules of public law.

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[12] R.B. STEWART, The Reformation of American Administrative Law, 88 *Harvard Law Review* 1669 (1975).

[13] D. J. GALLIGAN, *Discretionary Powers: A Legal Study of Official Discretion*, Oxford, Clarendon, 1986.

5. Administrative Law and the Economy; and Administrative Law Dysfunctions

A further aspect has to be highlighted. Since his essay on the history of administrative law theory (1940), Giannini stressed the importance of the legislation concerning the intervention of public powers in the economy. He wrote that administrative law scholars had almost ignored the statutes on public corporations, on the nationalization of banks, and on various forms of administrative regulation of markets, which were highly relevant. Since the Forties, Giannini often dealt with topics concerning the public regulation of markets. In particular, his book of 1977 on public law and the economy, already cited, was concerned with themes such as public property and enterprise, public goods, public regulation of private economic activities. He has been a pioneer in this respect. Nowadays, public regulation of markets has become one of the most important parts of administrative law.

Moreover, Giannini always paid much attention to the dysfunctions of public administration and administrative law. He highly contributed to building an administrative law system, but, at the same time, he ruthlessly criticized several limits of administrative law. For instance, many times did he underline the continuous risks of an excessive political influence on administrative action; the ineffectiveness of many administrative controls on private activities; and frequent deadlocks in administrative decision-making. But he never limited himself to destructive criticism; instead, he always proposed the necessary remedies to overcome the drawbacks.

6. Beyond the Academy

Giannini was not only an academic, but also a barrister, a statesman, a frequent writer of articles for the press. Not even in performing these activities did he abandon his role of professor.

In the opinions he gave in the legal profession, the conclusions containing the answers to the questions were always based on an attentive reconstruction of the historical evolution of the legal as-

pects under examination and on rigorous theoretical premises. His opinions are short treatises of administrative law.

As a statesman, he was - *inter alia* - head of the Cabinet at the Ministry which was established in 1945 to give support to the Assembly that approved the Republican Constitution of 1948: in fulfilling this commitment he gave relevant contributions to the construction of the constitutional text[14]. And, above all, he was Minister of public administration in 1979-1980. In this role, he presented in Parliament a Report on public administration[15], which analyzed administrative structures and functions and proposed a series of concrete recommendations for reforms. Again, the Report resembles an academic essay in administrative law.

Even when writing for the press, Giannini did not leave his academic attitude. His articles in newspapers are not written in a journalistic style, but are precious small pieces of legal literature. Starting from concrete particular cases - such as a statute just entered into force, or a strike in a public office, or a license granted or refused - he carried out concise but rigorous analyses of the legal aspects, showed the drawbacks, identified the remedies. In his articles on newspapers, his critiques of constitutional and administrative dysfunctions were particularly sharp and severe. He spoke of a collapse of the institutions, that needed to be vigorously treated. Many of these critiques highlighted dysfunctions that have not been cured so far.

7. GIANNINI'S LEGACY

What is the legacy left by Giannini?

As to the legal theory, he literally abandoned the wooden dogmatic of the classic doctrine and built a dynamic conceptualization based on the inclusion of other sciences in the legal discourse. A

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[14] More generally, on the contribution that Giannini gave in preparing the Constitution, see S. CASSESE, Giannini e la preparazione della Costituzione, *in: Rivista trimestrale di diritto pubblico*, 3/2015.

[15] Rapporto sui principali problemi della pubblica amministrazione, 1979, *in: Rivista trimestrale di diritto pubblico*, 2/1982.

partially similar tendency has recently emerged in the German doctrine, mainly due to Schmidt-Assmann's works[16].

As for the construction of administrative law, Giannini stressed that this law initially resembled "a bunch of institutions and rules which seems to go ahead without any direction and target"[17]. His work definitely contributed to transforming this original chaos into a system of norms and principles. A system that is not static, but always subject to changes.

As to the relationship between public administration, on the one hand, and citizens or enterprises, on the other hand, he showed that, in a pluralistic context, a dialogue is indispensable. This dialogue has been gradually achieved through participatory administrative procedures and through negotiated measures which have in many cases replaced unilateral measures.

As to the rules of which administrative law is composed, they are not always - according to Giannini - special rules in relation to private law, but more and more based on the latter. Diffusion of public corporations and of public contracts ruled by the civil code is a clear example of this trend. Scholars and case law are still reluctant to follow this way and to admit a large use of private law in administrative organization and action. In the day-by-day practice of public administration, however, private law has gained a wide dimension.

Finally, as has been said, Giannini's work stressed the growing importance of administrative institutions and rules in regulating markets. An aspect that has been recently emphasized by some administrative law scholars, such as Sabino Cassese, who has pointed out this relevant role of public administrations also in the global arena[18]; and by institutional economists and historians, according to

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16 E. SCHMIDT-ASSMANN, *Verwaltungsrechtliche Dogmatik*, Tübingen, Mohr Siebeck, 2013.

17 M.S. GIANNINI, Diritto amministrativo, *in: Enciclopedia del diritto*, vol. XII, Milano, 1964.

18 See, for example, S. CASSESE, *The Global Polity. Global Dimensions of Democracy and the Rule of Law*, Sevilla, Global Law Press, 2012.

whom the wealth or the failure of nations mainly depend on their institutions[19].

To conclude. What emerges from Giannini's work is the image of a restless administrative law, that is subject to continuous changes as to its norms and theories[20].

There also emerges the image of a great mentor, who has been capable of being, at the same time: realistic, in the conception of administrative law; systematic, in the construction of it; heretical, in his criticism of the system's failures; constructive, in the indication of remedies. A great richness: extremely rare in legal doctrine.

[19] See D. ACEMOGLU / J. ROBINSON, *Why Nations Fail. The Origins of Power, Prosperity and Poverty*, London, Profile Books, 2012; and N. FERGUSON, *The Great Degeneration. How Institutions Decay and Economies Die*, London, Penguin, 2012.

[20] A similar approach can be retrieved in Jean Rivero's work: see, for example, his definition of *droit administratif* as an "open and perfectible" law (J. RIVERO, *Droit administratif*, Paris, Dalloz, 1983, p. 521).