LAUDATIO: PROF. JEAN-BERNARD AUBY

GIACINTO DELLA CANANEA*

THE STATE AND ITS "STRANGE BEDFELLOWS"

THANK you very much. It is a great pleasure to be here. Let me begin by saying a few words about Jean-Bernard Auby: there will be, so to say, a Shakesperean prologue. This will be followed by three brief acts. In the first, the State has centre stage. The second and the third acts go in the opposite direction, because other "creatures" emerge, both within and outside the State. Finally, as is customary for this literary genre, there will be an epilogue.

1. A SHAKESPEREAN PROLOGUE

Jean-Bernard Auby is a well-known lawyer, a public lawyer if you follow established academic conventions. He has studied with very distinguished scholars of the previous generation. He has taught in prestigious law schools and elsewhere. He "has made, and continues to make, a great contribution to Administrative law, and Comparative Administrative law"[1]. He has had several pupils among lawyers.

* Full professor of Administrative law, Bocconi University (Milan), Italy; Member of the Advisory Committee of the Italian Consiglio di Stato

[1] P. CRAIG, Challenges for Administrative Law, *in:* J.-B. AUBY (ed.), *The Future of Administrative Law*, Paris, LexisNexis, 2019, p. 77. For further details, see G. DELLA CANANEA, Jean-Bernard Auby e il diritto pubblico europeo, *in:* G. DELLA CANANEA / J. ZILLER (eds.), *Il diritto pubblico europeo. Liber amicorum Jean-Bernard Auby*, Torino, Giappichelli, 2018, p. 7.

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He has several friends in the European community of public lawyers, including the author of this piece. My earliest memory of Jean-Bernard goes back to when we met in Spetses, the nice Greek isle where all this began, and we started our conversation. One could say that we have never stopped it.

Before discussing Auby's scholarship, it is apposite to say few words about the role of lawyers. I will begin with the mixed feelings vis-à-vis lawyers that were shown by someone who knew them quite well, Shakespeare. In the *Merchant of Venice*, Portia rescues Antonio, who would have otherwise suffered from sacrifice, but by way of a trick. She comes disguised not just as a man but as a "young lawyer". While she initially reiterates the importance of "justice" to be given by "the strict court of Venice", she argues that mercy should be given to the merchant[2]. Moreover, before the court she plays with the words "a pound of flesh" and eventually wins her case by referring to the exact language of the law. The question – a moral question – that arises is whether an unjust argument may win through eloquence and technicalities.

This may suggest that Shakespeare despised lawyers or at least that it did not trust them. Apparently, such interpretation might be reinforced by an oft-quoted line from *Henry VI*[3]. The full quote is "*The first thing we do, let's kill all the lawyers*" and it is pronounced by Dick the Butcher, one of the participants in Jack Cade's rebellion against Henry VI. He suggests to others that one of the ways they can improve the country is to kill all lawyers. In this way, he and the other rebels can take over the country. This suggests another interpretation, that is, if the first priority of murderous revolutionaries is the elimination of lawyers, then – it may be inferred – lawyers are the ones who defend the rule of law against tyrants. They stand as the shields of civilised society[4].

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[2] SHAKESPEARE, *The Merchant of Venice*, Act IV, Scene I.

[3] SHAKESPEARE, *Henry VI*, Part 2, Act IV, Scene 2.

[4] For further discussion, see B. CORWIN / M.C. NUSSBAUM / R. STRIER (eds.), *Shakespeare and the Law. A Conversation among Disciples and Professions*, Chicago, University of Chicago Press, 2013.

This is perhaps an idealised vision of lawyers, yet it is one that holds true when we consider the role lawyers play in countries where several fundamental freedoms are not protected and, *a fortiori*, within authoritarian regimes, some of which are unfortunately flourishing not only outside Europe but even within it. It is a vision of law as integrity, in the sense that legal propositions can hold true not simply because they flow from authority, but because they follow from the principles of justice, such as due process of law, reasonableness, and proportionality. It is not fortuitous that Jean-Bernard Auby has often examined the rights that individuals have against public authorities. But it is now time to conclude the prologue and to consider more closely the role of public authorities, in the following three acts.

2. Act I – At the Play's Opening the State Takes Centre Stage

For a better understanding of how Jean-Bernard Auby comes from a certain cultural environment, whilst departing from the established course, it is important to be aware of the paramount importance that the dominant (but perhaps diminishingly important) strand in public law devoted to the State.

For this strand, which is in effect first of all a philosophical strand, public law is – to borrow this term from Christian doctrine of essence or substance – "consubstantial" with the State. In former times, this positivist and nationalist strand found expression in a sort of metaphysical view of the State, which was viewed as the only source of law and power. Not only the State, each State could and did claim such monopoly, but only the State could have it, at the expense of all other public bodies. As observed by Alexis de Tocqueville, other human communities, with a long history, such as municipalities were put under "*tutelle*", that is, a more or less strict surveillance[5].

More soberly than the dominant positivist approach, in his *General Theory of the State*, Georg Jellinek held that the State was a human

[5] A. de Tocqueville, *L'ancien régime et la Révolution* (1856), book II, chapter 3, Paris, Gallimard, 1967, p. 121 ("*l'administration tenait toute la France en tutelle*").

community (population) that (successfully) claimed the monopoly of the legitimate use of physical force within a given territory[6]. His realist approach, among other things, allowed him to observe that in some circumstances two empires claimed authority over a certain territory and called this "*co-imperium*".

Internally, the States enjoyed vast prerogatives, not limited to the exercise of police powers, broadly intended. The prerogatives of the States included making of the law and dispensing with its observance, adopting unilateral administrative acts and withdrawing them and making and unmaking contracts with individuals and business enterprises. They even included resolving disputes involving public authorities, as happened when ministers rendered justice. In brief, as observed by Olivier Dubos, "*le droit administratif est fils de la théorie de l'Etat*"[7].

Subsequently, many of these privileges have been either eliminated or reduced. However, this strand of public law theory surfaces in cases where it is asserted that certain executive decisions are non-justiciable (*actes de gouvernement*, *atti politici*) because they deal with the essential interests of the State.

3. Act II – Fellow Creatures within the State

Even though at the beginning of the twentieth century the State was the *pouvoir public par excellence*, it was not so by definition: Santi Romano, in particular, emphasised this in his essay "Oltre lo Stato" (that is, beyond the State)[8]. Indeed, as noted earlier, other public bod-

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[6] G. Jellinek, *Allgemeine Staatslehre*, Berlin, O. Haring, 1900. On Jellinek's liberal approach, see J. von Bernstorff, Georg Jellinek and the Origins of Liberal Constitutionalism in International Law, *in: Gottingen Journal of International Law* (4), 2012, p. 659.

[7] O. Dubos, Le droit administratif contre la théorie de l'Etat, *in:* J.-B. Auby (ed.), *The Future of Administrative Law*, *cit*., p. 135.

[8] S. Romano, Oltre lo Stato (1917), *in: Scritti minori*, Milano, Giuffrè, 1950, p. 345. This work, the academic prolusion that Santi Romano gave in

ies existed since centuries, including municipalities and counties, and had some common traits with the State (they administer public interests and are thus entrusted with authoritative powers). In Shakespeare's words, it might be said, they were "fellow creatures". Jean-Bernard Auby has devoted several studies to them[9].

Let us begin with those that exercise legislative powers. After 1945, other levels of government emerged, including *Laender* in Germany and Regions in Italy. Spain went one step further when it established various types of regional governments. The UK, too, devolved functions and powers to Scotland and other areas. The emergence of this intermediate level of government between the locality and the centre (called the meso government)[10] constitutes one of the most important institutional changes in the modern Western state in the past forty years. Important not simply in terms of the power it wields but because it has radically altered the character of the State, and even called into question the very nature of the unitary State. Jean-Bernard Auby has not hesitated to acknowledge the new state of things, as is shown by his interest for the recent Spanish vicissitudes.

Meanwhile, he has given a fresh new look at the legal realities which existed since long time; that is, cities. Under French and Italian current law, the cities are generally considered as mere "creatures of the State" with several administrative functions, but with powers constrained by the State. In his book Auby has shown that this vision is limited and misleading. Sophisticated in its analysis of the underlying processes leading to a new role of *cities* (among other things, our author has devoted various studies to "*smart cities*"), the book examines various dimensions of the role of cities, with a freshly new perspective[11]. A French reviewer wrote that "*il s'agit du seul manuel*

Florence in 1917, was followed by his most well-known essay, *L'ordinamento giuridico*, Firenze, Sansoni, 1946, 2nd ed., which has subsequently been translated into French, German, and eventually English: *The Legal Order*, edited by M. CROCE, London, Routledge, 2018.

[9] J.-B. AUBY, *Droit des collectivités locales*, Paris, PUF, 2009, 5th ed.

[10] L. J. SHARPE (ed.), *The Rise of Meso Government in Europe*, London, Sage, 1993.

[11] J.-B. AUBY, *Le droit de la ville. Du fonctionnement juridique des villes au droit à la Ville*, Paris, Lexis Nexis, 2016, 2nd ed.

dédié à cet objet"[12]. This is true only in part, because the book is more than a textbook and still has no equivalent in other legal cultures.

4. Act III – Of "Strange Bedfellows" beyond the State

For the last Act, I need the support not only of the Bard, but also of an author from my nation, Pirandello: of Shakespeare, because in *The Tempest* he located a weird character, Caliban, in a place with "strange bedfellows" (the full citation is "misery acquaints a man with strange bedfellows")[13]; of Pirandello, because in his famous and controversial play *Six Characters in Search of an Author* (written and first performed in 1921) he showed the difficulties of six strange people who interrupted a play, affirming to be unfinished characters in search of an author to finish their story[14].

The strange bedfellows of the State are the European Communities and their heir, the European Union, on the one hand, and global regulatory regimes, on the other hand. Consider the EU. It has a population of 448 million inhabitants, but their main status is still national citizenship, which is the pre-condition for the citizenship of the EU. It has several institutions, but its lacks unity, in the sense in which individual States have it. It has an elected Parliament, but this lacks the power to tax. The Union's rules and decisions affect the life of individuals and social groups, as well as the conduct of business enterprises, but it does not have the power of coercion through police and security forces. This power still belongs to the individual Member States, though they must exercise it consistently with the principles established by the Union, as well as with the values upon which it is founded, including democracy, liberty and respect for the rule of law and fundamental rights. Finally, the EU rules a vast territory, but does not own a part of it. Consider now global regulatory regimes.

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[12] J. Betaille, Récension à Jean-Bernard Auby, Droit de la Ville, *in: Revue juridique de l'environnement*, 2013, p. 385.

[13] Shakespeare, *The Tempest*, Act II, Scene II.

[14] L. Pirandello, *Sei personaggi in cerca d'autore* (1921), Torino, Einaudi, 2014.

They are numerous, and operate in a wide range of areas, but they lack unity, their legitimacy does not flow directly from individuals, and their rules often lack legally binding effects. Sometimes, fundamental global functions are discharged by private bodies, for example in the field of internet's domain names. In brief, to the eyes of many observers the EU and, *a fortiori*, global bodies are "irregular", to borrow the words that Pufendorf used after the Peace of Westphalia to criticise entities that differed from the States (*res publica irregularis*)[15].

In other European legal cultures, where for one reason or another the State had not the same fundamental importance it had in France, the study of the new European and global principles and institutions became systematic. Amongst these writers Sabino Cassese and Paul Craig are undoubtedly preeminent in other legal cultures. Their works are well known to lawyers and are often quoted well beyond the academic environment.

By way of contrast, although French administrative law has exerted considerable influence on the creation and evolution of the administrative law of the European Community, until some years ago few well-known French authors sought to make sense of it. Among those authors were both Jean Rivero, who demonstrated – well before Alan Watson published his essay on legal transplants (1974) – the existence of borrowings between the various legal cultures in the field of public law[16]. But the dominant strand in public law did not pay attention to the emerging principles and institutions of EC administrative law. Its existence was either denied or confined to very few areas, such as the management of staff and financial resources. Still few years ago, members of the élite of public law professors – those

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[15] S. PUFENDORF, *De Statu Imperii Germanici* (1667), Eng. transl. by M. SILVERTHORNE, *The Political Writings of Samuel Pufendorf*, Cambridge, Cambridge University Press, 1991, p. 141-144.

[16] J. RIVERO, Les phénomènes d'imitation des modèles étrangers en droit administratif (1972), *in: Pages de doctrine*, Paris, LGDJ, 1980, t. 2, p. 459, on which see E. AGOSTINI, La circulation des modèles juridiques, *Revue internationale de droit comparé* (42), 1990, p. 461. WATSON's essay is *Legal Transplants. An Approach to Comparative Law*, Athens and London, University of Georgia Press, 1993, 2nd ed.

having a tenure in Paris, Bordeaux and few other universities – refused to acknowledge the existence of some general principles of law common to the legal orders of the Member States, such as legitimate expectations. *A fortiori*, the emerging principles of global administrative law (for instance, in the field of foreign investment) in France were analysed almost exclusively by the few specialists of "*droit international des affaires*".

There are two ways in which Jean-Bernard Auby has joined what could be called the battlefield of ideas: first, with his works and, second, with the establishment of networks. Writing in the 1990s, he suggested that the influence of EC/EU law was greater than most French public lawyers thought at that time. At the end of that decade, he was the first well-known writer who thoroughly examined the global standards concerning, among other things, public contracts. Subsequently, he devoted a book to the emerging global administrative law[17]. Interestingly, though such writing was innovative, the argumentation was fashioned into lines of reasoning that were acceptable for orthodox public lawyers.

Auby also called other public lawyers, or lawyers *tout court*, to work on these matters. The *Traité de droit administratif européen*, edited with J. Dutheil de la Rochère, provides an excellent example[18]. Most of the authors of the various chapters have close connections with him, either as colleague or pupil, and to some extent they form a fairly distinctive group in the academic environment, for its manifest trans-national character. Although the core of this group is quite small in comparison with national associations of scholars, the influence of their ideas is widely felt. Their works are quoted by many in France and elsewhere.

In so doing, Jean-Bernard has interpreted his role in our play similarly to how Pirandello's (imaginary) author did in the *Six Characters in Search of an Author*. When Pirandello's piece was first performed

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[17] J.-B. AUBY, *La globalisation, le droit et l'État*, LGDJ, 2020, 3rd ed.; the previous edition has been translated into English: *Globalisation, Law and the State*, Oxford, Hart, 2018.

[18] J.-B. AUBY / J. DUTHEIL DE LA ROCHÈRE (eds.), *Traité de droit administratif européen*, Bruxelles, Bruylant, 2022, 3rd ed.

in Rome, the public was split between those who affirmed that it was a chef-d'oeuvre and those who harshly criticised it as a fool's product ("*Manicomio!*"). In London, the Lord Censor banned its performance in 1925. But the passing of time made justice for this play and for its author, who in 1934 was awarded the Nobel prize for literature. In our case, some of Jean-Bernard Auby's works may have not been duly considered in his country, but they have been praised by many others in the vast world.

5. EPILOGUE

In contrast with the once dominant strand in public law, administrative law is not limited to the State. Nor is it characterised only by privileges and immunities. In fact, public authorities can use a variety of instruments, including those that are available to private bodies. However, in contrast with more recent works which are based on the assumption that administrative law is just the product of some authoritarian theories, public authorities must discharge functions and powers that differ in nature, not simply in degree, from those of private bodies. They are correspondingly subject to much more stringent – or wholly different – duties of legality, due process, rationality or proportionality, and transparency. There is, therefore, the necessity to make sense of these powers and duties. There are, in addition, various conceptual and pragmatic issues. Consequently, "we still need the insight of Auby"[19]. That is why, "friends, Romans, countrymen, lend me your ears", we are here – to borrow again from Shakespeare – to praise Jean-Bernard Auby[20].

[19] P. CRAIG, Challenges for Administrative Law, *cit.*, p. 80.

[20] SHAKESPEARE, *Julius Caesar*, Act III, Scene II.