DIRITTIFONDAMENTALI.IT
rivista on-line

Dirittifondamentali.it - Fascicolo 1/2019
Data di pubblicazione – 26 marzo 2019

"Dura lex, sed lex", yes or no?
Regarding a recent, relevant case of announced civil disobedience in Italy[*]

di
Adriana Ciancio[*]

1. Introduction

The title of this contribution stresses the need to figure out whether the duty to comply with laws under any conditions, traditionally summarized within civil-law systems in the latin motto "dura lex, sed lex" (i.e. "hard law, but law"), in the current legal framework of democratic states could tolerate being – we might say – "softened" because of the alleged superior demand of protecting fundamental values, if threatened by the norms. In particular, the main issue to be assessed is whether first and foremost human dignity could be considered a supreme principle of each contemporary democracy, able – in certain circumstances – to prevail over contrasting rules set by the Parliament. Or, conversely, if compliance with the laws, expression of the usual parliamentary centrality in the constitutional organization, is a principle that under the rule of law still cannot stand any exception unless a Constitutional Tribunals' ruling of unconstitutionality, even in the current context of "globalized" protection of human rights.

[*] Paper written to be presented at the Inaugural Conference of ICON-S Germany "Law and Order" (Humboldt University Berlin - March 28-29, 2019).

[*] Full Professor of Constitutional Law at University of Catania (Italy), Department of Law.

2. A recent example of civil disobedience in Italy

The issue is not purely hypothetical as shown by a recent case, which sprouted in Italy few months ago, when a few Mayors, following the initiative of the Mayor of Palermo (in Sicily), declared the will to suspend the application of some norms established by the law n.132/18, implementing the so-called "security – decree" n. 113/18, approved by the current Government under the proposal of the Interior Minister, Matteo Salvini.

Among other rules, they disputed the new regulation of asylum seekers' registration at the municipalities' registry offices that is a precondition to benefit from many public services and social rights, health care above all. The Mayors justified their announced act of this sort of "civil disobedience" by claiming that the new procedure would undermine some immigrants' fundamental rights, implicitly affirming the unconstitutionality of the law. In this context, it is worth underlining that in Italy municipalities are not allowed to directly appeal against national laws which is a possibility only given to Regions. Indeed, some regional Presidents immediately afterwards announced the intention to apply to the Constitutional Court against the same law as it is supposed to be in contrast with several constitutional norms and principles[1]. Indeed, not only do specific rules seem to have been violated, such as art. 32 that guarantees to everyone the right to health as fundamental, but also the general provision (set by art. 10.2) that obliges the legislator to conform to international norms and treaties in order to regulate foreigners' legal status. More in general, national and regional laws' validity is subordinated to compliance with both European law and international obligations (art. 117.1). Actually, the aim of protecting human dignity and fundamental rights is nowadays set down by several international and supranational documents

[1] See, among others, S. CURRERI, *Prime considerazioni sui profili d'incostituzionalità del decreto legge n. 113/2018 (c.d. "decreto sicurezza")*, in *federalismi.it*, 2018, n.22; S. PIZZORNO, *Considerazioni, anche di costituzionalità, su alcune delle novità introdotte dal decreto legge n. 113/2018 (c.d. decreto sicurezza) in tema di diritto d'asilo*, in *Forum di Quaderni costituzionali*, 2018, n.10; A.M. CECERE, *Le iscrizioni anagrafiche per gli stranieri richiedenti protezione internazionale dopo il d.l. n. 113 del 2018, il cd. Decreto-Salvini. Quando il legislatore demagogicamente orientato disorienta l'amministrazione pubblica*, in *federalismi.it*, 2019, n.3.

binding the national legal systems[2]. From this perspective, it would be enough to refer to Art. 2 TEU that establishes the European Union is founded on the respect both of human dignity and of human rights as shared values among member states. Furthermore art. 1 of the EU Charter of fundamental rights (which thanks to the Lisbon Treaty has been given the same efficacy as the Treaty itself) declares that "human dignity is inviolable. It must be respected and protected".

3. Issues of general public law concern

Therefore, the Italian Mayors' statement poses several questions to public-law scholars. In general – as anticipated in the introduction – first and foremost the doubt related to the possibility itself of civil servants at large not to applying unconstitutional laws before (and independently from) a Constitutional Court's declaration of illegitimacy[3], considering that they are members of the executive power, obliged under the rule of law to respect laws in order to fulfill the principle of separation of powers[4]. Furthermore, the Italian Constitution obliges those with public functions to take an oath before exercising them, when requested by the norms (Art. 54.2). In particular, Mayors are compelled to pronounce an oath formula that explicitly requires compliance with the laws. From this point of view, the consequence might even be a criminal prosecution against the "rebel" Mayors for breach of the law[5].

On the other hand, it is also worth remembering that the same article of the Italian Constitution obliges all citizens to comply with the duty of faithfulness to the Republic (art. 54.1) that involves the need to observe all its supreme principles[6], including respect for human dignity and protection of fundamental rights, as

[2] See M. CARDUCCI, *La "disobbedienza" dei Sindaci come "intreccio" di doveri "diffusi" di difesa dei diritti?*, in *laCostitutione.info*, 2019.

[3] V. ONIDA, *Pubblica amministrazione e costituzionalità delle leggi*, Milano, 1967.

[4] As recently stressed by M. CAVINO, *Da Riace a Palermo: non tocca ai sindaci giudicare la costituzionalità delle leggi*, in *LaCostituzione.info*, 2019.

[5] Similarly, A. MORELLI, *La "ribellione" dei sindaci contro il "decreto sicurezza": la tortuosa via per la Corte costituzionale*, in *Consulta Online*, 2019, n.1.

[6] See A. CERRI, *Fedeltà (dovere di)*, in *Enc. Giur.*, vol. XV, Roma, 1987, p. 4; and L. VENTURA, *Art. 54*, in *Commentario della Costituzione*, edited by G. Branca- A. Pizzorusso, Bologna, 1994, p. 74 ff.

guaranteed to everybody (art.2) under conditions of equality (art. 3, in the interpretation given by the Constitutional Court).

At the same time, it is well known that the above-mentioned principle of separation of powers is one of the strongest guarantees of fundamental freedoms themselves. Hence it still constitutes a keystone of the rule of law so to be undoubtedly included among the Italian Republic's basic principles.

Therefore, it is a consequential need to further assess if any eventual measures are left to civil servants against those laws that allegedly undermine fundamental rights and human dignity while waiting for the Constitutional judges' ruling.

The interrogative is not banal considering both the referred limits and difficulties in starting the constitutional trial and the length of the trial itself once triggered. For example, to go to extremes, it would be mostly interesting to analyze how they could manage a law that re-established the death penalty against the constitutional prohibition (art. 27.4) while they are awaiting the ruling[7].

4. Civil disobedience as expression of a true right or resistance: an old theoretical dispute

From a theoretical point of view, the issue is not new at all. For a longtime scholars have in-depth enquired about the possibility of referring to individual breaches of laws targeted at defending fundamental principles and values from abuses of the parliamentary majority as a true right of juridical scope rather than only an ethical matter[8]. Thus the doctrine is split between those who deny any legal basis to acts of so-called "civil disobedience"[9] and the opposite conclusion that regards as even "non-existent" laws in contrast with values acknowledged as absolute as human dignity is nowadays considered. To the latter, anyone would be allowed not to comply with those rules, degraded to mere facts[10].

---

[7] As highlighted by A. RUGGERI, *Fonti, norme, criteri ordinatori. Lezioni,* Torino, 2009, p. 28.

[8] See, among Italian scholars, A. BURATTI, *Dal diritto di resistenza al metodo democratico*, Milano, 2007.

[9] See, among others, H. HART, *Der Begriff des Rechts*, Frankfurt am Main, 1973, p. 214 ff.

[10] G. RADBRUCH, *Gesetzliches Unrecht und übergesetzliches Recht*, in Süddeutsche Juristen-Zeitung, 1946, pp. 105-108.

The topic is well-known in the German cultural environment through the conceptual opposition *Recht-Unrecht*[11] and where, especially since the end of WWII, arguments have been brought to both conclusions. Without retracing here the famous distinction between legality and legitimacy[12], civil disobedience has more recently been considered as expression of a right of resistance carried out through "intentionally and formally illegal" acts, nevertheless legitimated by the need to inhibit efficacy to norms that conversely are "only formally legal", having been approved by the Parliament following the procedural rules, but that are substantially "unfair", since they attempt to undermine the basis of the Constitution, as it is the case of those laws that violate the supreme principles on which the democratic order itself lays [13].

It is important to underline that following this opinion, not every breach of any unconstitutional law could be recognized as expression of the ascertained right of resistance, but only violations of those laws attempting to values that might be considered of universal scope since ethically based[14]. But in this way the ultimate justification of the "right" of resistance seems still entrusted to a meta legal element rather than truly rooted in the legal order.

5. A brief comparison between the Italian Constitution and the German Basic Law

Thus, this outcome seems unacceptable to positivists who anyway believe a constitutional basis necessary in order to hold single acts of civil disobedience apt to legally justify breaches of laws[15].

---

[11] In the Italian doctrine, the referred theoretical opposition has recently readdressed by V. BALDINI, *La disobbedienza civile come forma (illegittima?) di resistenza contro la legge ingiusta. La condotta individuale di opposizione tra imperativo etico ed (auto)tutela costituzionale*, in *dirittifondamentali.it*, 2019, 1, spec. p. 12 ff.

[12] C. SCHMITT, *Legalität und Legitimität*, München-Leipzig, 1932.

[13] J. HABERMAS, *Ziviler Ungehorsam – Testfall für demokratischen Rechtsstaat. Wider den autoritären Legalismus in der Bundereoublik*, in *Ziviler Ungehorsam im Rechtsstaat*, III Aufl., Frankfurt am Main, 2015, p. 33 ff.

[14] See J. HABERMAS, *Die Einbeziehung der Anderen*, Frankfurt am Main, 1999, p. 277 ff.

[15] See, among others, R. DREIER, *Widerstandrecht im Rechtsstaat?*, in *Recht – Staat – Vernunft*, 2 Aufl., Frankfurt am Main, 2016, p. 57 ff.

From this point of view, for example, there would be a great difference between the Italian Constitution, on the one hand, and the German *Grundgesetz*, on the other hand, since only the latter, differently from the former, establishes a right of resistance, as set down in Art. 20.4 GG, after the 1968 reform.

Indeed, even in Germany, not all acts of civil disobedience might hold "legal citizenship" – we might say – as acceptable exercise of the right of resistance, but only those behaviors that materialize forms of exceptional opposition to attempts of subverting the constitutional order, within the limits of a criterion of proportionality[16]. Hence, as also ascertained by the Constitutional Tribunal of Karlsruhe[17], resistance should aim at preserving the existing order, being the only way of reaction left when all ordinary means are failing against public powers' acts whose opposition to the legal order is manifest ("*offenkundig*").

So circumscribed, it is easy to understand that the right of resistance perfectly matches with a so-called "self-defending" Constitution, as the German Basic Law, which establishes limits both to political parties ("that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany", art. 21.2)[18] and (even) to fundamental rights in order to prevent them from being exercised in contrast with the Basic Law itself (Art. 18.1)[19].

Conversely, the Italian Constitution, which differently from the German one does not found a so-called "protected" democracy, does not even establish a right of resistance against laws so deeply unconstitutional to attempt to those principles constituting the axiological basis on which the social pact has been built. Indeed, it is well known that the compromise among several political visions of the State was

[16] R. GRÖSCHNER, *Art. 20 IV*, in *Grundgesets Kommentar*, edited by H. Dreier, II, Tübingen, 1998, § 9.

[17] BVerfG, 12.10.1993 "*Maastricht Urteil"* – 2 BvR 2134/92.

[18] For a milder interpretation of those limits, see BVerfG, 17.01. 2017 "*NDP Urteil"* – 2 BvB 1/13, annotated in the Italian doctrine, among others, by A. ZEI, *La nuova giurisprudenza del Bundesverfassungsgericht sull'incostituzionalità dei partiti politici: a volte la democrazia non si difende*, in *Nomos*, 2017.

[19] See K.P. SOMMERMANN, *Art. 20*, in *Das Bonner Grundgestez Kommentar*, edited by C. Stark, II, München, 2000, §337.

reached amid the 1946-47 Constituent Assembly thanks to the common will to react against the fascist dictatorship that led to set, among other principles informing the renewed rule of law, an intense pluralism in all its features (ideological, political, institutional, social), as precondition of democracy[20].

Hence, we are dealing with two different ways to target the same goal, i.e. to prevent the legal order established by both democratic Constitutions from being challenged.

6. Bridging the gap

Notwithstanding the fact that the Italian Constitution's preparatory work rejected the proposal to introduce an express norm declaring both a right and a duty upon each citizen to resist against oppression led through public acts undermining fundamental rights[21], some scholars assume at least an implicit constitutional basis to the right of resistance. It would lay on the necessity of extreme defence of the Italian Republic against attempts of overthrowing the whole democratic order.

In this light, it might be framed the theory that considers the right of resistance an expression of the democratic principle as a form of atypical exercise of popular sovereignty[22]. The lack of explicit provision is explained with the difficulties in foreseeing in advance all the possible circumstances that might solicit resistance, which would make it impossible to regulate the procedure[23]. However, the objection based on the (apparent) breach of the norm establishing that the people exercise sovereignty only "in the forms and limits of the Constitution" (art. 1.2) is prevented considering those constraints effective under the condition that all public powers themselves stick to their respective constitutional boundaries[24].

---

[20] A. BALDASSARRE – C. MEZZANOTTE, *Introduzione alla Costituzione*, Roma-Bari, 1986, p. 68 ff.

[21] As stressed by A. BURATTI, *Resistenza (diritto di)*, in *Dizionario di diritto pubblico*, edited by S. Cassese, Milano, 2007, vol. n. V, p. 5082.

[22] C. MORTATI, *Principi fondamentali, sub Art.1*, in *Commentario della Costituzione*, edited by G. Branca - A. Pizzorusso, Bologna, 1975, p. 32 ff.

[23] See also C. MORTATI, *Istituzioni di diritto pubblico*, VI ed., Padova, 1962, p. 936.

[24] V. CRISAFULLI, *La sovranità popolare nella Costituzione italiana*, in *Scritti giuridici in memoria di V.E. Orlando*, Padova, 1957, vol. n. I, p. 456 f.; and, with slight differences, G. AMATO, *La sovranità popolare nell'ordinamento italiano*, in *RTDP*, 1962, p. 101 ff.

Following this last opinion, the German Basic Law and the Italian Constitution might not be so distant on the topic as it seems at a first sight since both would allow (one expressly, the other implicitly) to resist against laws and, more in general, public acts that challenge the maintenance of the democratic state itself. By the way, it is worth mentioning that, even well before the constitutional reform of art. 20 GG that established the right of resistance, the *Bundesverfassungsgericht* had presumed a right of resistance as guarantee of the stability of the democratic order, when, in the well-known 1956 verdict of unconstitutionality on the *Komunistische Partei Deutschlands*[25], it specified the limits in which forms of political protest should be circumscribed, setting the modalities of its concrete exercise in order to be considered legal.

7. Towards a conclusion

From this perspective, the case resumed as the starting point of this contribution looks different since the "right of resistance" - as just described - appears as a form of so-called "emergency right", collectively exercisable as the ultimate defence against attempts of subversion of the constitutional order[26]; thus in conceptual opposition with the idea of revolution[27].

Conversely, the example initially considered is referred to breaches of laws even deeply unconstitutional, such as those that violate fundamental rights, but not targeted at overturning the democratic institutions and/or at totally abolishing all guarantees for human rights.

Hence, even if it was possible to find a (direct or indirect) constitutional basis to the right of resistance, it would still be necessary to answer to the initial question about which means in full compliance with the rule of law are left to civil servants whilst awaiting the Constitutional Judges' ruling on single laws infringing fundamental rights.

---

[25] BVerfG, 17.08.1956 "*KPD Urteil*" – 1 BvB 2/51.

[26] See, among others, W. WERTENBRUCH, *Per una giustificazione della resistenza*, in *Studi sassaresi*, III, Autonomia e diritto di resistenza, Milano, 1973, p. 330 ff.

[27] A. CERRI, *Resistenza (diritto di)*, in *Enc. Giur.*, vol. XXX, Roma, 1991, p. 7; E. BETTINELLI, *Resistenza (diritto di)*, in *Dig. Disc. Pubbl.*, vol. XIII, Torino, 1997, p. 188.

The situation is also different from the hypothesis of so-called "conscientious objection" when reaction against laws is expressed by exercising a right of which the "disobedient" is the owner. A typical example might be seen in a doctor's refusal to perform an abortion because of religious beliefs. In this and similar circumstances, actions aimed at suspending the laws' application seem legitimate by the exercise of a fundamental freedom of the "resilient"; more specifically in the given example, of the freedom of religion. Hence, it is dissimilar from those situations in which the questioned law in any case does not attempt at a specific fundamental right of the "disobedient", who – rather than in "self-protection"[28] – acts in the name of an important, but indistinct need of respecting human dignity in general.

Therefore, it becomes necessary to guess ways to express civil disobedience other than refusing laws' application as a form of reaction – as seen – hardly fulfilling the rule of law.

Without being able here to run out such a complex issue, this paper aims only at fostering reflection on the topic in order to imagine solutions suitable for adjusting civil servants' will not to apply unconstitutional laws to legal forms to show opposition to power.

From this point of view, resignation or even auto-suspension from functions' exercise, if ever possible, might be regarded as means to protest in defence of fundamental rights and human dignity, perhaps less practically effective, but undoubtedly equally striking than suspending norms' application.

Indeed, this way would have allowed the aforementioned Mayors to avoid executing the disputed laws, strongly demonstrating disagreement with norms approved by the legislator, at the same time without giving up the basis on which the legal order is set under the rule of law.

[28] As addressed, in the Italian literature, by A. PACE, *Problematica delle libertà costituzionali. Parte generale*, II ed., Padova, 1990, p. 80 f.