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Fulvio Cortese

Marco Dani
University of Trento

Francesco Palermo
University of Verona

Back to Government? The *Pluralistic Deficit* in the Decisionmaking Processes and Before the Courts

FULVIO CORTESE,* MARCO DANI,** FRANCESCO PALERMO***

"Yesterday, *law* was such an easy game to play...."

In periods of transition, it is common for lawyers to be asked, in light of an allegedly overriding reality, to critically revisit the table of contents or categories of their discipline. In such periods it is also normal for the scientific debate of the law to be pervaded by a deep sense of uneasiness. The physiognomy of the law is, at least to a certain extent, to drive rather than to follow the evolution of reality. Accordingly, it is a symptom of pathology if reality systematically departs from rules or categories still in force. Nonetheless, law is everything but a stable artifact. Only in the easy cases does its evolution comply with the procedures that the law itself provides for its amendment. In the other cases, namely when the reality constantly deranges the rules or the legal categories and imposes itself as dominant, it is up to the science of the law to decide either if (and how) the traditional categories have to be reinforced or if (and how) they are required to be updated, accommodating the law to the reality.

An example of this uneasiness emerges from the articles hereafter published as a result of a conference held at the Faculty of Law of Trento, Italy, in June 2004. The debate started from the broadly shared assumption that the performances of the traditional domestic circuits of representative democracy are increasingly challenged when a number of actors do not perceive they are properly involved in the regulatory (legislative and administrative) decisionmaking processes and before the courts. As organizers of the conference, we labeled this reality the *pluralistic deficit*, and we asked each of our guests to deal with this issue from the perspective of his or her highly differentiated academic background.[1]

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*Ph.D., University of Trento.

**Research Scholar in Comparative Public Law, Faculty of Law, University of Trento; Emile Noël Fellow at the Jean Monnet Center, New York University School of Law.

***Associate Professor of Comparative Public Law, Faculty of Law, University of Verona.

1. Accordingly, many of the articles reflect the authors' own understandings of the pluralistic deficit, and we are delighted to include this diversity of thought in the symposium.

This variety is reflected in the multiplicity of perspectives through which the theme has been developed. Nevertheless, the ticklish dilemma emerges in most of the contributions between (re)empowering and revitalizing the traditional democratic institutions and political circuits, and devising alternative forms of representation considering a reality where the actors not (or not properly) involved seem to prefer original and often informal practices to influence the decisionmaking with their own interests.

Quite provocatively, we decided that this unresolved tension between the traditional foundations of government and the inexperienced promises of governance could be expressed by the title "Back to Government?" This evocation of a return was intended to reveal the sense of homesickness felt by European continental public lawyers for having lost (inevitably?) some of their certainties in the current, increasing move toward governance-based—as opposed to formal, government-based—solutions.

At the same time, aware as we are that a mere reestablishment of old categories is not only hard to achieve, but also likely to be perceived as regressive, outdated, and ineffective, we did not organize a conference simply to convey nostalgia for a lost world. Critically, we address the issue arguing that government can still return to the point where its core value, the need for a prescriptive legal order, is reinforced. But how can the changes that have occurred in the "underworld" of our legal systems be reflected in a constitutional framework of governance?

Starting from these underlying questions, a number of scholars from different legal disciplines, as well as from different legal traditions, have investigated the evolution of how decisions are made in a number of selected areas of law.

Given the broad scope of the research and the countless possible examples of an increasingly complex system of governing legal and social phenomena through government and governance, we have tried to prepare a rather simple framework for the analysis. Going "back to the basics," we have divided the contents into legislation, regulation and administrative law, and judicial adjudication, and we examine these in the United States, in European Union Member States, and in the European Union itself. By so doing, the emergence of new trends in decisionmaking in the three traditional powers has become rather clear. And this seems to be happening regardless of the profound nature of the analyzed polities, including for what is, perhaps, the last, true nation-state (the United States), for "softened" nation-states such as the EU members, as well as for the supranational, nonstate form of government that is the European Union.

Albeit with considerable nuance between the investigated experiences, all systems and all powers, at least in the western legal tradition, show a shift from a traditional separation of powers toward a shared, overlapping, pluralistic, and consequently more complex decisionmaking process.

The first set of articles deals with the pluralistic challenge facing legislation. It is a rather provocative issue considering that legislation is conceived to be the realm of political sovereignty whose pluralism should coincide with the pluralism of the voters. However, in various fields of law, such as those profoundly shaped by scientific achievement, by ethics, and by the role of actors structurally outside the orbit of political legitimacy, such as the so-called civil society, a number of difficulties arise. From different angles, David C. Williams (Indiana University School of Law—Bloomington), Peter Leyland (London Metropolitan University), Cinzia Piciocchi (University of Trento), Susan H. Williams (Indiana University School of Law—Bloomington), and Francesco Bilancia (University of Pescara) tackle some of the numerous facets of a very intriguing issue.

The second set is devoted to regulation and administrative law, a field that has more experience in accommodating pluralism in terms of participatory rights of individuals and groups. However, the structure, and even the very concept of administration, varies quite remarkably between the U.S., the European, and the continental traditions, as emerges from the papers by Alfred C. Aman, Jr. (Indiana University School of Law—Bloomington), Juli Ponce (University of Barcelona), Fabrizio Fracchia (Bocconi University—Milan), and Stijn Smismans (European University Institute).

The third set focuses on pluralism and decisionmaking in the courts. Here, the analysis is mostly concentrated on the issues of standing, with particular regard to the formal rules of access as well as to the problem of standing in particularly delicate and politically sensitive cases. These features emerge in contributions by Christiana Ochoa (Indiana University School of Law—Bloomington), Luisa Antoniolli (University of Trento), Luigi Malferrari (European Court of Justice), and Serena Baldin (University of Trieste).

We decided to publish the papers by both the speakers and the discussants, as well as some contributions that emerged from the discussion, believing that they might all, in one way or another, stimulate the reader's interest and imagination about these challenging topics.

A feature common to the presented papers is the insufficiency of the traditional, "political" system of democratic representation. Delegation to elected and politically accountable governments is a necessary but incomplete answer to the

pluralistic, intimately nonmajoritarian demands of modern societies. Moreover, the institutional tools experimented with to establish a permanent link between government and pluralistic claims are showing their deficits, as demonstrated by the deep crisis of the corporative bodies for institutional involvement of the so-called civil society, typical of early twentieth-century continental Europe. Examples include the German Councils for Work and Economy under the Weimar Constitution (Art. 165) and the European Economic and Social Committee established under the European Community Treaty (Art. 257).

Neither can informal networks of lobbyists for special interests be a solution because they unavoidably represent only highly organized, strong interests, which have access to relevant information and economic resources. Above all, such an informal system of interest representation is neither assisted by guarantees in favor of the interests nor confers to the actors equal chances of participation.

The answer to the pluralistic deficits of contemporary societies can thus be institutional only to a limited extent, yet at the same time it requires a fundamental institutional link. Institutions (government) remain the backbone of decision-making and are, therefore, not only the first and most relevant step in the process, but also the only solid foothold for the lawyer to cling to in times of methodological uncertainty (Back to Government). But backbones, however necessary, are not enough. The dry bones need to be clothed by flesh, to paraphrase the famous definition of constitutional conventions under the common law.

This seems to be the focal point of the debate. Conventional, unformalized rules cannot be a credible answer to the crisis of government. Because pluralism increases the potential for conflict, there is a need for legal, and not merely political, guarantees. As John H. Ely has argued, "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."[2] Therefore, there is a need for constitutional solutions to a constitutional deficit. Using Madison's words, "A dependence on the people is no doubt the primary controul [*sic*] on the government; but experience has taught mankind the necessity of auxiliary precautions."[3] What are these auxiliary precautions? What are the legal guarantees of governance that can help contemporary pluralistic societies overcome the dilemma between the pluralistic deficit of government and the deficit of legal guarantees of governance?

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2. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 183 (1980).
3. THE FEDERALIST No. 51, at 262 (James Madison) (Buccaneer Books 1992).

If a common tentative answer can be formulated on the basis of the following papers and the debates that emerged during the conference, it might sound like this: "participation as standing" or "procedural democracy." Inevitably more complex decisionmaking is based on the backbone of government and assisted by participatory rights in legislation, regulation and administrative law, and adjudication. It is a participation that is not only institutional, and not assisted by merely political guarantees, but a self-selecting choice of individuals and groups to be involved according to procedural rules.

Participation, in other words, can be seen as a procedural guarantee for the pluralistic demands to have standing, though to a different degree in the processes of decisionmaking, implementation, and adjudication. Thus, "Back to Government?" Yes, but only if the legal category of "government" is much different and much more complex than it has been in the past.