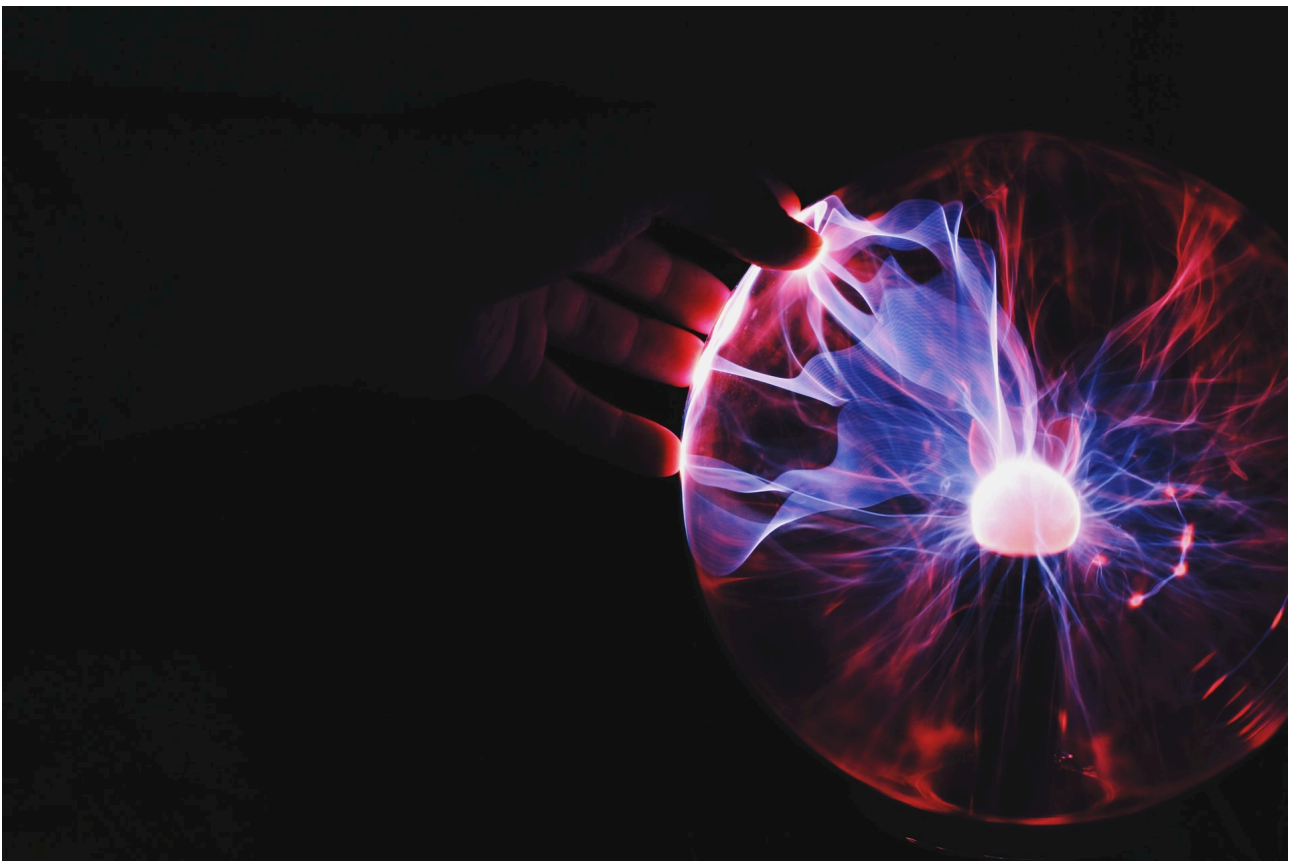


La décision publique, l'expertise et le droit XI. Law and Technocracy: the European Variant

par
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Over the last quarter of a century, the public authorities of nation-States (especially Italy) have shown a kind of bipolar disorder when called upon to take administrative decisions.

1. A bipolar disorder of the State

Firstly, the technical branches in 'traditional public administrations' have been dismantled or severely weakened. Traditional administrations have political leadership, whose senior management dictates political direction, such as ministries, regions, local authorities, etc. Technical branches include the civil engineering department, labour, education and territorial inspectorates, and supervisory bureaux, among others. In the late nineteenth and early twentieth centuries, the State invested heavily in technical branches: the civil engineering department was a flagship of the national administration, along with the monuments and fine arts bureau. In the administrative State, the best engineers, architects, and art historians worked in the public sector. This is no longer the case; on the one hand, the administration is no longer able to produce its own projects, so technical activities are outsourced to private companies and consultants. On the other, the workforce within the 'traditional public administrations' has not adapted to the third, or digital, industrial revolution. Computer experts are few and far between – and undervalued. As a result, administrations lag behind in the digital transformation process and are forced to turn to private corporations for more challenging tasks. These concerns have technical expertise, but they are unfamiliar with the complex national administrative machine, so they have problems getting to grips with the objectives they need to pursue. This difficulty means that 'traditional administrations' often have to rely on other private companies, as they are rarely in a position to understand whether the proposals coming from the private sector are adequate and whether they are can offer guidance to the private sector regarding the direction to take.

On the contrary, independent administrations (safeguarding fair competition, supervising the financial markets, the budget, strikes, public utilities, privacy, and corruption) have no shortage of technical officials, and the heads of these authorities are legally required to have strong technical skills. Of course, being independent, they are not bound to the political direction of the State: instead, they are linked to the European institutions (in particular, the European Commission) and their counterparts in other Member States. Essentially, these highly specialised technical branches are something of an offshoot of Brussels, or at least they are more influenced by the technicians of the European institutions than by national politicians.

In short, over the last few decades, technical branches have been considerably weakened in terms of the areas of competence of national governments. Conversely, those involved in the new Economic Constitution have been significantly strengthened, but they are more closely linked to the European institutions than national ones.

2. Epistemic communities and the European institutions

This brings us to the crux of the matter, namely that the North American model of independent authorities has come down to the European States in diluted form, having reached us via the European tendency to rely on epistemic communities. These were developed and endorsed by the founding fathers of the European legal order as a reaction to the political excesses of the second quarter of the twentieth century, which led to WW2. Reliance on technical expertise and the impossibility of political guidance in a legal order constructed on functionalist principles led to the 'apolitical' development of the supranational order (although even technology cannot be said to be devoid of politics). The European institutions are therefore essentially grounded on technocratic legitimacy as, at least in the initial phase, the aim was to generate a spill-over effect, i.e. extending the beneficial effects produced in the economic and financial areas to other sectors by creating a common market based on a sort of output legitimacy.

Concentration on economic and financial competencies has meant that a typical European official is traditionally very different from the figure of the State bureaucrat. The latter is a generalist, usually coming from a legal and political background. The European bureaucrat, however, in constant contact with international organisations and independent national authorities, is a specialist with an interdisciplinary background and is very much oriented towards economic and financial technicalities. For example, highly technical issues are entrusted to bodies with staff specifically trained to perform these functions through agencies. Alongside the technicisation of the supranational bureaucratic apparatus, the way bureaucratic activity is exercised has also changed to include forms of flanking, partially replacing the traditional bureaucratic model based on procedural sequences with a model constructed around management engineering skills. This kind of bureaucracy differs from that of nineteenth- and twentieth-century States, a bureaucracy derived from private enterprise and the process dynamics of private power, which then spilt over into the public institutions. Just as public bureaucracy techniques inspired Tayloristic industrial models in the United States in the late nineteenth and early twentieth centuries, the late twentieth-century engineered business model has made its way back into the public sphere.

3. The asymmetry between technology and politics

Of course, good use of technology and skills is a prerequisite for the proper functioning of any legal order and, more broadly, any society. The scribes of Ancient Egypt, the first-millennium Chinese mandarins, and the Board of Trade and Plantations of the British empire in the eighteenth century are historical (and very different) examples.

The resilience of any legal order depends considerably on the strength of its bureaucracy. For this reason, the top-level technical and natural interdisciplinary skills of European civil servants are to be welcomed.

One of the critical problems of the European legal order therefore lies not so much in the technical dimension of the decision-making power of the European Central Bank or the principal agencies but in the demise of a political power able to balance the technical strength of supranational bureaucracy through democratic legitimisation. The fundamental question, therefore, concerns the democratic legitimacy and shared governance of the composite European order. The neo-positivism resulting from the third industrial or digital revolution is not balanced by democratisation mechanisms capable of preventing citizens from becoming disconnected from the European institutions.

Technicisation not offset by democratisation is particularly noticeable in times of pandemic, when, even in the decisions of States, the traditional decision-making methods based on the balancing of interests have to be attenuated in order to overcome limitations of fundamental rights through the guidance of science and technology.

The particular and original structure of the European legal order, with its composite character, considered by many to be a strength, has shown and is showing its fragility in times of crisis (before) and emergency (now). This model has allowed it to operate through so-called shared sovereignty, devolving a series of competencies (including the majority of economic ones) to the European Union while retaining others in the hands of the Member States. However, this split leaves the legal system in the middle: it weakens the States and leaves the European institutions with weak governance, poised between the intergovernmental and Community models.

The journey towards greater integration has not come to a halt; indeed, it has even accelerated following the pandemic emergency. The European institutions of government and assembly have been steadily reinforced, but the Living Constitution characteristic of the European order is still far from being able to guarantee it real and autonomous political force. Hence the imbalance between the technical strength and the weakness of politics due to the soft grip of European droit politic, as constitutional law was once called, faced with the different degrees of coherence, structure, and power of European administrative law.

The shortcomings of this asymmetry are particularly evident in geopolitical relations with the other major international partners (United States, China, Russia). However, they are also evident in the way the central policies of the current phase are addressed: health, immigration, energy, taxation and banking, to name but a few.

It has been said that the European legal order is slow-moving, in the process of gradual but constant implementation. The question is whether its institutions and citizens can absorb the consequences of the asymmetry between technology and politics described above in this particularly delicate period.

We have now moved on to a different kind of problem, which, albeit closely linked to what we have been discussing, cannot be examined in just a few keystrokes. So it would be better to stop here.