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ATTI DEI CONVEGNI INTERDIPARTIMENTALI
2.

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(a cura di)

Fare scienza oggi

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La collana testimonia il lavoro di confronto interdisciplinare che si svolge all'interno dell'Università di Perugia, nella consapevolezza che solo la capacità di mettere insieme approcci scientifici diversi può fornire un importante contributo di conoscenza – a disposizione di esperti e di non esperti – sulle grandi questioni del nostro tempo.

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The shape of water: freedom and rules in the organisation of research activities

«What is the shape of water?»
«But water has no shape!» I said laughing:
«It takes the shape that you give it».
(Andrea Camilleri, *The Shape of Water*)

1. Introduction

According to a popular opinion, men of culture have a special position within society. This is the idea behind the role played by philosophers in the work of Plato, of the Sapient in the *De otio* of Seneca, of men of culture composing the *République littéraire* in Voltaire (see also Chabod 2001, 45) and so on.

Today such a speciality is expressed by the idea of neutrality of science, its independence by the contexts, with the unique imperative of «know to know» (see Morin, 1990).

As Heidegger provocatively affirmed, «science does not think», meaning that it protects itself in a «comfortable reserve» without limits (Vattimo, Zucchetti, 2016).

According to scientists, it is politics that imposes limits to the flow of the pure and disinterested scientific creativity for its finalities often «perverse» (Morin 1990, 111).

Anyway, the relationship between science and public powers, which is very ancient, appears necessary and very strict.

2. The Academic position as Privilege

During the Middle Age, a new social group was formed, the «intellectuals» (Le Goff 1957) who, despite the practical difficulties of movement, were lecturing throughout Europe, representing one among

the main « transEuropean waves» which built the continental culture (Morin 1987).

At that time, teachers and students were grouped within associations, based on the scheme of professional corporations, which was deeply changing the traditional social structure (consisting of the immutable categories of nobles, merchants, religious and peasants).

From such associations born the **Studii** or **Universitates** (Borio 2007), among which Bologna (1053), Paris (1150), Oxford (1167), Salamanca (1218), Montpellier (1220), Padua (1222) Naples (1224), Rome (1303) and the Studium Generale of Perugia (1308) are particularly remarkable.

The **Universitates** became important social (and economic) phenomena. Thus, the ecclesiastical and civil authorities recognised several important privileges to students and professors, who took advantage of a special status in fields such as jurisdiction, military service, and even tax exemptions (Ferrada Bórquez, 2001, 65).

A famous example of that kind of measure was the **Authentica Habita** enacted in 1158 by Emperor Frederick I **Barbarossa** at the Diet of Roncaglia in favour of the students of the ~~University of the~~ Bologna's Studium (Marongiu, 1965; Id., 1972).

3. The Professor as Public Officer

From the fifteenth century, significant economic, social and cultural transformations were put in place, constituting the base of the Enlightenment philosophy and the affirmation of the scientific method as dominant form of knowledge (Aguiló Bonet 2009).

In the following centuries, a new powerful phenomenon impacted also on the culture life: the born of national States.

During the XIX century science and teaching became powerful tools to build the idea of nation and nationality. They are not the product of communities of scholars yet, but of a nationalised science and education (about the «method» on the construction of the «national identity», see Thiesse, 2001; Id. 1999).

Wilhelm Von Humboldt in his «Über die innere und äußere Organisation der höheren wissenschaftlichen Anstalten in Berlin» («On the internal and external organization of the high scientific institutions in Berlin») of 1810 underlined the role of the universities and other scientific institutions in shaping the spiritual and moral culture of a Nation.

He did infer neither that the relationship between State and universities had to be a hierarchical subordination, nor that the State could use «its» universities as if it were a technical or scientific council. However, such a relationship had to be based on a sort of functionalization of the university to the aims of the State.

Therefore, in the nineteenth century the university model was elaborated, which Immanuel Wallerstein defines the «modern university system» (Wallerstein 2007, 77), according to which the university acted as a bureaucratic institution with full-time employed professors, characterised by reduced autonomy, being subject to the State centralised decisions on educational matters.

4. The Constitutional recognition of Academic Freedom as a Right

The Enlightenment begun to identify among the human natural rights of men also the freedom of teaching (Schoijet, 2009; see also Jolibert, 1993).

However, freedoms of teaching and research became individual «rights» in a technical legal sense, only based on of the Constitutions of the second half of the twentieth century, which were anticipated by the Weimar Constitution of 1919¹ and the Spanish Constitution of 1931 (Article 48.3)².

After the physical and moral destruction of the European continent, individual rights were asserted against the excessive power of the States (Álvarez Ledesma, 1998; Id., 2103a).

1. According to the Article 142 «*Die Kunst, die Wissenschaft und ihre Lehre sind frei. Der Staat gewährt ihnen Schutz und nimmt an ihrer Pflege teil*».

2. See Article 48.3 which, after affirming that the public professors were «official», established that «*La libertad de cátedra queda reconocida y garantizada*».

Today, the freedoms of teaching and research are recognised by all European Constitutions: paragraph 5 of the German *Grundgesetz* of 1949; the first paragraph of Article 33 of the Constitution of the Italian Republic of 1948; Article 20 of the Spanish Constitution (1978); Article 16 of the Constitution of Greece (1975); Article 42 of the Constitution of Portugal (1976); Article 16 of the Constitution of Finland (2000); etc. Academic freedom has been also recognised and protected even at a supranational and international levels, as other individual rights in the previous century.

In particular, the International Covenant on Economic, Social and Cultural Rights of 1966 also explicitly considers the respect of the «(...) freedom indispensable for scientific research and creative activity » (Article 15) (see Ahumada Canabes, 2012).

Within the European law, Article 13 of Charter of Fundamental Rights of the European Union states that: «The arts and scientific research shall be free. Academic freedom is respected» (see Molina del Pozo & Archontaki, 2013)

5. The Features of the Academic Freedom

Today, according to the legal sources, the freedom of teaching and research could be considered a derivation of the freedom of expression, in the particular form of the systematic transmission of culture³.

As stated by the Spanish Constitutional Court, in the leading case of 13 February 1981, no. 5, the academic freedom is the right to freely express and disseminate thoughts, ideas or opinions, as recognised by the Constitution and by Article 9 of the European Convention on Human Rights (see para. 7 of motivation).

On the other hand, the «freedom of research» can be regarded as the fundamental right guaranteed to the researcher in carrying out the activities of obtaining new knowledge through rigorous approach that characterizes the scientific and dissemination of results» (Rodriguez De Santiago, 2012, 228).

3. See Italian *Corte Costituzionale*, judg. 8 July 2004, no. 256; see also SCC n. 5/1981, para. 7 and ECHR, judg. Campbell and Cosans v. United Kingdom, 25 February 1982, § 33, series A no. 48.

Anyway, the academic freedom is not «simply» a declination of the freedom of expression which must be recognised to every citizen without any limitation relating to his/her personal conditions or age (see Articles 24 ff. Charter of Fundamental Rights of the European Union).

Also in this case, academic freedom (including the freedoms of teaching and of research) shows its speciality, because it must be recognised only to persons with specific professional skills and qualifications (Lorenzo Vázquez, 1994, 259).

Freedom of teachers/researchers has both positive and negative contents. From a positive viewpoint, researchers and teachers are entitled to choose the content of their activities (cfr. para. 28, 61 and 62 of joint ILO Recommendation and the UNESCO Recommendation concerning the Status of Teachers, 1966). However, some limitations are allowed taking into account the different organisations (i.e. universities, public centres of research, enterprises) or the different beneficiaries (the freedom of the university professor is considered wider than that of the secondary or primary teachers).

Nevertheless, the rights of the teachers and researchers, being related to a «freedom», have a negative content, in the meaning of preventing the invasion by the others, especially public authorities (see para. 27 of the UNESCO Recommendation 1997).

6. Limits of Academic Freedom

According to the previous paragraphs, the intellectuals took advantage of some corporatist privileges at the beginning of the university history.

As all privileges, they were a concession, unilaterally allowed by the civil or religious powers. Those privileges did not prevent the repression of the scholars supporting the not orthodox ideas, and the history of the thought is also the tragic history of its repression (Schoijet 2009).

When the national State was born, scholars started to be public officers and since that period they have been exercising a public mission.

Therefore, the new position of the scientists causes a strong intervention of the State on education and science, especially by the

totalitarianisms of the XX (Nazism, Fascism, Stalinism: see Maiocchi, 2003; Ball, 2014) but also of the XXI centuries (see the recent brutal repression of the intellectuals realised by the Turkish Government).

On the ground of the national constitutions and the transnational rules the academic freedom has become an individual right.

This means that the academic freedom could be legally enforceable and may be protected by a national or supranational court.

On the other hand, the qualification of the academic freedom as a right implies that it is necessary to consider also its limits.

The academic freedom, like and even more than other rights arising from modern Constitutions, is recognised in order to play a social function (cfr. Pototschnig 1971; Crisafulli 1956, 70).

As an individual right, the academic freedom cannot be considered as absolute and, therefore, it is subject to legislative limitations (see the Italian *Corte costituzionale*, judg. 4 June 1958, n. 36).

The academic freedom must be coordinated with other constitutional interests of equal rank, like as dignity, honour, public image, privacy, etc. (See in Italy, *Cassazione penale*, judg. 7 May 2008, n. 37581)

With respect to other interests, considered as superior, such as the health, the limitations of the right to teach or research are stronger. Therefore, for example, the public authorities are entitled to verify the scientific and technical skills necessary for the exercise of professions which might affect people health (see for example the Italian *Corte Costituzionale* judg. n. 36/1958 ref.).

The scientific activities must also be consistent with other fundamental interests, which may be affected by techno-science, such as human dignity; wellbeing of animals subject to experimentation; environment; security (as established by many provisions adopted by the Council of Europe and by the European Union).

7. The Organisation of Research

Other limits to the individual academic right arise from institutional dimension within which that freedom is developed.

Unlike the general freedom of thought or expression, the teaching and scientific research must be carried out within an institutional context, which corresponds to the university or other educational or scientific body (see Article 33 of the Italian Constitution; Article 27.10 of the Constitution of Spain).

Indeed, the organisation of teaching and research makes possible the development of the individual dimension of academic freedom (SCC in the judgment 212/1993).

On this ground, the constitutions recognise the university autonomy and the institutional dimension of academic freedom (SCC 75/1997).

Both personal and institutional dimensions

(...) serve to delimit the “area of intellectual freedom” without which it is not possible the creation, development, transmission and criticism of science, technology and culture (...) which is the ultimate rationale of the University (SCC 26/1987, FJ 4).

Academic freedom and university autonomy represent the ground towards each other. (Amaya, Gómez, Otero, 2007).

As argued by the Spanish Constitutional Court (see the judgment SCC 179/1996, of 12 December, FJ. 6; see also the judgment SCC 217/1992, F.3), the academic freedom cannot be identified with a right of self-regulation of the teacher in all its aspects, by and with a complete independence of organisational direction criteria of the university.

In general, the teacher and the researcher must respect the internal rules governing the organisation in which they work, such as those concerning the access and use of infrastructure (rooms, laboratories), the schedules of classes and exams, the allocation of the resources among the departments, etc.

Afortiori, the obligations to comply with the national or supranational laws should not represent an illegitimate restrictions on the freedom of professors and researchers, such as, for example, the legislation concerning the public procurements, the fiscal laws, the normative on intellectual property rights, the rules set out by the funding bodies like as the European Union (see the European Charter for Researchers)⁴.

4. Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers.

8. *A New Alliance...*

The recognition of the social function of the academic freedom implies the needs to build some «embankments» to the scientific freedom, which cannot be longer be considered as an unlimited flow of creativity.

Legal limitations are necessary for the scientific activity it-self. Indeed, ~~aws~~ may allow the respect of the other fundamental interests of the society and, moreover, the social acceptance of the scientific research.

However, public authorities, especially the legislative and the executive powers, often seem not to take «seriously» into consideration the freedom of research.

In order to avoid the conflicts between the academic freedom and the law making powers, a «New Alliance» between science and social disciplines (Prigogine and Stengers, 1979), in this case with the law, should be welcome.

9. *...and a New «Decalogue»*

As it happens in every «New Alliance», a pact should be signed, a «New Decalogue», in order to protect all the concerned interests (of the scientists, of the society, etc.).

This Decalogue should be written considering several principles already identified by the case-law and by other legal sources:

- Dialogue vs. unilaterality: The legislation concerning science and its implication on society should arise from the debate within the society (see *Evans vs. United Kingdom of 2007*⁵, para. 86)
- Control on the legislative power: ~~Even if~~ the law making power lawfully has to exercise a legitimate margin of appreciation, in particular in a matter where sensitive moral and ethical questions are involved, which may be solved with different approaches (see *S.H. et oth. v. Austria*, para. 61).

5. ECHR, judg. 10 April 2007, *Evans vs. United Kingdom* [GC], no. 6339/05.

- However, the margin of appreciation of the legislator is not without limits and have to be subject to the control at a national and supranational level (see ECHR, judg. 22 April 1997, X, Y and Z v. the United Kingdom, para. 44).
- Scientific acceptability of the law: According to the European Court of Human Rights the implementation of the law making power must be based on the «scientific acceptability»⁶ and it is not entitled to substitute the scientists in the identification of the best instruments in order to satisfy fundamental rights, such as the right to health (see also the judgment of the Italian Constitutional Court no. 151 of the 8 March 2009).
- Adaptability: In the scientific matters the European Court invokes the principles of proportionality when it affirms, in S.H. v. Austria of 2011, the necessity of an «assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and» (see the paragraph no. 117)
- Freedom of knowledge: The whole of EU legal sources, by recognising the academic freedom, consider it as the «fifth freedom» granted by the EU Treaties⁷.

In this context, the freedom of movement is not only a right, but a necessity. The objective is to make the above mentioned «freedom of knowledge» effective, deleting the residual bureaucratic and administrative obstacles⁸.

The particularity of the academic activity. It should be taken into account, in balanced relationship between law and academic freedom, the particularities of the academic activities.

From an objective perspective, legislation should consider the characteristics of the scientific work as follows: the particularity of the required skills; the uncertainty of the achievement of the aims; the great quantity of time to carry out the research; the ethical implication; the

6. ECHR, judg. 28 August 2012, *Costa y Pavan v. Italia*, no. 54270/10.

7. Communication, Better careers and more mobility: a European partnership for researchers, COM(2008) 317 final, 23 May 2008.

8. In particular see the Springtime European Council of 2002, Presidency Conclusion par. 33.

need to protect the results together with the importance of publication and dissemination; etc.

This is the ground of, for example, the European legal sources and practices with a specific focus on research: rules in public procurements; discipline concerning the results of research; practises concerning the agreements related to research and innovation.

▲ The status of researcher/teacher. From a subjective viewpoint, law must consider that researcher and teacher are workers with special needs. They have to move from a country to other ones; to study; to publish; to take into consideration the social and ethical context in which they act. Scholars should be supported in their personal and professional efforts and encouraged. (see the European Charter for Researchers and the Code of Conduct for the Recruitment of Researchers).

▲ Social Responsibility and accountability. The social function of the researchers/teachers has as a consequence that the academic freedom is a set of rights, as well as of duties. The academics will be socially responsible of its their role. They should «exercise their intellectual capacity and their moral prestige to defend and actively disseminate universally accepted values, including peace, justice, freedom, equality and solidarity». (see Article 2 of the UNESCO Declaration on Higher Education).

▲ Accountability. The social responsibility means an efficient use of resources, and therefore the compliance with principles such as transparency and accountability (see paragraph 22 of the 1997 UNESCO Recommendation).

In particular, the international rules require the evaluation of the higher education and research institutions, as well as of the academic staff (see UNESCO Recommendation of 1997, and in Europe, the documents of the Bologna Process, especially the «Standards and Guidelines for Quality Assurance in the EHEA» adopted in Bergen (ESG) on 2005) (Álvarez González, 2010).

According to the above mentioned «Decalogue», the relationship between law and science, so necessary for a sustainable and well – balanced society, will achieve the correct «shape».

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III. STRATEGIE DELLA RICERCA

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