 Etica & Politica / Ethics & Politics, XXII, 2020, 3, pp. 299-301
ISSN: 1825-5167

LAW, INFRA-LAW, COUNTERLAW. REGULATORY INSTRUMENTS AND FUNDAMENTAL RIGHTS PROTECTION

GUEST EDITORS' PREFACE*

ILARIO BELLONI
Dipartimento di Giurisprudenza
Università di Pisa
ilario.belloni@unipi.it

GIUSEPPE CAMPANELLI
Dipartimento di Giurisprudenza
Università di Pisa
giuseppe.campanelli@unipi.it

LORENZO MILAZZO
Dipartimento di Giurisprudenza
Università di Pisa
lorenzo.milazzo@unipi.it

ABSTRACT
The text aims to deliver a brief presentation of the special issue devoted to "Law, infra-law, counterlaw. Regulatory instruments and fundamental rights protection".

KEYWORDS
Infra-law, Counterlaw, Rights, Sources of law, Rule of law.

As it is well known, Foucault noticed in *Discipline and Punish* that, on the one hand, «the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was masked by the establishment of an ex-

* Translation from Italian by Serena Vantin.

plicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary, representative regime»[1], while, on the other hand, «the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines», whose functioning guaranteed *de facto* «the submission of forces and bodies»[2].

According to Foucault, the disciplines could be described as «infra-law» if they operated following truly 'legal' logics and principles in order to disseminate their effects «on a different scale, thereby making it more meticulous and more indulgent»[3]. Their role though was rather that «of introducing insuperable asymmetries and excluding reciprocities» the law otherwise appeared to have to ensure. Thus «the disciplines should be regarded as a sort of counterlaw», even when they operate in a regular and institutional way[4].

Although adopting considerably different research approaches and scientific, political, cultural perspectives, the authors of this monographica – whose idea developed in the framework of a research project titled "Diritto senza politica. Le forme della produzione giuridica nell'epoca transnazionale", directed by Rolando Tarchi and entirely funded by the University of Pisa – endorse the assumption that the stream of the counterlaw still recurrently flows, despite its 'disciplinary' peculiarities, covered by the general form imposed to law by the liberal and democratic «legal project»[5].

Particularly in some areas of the legal system, the issue of the protection of rights is notably, and sometimes tragically, addressed. More broadly, informal regulatory instruments are widely used in order to regulate specific matters or, more often, the conducts of certain groups of subjects in ways that are occasionally incompatible with the principles of the rule of law. Along these lines, the authors will focus on some administrative and governmental practices characterised by the use of infra-legal regulatory instruments, aiming at identifying their most problematic aspects and their impact on the protection of rights, with particular regard to those pertaining to the most vulnerable subjects.

Lorenzo Milazzo, who introduces the section, briefly traces the theoretical framework in which the concepts of *infra-law* and *counterlaw* are more clearly shown in order to emphasise their potentialities and limits. Iside Gjergji, who devoted remarkable academic studies to the infra-law relative to migrant people, returns on

[1] M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Paris 1975, Eng. tr., *Discipline and Punish. The Birth of the Prison,* Translated from the French by A. Sheridan, New York 1995, 222.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*, 223.

[5] P. COSTA, *Il progetto giuridico: ricerche sul liberalismo classico*, Milano 1974.

this crucial issue, concisely presenting the colonial and postcolonial history of the 'government by administrative deeds', and thus recognizing a possible development of that practice in the current 'tweeting-governance'.

Silvia Talini pays attention to the system of criminal enforcement and to the *infra-criminal* or restrictive practices that feature the penitentiary system. She suggests that the proliferation of these practices depends on the 'surreptitious' assignment, achieved by public authorities, of a vast additional power which is 'not provided for by the Constitution' and whose exercise is beyond «the constitutional review reserved – as is well known – to primary legislation».

Francesco Marone and Andrea Pertici explore the regulatory instruments conferred to ANAC (National Anti-Corruption Authority) by legislative decree no. 50/2016, with specific regard to the *guidelines* by which the Authority implemented the 2016 Public Contract Code.

Ilario Belloni turns his attention to the ways 'non-human animals' have been handled in our societies. Their treatment appears, in fact, to be widely regulated through infra-legal instruments and measures, that frequently became an actual counterlaw.

Finally, Antonello Lo Calzo makes use of the conceptual categories that broadly ground this research in order to analyse the ways in which the State's apparatus governed, or tried to govern, the current sanitary emergency, particularly emphasising the regulatory and innovative function that the publication of the FAQ, on the websites of the Ministries involved in the management of the crisis, has unexpectedly adopted.