

EDITORIAL

ECONOMIC CRISES AND PUBLIC LAW

Giacinto della Cananea*

Between 1980 and 2000, when the main political goal of the European Community were the achievement of the Single European Market and the creation of the Economic and Monetary Union, governmental activity directly affecting individual citizens and enterprises was carried out primarily by national and local authorities. Not surprisingly, the activities of the European Union that were subject to due process of law review were essentially those dealing with competition and other economic issues.

The terrorist threats, after 2001, have, if not reversed, changed the situation. The rules and decisions adopted by the institutions of the EU have shown an increasing activism in the field of justice and home affairs. But they have also determined an increase of due process claims. The association of governmental activism and due process litigation is particularly evident in the ruling of the European Court of Justice in *Kadi* (2008). Hence the conjecture that, as governmental activities of the Union began to expand in new areas and adopted new forms, the constraints on government have been adjusted and the rule of law, or at least its *noyveau dur*, has been guaranteed. Whatever the soundness of this conjecture, the question arises whether also the other fundamental pillar of liberal democracies, that is to say the democratic legitimacy of public institutions, has been strengthened.

This question is all the more serious after the emergence of the greatest economic and financial crisis after that of 1929. In a famous speech ("*The End of the Laissez-Faire*") given in Germany in

* Professor of Administrative Law, University of Rome "Tor Vergata".

1926, the English economist John Maynard Keynes had made a sharp critique of liberalism and capitalism, rejecting the free private ownership of the means of production. Both the Italian economist Luigi Einaudi and Ludwig von Mises, the leader of the Austrian School of economic thought, criticized Keynes, particularly on the grounds that protectionism had put several countries in the most difficult economic situation. However, European governors decided - unilaterally - that an extraordinary situation required extraordinary measures, including nationalization of banks and industries. The role of government changed, accordingly, and a new public law gradually emerged (and the same happened in the United States with the *New Deal*). But many European scholars refrained - as Massimo Severo Giannini, one of the leading Italian public lawyers of the twentieth century, observed critically some years later - from studying the new legal institutions, holding that they were transient, not permanent, and accordingly not worth studying from a theoretical point of view. Quite the contrary, those institutions lingered throughout the following decades. However, public law doctrines divorced from their object for several years, though with some notable exceptions.

Significant changes seem to emerge in this period, too. In order to exit from the crisis, not only did most European States adopt extraordinary measures within their jurisdictions, nationalising banks, and thus inevitably increasing their public deficits, but they have also authorized the Union to intervene, by providing financial support to Greece, Portugal and Ireland. While some observers have merely affirmed that the States are compelled to play many roles, internally and externally, other voices have highlighted the potential conflicts between such roles. In Germany, in particular, the legality of the financial measures decided by the Union have been contested before the Constitutional Court, from the point of view of their implications for national principles and values, in particular the financial stability, strengthened by the recent constitutional reform.

Whatever the wisdom of the solutions adopted by that respectable judicial institution, a three-fold question arises with regard to the principles of law and the underlying values that are

common to the legal orders of EU countries. First, there is the problem of the model of market regulation. Are the new institutions, such as the EU agencies for the financial sector, and regulatory tools going to shape the relations between the market and public institutions, considered as a whole, in a new way or are they similar to the solutions adopted to cope with the great crisis of 1929? And are such regulatory tools going to endure? Second, and by no means less important, there is the problem of the discretion exercised by policy-makers, especially if national authorities will intensify their cooperation. Public law has always been concerned with constraints on power, and many solutions have been concerned with procedure. It remains to be seen whether, and the extent to that, EU courts, including national judges, will be able to elaborate and apply standards of judicial review that go beyond the recognition of the state of necessity, that is to say *realpolitik*. Last but not least, the question arises whether the political guidelines, general rules and administrative measures taken by the institutions of the EU are legitimate, from the point of view of the social groups that form the Union. In current legal and political discourses, the problem of democratic legitimacy is often equated with the role of the European Parliament. However, as Joseph Weiler and few other scholars have argued, for all its political significance, the European Parliament lacks financial legitimacy, because it does not decide on taxation. In other words, it is only a spending Parliament. It remains to be seen, therefore, whether the decisions taken by EU institutions can be legitimated indirectly, through national political processes and chains of legitimacy.

In conformity with its mission to discuss critically about public law, the *IJPL* will publish in the next issues some analyses of such problems, beginning with the treatment of non-EU nationals, and welcomes submissions by lawyers and experts of other social sciences.