EDITORIAL

CHALLENGES FOR PUBLIC AUTHORITIES IN A UNIFIED EUROPE

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A prominent strand of academic debate within the European Union, in the first years of the Twenty-first century has been the challenge to the legitimacy of EU institutions. The debate has been vigorous and wide-ranging. Both lawyers and political scientists have drawn on arguments concerning input legitimacy in framing their remarks concerning the asserted inadequate legitimacy of the EU. Fewer observers, including Giandomenico Majone, have highlighted that there was a preliminary question of standards, in the sense that the critics commonly reason by analogy from legitimacy discourses within national frameworks. It is therefore questionable whether the institutions and processes of the Union should be assessed on the basis of the same standards that are used for the States.

Ten years later, it is interesting to seek to take the debate forward by considering two more recent challenges for the EU. There is, first, a challenge of general application, in the sense that it is relevant to both the Union and its Member States. This challenge regards output legitimacy; that is, the capacity of public institutions to deliver the 'goods' that are relevant for their constituencies. There is another challenge that is of general application but in another sense. It concerns the role of 'regional' judicial and non-judicial institutions, viewed as constraints to national actors and processes in order to ensure the respect of the Rule of law and of fundamental rights.

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The first challenge is to consider the performance not only of EU institutions, but also of public authorities. Most critics have focused on the inadequacy of the measures taken by EU institutions after the great economic and financial crisis emerged. Some recent reports published by the Court of Auditors of the EU show, in particular, that the Commission failed not only to elaborate a coherent strategy to face the crisis, but even to treat all Member States alike.

In contrast with this, little thought has been given by those critics to the performance of national institutions. Consider the problem of order. In a Hobbesian perspective, not only authority is simply necessary for order, but it must be effective. In a democratic perspective, the achievement of the goals set out by the electorate is not less important. But after especially in the last few years what is being contested, particularly in some Member States, is the adequacy of present structures of public authority to the emerging threats posed by transnational terrorism and migrations. Although the two phenomena are often associated, they must be kept distinct. Citizens' confidence in the capacity of public authorities to effectively prevent and contrast transnational terrorism has been undermined by several recent terrorist attacks and it is hard to see how such capacity can be improved without a more effective co-ordination of national police authorities. It is hard, likewise, to see how national structures of authority can cope with the unprecedented rise of migrations without a common policy of borders control. While some members of the EU seek to achieve such common policy and to use a variety of incentives, including better information about the risks for migrants and money for their governments, others look inclined to rely more and more on force to maintain order at their borders. However, this replacement of authority by force is typically a symptom of weakness, that cannot be hidden by the argument that this is what "the people" wants.

There is a second challenge facing public lawyers and other social scientists concerned with the functioning of our governments. After the fall of the Berlin wall, considerable efforts have been made to convince the drafters of the new European constitutions of the advantages associated with a set of institutional arrangements, including a bill of rights protecting minorities and constitutional review of legislation. The rationale

for the former, often regarded as being self-evident (we all live better if our rights are protected from misuses and abuses of power), had important consequences for the latter, given that at the roots of constitutional review of legislation there is some kind of rights-based theory of public law. While the discussion continues between theorists about the preferability of stronger or weaker versions of constitutional review, there is evidence that in some countries of Central and Eastern Europe what is being contested is not the type, but the existence of an independent constitutional court. This confirms the validity of the warning of the precarious nature of institutional arrangements aiming at protecting the Rule of law and fundamental rights and, more generally, about the tendency in political life towards an excessive concentration of power. At the same time, within traditional liberal democracies what is increasingly being contested by some political parties or movements is not only the judicial review exerted by EU courts, but also the legal rights-based claims of the kind grounded in the European Convention of Human Rights. The contestability of some of its provisions is not what matters here. Nor is it the fact that the courts are not the only means of obtaining relief. What really matters is the growing dissatisfaction with these legal limitations to national rulers.

Public lawyers are increasingly aware of these challenges. However, thus far their response has been partial and their conclusions not always enlightening. Whether this depends on received ideas about the primacy of representative institutions or on the need to give them more margin of maneuver in the current phase of globalization is another question and by no means an unimportant one. The *Italian Journal of Public Law* intends to keep a sustained focus on such question, as well as on the legal realities of our epoch, by publishing studies on issues such as popular referenda on European issues and the protection of rights within and beyond the borders of the EU.