Margherita Poto

Financial Supervision in a Comparative Perspective

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FOREWORD AND ACKNOWLEDGMENTS

Supervision in financial markets has followed different paths in the European system. One of the approaches useful to track them is the comparative analysis. The key point of the present work has focused on the necessity to find out both a constitutive model and a functional model of the authorities in charge of the financial supervision. In this sense, the German and the Anglo-American systems have been deeply scrutinized.

Both the models have been studied using a bipartite parameter: firstly, a comparative study on the powers and missions of the financial supervisory authorities; secondly an analysis of the responsibilities and liabilities, through the lenses of the legislative sources and the decisions of the Courts. The European case law has been the seismograph to test the overall situation.

The descriptive part of the work has been then evaluated from a critical perspective, involving historical, sociological and economical remarks, which formed the first two chapters of the book.

The second reading of the work can be considered as a roundtable for discussions, about the feasibility of a model of supervision through independent authorities. In this occasion, some perplexities regarding the efficiency of such a choice have been arisen.

This book aims to provide a new perspective on the role of the financial supervisory authorities, with some critical hints regarding the effectiveness of their activities.

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The present work is a reviewed and updated version of my Doctoral studies conducted in Italy and in Germany in 2003/2006. The English translation has been lovely cured by Elisabeth Poore and John B. Wilson.

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Wageningen, 8 February 2010

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Chapter 1

CHAPTER 1. THE THEORETICAL SUBSTRATUM

1. Towards the decline of national sovereignty

The consolidation of the European system is an aim that generations of scholars and statesmen have long sought, since 18 April 1951, when the treaty that established the European Coal and Steel Community (ECSC), now defunct, was signed in Paris. This was followed by the establishment of the European Economic Community (EEC) and European Atomic Energy Community on 25 March 1957 with the Treaty of Rome.[1]

But this is well-known.

The intention of this introduction is to not linger excessively on the main stages which have marked the long path leading to the formation of a new kind of legal order, but rather, to explore the historical and philosophical context from where this system gathered inspiration and which enabled its development.

In other words, we need to provide an introduction to this topic of the independent authorities assigned to the oversight of financial markets by outlining both the historic and economic background, the warp and the weft of the European system, where these authorities have emerged and now operate.

The two aspects will be analyzed with particular attention given to the philosophical thinking which has followed their development in terms of theory, with attention to key notions as regards finance, and the stages achieved at the community level of supervision as regards economics.

In addition a comparison will be made between the German and British legal models, with the purpose of providing some examples of independent authorities operating in

1 The EEC Treaty's original full name was the Treaty establishing the European Economic Community, but in 1993 the Treaty of Maastricht changed the name of the EEC treaty to reflect the change of the EEC in becoming the European. Hence the treaty became the Treaty establishing the European Community (TEC). If the Treaty of Lisbon comes into force as planned, a further change in the nature of the Community would lead to the EEC treaty being amended and renamed as the Treaty on the Functioning of the European Union (TFEU) On this topic see in literature: L. DANIELE, *Diritto del mercato unico europeo. Cittadinanza – Libertà di circolazione – Concorrenza – Aiuti di Stato*, Milano, 2006; G. TESAURO, *Diritto comunitario*, III ed., Padova, 2003. J. STEINER, L. WOODS, C. TWIGG-FLESNER, *EU Law*, 9th edition, Oxford University Press, Oxford, 2006.

the financial sector in order to determine characteristics, powers, functions and responsibilities.

It is now necessary to look back to 1951 when the need arose to create a specialized administrative agency with international and supranational traits.

The idea of setting up a third party organism in relation to the single member states was in some ways revolutionary within the ideological and political context in which it was conceived, imbued with the persuasive force of Weber's distinction between the public and private domain, and between economic and public rationality; this distinction, which will be discussed below, marked the transition from the 19th to the 20th century until its progressive erosion after the second world war.[2]

It was a sensationally powerful idea: to create institutions separate from member states, with the goal of regulating economic relations, facilitating trade, and increasing flexibility during negotiations.

This idea has succeeded in inserting itself like a wedge between the apparently unassailable opposition between public and private, the "two extremes upheld by different principles and rules", the distinction which Weber made himself a spokesman for.

In contemporary Italian legal literature, Cassese demonstrated that fundamentally, if compared within today's European framework, these two forms of rationality are not so radically different. He did this by analyzing the supervision of certain specific sectors (paying particular attention to telecommunications) in which independent authorities have been operating for some time.[3]

This conclusion led him to admit the possibility of interaction between various public authorities, and between public authorities and private actors. Therefore it can be said that public rationality in a sense uses the market's categories and rules of engagement.

It is now necessary to analyze these concepts to see how they gradually developed; there is a particular need to comprehend the reasons why the notion of national sovereignty has undergone revision, and, attacked on a number of sides, seems today to be changing.

"Suddenly, as blow knocks shield, the force of the wind cuts in", we read in a poem by D'Annunzio, "The Wave", from his work "Halcyon". If sovereignty is a wave, the strength of the wind, of other waves, of other power centres, have surely cut into it.[4]

Metaphors aside, it is clear that a long hard effort is required to bring together of the concept of national sovereignty with the concept of integration between separate centres of power: the States, lords of the Treaties (*Herren der Verträge)* must come to terms with new entities, which they themselves have established, with specialized agencies, committees and independent authorities, endowed with specific functions, but all true to the common principle of fair cooperation.[5]

2 See S. Cassese, *La spazio giuridico globale*, Bari, 2003, 138. During the present work, I will mainly refer to M. Weber, *Wirtschaft und Gesellschaft*, Mohr/Siebeck, Tübingen, 1921, 1976.

3 S. Cassese, *Lo spazio giuridico globale cit.*, 138.

4 Translation of "L'Onda", by G. D'Annunzio: "A un tratto, come colpo dismaglia l'arme, la forza del vento l'intacca".

5 See the website: www.europa.eu/agencies/community_agencies/index.htm, consulted in May 2008. A. Dammann, *Die Bechwerdekammern der europäischen Agenturen*, in *Schriften zum Europa – und*

The considerations regarding this point made by G. Berti are fitting: "The history of the past two centuries, characterized by legal positivism, itself the outcome of secularisation, is full of problems related to the definition of society-State relations through the law. When states recognise themselves and isolate themselves in their domestic domain, as has been the case particularly in the last century, they want to elevate politics as society's guardian and they make use of their sovereignty and the system which accompanies it to influence the legitimacy of the sources of social, or non-state production. [...] The situation, thus summarised, is however rapidly changing. The market economy, ally of the quasi paroxysmal communication between human beings and peoples, is causing the myths and symbols of territorial states to gradually fall".[6]

Firstly, it seems therefore essential to comprehend the notions of sovereignty, of power and of citizens' obedience to a pre-established order.[7] Classical doctrine raises many interesting doubts: "In truth, so much has been said or written on the concept of sovereignty, but still today there are many more doubts than certainties. Is sovereignty a legal notion or a fact? And in this second case, is it a structural and political, and therefore meta-legal, fact? Is it a product of law, or rather its absolute source of power, even inaccessible and indivisible? Is there a limit, and if so what is it, to the exercise of sovereignty, particularly expressed in a democratic system by the representative body, that is by Parliament? Can one divide sovereignty and share it, without risking losing it?".[8]

To answer such questions it is necessary to analyze the concepts of sovereignty and power, as they emerge from the pages of *Wirtschaft und Gesellshaft*, in order to understand their gradual disintegration.

Thus a short analysis is necessary, prior to any reflection on the problems of regulation, of this work, *Wirtschaft und Gesellshaft*, that has been defined as the "Mammoth of the 20th century"[9], and meticulously studied by generations of jurists, one of the most important being Jurgen Habermas. This analysis will enable us to go on to discuss the modern debate on the crisis of the democratic model in Europe and any possibility of relaunching it.

Völkerrecht und zur Rechtvergleichung, Peter Lang, Europäischer Verlag des Wissenschaften, Frankfurt am Main, 2004.

6 G. Berti, *Diffusione della normatività e nuovo disordine delle fonti del diritto*, in G. Gitti (ed.), *L'autonomia privata e le autorità indipendenti. La metamorfosi del contratto*, Bologna, 2006, 28.

7 G. Rebuffa, *Max Weber e la scienza del diritto*, Torino, 1989, 13.

8 G. Tesauro, *Sovranità degli Stati e integrazione comunitaria*, in *Diritto dell'Unione Europea*, 2006, 235.

9 J.P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, in *Yale Journal of Law and Humanities*, 1997, 300: "the sociology of law elaborated in Weber's mammoth Economy and Society in many ways sets the agenda for Habermas' legal philosophy...I will argue here that in order fully to understand Habermas's theoretical efforts in Between facts and Norms one must take into account the legal-sociological framework that he inherits from Max Weber. [...] [F]or Weber's sociology of law played a crucial role in the historical drama that was the collapse of Germany's first effort at liberal and social democracy: the Weimar Republic. It is the ghost of this failure that has haunted virtually all of Habermas's theoretical endeavours, no less Between Facts and Norms – perhaps even especially therein because of the centrality of law to its framework".

2. Max Weber and the notion of sovereignty

Max Weber's writings are of great relevance to comprehension of modern capitalist societies.

His thinking, the product of careful survey of economic and legal history, make it possible to define the main characteristics, the origins and the destiny of these societies.

The origin of western capitalism is pinpointed by Weber in specific forms of European culture at the beginning of the modern age, and that is in forms of religious culture. This is the idea he develops in the essay *The Protestant Ethic and the Spirit of Capitalism*[10], which is then taken up again in *Wirtschaft und Gesellshaft*, whose publication was attended to by his pupils.

After examining the different levels of rationalisation attained by the leading world religions, Max Weber identifies a link between the Protestant faith and the foundations of capitalism. Capitalism, according to Weber, is an expression of the secularisation of society, and the Protestant ethic, amongst many other manifestations of religiosity, epitomises its authentic meaning, its "Spirit": "Kapitalismus" hat es auf dem Boden aller deiser Religiositäten gegeben. Eben sochen wie es [hin] in der oksidentalen Antike und im abendländischen Mittelalter auch gab. Aber keine Entwicklung, auch keine Ansätze einer solchen, zum modernen Kapitalismus und vor alle: keinen "kapitalistischen Geist" in dem Sinn, wie er dem asketischen Protestantismus eignete.

This connection is, according to Weber, summed up in the renowned phrase ascribed to Benjamin Franklin: "Time is money", intended as it were in a spiritual sense: "It is infinitely precious, because every lost hour is taken from work in the service of God. Without value, if not indeed indecent, is idle contemplation, at least when it occurs at the expense of professional labour".[11]

Protestantism indeed portrays a series of features which are thought to be beneficial to the capitalist spirit, such as a focus on the individual as regards faith, and the idea of profession as a calling, expressed by the German term *Beruf*.[12]

The observations of a great scholar of Protestantism, R.H. Bainton, are interesting in this regard: "What part did religion, and in particular Protestantism, have in all this growth? If capitalism must be defined in terms of loans, credit, accounting and banking activity, it must be said that this process is inextricable from the financial activities of the Catholic Church, which made ample use of the services offered by Italian and German banks, and especially of the big financiers such as the Welsers and the Fuggers. But if capitalism is instead considered as a view of life that is distinguished by incessant activity, then it is to Protestantism that not only a general affinity but also actual paternity are largely attributed".[13]

It is the inscrutability of divine judgement which makes the work dimension and methodic professionality so central: success at work can be perceived as a sign of God's

[10] M. Weber, *The Protestant Ethic and the Spirit of the Capitalism*, firstly published in 1905. See the edition by *Penguin Books, 2002* translated by *Peter Baehr and Gordon C. Well.*

[11] B. Franklin, *Advice to a Young Tradesman* (1748).

[12] M. Weber, *The Protestant Ethic and the Spirit of the Capitalism cit.*, 59.

[13] R. Bainton, *The Reformation of the Sixteenth Century*, Boston, The Beacon Press, 1952, 23.

benevolence. In this sense Weber speaks of *ascesis within the world*: "because Protestants adhere to the material world in the accomplishment of their *Beruf*, but at the same time are ascetic as regards the world because of their renunciation of all earthly delights and flight from all temptation".[14]

This point raises questions as to what could be the reason which drives humans to obey the law. If there exists an established rational order, a state authority that holds it, what is the reason which makes the community agree to it?

In answering this question, Max Weber applies the so-called "typological method", according to which analysis of social phenomena can and must be broken down into the study of individual behaviours, by means of analysis of the uniformity of such behaviours as regards the rules and dictates of authority.

According to Weber there is a close connection between the concept of obedience and the need to rationalise the world. It resides in the need to build around the principle "time is money" a grid of criteria on the basis of which this principle is applied, and to define the scope of its legitimacy. This principle must, fundamentally, be translated, systematised, in "rational criteria", in which all individuals may identify themselves. This is effectively expressed by Barbara Thériault: "Si les Puritans de l'éthique protestante s'accordent sur la phrase "Le temps, c'est de l'argent" – et, par ricochet, sur le principe de rentabilité – ils doivent cependant spécifier quand, comment, dans quelles circonstances et selon quels critères la maxime s'applique; bref, ils doivent définir son contexte de validité. Parce-qu'elles sont sujettes à de multiples interprétations, les maximes doivent être traduites, codifiées, en "critères de rationalité"[15].

The answer to the question concerned with the uniformity of individual behaviours towards the rules laid down by the holders of power lies in the activity that Weber calls "ethically rationalizing the world": by purifying oneself of every spiritual inhibition, individual action becomes economic action, endowed with high moral significance.[16]

The introduction to Economic History says: "What in the ultimate analysis has created capitalism is a permanent enterprise of a rational nature, rational accounting, rational technology, rational law, but not only. To these factors others needed to be added, in completion: the rational mentality, rationalisation of the conduct of everyday life, and

14 M. Weber, Geistige Arbeit als Beruf. Vorträge vor dem Freistudentischen Bund. Erster Vortrag. Prof. Max Weber (München) Wissenschaft als Beruf, München/Leipzig, Duncker und Humblot, 1919.

15 B. Thériault, *Ordres légitimes et légitimité des ordres chez Max Weber*, 179, in M. Coutou and G. Rocher (cur. by), *La légitimité de l'État et du droit. Autour de Max Weber*, L.G.D.J. et les Presses de l'Université Laval, Paris, 2006; V. M. Weber, *Soziologische Grundbegriffe cit.*, 62. See also M. Coutou, *Max Weber et les rationalités du droit*, L.G.D.J. et les Presses de l'Université Laval, Paris, 1997, which contains an analysis of the rational criteria: "1. L'action rationnelle en finalité (zweckrational), orientée d'après les fins, moyens et conséquences subsidiaires; [...] 2. l'action rationnelle en valeur (wertrational), fondée sur la croyance en valeur intrinsèque inconditionnelle [...] d'un comportement déterminé; 3. l'action affectuelle (affecktuel), fonction de l'émotion, du sentiment momentané; 4. l'action traditionnelle (traditional), laquelle repose sur l'observation quasi-mécanique de ce qui est coutumier".

16 M. Weber, *WG cit.*, 379 states: "Nur der asketische Protestantismus machte der Magie, der Außerweltlichkeit der Heilssuche und der Intellektualistischen kontemplativen 'Erleuchtung' als deren höchster Form wirklich den Garaus, nur er schuf die religiöse motive, gerade in der Bemühung im innerweltlichen 'Beruf' [...] das Heil zu suchen".

the rational economic ethos". With these words Weber summarises the meaning of his teachings. The Protestant ethic appears, in the end, as the decisive factor in the rise of capitalism: a factor which adds to all the others that had formed in the previous centuries.[17]

The idea of obedience is connected to the idea of power which, as has already been said, represents the heart of Weberian thinking. The word "power" must be interpreted as meaning the possibility for specific commands (or any command) to be followed by part of a given group of human beings, and not the possibility of exercising "power" (Macht) and "influence" (Einfluß) on other human beings: "'Herrschaft' soll, definitiongemäß, die Chance heißen, für spezifische (oder: für alle) Befehle bei einer angebbaren Gruppe von Menschen Gehorsam zu finden. Nicht also jede Art von Chance 'Macht' und 'Einfluß' im Einzefall auf den verschiedensten Motiven der Fügsamkeit".[18]

Among the factors which determine this liberation from the straitjacket of a traditional type of obedience is the market directed economy oriented towards the meeting of demand and the supply of goods and services. Historically the transition from an agrarian economy to a market economy was complex and not without obstacles. Weber examines this development from the viewpoint of a progressive "objectivisation" of relationships (not by chance he dedicates ample space to the notion of the "contract" as the ideal instrument to discipline relations among individuals) and of their related rationalisation: "Die Marktgemeindschaft als solche ist die unpersönlichste praktische Lebensbeziehung, in welche Menschen miteinander treten können".[19]

In short, the rationalisation of relations involves their "depersonalisation".

From the individual to the collective, from an individual's action to the rationalisation of conduct in a pattern, or better rather, in a network of rationally calculated behaviours.

I use the term "network", because it is precisely this notion that will constitute the means for transforming the public-private dichotomy – to which, however, Weber, *fils de son siècle*, remains inevitably anchored – to a system based on the parcelling out of powers.[20]

The market order is, therefore, not only a mere vessel for distributory relationships, but becomes a system for the organisation of social, economic and political relations, to which bonds and ties of a personal nature remain completely extraneous: "Der Markt ist in vollem Gegensatz zu allen anderen Vergemeinschaften, die immer persönliche brüderung und meist Blutverwandtsschaften voraussetzen, jeder Verbrüderung in der Wurzel fremd".[21]

The suggested conception of work as *Beruf*, as vocation, places the individual in a dimension in which he becomes "the absolute goal of himself", and, at the same time, the

17 *WG*, I, 122.

18 Ibidem.

19 M. Weber, *Wirtschaft und Gesellschaft*, 382.

20 C.P. Guarini, *Contributo allo studio della regolazione "indipendente" del mercato*, Bari, 2005, 13.

21 *WG*, 383. See *amplius* G. Rebuffa, *Nel crepuscolo della democrazia*, Bologna, 1992, 84 and K. Polanyi, *The Great Transformation*, 1944, New York, Holt, Rinehart & Winston Inc., 1944.

rational organisation of work is the road towards the establishment of a system based on companies. Rebuffa's comment on this point is: "Rationalization of economic relations, intended as the matching of means to ends, in the sense of maximum predictability of outcomes, implies an unprecedented extension of legal regimentation, and the penetration of rules into all aspects of public and private life".[22]

From the collective to the individual, whose actions respond to a rational logic, intertwining with those of other individuals, in an organized web of relations, regulated by the logic of the market.

It must be emphasised, for the purposes of this dissertation, that there is an intimate connection between the dynamics of the economy and the need to give these dynamics a legal form, through the law.

For Weber, economics and law are two complementary forces, whose relations are well defined. To quote *Economic History*: "Finally, it is necessary to emphasise again that the history of economics [...] does not coincide with the history of the whole of human civilisation, as the *materialistic vision of history* would like us to believe. Civilisation is not a result, but only a function of that; rather the history of economics constitutes only an underlying structure. However, without an understanding of it, fruitful investigation of any great area of civilisation is impossible".[23]

This statement requires further clarification concerning Weber's vision of relations between law and economics.

As commentators have pointed out, generally for Weber legal phenomena are not directly influenced by economic factors, since they depend on intra-legal relations and also on the political conditions (the example given concerns the power interests of an absolute sovereign against class privileges, particularly against a system of justice which is not under their control).

However, legal and economic relations may influence each other, if one observes them from a "reverse" perspective, as it were: if rational law is indeed independent from capitalistic development, it precedes it in a certain sense, and is a favourable precondition to it, since legal rationalisation provides an incentive to capitalism.

Therefore rational capitalism, a consequence of the combination of the work effort of single individuals, and liberated from the yoke of tradition and mere obedience to religious precepts, acquires the language of law, and attends to the selection and propagation of certain patterns. This does not mean that economic situations automatically

22 G. Rebuffa, *op. ult. cit.*, 88. See also F. Tessitore, *Storicismo*, 513, in P. Rossi (dir. by), *La Filosofia*, vol. IV, *Stili e modelli teorici del Novecento*, Torino, 1995: "Quest'è il disancantamento dal mondo, prodotto di una lunga storia, che parte dal mondo greco e arriva alla matura modernità".

23 See M. Weber, Economic History, *cit.*, 44; K. Löwith, *Max Weber und Karl Marx*, 1932; R. Roth, *Das historische Verhältnis der weberschen Soziologie zum Marxismus*, in *Kölner Zeitschrift für Sociologie und Sozialpsychologie*, XX, 1968, 429; W.J. Mommsen, *Max Weber als Kritiker der Marxismus*, in *Zeitschrift für Sociologie*, III, 1974, 256; F. Ferrarotti, *L'orfano di Bismarck: Max Weber e il suo tempo*, Roma, 1982, 82; A. Roversi, *Weber e Marx: le premesse storiche e concettuali di un confronto*, in *Quaderni di sociologia*, XXXIV, 2/3, 1985, 207.

generate new legal forms, but rather that they do not oppose the possibility [Chance] that a technical-legal invention, once created, will succeed in proliferating.[24]

This is where the metamorphosis of the notion of "power" begins: where in a pre-capitalist economy power was identified with subjects' obedience to a preconstituted order, with the development of capitalism, the depersonalisation of relationships and their consequent rationalisation, causes it to become a favourable condition for the spread of commerce.

"Macht bedeutet Chance" Weber repeats on more than one occasion. It is also true that, in and for itself, the concept of power, Macht, is sociologically amorphous: "Der Begriff 'Macht' ist soziologisch amorph".[25] It could mean obedience towards a sovereign will, justified by an ethical, religious feeling, but experiences a transformation when there is a change in the historical context in which it arises. Thus it adopts the form of a positive circumstance, when the context is cleansed of personalisation of relationships; when, that is, as we have already seen, a market economy develops, in a series of "economically oriented" behaviours ("Wirtschaftlift orientiert").[26]

But now let us return to the logical stages which, in the works of the German sociologist, mark the relations between economics and law. According to Weber, first and foremost rational law is independent of the development of capitalism. It may be considered by the same standards as an extra-economic condition which influences the development of entrepreneurial capitalism; but it is capitalism – market economics – that, making use of technical-legal patterns, provides for their selection and diffusion.

The relation between legal and economic systems can be sought in the distribution of effective power to regulate economic goods and services.[27]

The distribution of goods and services according to the logic of efficiency and rationalisation is an abstract guarantee of power; in other words, it ensures that players can put themselves in a favourable condition, thus contributing to the creation of formally rational law and the establishment of an organised system, in which rules replace privilege.

This, according to Weber, is the explanation of the relationship between law and economics, whose foundations, as we have seen, are based on the complementariness of the one to the other, without creating the dependency of the latter on the former. Law does not guarantee any economic interest considered in and for itself, but since an

24 M. WEBER, *Soziologische Grundbegriffe*, 6. erneut durchgesehene Auflage, mit einer Einführung von Johannes Winckelmann, J.C.B. Mohr (Paul Siebeck), Tübingen, 1921, 1984, 47: "in der Chance, daß in einer (Sinnhaft) angebarren Art sozial gehandelt wird, einerlei zunächst: worauf diese Chance beruht". See also on the topic L.M. FRIEDMAN, *On Legalistic Reasoning. A Footnote to Weber*, in *Wisconsin Law Review*, 1966, 148.

25 M. WEBER, *WG cit.*, 28.

26 M. WEBER, *WG cit.*, 31.

27 M. WEBER, *WG*, 181: "Danarch bestimmt sich auch die prinzipielle Beziehung zwischen Recht und Wirtschaft. [...] Die durch die Art des Interessenausgleichs jeweils einverständnismäßig entstandene Verteilung der faktischen Verfügungsgewalt über Güter und ökonomische Dienste und die Art, wie beide Kraft jener auf Einverständnis ruhenden faktischen Verfügungsgewalt dem gemeinten Sinn nach tatsächlich verwendet werden, nennen wir 'Wirtschaftsordnung'".

objective of the law is protection from any possible form of subjection, it may constitute a means of protection also of economic interests.[28]

Weber's idea of the relationship between law and economics is therefore merely coincidental; that is, it may arise by virtue of the specific objective which the law pursues, in other words, protection from abuse of power.

The structure of the relationship between economics and law is different: economic relations are based on the notion of reliance (the so-called "Interesse an der 'Verträgslegalität'), which translates into a complete faith placed by economic operators in the honesty of their interlocutors and in respecting agreements reached: "Die universelle Herrschaft der Markt vergesellschaftung verlangt einerseits ein anch rationalen Regeln kalkulierbares Funktionen des Rechts".[29]

Here is another observation made by Rebuffa regarding this topic: "At the beginning of the section of Economics and Society about the sociology of law, Weber tries to define the distinguishing features of public law and of private law: whilst public law regulates situations of authority, where "the holder of a dominant power faces other people... who are subordinate", the situations regulated by private law are those where "defining legal spheres is the legally correct meaning of the activity of the legislature, or of the judge or of the parties involved themselves [...]".[30]

Private law in the modern state originates from the replacement of "privilege", in the sense of the definition, on the part of communities and private citizens, of subjective legal spheres, with the rules of the market, as regards private relations and relations with bureaucracy – the public administration – with the aim of guaranteeing the impartiality of public law choices. The "two great rationalising forces" (the market and the public administration) determine an equilibrium through the substitution of the logic of privilege with that of the formal legal equality of all individuals belonging to the community.

3. Market rules and public administration rules

It is now necessary therefore to focus our attention on the distinction between these two main spheres of law, public and private.

Chapter VII of *Wirtschaft und Gesellshaft* is on the subject of this distinction, and the study of so-called "Rechtssoziologie". Weber begins: "Die heutige Rechtstheorie und

[28] M. Weber, *WG*, 182: "Das Recht [...] garantiert keineswegs nur ökonomische, sondern allerverschiedensten Interessen, von den normalerweise elementarsten: Schutz rein persönlicher Sicherheit is zu rein ideellen Gütern wie die eigenen 'Ehre' und derjenigen göttlicher Mächte. Es garantiert vor allem auch politische, kirchliche, familiäre oder andere Autoritätsstellungen und überhaupt soziale Vorzugslagen aller Art, welche zwar in der mannigfachsten Beziehungen ökonomisch bedingt und relevant sei mögen, aber selbst nichts".
Oekonomisches und auch nichts notwendig oder vorwiegend aus ökonomischen Gründen Begehertes sind".

[29] M. Weber, *WG*, 198.

[30] G. Rebuffa, *Nel crepuscolo della democrazia cit.*, 100.

Rechtspraxis kennt als eine der wichtiges Scheidungen diejenige von 'öffentlichem' und 'Privatrecht'. Zwar über das Prinzip der Abgrenung herrscht Streit".

Once the difference between public law and private law has been identified, Weber strives to define the boundaries of the two systems. The operation, as Weber himself admitted, is anything but easy: "Auch heute also ist die Abgrenzung der Sphäre von öffentlichem und privaten Recht nicht überall eindutig".[31]

Public law is made up of the set of regulations (die Gesamheit der "Reglements") concerned with proceedings related to the institution of the State, actions which are needed to maintain, to extend and to directly pursue the State's objectives.

Private law is, on the contrary, concerned with actions regulated by the provisions of the State: "Mann könnte 'öffentliches' Recht identifizieren mit der Gesamtheit der 'Reglements', also: der ihrem richtigen juristichen Sinn nach nur Anweisungen an die Staatsorgane entalten den nicht aber erworbene subjektive Recht Einzelner begründenen Normen, im Gegensatz zu den 'Aus pruchsnormierungen', welche solche subjectiven Recht begründen".

The difficulty in pinpointing a precise demarcation line between the two spheres is principally due to the fact that one of the areas of regulatory jurisdiction of public players in the modern State is the area related to the distribution of economic commodities and of powers. Hence, tension is created between regulatory monopolisation and private autonomy that may cause unstable legitimacy of the political group which exercises regulatory powers monopolistically.

With the purpose of finding an equilibrium amongst such tension, it is necessary to ground all conflicts pertaining to goods and powers on predetermined procedures. They must, in other words, be "regulated". In this way, the rules of private law, exclusively based on criteria of formal and procedural justice, and that is to say on regulation aimed at safeguarding contractual autonomy, appear as the supporting structures of the legitimacy of the rational power of the modern State. Even though it is regulated, the activity of private law is considered as an expression of the rationality of the State rationality and, as such, may be exercised both by private and public players.

The state's system of private law, Rebuffa again observes in his discussion of Weber's reasoning, is hence formed as a structure which limits the powers of the political branch, removing discretionary power from it.[32]

A careful definition of jurisdiction constitutes then a guarantee that sovereignty will not become simply arbitrary, but, on the contrary, that it is channelled and directed within an organised system.

Sovereignty, the notion of *Herrschaft* which was mentioned above, must necessarily be connected (maybe even bound) to that of "Administration" (Herrschaft...mit Verwaltung verbunden ist), in the sense that it is an expression of, and is articulated in, the form of the administration. Likewise the administration is in need of sovereignty, since it is directed and organised in accordance with sovereignty's orders: "Herrschaft" interessiert uns hier in erster Linie, sofern mit "Verwaltung" verbunden ist jede Herrschaft

31 M. Weber, *WG*, 387.

32 G. Rebuffa, *Max Weber e la scienza del diritto cit.*, 103.

äußert sich und funktioniert als Verwaltung. Jede Verwaltung bedarf irgendwie der Herrschaft, denn immer müssen zu ihrer Führung irgendwelche Befehlesgewalten in irgend jemandes Hand gelegt sein".[33]

Thus, here is a definition that sees a reciprocal interrelation between sovereignty and public administration: if one thinks back to the line of argument that has been followed to reach such a conclusion, it is clear that it is an extremely linear process: from the individual to the collective, from the rules of economics to the rules of law, from the public and private distinction, the process of rationalisation follows a crescendo, a progression which rises in intensity, and that reaches its apex with the definition of the rules of good governance.

After having traced the relationship between *Herrschaft* and *Verwaltung*, Weber specifies that sovereignty must be exercised by means of an organized system: "Herrschaft durch 'organization' wie Struktur einer Herrschaft empfängt nun ihren soziologichen Charakter zunächst durch die allgemeine Eigenhart der Beziehung des oder der Herren zum der Apparat und beider zu den beherrschten und weiterhin durch die ihr spezifischen prinzipien der 'Organization'".

The correct application (die Geltung) of an order is expressed in a rational system of rules: "'Die Geltung' einer Befehlsgewalt kann ausgedrückt seine entweder in einem System gesatzer [...] rationalen Regeln". This passage is particularly important: "Der Gehorsam wird den Regeln, nicht der Person geleistet". It is a question of compliance with rules and not the person who makes them.

The rationalisation process here is at its highest expression: sovereignty as power exercised within an organized system of rules, endowed with intrinsic and cogent force and not, and no longer, sovereignty as an expression of personal will.

Weber then proceeds to list the principles that guarantee the correct operation of the public administration: the principle of competence (Kompetenz), according to which public action is performed by a body to which the power to exercise it (Behorde) has been conferred, or, as regards private action, by the offices (Bertriebes).[34]

Next is the principle of hierarchy (Amtshierarchie), according to which every administrative decision may be subject to the control of a body which is superordinate to the one which made the decision. It does not seem to be by chance that here a concept re-emerges which is very dear to Weber: Beruf, profession, intended as calling, or vocation: "Das Amt ist 'Beruf'".

Furthermore, public action must be characterised by the utmost technicism and endowed with the principles of precision, rapidity, correctness, efficiency, continuity, discretion, coherence and rationalisation: "Der entscheidende Grund für dar Vordringen der bürocratische Organisation war von jeher ihre rein techinische Überlegenheit über

33 M. Weber, *WG*, 345.

34 WG, 551 and ff.; and also p. 125: "die Grundkategorien der rationalen Herrschaft sind also: 1. ein kontinuierlicher regelgegundener Betrieb vom Amtsgeschäften, innerhalb: 2. eine Kompetenz (Zuständigkeit), welche bedeutet: a) einen kraft Leistungsverteilung sachlich abgegrensten Bereich von Leistungsplflichten – b) mit Zuordnung der etwa dafür erforderlichen Befehlsgewalten und c) mit fester Abgrenzung der eventuell zulässigen Zwangsmittel und der Voraussetzungen ihrer Anwendung. Ein derart geortneter Betrieb soll 'Behorde' heißen".