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New Perspectives in Administrative Law

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Abstract

Administrative law is undergoing profound changes in Europe and the world. In national laws, judicial review has changed in profound ways in recent years. A major change is also that administrative law is more and more conceived on a transnational basis: administrations are working in networks, public services are delivered on a cross-border basis. This raises questions about the accountability of the administration and the possible challenges to administrative action. European administrative law is also changing: agencification is an ancient phenomenon now, but recent cases have called for more oversight of the powers of the agencies. Also, administrative law professors have called for the adoption of a European code of administrative procedure. Finally at global level new forms of rule-making are appearing through private bodies.

The course was devoted to discussing the latest developments in administrative law. Three kinds of developments were studied:

1. on a comparative perspective we tried to understand how national administrative laws have evolved recently through the roles of fundamental rights, new public management, privatization and contracting out;
2. at a European level we tried to assess the developments of transnational relations in administrative law;
3. we studied the forms of the globalization of administrative law.

Part 1 - The Comparative Perspective: New Challenges to Administrative Law

Among these new perspectives on administrative law, we must count Brexit, attacks on the Administration and judicial review, the rise of algorithm in administrative action, new codes of administrative procedure, contracting-out (and the new trend to remunicipalize public service provision), the consequences of uberization on public regulation and recent reappraisals of New Public Management reforms.

Brexit and Administrative Law

The recomposition of States in the world brings new challenges to administrative law, as it may raise questions of relations between the executive and the legislative branches. This is what we studied, using the Brexit case and studying the *Miller* judgment. In the *Miller* case, the UK Supreme Court reaffirmed the principle of parliamentary sovereignty and limited the power of government to negotiate treaties. This is of particular importance to administrative law, because here the Court defined the remit of the prerogative power with respect to foreign relations¹. We also examined the possible consequences of Brexit on administrative law: as the UK leaves the EU, the repeal of the European Community Act 1972 (that enshrined EU law inside the UK legal order) will involve considerable executive law making in order to modify, remove, repeal European law. What will be the status of ECJ judgments after exit remains a debated question for instance? Brexit questions the positions of the Courts, Parliament and the executive within the British legal order.

New attacks on the Administration and Restriction of Judicial Review

Brexit is only one of many challenges to administrative law today. Another challenge is the current attacks on the administration and judicial review. We studied how the Trump administration is trying to limit agencies' powers and the content of the Regulatory Accountability Act². Most worrying is a trend in the UK and in France towards a restriction on access to judicial review.

After these sessions devoted to potential threats, we analyzed the development of robots, algorithms, and the blockchain in administration action.

Robots, Algorithms, Blockchain and Administration Action

The rise of algorithm in public decision-making raises new questions: do people have a right to access the software in order to detect biases? How do you challenge these new kinds of decisions? Terrific papers were written on the topic in several jurisdictions in order to assess the potential of these new tools and the threats³.

Procedure and Administrative Law

This session was an occasion to study the development of codes of administrative procedure in the World and to study the new code in France. We tried to see the commonalities and differences between these codes and to answer the question whether there is a common core of administrative procedure.

¹ See the *Miller* judgment (<https://www.supremecourt.uk/news/article-50-brexit-appeal.html>) and a commentary here: "The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle" (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952331).

² There are very interesting developments currently on the Regulatory Accountability Act in the US: <https://www.thereview.org/2017/05/18/walker-model-bipartisan-reform/>; <https://www.thereview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/>.

³ CARY COGLIANESE / DAVID LEHR, Regulating by Robot: Administrative Decision Making in the Machine-Learning Era, *Georgetown Law Journal*, Vol. 105, p. 1147, 2017 (https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2928293); RORY VAN LOO, Rise of the Digital Regulator, 66 *Duke Law Journal* 1267 (2017) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902238); VIVIAN NG, Algorithmic Decision-Making and Human Rights (<https://hrcessex.wordpress.com/2017/04/21/algorithmic-decision-making-and-human-rights/>); FRANK PASQUALE, The Emerging Law of Algorithms, Robots, and Predictive Analytics (<https://balkin.blogspot.fr/2016/02/the-emerging-law-of-algorithms-robots.html>).

Contract and Public Services: The Rise and Fall of Contracting Out?

Although the topic of contracting out in the administration is hardly new, some developments could show a reversal of these trends. We studied here the new trend of re-municipalization of public services at local level. Several reports were written on the subject and books as well. This was the occasion to study the reasons for contracting out, the procedure and the shortcoming of the private provision of public services⁴.

Uberization and the Future of Regulation

Is occupational regulation dead? This session was an occasion to study the recent clash between the new economy, uberization, and regulation. In many states, there was litigation against Uber in administrative courts. It was a good occasion to study how administrative law principles traditionally limit public bodies' intervention when they regulate occupations and how Uber was a challenge in several jurisdictions⁵.

New perspectives on New Public Management

In this session we discussed C. Hood and R. Dixon's recent book *A Government that Worked Better and Cost Less?: Evaluating Three Decades of Reform and Change in UK Central Government*⁶. The specialists of NPM made a very clear appraisal of more than 30 years of NPM reforms, very aptly summarized thus: "The book examines the main NPM hypothesis that NPM reforms would enhance the quality and reduce the costs of public administration. The authors address the paradox that the NPM movement, which was legitimized by a performance argument, in practice was often ideologically driven, pressing ahead with reforms with little regard for confirmation of their efficacy. The United Kingdom was one of the first countries to adopt NPM reforms and did so more radically than many other countries. It is therefore a good test case of the NPM hypothesis. If clear cost reductions and quality improvements are to be found anywhere, they ought to be found in the United Kingdom. The main finding of this book is that after 30 years of NPM, the United Kingdom does not have 'a government that works better and costs less,' as promised by the reform agents. In fact, the government now works slightly worse with respect to fairness and costs a bit more than before."⁷

We tried to see whether such a conclusion could be made also in other jurisdictions.

⁴ DAVID HALL, Re-municipalising municipal services in Europe, A report commissioned by the European Federation of Public Service Unions (EPSU); H. WOLLMANN / G. MARCOU (eds), *The Provision of Public Services in Europe - Between State, Local Government and Market*, Edward Elgar, 2010; H. WOLLMANN / I. KOPRIĆ / G. MARCOU, *Public and Social Services in Europe - From Public and Municipal to Private Sector Provision*, Palgrave Macmillan.

⁵ There was litigation in Italy, Germany, France, Spain, the US, the UK. DANIEL E. RAUCH / DAVID SCHLEICHER, *Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the 'Sharing Economy'*, George Mason Law & Economics Research Paper No. 15-01; JOHN BLEVINS, License to Uber: Using Administrative Law to Fix Occupational Licensing, 64 *UCLA L. Rev.* 844 (2017); AMANDA SHANOR, Business Licensing and Constitutional Liberty, *The Yale Law Journal Forum*, December 5, 2016; DAVID E. BERNSTEIN, The Due Process Right To Pursue a Lawful Occupation: A Brighter Future Ahead?, *The Yale Law Journal Forum*, December 5, 2016.

⁶ Oxford University Press, 2015.

⁷ PER LÆGREID, A Government that Worked Better and Cost Less?, *Governance*, Jan. 2016, Vol. 29 Issue 1, p. 139-140.

Part 2 – The European Perspective

In this section, we studied the following question: the impact of regulatory competition in Europe on administrative law, the question of lobbying and conflicts of interests, the problems of delegation, multilevel governance and the networking of agencies.

Regulatory Competition in Europe

Here we first attempted to understand the phenomenon of regulatory competition in Europe using the historical example of the United States and examining the case law of the ECJ. We then tried to understand the effect of regulatory competition on several areas of public action: labor law, tax law, corporate law. Here, we mainly discussed the policy of the ECJ and analyzed the main cases.

Lobbying and Conflicts of Interest

Lobbying and conflicts of interests are a very thorny issue in Europe. We tried to describe the current regulations trying to limit the effects of lobbying and conflicts of interests and we discussed the limits of this legal framework.

The Problem of Delegation in the EU

Here we discussed the cases dealing with the problem of delegation in the European Union until the recent case *UK v Parliament and Council* (case C-270/12).

Multilevel Governance and Networks of Agencies

The reality of governance in the EU is both vertical and horizontal. Vertically, we analyzed the mechanisms to allocate jurisdiction between the different layers of policy-making in Europe. Horizontally, we described the functioning of several networks of agencies to see the different arrangements according to the sectors and the possible issues they raise.

Part 3 – The Global Perspective

This enquiry was devoted to the study of private standards and their role in global governance, to the link between investment treaties and economic regulation, and then to procedural issues.

The Role of Private Standards

The study of private standards was organized on a comparison between their role in domestic laws (how domestic laws regulate private standards? How are the problems with private regulation raised in domestic laws?)⁸ and on the international stage⁹.

⁸ For the US experience, see: P. STRAUSS, *Private Standards Organizations and Public Law*, Columbia Public Law Research Paper No. 13-334: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194210.

⁹ See M. DE BELLIS, *Public Law and Private Regulators in the Global Legal Space*, Jean Monnet Working Paper 16/10; EU and Global Private Regulatory Regimes: the Accounting and Auditing Sectors, in: E. CHITI / B.G. MATTARELLA (eds.), *Global Administrative Law and EU Administrative Law*, Springer-Verlag Berlin Heidelberg, 2011; Certification and climate change. The role of private actors in the Clean Development Mechanism (CDM), *Rivista Italiana di Diritto Pubblico Comunitario*; Global Financial Standards and Regulatory Failure: Lessons for Reforms, *Global Standards for Public Authorities*, GIACINTO DELLA CANANEA / ALDO SANDULLI (eds).

Investment Treaties and Economic Regulation

Here the aim was to analyze the new ways in which investment treaties can curtail State regulatory powers, can be a form of judicial review and offer remedies against administrative action and the problems entailed. This session required comparing different administrative laws and the remedies they offer with regard to the remedies available in investment treaties.

Global Due Process

The last session was about examining Giacinto della Cananea's argument in his book *Due Process of Law Beyond the State*¹⁰.

¹⁰ GIACINTO DELLA CANANEA, *Due Process of Law Beyond the State*, OUP, 2016.