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New paths for administrative law.

A manifesto([*])

Contents:

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1. Administrative law in transition

The literature of the last ten years contains numerous references to two opposite trends: on one hand, "the end of administrative law", on the other, the "new administrative law".

According to the first body of literature, which is of mainly French and Belgian origins, administrative law has lost its peculiarities (thus giving rise to increasing difficulty in defining its status and scope), has become an hybrid, and is now in ruins. This situation is – according to this narrative – the product of various, and conflicting, causes: globalization, constitutionalization, de-Statization, privatization, decentralization. As a result of the pressures stemming from these diverse trends, administrative law is slowly losing its "raison d'être" - its center, the State[1].

On the contrary, according to the second point of view, which is held mainly by German observers, , a new administrative law is developing, due to a process of change, modernization, and reform. This new or postmodern administrative law is more open than the old administrative law, and is

[1] J.-B. Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, in « Actualité Juridique – Droit Administratif », 20 Nov. 2001, pp. 911 ff. ; J.- M. Pontier, *Qu'est-ce que le droit administratif ?*, in « Actualité Juridique – Droit Administratif », 23 Oct. 2006, pp. 1937 ff. ; P. Martens, *Que reste-t-il du droit administratif ?*, in « Administration Publique », V. 30, 2006, T. I, p. 1 ; J. Caillosse, *La constitution imaginaire de l'administration. Recherches sur la politique du droit administratif*, Paris, PUF, 2008,

focused on "steering" rather than on ordering. This new administrative law is – on this view – the product of the new role of the State as a promoter, as a facilitator, as a risk regulator, and as the helmsman of economy and society. It therefore requires a new, more interdisciplinary, approach[2].

Should we share the view that administrative law has reached the final stage of its life, or, on the contrary, that it is undergoing an process of intense change and renewal? What prevails now: continuity and decline, or development and modernization?

Before providing an answer to these questions, I shall address the more general issue of continuity and change in administrative law.

2. Continuity and change

[2] M. Ruffert (ed.), *The Transformation of Administrative Law in Europe*, München, Sellier, 2007; W. Hoffmann – Riem, *Zwischenschritte zur Modernisierung der Rechtswissenschaft*, in "Juristenzeitung", J. 62, 6 July 2007, pp. 645 ff.; E. Schmidt – Assmann, *Principes de base d'une réforme du droit administratif*, "Revue française de droit administratif", 2008, May - June, pp. 427 ff. and July - August, pp. 667 ff.; G. F. Schuppert, *Verwaltungsrecht und Verwaltungsrechtswissenschaft im Wandel. Von Planung über Steuerung zu Governance?*, in "Archiv des öffentlichen Rechts", B. 133, 2008, pp. 79 ff.; W. Kahl, *What is "New" about the "New Administrative Law Science"in Germany*, in "European Public Law", 16, 2010, n. 1 pp. 105 ff.; K.-H. Ladeur, *The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law*, Osgoode Hall Law School Research Paper Series, n. 16/2011.

For a long time, administrative law was conceived as the domain of stability and continuity. Otto Mayer, in the introduction to the third edition of his "Deutsches Verwaltungsrecht", observed that it was a common opinion of his times that "Verfassungsrecht vergeht, Verwaltungsrecht besteht" (constitutional law passes, administrative law remains)[3].

This conclusion was strengthened by the dogmatic approach adopted by administrative law scholarship in many European countries, where the dogmatic reinterpretation of Roman law by the German scholar Friedrich von Savigny was taken for granted and imported into the study of administrative law. For instance, in Italy, the founding father of administrative law scholarship, Vittorio Emanuele Orlando, espoused the "systematic approach" developed by Savigny and by scholars of private law. Therefore, concepts and methods possessing a high degree of stability in the field of private law, became familiar to administrative law scholarship. Administrative law was founded on timeless tenets or dogmas derived from private law.

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[3] O. Mayer, *Deutsches Verwaltungsrecht*, B. I, Duncker und Humblot, Berlin, 1924, Nachdruck, Berlin, 1969, Vorwort III Auflage, p. II. See also T. Ginsburg, *Written constitutions and the administrative state: on the constitutional character of administrative law*, in S. Rose-Ackerman and P. L. Lindseth (eds.), *Comparative Administrative Law*, Cheltenham, Elgar, 2010, p.121 ("[A]dministrative law institutions endure, while constitutions do not").

Continuity in paradigms of study paralleled the idea of continuity in administrative institutions.

Over the last twenty years, both assumptions have become obsolete. Administrative institutions have undergone impressive changes. Consider the accumulation of these: globalization, privatization, citizens' participation, new global fiscal responsibilities. The very idea that administrative law concepts could remain stable over time has been abandoned.

The purpose of this paper is to catalog and briefly review the major changes that have occurred in Europe in the last twenty years, and to mention the resulting changes produced in the methods used to study administrative law. Discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying the new administrative law.

3. Beyond the State

According to Otto Mayer, "[t]he administration is the activity of the State for the accomplishment of its ends"[4]. Therefore, administrative law

[4] O. Mayer, *Deutsches Verwaltungsrecht*, *ibid*., p.1 ("Danach ist Verwaltung [....] Tätigkeit des Staates zur Erfüllung seiner Zwecke".

originated as the product of the State, but has now become dependent on other powers of transnational, global, and local dimensions. Many complex phenomena are currently unfolding: the growth of ultra-national and intra-national powers; increasing "dédoublement fonctionnel" (functional splitting), in which national governments act both as sovereign powers and as "delegates" of ultra-national bodies; the development of certain basic principles of administrative law at global, national, and local levels – (for example, in Europe, the principle of "good administration"); open Statehood ("offene Staatlichkeit") and increased communication between national legal orders, thanks to which principles may circulate (for example, the principle of proportionality, first developed in the German legal order, was then imported in the European Union, and from there into many national legal orders); development of principles that are shared by several legal orders, at the global, national and local levels, which therefore become universal (for example, the right to a hearing, the duty to give reasons, judicial review), and thus provide increased opportunities for popular participation, but also produce increasing conflicts; rights are not recognized only by national constitutions, but also by global rules and imposed by these on national legal orders.

The most important of these developments is the growth of a global space and a global polity. These are not only arenas in which contending forces operate, but also sets of organizations claiming control not over territories and people, but over functions [5].

These developments require administrative law scholarship to be denationalized. Thus far, nationalism has been the prevailing mode through which administrative law scholarship has been conducted. But, as common core principles have developed at the national, transnational and global levels, administrative law scholarship must give up this traditional nation-based approach.

Indeed, for example, to understand the European Union, it is necessary to draw inspiration from the imperial paradigm rather than the State one. Like the empires, the Union is a compound structure.

Attempts to establish a common European area of research in the field of public law are already under way.

4. Beyond democracy

Representative democracy and the traditional legitimacy paradigm (featuring governing bodies vs. governed) have been exhausted. In all

[5] S. Cassese, *The Global Polity,* unpublished.

countries, and globally, public powers and civil societies are in search of new sources of legitimacy, and new ways of holding power accountable have been tested.

National and supranational legal orders are developing in two different directions. Vertical accountability is increasingly juxtaposed with horizontal accountability (inter-institutional accountability) is increasingly juxtaposed[6]. National governments respond to other national governments and to supranational institutions, and independent regulatory agencies balance ministerial bodies. Power is shifted to "technocrat – guardians" who are shielded from political influence[7].

Delegation of power through elections is now flanked by participation in the decision-making process: major urban planning, environmental, and regulatory decisions require public inquiries through which individuals can make their voices heard. Popular participation and deliberative democracy complement representative democracy.

These constitutional developments also affect administrative law, and an entirely new area of study is opened up to the scrutiny of

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[6] G. O'Donnell, *Horizontal Accountability in New Democracies*, in A. Schedler, L. Diamond and M. F. Plattner (eds.), *The Self-Restraining State. Power and Accountability in New Democracies*, Boulder (Colorado), Lynne Riener, 1999, pp. 29 ff.

[7] A. Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government*, New York, Oxford University Press, 2010.

administrative law scholarship, which, in the past, developed essentially along vertical lines. This requires renewed attention to cooperation, co-decision, and reciprocal accountability; and to procedures, disclosure and access to information, notice and comment, hearings, and reasoned decisions.

5. Private versus public

Administrative law was initially established as a "special" law, separate from private law.

Globalization, overburdened governments, privatization, and new public management techniques all de-emphasized and blurred the public–private divide. Private law invades the space of public law and erodes its specificity[8].

In the global polity, hybrid and private bodies are as numerous as public bodies.

National governments make increasing use of private law. Contracts between the State and private persons, once almost unknown (as they

[8] P. van Ommeslaghe, *Le droit public existe-t-il?*, in "Revue de la Faculté de droit", Université libre de Bruxelles, Vol. 33, 2006, I, pp. 15 ff.; P. M. Huber, *Die Demontage des öffentlichen rechts*, in *Wirtschaft – Verwaltung – Recht*. Festschrift für Rolf Stober, Köln, Heymanns, 2008, pp. 547 ff.

challenged the very idea of State sovereignty), are now a common feature of State activity. Consequently, the State becomes dependent upon collaboration with civil society.

With the emergence of the enabling State, the focus of public activity shifted toward measures aimed at financing benefits through the market. Therefore, a large part of social welfare has become a lucrative, privatized, commercial and for-profit activity[9]. Outsourcing and public – private partnerships increase efficiency and sectionalism, which in turn contribute to the fragmentation of the State.

On the contrary, private institutions increasingly apply administrative law rules (an example are the ICANN by-laws, which contain a sort of administrative procedure act). As public bodies are not necessarily subject to administrative law, so too private bodies are not necessarily subject to private law. Topics such as State-owned enterprises, public-private partnerships, public incentives to private companies, and market-oriented regulation thus become crucial for the analysis of administrative law.

These developments make it necessary to abandon the public law regime paradigm, to de-publicize the approach adopted by administrative

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[9] N. Gilbert and B. Gilbert, *The Enabling State: Modern Welfare Capitalism in America*, New York, Oxford University Press, 1989.

law scholarship and to study the ambiguities and the richness of the interconnections between public and private law.

6. The "administrative machine"

Between the 19th and the 20th century, Weberian-style administration was a "machine", with linear development and linear decision-making processes. According to this mechanical form of regulation, the executive branch was ruled from above (politicians governed bureaucrats), agencies developed according to popular demand for services as interpreted by parliaments, decision-making processes ran directly from the initiator (usually a high-level politician) to the deciding officer (again a politician), through the machinery of the executive agencies.

In the last fifty years, the picture has become more complex. Administration, politics and society now form a triangle; there is no longer a clear dividing line between administration and society; negotiation runs side by side with command and control; as soon as new services require new structures, these new structures establish links with their institutional clients and attract new clients (both internally and externally); decision-making processes are replaced or accompanied by consultation, mediation, Parliament-like procedures, or, simply, muddling through. "The old image

of a hierarchical public administration single-handedly implementing well-defined policy goals set down in legislation must today compete with a vision of the administrative process as open-ended, collaborative, and networked"[10].

Administrative law scholarship must adapt its paradigms and research techniques to this new reality. It must be prepared to study administrative law less as a mechanical structure than as a market, where many intersecting negotiations take place. "To capture the new reality, comparative administrative law should be framed no longer as the rules and judicial-redress mechanisms that guarantee the effective working of administration, but rather as an accountability network through which civil servants are embedded in their liberal-democratic social orders"[11].

7. The executive branch between politics and society

The executive branch, which once served the elected politicians and the state-provider of a few basic services (e.g. defence, public order, tax collection), has now become society's largest artefact. It has also become

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[10] F. Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, in "The American Journal of Comparative Law", Vol. 59, 2011, p. 869.

[11] F. Bignami, *From Expert Administration ibid*., p. 872.

increasingly separated from politics, becoming, rather, ever more embedded in society. The State is no longer extraneous to society, as it is not extraneous to the economy.

These developments are noticeable if the size of government apparatuses is measured: a century ago, public employment occupied between 1 to 5 per cent of the labor force, a figure that has risen now to between 10 and 50 per cent[12]. The State has become the largest employer and the most important financial intermediary. Further, it is the main actor in all major social and economic events.

Therefore, administration and its law cannot be understood if the administrative culture of a country and its civic values are not studied. For example, the degree of industrialization and the experience of wars and the need to maintain large armies all have a significant impact on the management of government, both in terms of diffuse managerial cultures and popular attitudes of skepticism or deference vis-à-vis the State.

8. From bipolarity to multi-polarity

[12] OECD, *Government at a Glance 2011*, Paris, OECD Publishing, 2011.

Traditionally, administrative law was based on the bipolarity between the "administré" and the "autorité publique". In the last thirty years, two developments have occurred.

The "administré", subject to administrative authorities, has become a citizen, fully entitled to rights vis-à-vis the government: for example, he has a right to be informed, to make his voice heard, to receive reasoned decisions and to have administrative decisions reviewed by independent courts.

Broadened suffrage, organized societies and the fragmentation of executives have replaced bipolarity with multi-polarity. Today, the administrative landscape is dominated by multi-polar relations among a plurality of autonomous public bodies and conflicting private interests. For example, there are numerous State and EU agencies in the field of private finance that interact with banks, insurance companies and stock markets.

So far, administrative law scholarship has focused on the citizen only as an addressee of public orders or benefits and on the bipolar relations between the State and citizens. New administrative law scholarship has a new task. It must develop a fresh view of statutes and statutory instruments governing administrative procedure, seeing them not only as regulations of administrative proceedings (that distribute power among governmental

agencies), but as charters of citizens' rights vis-à-vis administrative authorities (that impose duties on agencies, to the benefit of private parties). It must study the "arenas" in which conflicting interests meet, dialogue, oppose one another and reach agreements and in which agencies act as promoters, arbitrators, controllers[13].

9. Legality in crisis

Administration is subject to the law consequently, an administrative law does exist. But the law does not constrain public administration's activities in their entirety. There are "black holes" and "grey holes" - domains such as military and foreign affairs in which the executive is exempt from legal constraints[14].

Executive prerogatives and privileges, once widely accepted, are now increasingly perceived as being contrary to the rule of law and to the principle of judicial review. There is, therefore, a constant tension between the executive powers and social expectations for rights-based institutions.

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[13] S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in S. Cassese, *La crisi dello Stato*, Roma-Bari, Laterza, 2002, pp. 74 ff.

[14] A. Vermeule, *Our Schmittian Administrative Law*, in "Harvard Law Review", Vol. 122, 2009, n. 4, p. 1096 ff.

Moreover, there are areas where governmental agencies must address complex and technological problems in a flexible fashion or follow the principle of precaution (for example, in environmental matters) and cannot be constrained by requirements of strict legality[15].

Finally, the executive makes frequent resort to informality. For example, it produces reports and carries out informal consultations or cooperative arrangements[16], which are neither required nor forbidden).

These developments open up an entirely new set of issues for administrative law scholarship. Traditional administrative law scholarship has worked on the basis of statutes, judicial decisions, and institutional practices. The new scholarship has a much more difficult task: to look at institutional practices without the guidance of statutes and judicial decisions. It must conduct fieldwork, with interviews and analyses of official documents and statistical data, in order to study these unregulated areas.

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[15] E. Fischer, *Risk Regulation and Administrative Constitutionalism*, Oxford, Hart, 2007, p. 43; A. – C. Favre, *Cent ans de droit administratif: de la gestion des biens de police à celle des risques environnementaux*, in "Zeitschrift für Schweizerisches Recht", Band 130, 2011, II, Heft 2, p. 233 ff.

[16] R. B. Stewart, *Administrative Law in the Twenty-First Century*, in "New York University Law Review", Vol. 78, 2003, May, n. 2, pp. 437 ff.

10. The end of the age of revolutions

In the past, in the European area, revolutions and wars were the main causes of changes in administrative law. However, now, the age of revolutions and of wars has come to an end. This has had an impact on governments' systems, as they are either free from major change, or change takes place more gradually. Administrative law is more dependent upon history and previous paths; therefore, institutional layering is the rule.

Administrative law therefore consists of multiple layers, accumulation, and juxtaposition: "the earlier approaches have not disappeared. Administrative law has been profoundly conserving. Through a process of evolutionary adaptation to changing societal circumstances, the older forms continue, but their function has been changed in the process"[17].

Moreover, "[h]ow administrative institutions form, grow and are constrained by law in any state is indeed a multi-causal phenomenon"[18]. The factors that influence administrative development are ideas and

[17] R. B. Stewart, *op. cit*., pp. 443 – 444.

[18] J. L. Mashaw, *Explaining administrative law: reflections on federal administrative law in nineteenth century America*, in S. Rose-Ackerman and P. L. Lindseth (eds.), *Comparative Administrative Law*, *ibid*., p. 37.

ideologies, economic conditions, constitutional provisions, social traditions, time and history (and, according to Montesquieu, even climate).

This requires stratigraphic analyses of the overlapping layers of regulations, of their contexts, and of their interactions. A classic example of stratified rules and institutions are budgetary regulations which reflect incremental budgetary changes.

The study of these complex structures demands, first, an attention to history and the contexts in which they originated, to the different contexts, to the underlying ideologies and historical contingencies; secondly, it requires an analysis of the interrelations between the different strata, to establish how they combine and which rules and institutions prevail.

11. From the open economy to communication between legal orders

As economies become increasingly open, legal systems become more interdependent. National legal orders are no longer self-contained systems. Exchanges, the import and export of institutions, and dialogue between judges are common. An open legal space replaces closed-off national territories.

The world has become a “cultural bazaar”, where it is possible to go “shopping for institutions”, and consequently move sets of principles move

from one legal order to another. There are not only legal transplants, but also cross-fertilizations, emulations, penetrations, harmonizations and self–harmonizations[19]. Elite networks and transnational policy communities are at work. Alongside the "lex mercatoria", merchants in administrative law have arisen.

This does not mean that individual national legal orders have become similar. Cultural traditions and contexts play a major role in transforming convergent institutions and differentiating them from one another.

These developments require two major changes in administrative law scholarship. On one hand, they require comparison: it is increasingly true that the law of one country cannot be fully understood if it is studied in isolation. Moreover, at this point, comparison requires a "total law" approach, compelling the study of the law as contained in books (i.e. statutes and statutory instruments), of law in action, of legal conventions, legal practices and customs, history, and legal myths.

On the other hand, these developments require going beyond simple comparison, to take into account the greater picture of communicating legal systems and the formation, diffusion and impact of common ideas and

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[19] C. J. Bennett, *Review Article. What Is Policy Convergence and What Causes It*, in "British Journal of Political Science", Vol. 21, P. II, April 1991, pp. 215 – 232.

principles in numerous legal orders. In other words, the developments require adopting the "cosmopolitan vision"[20].

For example, to study the contrast between common law and continental legal orders, it is necessary to explore the various State traditions, "étatiste", on one hand, and "State-lessness", on the other; the notions of the "Rechtsstaat", rule of law and "legalité", their peculiarities and similarities; institutions and pluralism as opposed to the State and monism; the notion of "service public", developed in France to counter the German concept of "Herrschaft"; "self–government" and its opposite centralization; the global diffusion and the many national re-interpretations of "new public management"; the worldwide diffusion of administrative justice and of the principle of proportionality; the convergence of dualist and monist systems on a common pattern (specialized judicial review of administrative decisions); the combination of the various different national models and ideologies as a result of increased communication between legal orders.

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[20] U. Beck, *The Cosmopolitan Vision*, Cambridge, Polity Press, 2006. See also, L. Moccia, *Comparazione giuridica, diritto e giurista europeo. Un punto di vista globale*, in "Rivista trimestrale di diritto e procedura civile", 2011, fasc. 3, pp. 767 ff.

As administrative law developed first in Europe, it is also important to study the common European roots of the subsequently-diverging national administrative cultures.

12. Methodological pluralism

Legal scholarship developed as a tool to educate practitioners, mainly lawyers and judges. Legal education must now achieve more than that, as it should also serve policymakers, arbitrators, and managers.

In the past, when it was a tool to prepare individuals for a limited number of legal professions, administrative law scholarship labored to find its own exclusive method.

Today, the demands upon it have diversified and require new techniques of analysis, and not one method alone. Indeed, it is possible to state that each problem prompts its own method of analysis. There is no exclusivity, but rather methodological pluralism (legal, economic and political analyses of the law), with the important caveat that administrative law scholarship should not be sidelined by a blind empiricism, and lose sight of certain basic categories that drive legal analysis.

In a plural and open world, in which legal orders communicate, "the national isolation of legal science is anachronistic"[21]. But a legal scholarship with the ambition to be not merely national, but universal, cannot be inspired by the same methodological convictions and must reject the idea that there is only one form of legal reasoning[22]. A doctrinal theory of law does not necessarily imply an assumption that internal coherence, a rational and organized system, or a logically consistent whole must be sought[23]. It is, therefore, impossible to "reconstitute Savigny's Historical School of Jurisprudence on a European level"[24] (or on a universal level).

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[21] R. Zimmermann, *Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science*, in "The Law Quarterly review", Vol. 117, 1996, October, p. 581.

[22] C. Wells, *Langdell and the Invention of Legal Doctrine*, University of Southern California Law School Working paper Series, Year 2009, Paper 591.

[23] As proposed by R. Zimmermann, *op. cit*., pp. 578 and 585

[24] R. Zimmermann, *op. cit*., p. 605.