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## **E. Nieto-Garrido and I. Martín Delgado, European Administrative Law in the Constitutional Treaty**

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Since the birth of the European Economic Community, the area of European administrative law is one that has experienced an enormous growth. Despite this increasingly prominent role, EU administrative law has, until recently, attracted fairly little academic interest. This book contributes to the further development of the academic discourse on European administrative law, by critically analysing the current problems and challenges faced at the European level by administrative law.

At the heart of the book lie two constitutional texts, which the authors regard as fundamental for the development of European administrative law.

The first is the ill-fated Constitutional Treaty. With regard to this point, it must be said that, despite the fact that the Constitutional Treaty is not going to enter into force, the analysis presented in the book under review is still highly relevant for the discourse on EU administrative law, since most of the changes introduced are taken up by the Lisbon Treaty in some way.

In their chapter 1, the authors discuss the complexity surrounding the sources of law of the European Union, the problems with the current system of normative instruments and the new approach to EU law-making. As is well known, the variety and complexity of the current decision-making processes has been criticised for its lack of transparency and democratic legitimisation. The authors argue for simplification and maintain that the way chosen by the Constitutional Treaty (i.e.

the introduction of the principle of hierarchy of norms and the consequent distinction of normative instruments into legislative and non-legislative instruments) will bring about more transparency and more efficient and democratic lawmaking. They further maintain that the newly introduced division between primary and secondary law will not only enhance democracy, but also lead to a simplification of the Union's everyday activities. It is worth mentioning that, although the Treaty of Lisbon no longer keeps the concept of 'European laws' and 'European framework laws' introduced by the Constitutional Treaty, it does retain the principle of hierarchy of norms and a distinction between legislative and non-legislative instruments.

The Constitutional Treaty also brought about several changes in the area of judicial protection, many of which are taken up by the Lisbon Treaty. In chapter 5 of the book under review, the authors discuss some problematic areas of judicial protection and analyse the improvements brought about by the Constitutional Treaty. In particular, this chapter highlights the main problems in the current system regarding the right to effective judicial protection and assesses whether the drafters of the Constitutional Treaty have managed to fill the gaps of judicial protection in the EU's legal system. Four main changes are analysed, namely the modification of the rule of standing of individuals in the annulment proceedings, the extension of the Community courts' jurisdiction to review the legality of agencies and bodies' acts, the provision concerning the obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law and, finally, the extension of the Community courts' jurisdiction to the current third pillar. The authors regard these changes as improvements and as evidence of a trend of the EU legal system towards a traditional model of administrative law, which aims to control any excess of institutional power and subject it to judicial scrutiny.

The Charter of Fundamental Rights and Freedoms is the second constitutional text regarded by the authors as important for the future development of EU administrative law. While the Charter constituted an integral part of the Constitutional Treaty, it is no longer present in the Lisbon Treaty, although it retains its binding force via a reference clause made by the Lisbon Treaty itself.

With regard to the Charter, the authors touch upon two distinct yet intertwined issues. In their chapter 2 they discuss the impact of the Charter on the EU administration, while in chapter 3 the focus is placed on the influence of the Charter on the national legal systems. Both chapters analyse whether the binding nature of the Charter will create new obligations for the Community and national administrations, or whether it will simply facilitate the enforcement of already existing rights by making them more visible for the citizens of the Union.

As far as the impact of the Charter on national administrative legal systems, it must be pointed out that the Member States are in principle obliged to respect the Charter 'only when they are implementing Union law' (Article 51 of the Charter). Given the uncertain boundaries of this provision, the authors provide, on the basis of the European Court of Justice's case law and EC law provisions, a theory of what is actually meant by implementation of Union law. The conclusion here seems to be that Article 51 does not introduce anything new in relation to the jurisprudence of the ECJ as regards the application of fundamental rights to Member States. However, one innovation can be detected, in the authors' view, in the second part of Article 51, which creates an obligation – also for the Member States implementing EU law – to respect the rights and observe the principles and promote the application thereof in accordance with their respective powers. In this way, the fundamental rights enshrined in the Charter operate not only negatively as a limit to the acts of the public powers, but also so that they can be invoked to demand positive action from the public powers in the fields covered by EU law.

It worth noting that in these two chapters the authors also raise important, unanswered questions, especially with regard to complex, multi-level European decision-making processes, such as

whether it will really be possible to confine the ambit of the Charter to cases where Member States are implementing Union law and whether conflicts between the Luxembourg and Strasbourg are likely to arise in the future.

Chapters 2 and 3 also contain a thorough analysis of three rights contained in the Charter which, in the authors' view, will have an impact for the future of EU administrative law, namely the right to good administration, the right of access to documents and the right to protection of personal data.

With regard to the right to good administration, the authors conclude that, thanks to the binding nature of the Charter, this right will have implications for individuals that may challenge any administrative measure that allegedly infringes upon their right to good administration. Although the Charter only explicitly mentions the Union administration in the field of application of the right to good administration, this right will, in the authors' view, have significant effects also for national administrations when they apply EU law. Concerning the right of access to documents, the authors correctly note that the wording of the Charter is identical to that of the already existing EC provisions; however, they also consider the incorporation of this right in the Charter as significant for its recognition and establishment in the Community legal order, both with regard to the EU and the national administrations. A particularly interesting analysis is carried out with regard to the right to protection of personal data. The authors here highlight the potential clash between the freedom of information and data protection, placing the right to privacy firmly in the field of administrative law. In their view, the main innovations brought about by the Charter are the creation of a single legal basis for the protection of this right within the ambit of the EU (therefore, binding for the EU and the Member States) and its application to the third pillar of the EU.

Finally, Chapter 4 is dedicated to the still open discussion on the feasibility and desirability of a European Code of Administrative Procedure. Considering that the Union is a Community of administrative law, it seems clear that administrative procedure is a fundamental theme in European administrative law. As is well known, the Community legislator has remained passive with regard to a possible comprehensive law of administrative procedure, while the ECJ has formulated some general principles which the Community and national administrations must respect when carrying out their tasks.

The authors start off their examination by noting that one is currently faced with the existence of a European public administration without a law on administrative procedure. Instead, there are norms scattered in various provisions of primary and secondary law and in the general principles of law developed by the European Court of Justice, which govern the procedural rights of private parties during the administrative decision-making process. The authors consider this situation as insufficient and argue that, if the Union administration is to act efficiently, transparently, responsibly and independently, it needs a law on administrative procedure which would apply equally to European and national administrations insofar as they apply EU law. The legal basis is to be found, in the authors' view, both in Article III-398 of the Constitution, which has been taken up verbatim by the Treaty of Lisbon and will become Article 254a of the EC Treaty<sup>1</sup>, and in the right to good administration. As far as the content is concerned, the authors plead for a law containing 'standard stages', independent of the acting body, the subject matter and the nature and type of act adopted within it. The protection of individuals' and Member States' interests should play a fundamental role in the procedure, as well as the participation of a broad range of interested parties.

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<sup>1</sup> According to this provision, 'In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 283, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end'.

In conclusion, it can be said that the book under review can be regarded as an important contribution to the developing field of European administrative law. While not being a student book or a comprehensive treatise in EU administrative law, the book can be praised for its original approach, which departs from the Constitutional Treaty to examine the innovations which contribute to shape administrative law at EU level. The book shows a clear effort of systematisation, which this field is in need of.

On a more critical note, one last word deserves to be spent on the issue of a possible code of European administrative law. While appreciating the authors' search for a possible legal basis and the content of such a code, it is respectfully submitted that the authors seem to regard the very *desirability* of such measure as a given, rather than a matter for debate. Indeed, they take a clear position in favour of codification, but fail to respond to the arguments brought forward against their position. However, it cannot be overlooked that, while a codification of European administrative procedure might potentially bring about advantages for individuals and businesses, several arguments speak against the idea of such a measure.

First of all, such a general law on administrative procedure would entail the risk of a rigid and inflexible system, and go against the increasing trend of using more soft law instruments and the Open Method of Coordination. Furthermore, one could argue that the aim of ensuring uniform European decision-making processes might be in conflict with legitimate national interests, such as the need to protect fairness, and would create awkward problems of double standards of protection. These difficulties could be perceived in an acute form and could potentially lead to unmanageable situations in cases in which national administrations are, in one decision-making process, applying both national and European law. Another argument against the creation of a European law on administrative procedure is based upon the fact that such norms may be perceived as an extraneous body which might not fit with the different legal traditions of the Member States. These fundamental differences could make it extremely hard to agree, at the European level, upon common rules which all national and European administrative authorities would be bound to adhere to.

While the desirability of a European administrative code of procedure is questionable, it is, however, by all means desirable that a debate takes place concerning this issue. In this sense, the book under review takes one of the possible positions with regard to an objective whose attainment can no longer be postponed, that of more efficient, transparent and democratic European administration.