iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

BOOK REVIEW

H. C. H. HOFMANN, R. L. WEAVER, *Transatlantic Perspectives on Administrative Law*, Bruylant, Bruxelles, 2011, 271 pages.

ISBN: 978-2-8027-3052-1.

(January 2013)

FRANCO PEIRONE

The book *"Transatlantic Perspectives on Administrative Law"* addresses a well-known issue dealing with an innovative approach. The comparative analysis of the US and EU administrative laws is examined through the tools of a new trans-national administrative law, rising from the two sides of the Atlantic Ocean.

The trans-Atlantic administrative law is characterized not only by the common roots and perspectives but also by suffering the consequences of the internationalisation of legal systems too. The administrative actions are often the necessary result of obligations arising from international organizations such as UN, OECD, WTO.

The common scope of the various articles included in the book is to highlight the gains which the US and the EU systems could obtain studying mutually and learning from past failures.

The main objective is to focus the proper task of the study. The US administrative law, since the 30's, is something different from the European's one, and is more likely a fourth power which carries on the three

traditional functions of legislative, executive, judiciary powers. This, above all, thanks to the large functions and powers assumed by the system of the agencies, which develop the main tasks of the public law, as competition, services, public order. It can be a huge issue, since the XXIth century outstanding matter of public law, rather than the separation of powers, is the threat of the monopolization of powers by a single type of decision-making bodies, as the agencies are. The solution is to find a balance with the issues carried on by agencies, as effectiveness and efficiency, with the value of democracy, as transparency and public participation.

The EU system of administrative law mainly faces the different problem of the direct implementation, which induces a vague and inconsistent legal landscape.

The scholars of the EU administrative law have tried to overcome this issue with the theorization of the functional, organizational and procedural dimensions of the EU administrative law. The first one concerns what polices have to be implement. The second regards the main actors (European and national) involved in these developments. The last one underlines the cooperation between these actors. The functional unity of the EU administrative law is therefore carried on organically by different actors but engaged in a procedural cooperation. Nevertheless, from this concepts of mixed administration and shared sovereignty could derive a lack of accountability. The future challenge for the EU administrative law is to provide *ex post* and *ex ante* mechanisms of political and legal accountability for administrative action in general and not policy-specific.

Some tasks in the US and EU systems have started from common roots but reached different solutions. Talking about the electric energy sector in the XXth century the solution was a vertically integrated system, in both legal orders, based on a large monopoly state-managed (EU) or a big private firm (US). Both solutions caused a welfare social loss since those systems produced less electricity at higher prices compared to market prices due to the government's intervention (e.g. nationalisation). It became clear that these three functions - generation, transmission and distribution of the electricity - were not necessarily joined each other. Therefore the governments have tried to find out an alternative dialogue to solve the conflicts between the interested groups, especially between public and private. This approach crowns nowadays in a collaborative governance of electric market facing its special featuring (production undifferentiated, natural monopoly) consistently with the competition.

The best option is a self-regulation set by firms supported by the government: this improves fairness and efficiency more than the free market forces. Firms benefit from keeping themselves clean before the government's intervention. Government's regulation should not be completely removed, but should still take place at a multi-level dimension (federal, state, local). The US model of auto-regulatory organization shows a cross-boundary effect, which can be effective for the EU assets as well.

Right now the EU is trying to impose that kind of regulation on electricity - command control mechanism - that the US is now refusing, creating a truly independent authority as a chain between stakeholders and third users. Therefore the EU system seems condemned to the worst choice, fixing price

regulation - no electric system pan-European exists neither agencies nor inner controls - and leaving the Member States free to determine the prices.

Administrative law is also a useful tool for protecting the consumers. The free-trade organizations (EU, NAFTA, MERCOSUR) have brought advantages for the developed countries (e.g. low-cost manufactured) but also social and health costs: serious health issues related to the products arriving from developing countries, resulting in increased costs on consumers for the imported goods (e.g. toxic foods).

It's obvious that nation-states have specific troubles of scale to respond to the dangers of world-trade; moreover their traditional systems are based mostly on liability rules and not on preventing rules.

The solution lies in creating multi-national structures for increasing cooperation among different countries. During the mad-cow crisis the EU lacked the coordination and an unique top-level head research structure for determining health-risk levels; France tried to stop importing meat from UK but consequently had been sanctioned by the EU Commission and by the ECJ. Later on the EU created the European Food Safety Authority [EFSA].

After the mad-cow crisis the Members States could impose fines and nowadays the EU Commission oversees the national controls. Moreover, the Commission harmonizes these fines and implements a system of reports.

Focusing on the main principles of the administrative systems, transparency and participation had always been trademark of the US administrative law. Their lack in the EU law is one of the reasons about the feeling that EU is perceived as remote and undemocratic. Such principles are therefore the platform for future challenges for the EU law.

The failures of some US administrative acts, initially established to implement transparency and participation (Federal Advisory Committee Act; Sunshine Act) disclosed structural obstacles these principles to improve: on such failures the EU system should deeply reflect.

Interestingly the US administrative system was firstly developed and then reached his peak during the New Deal; at that time persons had no right of access to any agency records, nor that was any requirement for those agencies to publish the regulation they adopted. The Due process Clause was likely to guarantee the correct procedure, where the transparency could give just space for political pressure. The public participation was unnecessary to protect the public, since the experts inside the administration were believed to protect the public interest at the best. It was an elitist, un-democratic solution as the EU law is right now.

The APA rejected the New Deal model for an ultimate judicial model: since the agencies were no longer trusted to pursue the public interest, the public's interest needed to be represented by advocacy on behalf of public interest, balancing the countervailing private interests.

The next model of "regulation-negotiation" (*"reg-neg"*) was based on involving stakeholders, negotiating with them the terms of a proposed regulation. The aim was to avoid the judicial model, tackling the conflict between the competing private and public interest, both in the procedure before and then in front of the court. Obviously even this model, based on costs-benefits analysis to prevent litigation before the courts, privileged certain kind of interest of the administration (e.g. money) and sacrificed others ones (e.g. health, environment).

The agencies, created to support the EU Commission with technical analysis but also to develop the power and visibility of the EU institutions, still lack a clear regime of responsibility. The independence of agencies - the *Meroni* doctrine - is not more a mantra. As already happened with the legal accountability by judicial review to the decision of agencies or through internal-board of appeal, the same should be accomplished with regard to political accountability. The EU Parliament has gained more chances to scrutinize the appointments of the agencies' members.

This is also consistent with the decisional role assumed by several agencies (European Chemical Agency, ECHA), which are authorized to adopt legally binding decisions.

Even if their original scopes and tasks were different - for agencies, enhance the EU executive room for discretion at European level, for networks, foster the cooperation among Member States - now they both serve the same scope: improving the administration of the common market and the coherent application of the EU law in the Member States. Agencies still work on a scheme of direct implementation, where the networks are used to deal with the issues of indirect implementation or when the sovereign authority delegated to the EU institutions is still limited. In such a case the agencies' s functions would face off not only political but also legal constraints.

Nowadays there are no more differences between building up an Agency or a Network neither in their functions and powers (e.g. European Telecommunication Agency; Proposal for an European Migration Network; Proposal for an Energy Agency).