Book Review

Eva Nieto-Garrido and Isaac Martín Delgado, *European Administrative Law in the Constitutional Treaty* (Oxford and Portland, Oregon, Hart Publishing 2007) ISBN: 978-1-84113-512-0, £45.00, 190p.

In professor Harlow's foreword to this book, it is underlined that 'EU administrative law has until fairly recently attracted little sustained academic interest'. From her point of view, this situation is due to factors like the emphasis on trade and commerce, monopolies and state aids, etc. without realizing that they are regulatory processes forming part of administrative law, or the problem of language (p. viii). Consequently, professor Harlow welcomes this book written by two Spanish professors of administrative law, which is not 'a student text or straightforward administrative law treatise' but 'something much more original and ambitious', based on two constitutional texts: the Constitutional Treaty and the Charter of Fundamental Rights of the European Union.

In the case of the Charter, the new Treaty of Lisbon gives it legal binding effects. Therefore, all the considerations included in this book are of great interest. On the other hand, the short life of the ill-fated Constitutional Treaty is well known. However, the book is also still interesting in this part: firstly, as a reminder of what could have been and was not and as a source of inspiration to analyze the Treaty of Lisbon and its reforms of the EU treaties; and secondly, because the authors focus their study of the Constitutional Treaty in relation to EU lawmaking, underlining the challenge of simplification. And this is still interesting in the new scenario under the Treaty of Lisbon. Obviously, new studies will be undertaken on this subject and its legal implications. As reader, you will not find this kind of analysis in this book but it will increase your knowledge about the roots of some of the new provisions. In that sense, we have to praise the authors' interesting work.

The book is divided into five chapters (1, 2 and 5 written by Nieto Garrido and 3 and 4 by Martín Delgado). But it is possible to establish a second and less formal division according to the authors' own words. On page 140, they explain how the last chapter is devoted to judicial protection within the EU legal system reflecting the famous red light theory of Harlow and Rawlings[1]. However, at the same time, they highlight how the previous chapters are devoted to a less traditional model of administrative law focused on the implementation 'of principles of transparency, participation, effectiveness and accountability in the daily operation of public administration'. This is a modern model of administrative law contained in Harlow and Rawling's green theory. In other words, it is a newer paradigm (using the famous Khun' s expression) in the field of administrative law based on ensuring the *legality and (as a legal requirement) also the quality of administrative behavior and decisions*. Consequently, as we will see below, the right to good admin-

[1] Harlow, C. and Rawlings, A. (1997) *Law and Administration*, London, Butterworths.

istration included in the Charter of Fundamental Rights of the European Union becomes a key legal concept in this new frame, as the book's authors point out.[2]

The first chapter analyzes the complexity surrounding the sources of law of the European Union. Taking into account the existing legal framework (Article 249 EC Treaty), the authors underline the problems of lack of transparency, legal certainty, and democratic legitimacy in the decision-making process. They think that there is a clear need of more simplification and democratization under the principle of hierarchy of norms. Regarding simplification, the book insists in its paper that this is a key element to transform EU administrative law under the principles of democracy, transparency, participation and accountability. According to these basic ideas, the chapter analyzes the Constitutional Treaty and its regulation in relation to the sources of law (based on the principle of hierarchy of norms) and the consequences of the choice between primary or secondary law.

The second and third chapters study the impact of the Charter of Fundamental Rights of the European Union on the Community administration and on the national administrations respectively. All the considerations made are of major interest taking into account, as it was said before, that the Treaty of Lisbon gives it binding force. Specifically, these chapters deal with the right to good administration (having both chapters clearly linked with chapter 4, as we will see), the right of access to documents and the right to protection of personal data (linking with the last chapter which is devoted partially to the judicial review of Europol and Eurojust).

We can underline here the analysis of the meaning and significance of Article 51 of the Charter regarding its scope of application to member states, 'one of the most confusing and obscure clauses to be found in the entire' Charter (page 67). After taking into account the European Court of Justice's case law and the confusing legal literature in relation to the concept of 'implementation', the authors explain their point of view. According to their opinion, there would be implementation of EU law when a national act falls within the competence of the EU, affects some community obligation relating to this field or when it impedes, hinders or negatively affects one of the objectives of the EU. Therefore, the book chooses a wide interpretation of this clause beyond the mere application of a rule of Community law, a

[2] In this direction, see e.g De Graaf, K.J, Jans, J.H., Marseille, A.T. & De Ridder, J. (Ed) (2007) *Quality of Decision-Making in Public Law. Studies in Administrative Decision-Making in the Netherlands*, Groningen, Europa Law Publishing and Ponce Solé, J. (2002) 'Good administration and European Public Law. The Fight for Quality in the Field of Administrative Decisions', *European Review of Public Law*, vol. 14, n. 4, winter, pages 1503-1544. A comparative study about the right to good administration in the legal systems of member states can be found in Swedish Agency for Public Administration (2005), *Principles of Good Administration*, (available at: http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf. Last visited: February 19, 2008.

narrower interpretation that is considered contrary to the logic of the functioning of the system.

In chapter three, it is also interesting to note the study of the three aforementioned rights in relation to member states, using, again, a flexible interpretation in favor of their possible application to the national administrations when implementing EU law. This is evident in the case of the right of good administration that is considered applicable to national administrations for several reasons in spite of the literal content of Article 41 of the Charter. This third chapter concludes with the application of the theoretical arguments developed in the previous pages to a specific sector of EU law, used as a case study: the EU's structural funds.

The fourth chapter argues for the need to create a law on common administrative procedure. Clearly this is an old issue, now revisited by the authors in the light of the Constitutional Treaty. After analyzing the current situation, the book exposes several arguments in favor of codifying European administrative procedure. The authors consider that there is a legal foundation to prepare this codification. In the case of EU activity, the connection between procedure and substance is the obvious reason. In the case of member states applying EU law, the right to good administration is, among other reasons, a strong argument, which found legal anchor in Article III-398 of the Constitutional Treaty. Although professor Harlow is skeptical in her preface about the need for codification (arguing about the 'ossification' it could create and the risk of more judicial conflicts based on procedural grounds),[3] I agree with the author's opinion and think that one more reason will make inevitable the creation of this code in the future: the United States is interested in having more legal certainty in its commercial relationships with the EU (as professor Harlow points out in her preface). But probably the main point is not *whether to have* a code but *what kind of* code. The book states that we need a law *on* administrative procedure based on general principles as an opportunity for innovation taking into account TIC and guided by the ideas of simplification and minimum common procedural standards. The authors see the process of building such a code as 'reasonably simple' using existing law as a model, the right to good administration and the Code of Good Administrative Behavior of 2001.[4]

All in all, without denying the interesting perspectives in the chapter, I miss two aspects in the study. Firstly, all the reflections are made in relation

[3] Apparently changing her previous opinion, see e.g Harlow, C. (1996), 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Show to the Foot', *European Law. Journal*, vol. 2, n. 1, March, pages 3 and ff.

[4] For a study of this Code, see Ponce Solé, J. (2005) 'Good Administration and Administrative Procedures', *Indiana Journal of Global Legal Studies*, Vol. 12, n. 2, summer, pp. 551 at 589 (available at: http://muse.jhu.edu/journals/indiana_journal_of_global_legal_studies/v012/12.2ponce.pdf. Last visited: February, 19, 2008).

to acts, without treatment of the rule-making process,[5] a crucial aspect in the EU legal system to be improved, as Shapiro underlines.[6] Secondly, a deeper treatment of the legal regime regarding breaches of procedural requirements, a delicate and important issue, would have been very welcome.[7]

Finally, chapter five deals with the reform of the limited jurisdiction of the European Court of Justice. Firstly, it is considered the existing rule of standing (Article 230.4 EC Treaty) and its deficiencies, underlined by the *UPA* and *Jégo-Quéré* cases before the CFI, as well as the modifications introduced by the Constitutional Treaty. Secondly, the chapter deals with the extent of judicial review according to the Constitutional Treaty. In order to study this issue, the authors classify the EU agencies in three different types (data-collecting, regulatory and executive) and add a specific study concerning Europol and Eurojust. Their conclusion is clear: the Constitutional Treaty improved judicial review of EU agencies and bodies both in the field of remedies for annulment and of remedies against failure to act. The book closes with two points: a study of Article I-29 of the Constitutional Treaty which established the obligation of member States to provide appropriate remedies to ensure effective legal protection in the fields covered by EU Law and with a reference to the extension of the European Court of Justice's competences to the third pillar.

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5 About administrative rulemaking see Ziamou, T.TH., *Rulemaking, Participation and the Limits of Public Law in the USA and Europe*, Ashgate, 2001.

6 See e.g. Shapiro, M. (2003) 'Trans-Atlantic: Harlow Revisited', in Craig, P. and Rawlings, R. (Ed.), *Law and Administration in Europe. Essays in Honour of Carol Harlow*, Oxford University Press, pages 225-239.

7 See e.g. Schwarze, J. 'Judicial Review of European Administrative Law' (2004), *Public Law*, Spring, page 158.