Eliantonio, M and Backes C, *Cases, Materials and Text on Judicial Review of Administrative Action,* Hart Publishing 2019, 1st edn, ISBN 97815099214 78, 1032 pp., £49.50

Judicial review is the oldest and the most developed area in comparative administrative law. Institutions and rules of judicial review are usually considered as products of the history and legal traditions of each country. This explains why the literature has traditionally focused on the opposition between countries in which disputes between public authorities and individuals are decided by ordinary courts and countries where they are solved (at least in part) by separated administrative courts. Generally, this opposition has been considered foundational for the conceptual framing of the distinguishing features of each national system of administrative law. As a matter of fact, alongside this opposition, scholars have pointed to the radically different systems of the French *droit administratif* as compared to the alleged inexistence of administrative law in England.

Only in the last twenty years have scholars started to demonstrate the increasing convergence of different systems of judicial review. A growing body of literature hence emerged, focused on theoretical issues,[1] on the legal and institutional framework,[2] on the role of judicial review in the broader regulatory environment of administrative law[3] and on the standards of judicial review.[4]

However, what was still missing was an overall analysis of all the components of judicial review of administrative action. The book edited by Eliantonio and Backes fills this gap in the literature and offers a functional comparative approach by analyzing and comparing a large number of materials and cases that cover different areas of judicial review in various European legal systems. The attention is focused on the three major jurisdictions, identified by Michel

1 W Bishop, 'A theory of administrative law' (1990) 19 The Journal of Legal Studies 489-530; A Perry, 'Plan B: A Theory of Judicial Review' (2017) Oxford Legal Studies Research Paper 66/2017 861-877 <https://ssrn.com/abstract=3075886> accessed 11 November 2020.

2 MP Chiti, 'Monism or Dualism in Administrative Law: A True or a False Dilemma?' (2000) 2 La Revue Administrative 46-56; S Amaral-Garcia, 'Administrative Courts', *Encyclopedia of Law and Economics* (Springer 2015); G Napolitano, 'The Legal Design of Judicial Review Systems: A Comparative Overview' (2018) 3 Rivista trimestrale di diritto pubblico.

3 M Asimow, 'Five models of administrative adjudication' (2015) 63 The American Journal of Comparative Law 3; P Cane, *Controlling administrative power: An historical comparison* (Cambridge University Press 2016); F Bignami, 'Regulation and the courts: judicial review in comparative perspective' in F Bignamis and D Zaring (eds), *Comparative Law and Regulation* (Edward Elgar Publishing 2016) 275-304.

4 P Craig, 'Judicial review of questions of law: a comparative perspective', in S Rose-Ackerman, P Lindseth and B Emerson (eds) *Comparative Administrative Law* (Edward Elgar 2017); N Garoupa and J Mathews, 'Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review' (2014) 62 The American Journal of Comparative Law 1-33; E Jordao, *Le juge et l'administration. Entre le contrôle et la deference* (Bruylant 2016); S Ranchordas and B De Waard (eds), *The Judge and the Proportionate Use of Discretion: A Comparative Administrative Law Study* (Routledge 2015); J Mathews, 'Proportionality review in administrative law' in *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing 2017) 405-419.

Fromont, as the three fundamental types of administrative law in Europe: France, Germany, and United Kingdom. The Netherlands are added to the list, probably because this is where most of the authors teach and the project was conceived. Unfortunately, there is no reference to the relevant experience of Latin countries, such as Italy and Spain, nor to Scandinavian and East European countries. The analysis of the selected national jurisdictions, however, is supplemented with that of the European Union.

The book's purpose is to identify the persisting differences and on-going convergence trends, trying to explain how national approaches to judicial review have been modified by EU and ECHR law requirements. In particular, the research aims to assess to what extent convergence is creating a common legal framework. To elucidate this, the book provides a wide range of administrative law materials, including classic readings, statutory provisions, and above all, cases and rulings by national and European courts. These legal sources relate to a homogeneous set of legal issues that allow for analysis and comparison of how similar problems are solved in different legal orders. The analysis therefore prefers a pragmatic approach aimed at understanding the functioning of the law in practice. *Cases, Materials and Text on Judicial Review of Administrative Action* constitutes the first real attempt to provide a comparative and comprehensive analysis of the most important issues concerning judicial review of administrative action.

The book adopts a micro-comparative approach. The comparative remarks in each chapter are restrained to the specific issue analyzed in the sub-sections. Commonalities and differences are described in detail, but broader constitutional and regulatory explanations are only seldom provided. The casebook is divided into eleven chapters that address general topics such as the constitutional foundations and structure of judicial review, the organization of the judicial systems, the different types of administrative action and corresponding types of review. Access to court as well as grounds and standards of review, structure and style of judgments, alternative dispute resolution systems and liability claims are also analyzed.

Chapter 1, written by Thomas Perroud, deals with the constitutional structure and the basic characteristics of the legal systems considered. After examining the historical evolution of administrative justice, the chapter analyses the main sources of law regulating the field in each jurisdiction and their constitutional guarantees. Finally, objective models aimed at protecting the public interest are compared with subjective ones aimed at the enforcement of individual rights. The institutional design of the administrative judicial system is the result of a long historical evolution in every legal system, marked by statutory choices and judge-made law. In most cases, however, especially after World War II, the fundamental guidelines are now provided by constitutions (with the relevant exception of France). In this way, judicial review of governmental action becomes a relevant part of the constitutional system of checks and balances. The provisions contained in the constitutions are generally divided into two types. On

the one hand, they ensure the right of every individual to take legal action against public authorities in the event of an alleged violation: this often leads to judicial review systems becoming more subjective. On the other hand, the constitutional provisions regulate the organization of the judiciary system and indicate the courts with jurisdiction over disputes with public authorities.

Chapter 2 by Mariolina Eliantonio focuses on the way in which judicial review is organized. The chapter analyses the separation between administrative and ordinary courts, the different lawyers of courts, the status and employment of administrative judges, the criteria for allocating jurisdiction, the existence of specialized courts, and the mandatory or facultative character of intra-administrative objection procedures. The aforementioned issue involves the question of separation between administrative and ordinary courts. From an organizational point of view, a relevant distinction between separated (France), special (Germany), and ordinary (UK and EU) courts can still be drawn. Differences between monistic and dualistic systems, however, have decreased significantly over time. On one side, even in the UK, specialized sections or divisions within the ordinary courts are established. On the other side, in many civil law countries, the status and employment of administrative judges has been progressively assimilated to that of the judges of ordinary courts.

Chapter 3, written by Mariolina Eliantonio and Franziska Grashof, considers the types of administrative action and their corresponding review proceedings within the different legal systems considered. Specific attention is devoted to single-case decisions, general acts, factual action, contracts, silence and failure to act, and internal measures. The comparative analysis shows that all of these different types of resolutions involve a different kind of review at every level. However, the way in which each type is dealt with changes remarkably from one jurisdiction to another, except when single-case decisions are at stake (in that case, a rather common standard is applied everywhere).

Chapter 4 by Chris Backes addresses the issue of access to courts, regarded as an essential element to ensure effective judicial protection. The author analyses the capacity to institute proceedings, the duty to have legal representation, standing, the cases of public bodies as claimants, third-party intervention, time limits, preclusion, court fees and other costs, and legal aid. Of course, rules on access to courts are historically conditioned by the prevalence of an objective or a subjective conception of judicial review. According to the first conception, the fundamental purpose of judicial review is to restore legality and to ensure the protection of the public interest which has been violated by the unlawful administrative decision. From this perspective, the plaintiff acts to protect his own legally relevant interest, but his initiative is also relevant to that of the public and to the restoration of legality. The author defines it as the interest-based approach, which is adopted in France, UK, Netherlands, and the EU. According to the subjective view, the fundamental purpose of judicial protection is to protect individual rights from abuses by public authorities. This is the rights-based approach, adopted in Germany. Therefore, access to courts is

limited to a smaller class of right-entitled subjects. As a consequence, Germany is also the jurisdiction where international and EU constraints changed the rules about access to courts on a more fundamental level, even if only in relation to environmental protection disputes.

Chapter 5, written by Mike Varney, focuses on the procedural steps for the conduct of court proceedings. Specific attention is devoted to the evidence regime, the role of experts and amici curiae, the power of courts to decide issues *ultra petita* and to consider issues ex officio, the equality of the parties, the use of information technology and efficiency measures, and language and translation issues. The problem of equality of parties is of course the most sensitive issue, considering the historical origins of administrative courts in many countries. However, the analysis shows that, beyond the differences in procedural rules, almost all systems aim to ensure a degree of substantive equality between the parties. Here, judges lead the proceedings, even adjusting, when needed, the burden of proof of the private claimant or the duty of candor of the public authority. Paradoxically, the country where substantive equality is at its weakest is the United Kingdom. In a strongly adversarial procedure, the court does not assist the weakest party ex officio, and the burden of proof remains fully on the private claimant.

Chapter 6, written by Hermann Pünder and Anika Klafki, analyzes the different aspects of the grounds for, and the scope of, review, in order to determine the effectiveness of judicial review. In particular, specific attention is paid to the different grounds for review, the review of discretion, the protection of human rights, the role of principles (starting with proportionality), the relevance of breach of formalities, the direct effect of (and consistent interpretation with) EU law. Despite the difference in starting point arising from the definition of grounds for review, human rights and general principles represent today a powerful factor of convergence between legal systems.

Chapter 7, by Emile Chevalier, concerns remedies and consequences of court decisions, including annulment, orders and guidance to the public authorities, declaratory judgments, liability dicta, the revision of final judgments and the principle of res judicata, indirect review and interim relief. The extension of judicial powers is, of course, strictly related to the expansion of the subjective conception and a rights-based approach. When the latter prevails, the remedies available to the judge are more articulated than the simple power to annul the illegitimate provision. This allows the judge to make use of broader powers of assessment and conviction, such as the order addressed to the administration to uphold a certain standard of behavior, which is protected by the introduction of compliance actions. In some areas (i.e. public contracts award), a special role is also played by EU law, which requires all Member States to ensure the effectiveness of legal remedies.

Chapter 8 by Rob Widdershoven is devoted to appellate procedures, with one or two levels, access (with or without permission), procedural aspects and remedies. This issue represents another relevant evolution, especially in admin-

istrative courts' systems, traditionally based on a single ruling by the Council of State. Nowadays, both France and Germany have a three-stage system: however, in the latter, the last-resort court can only review legality issues.

Chapter 9 by Chris Backes examines how judgments are structured and drafted, with specific reference to style, reasoning, use of precedent, dissenting opinions, and use of international and foreign law. Even if the comparative analysis shows relevant differences in form and style of judgments, reference to foreign courts' decisions is very rare even in the areas of administrative law where the influence of EU law is predominant, such as asylum rights, environmental protection and public contracts awards.

Chapter 10 by Mike Varney is devoted to non-judicial redress mechanisms, including ombudsmen. Even if alternative dispute resolution mechanisms other than the traditional administrative appeals now exist everywhere, their relevance and effectiveness varies remarkably from one jurisdiction to another. In Germany and in France, judicial review is still dominant (even if in the latter there has been a Mediator of the Republic since 1973). In the United Kingdom, on the contrary, the important role traditionally played by administrative tribunals is now coupled with the redress mechanisms created after the privatization of many public services and the transformation of citizens into consumers.

Chapter 11 by Hermann Punder and Anika Klafki is about the liability of the administration. Specific attention is devoted to competent courts, liability for unlawful and lawful action, liability of the judiciary, public liability for breaches of EU law, liability for breaches of article 6 ECHR (reasonable time). Even if all legal systems acknowledge public liability for unlawful action, the UK and the Netherlands integrate public liability into the general tort law system, while in France there is an autonomous public liability system, with Germany remaining somewhere in between. EU law, however, produced a significant harmonizing effect.

The incredible richness of the materials collected in this book and the soundness of the in-depth analysis provided in all the chapters will certainly represent a very useful resource for classes and research in comparative administrative law and judicial systems.

*Giulio Napolitano**

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Professor of Administrative Law and Comparative Administrative Law in the University of Roma Tre, Department of Law.