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Comparing the incomparable? Some introductory remarks on a comparative study on "administrative public power"

DIANA-URANIA GALETTA[1]
Professor of Administrative Law and EU Administrative Law
Università degli Studi di Milano

The chapters of this book are the result of the discussion of draft-papers presented by the Authors on 16 September 2021, during an inspiring seminar organised by the Editor of this book, Eduardo Gamero Casado, at the Universidad Pablo de Olavide de Sevilla. They are more or less in the form of "National reports" and the expression of a genuine "comparative law exercise" carried out by a group of outstanding law scholars, who are used to such a complex exercise and to the risks that it inevitably involves.

As the very well-known novelist and semiologist Umberto Eco wrote in his illuminating 2003 book on Translation experiences - bearing in its Italian (and original) version the self-explanatory title: "Saying almost the same thing"[2] - the translator's work is essentially based on "negotiation processes", as a result of which, to obtain one thing you give up on something else. Consequently, the translator's task is to "transfer" a text from one cultural universe to another, being aware of the substantial "non-feasibility" of this: since translating always means "filing away" some of the consequences that the original term implied. So, in this sense, when translating one says "almost the same thing" as, at the end of the day, translation is a form of interpretation which implies having to look at the intention

[1] http://ssrn.com/author=2243261; ORCID iD: https://orcid.org/0000-0001-6699-1570
[2] U. Eco, *Dire quasi la stessa cosa. Esperienze di traduzione*, Milan, Bompiani, 2003. See also a version published in English with the title "Experiences in Translation", translated by Alastair McEwan. Buffalo, University of Toronto Press, 2001, 135 pp., reviewed by J. Bland, *Experiences in translation. Umberto Eco. Trans. Alastair McEwan*, in *Cadernos de Tradução*, 2010/2, p.145 ss.

of the text, what the text says or suggests in relation to the language in which it is expressed and the cultural context in which the text was born[3].

The authors of this book are well aware of this. For example, in his first chapter about Spanish law Eduardo Gamero Casado explains that he will simply use the Spanish law-concept of *potestad administrativa* without even trying to translate it: as this concept has particular characteristics and cannot therefore be translated either as administrative power or as public function without losing an important nuance as to what it really means in the Spanish legal order.

As for the concept of *potestad administrativa*, he starts by explaining the concept of "Public Authority" as the one aiming at achieving public or general interest, which acts with one-sided power (unilateral) and according to the principle of legality. He then refers to the two concepts of promptness and enforceability and points out the importance of submitting this activity to judicial review and to procedural guarantees (a set of procedures for each "*potestad administrativa*").

After an in-depth and diachronic analysis of scope and concept of *potestad administrativa* in Spanish law, he comes to the conclusion that the progressive extension of the concept of *potestad administrativa* has, in fact, led to a situation where it encompasses very different manifestations of public authority each of which has a common core of characteristics, but also very different legal regimes. He therefore mentions the idea of developing a kind of "supra-concept" to include all different manifestations of the same phenomenon. He also highlights how a kind of integration has been achieved in Spain as to what he identifies as the two main schools of thought on the concept of Public Administration and administrative law: that of public authority (*puissance public*) and that of public service (*service publique*), with the general interest as key element allowing to link them together.

Jean Bernard Auby's chapter on France starts by underlining how a consensus could easily be reached around three points: that the concept of public authority did play an important role in the historical building of French administrative law; that it nonetheless plays only a limited practical role in modern times; that it remains essential, though, in order to understand the conceptual bases of French administrative law.

One crucial point in Auby's analysis consists also in pointing out how in French law "Public Authority" as a subjective notion and "Public Function" as an objective notion are not synonyms.

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[3] U. Eco cit., p. 83 ss.

This is quite different from what Jens-Peter Schneider explains in his chapter, where he deals with both of them ("Public Authority" and "Public Function") as if they were synonyms, obviously observing this phenomenon from a German law perspective.

Schneider, in his chapter, starts by highlighting how, according to the German perspective, *öffentliche Verwaltung* (Public Administration) cannot be defined but can only be described due to its diversity and openness to future developments. He explains also about the differentiation between *Aufgaben* (tasks) and *Befugnisse* (powers) in German administrative law and refers to the German concept of *Daseinvorsorge*: which is itself impossible to translate.

This is another confirmation of the idea, which I tried to express already in the title of this introduction: namely that, when dealing with a comparative study on "administrative public power", we may well end up trying to compare the incomparable.

A further confirmation of this idea is that, significantly, Schneider does not deal in his chapter with the (for German administrative law) fundamental differentiation between *Eingriffsverwaltung* and *Leistungsverwaltung*: again, two expressions which are almost impossible to properly translate into English. Nonetheless, this differentiation is implicit in his way of reasoning about "administrative public power" and has important consequences on his approach to the whole issue.

Here emerges clearly, in my opinion, how difficult (if not impossible!) "comparative law exercises" are for monolingual readers: to perform but also simply to understand![4]

Another important issue which emerges clearly throughout the different chapters of this interesting book is how, in the last decades, in all the countries under analysis administrative laws were confronted to a common evolution in the direction of privatizations, contracting out and the like. Such evolution, which is viewed rather as a symptom of extension and transformation of *potestad administrativa* in the Spanish context is, on the contrary, perceived as a regression of *puissance publique* in French law. According to Auby, the fact that the distribution of public tasks between public and private entities has become a very conspicuous and very confused reality is, in fact, the symptom of a weakening of *puissance publique*.

To this regard Auby also recalls the specific French development, according to which the notion of administrative act has become central in French administrative law: as

[4] To this regard in his review (quoted already, in footnote nr. 2) of Umberto Eco's book, Bland underlines how difficult it is for the "*monolingual reader*" to understand what Eco tries to explain, as "*he makes very frequent comparisons between translations in up to six different languages*". See J. Bland cit., p. 146 s.

in such a context, like the one he describes, the concept of *puissance publique* does not any longer allow to guarantee respect of public law rules.

As a reaction to this statement, during the discussion of the draft-papers Gamero Casado raised the issue that, perhaps, one had/has to revisit the definition of "Administrative Law" itself, which seems nowadays to be rather about a set of different administrative powers and a set of different administrative procedures adapted to each and every specific "administrative power".

I personally disagreed (and still disagree) with this idea.

From my perspective (which is also the ReNEUAL Model-Rules one[5]) the multiplication of administrative procedures is a catastrophe in the perspective of the protection of the addressee of administrative activity.

So, if it seems to be a common feature of most legal systems that administrative public powers are exercised through administrative procedures which entails standards and guarantees of legality, fairness, hearings/participation, reasons giving and transparency, my personal opinion is that the best option is still to have a set of codified basic rules applying to all administrative procedures[6]: as it is the case even for France since 2016 and much earlier for Spain, Germany, Italy, etc.

The European Union is still an exception to this "golden rule", as there are at present as many administrative procedures as are the "sectoral policies" carried out by the European Union. Nonetheless, the European Parliament is once again taking into its hands the initiative of calling the EU Commission - pursuant to Article 225 of the Treaty on the Functioning of the European Union (TFEU) - for the adoption of a regulation on an open, efficient and independent European Union administration under Article 298 TFEU.

[5] See at http://www.reneual.eu/projects-and-publications/reneual-1-0

[6] See further D.U. Galetta, *Attività e procedimento nel diritto amministrativo europeo, anche alla luce della Risoluzione del Parlamento europeo sulla disciplina del procedimento per istituzioni, organi e organismi dell'Unione europea*, in *Rivista italiana di diritto pubblico comunitario*, 2017/2, pp. 391

This is very significant, in my perspective, if one considers that the last time[7] the EU Commission dismissed such a proposal concluding that it was not worth the effort of "*engaging in a highly complex exercise of codification, with uncertain added-value*"[8].

To be more precise, Gamero Casado shares in fact my opinion that a general law on administrative procedure with a "core" of fundamental common guarantees is outmost necessary. As a matter of fact, this corresponds to the tradition of Spain administrative law scholars, as Spain was the one adopting the first legislation on administrative procedure as early as in 1889[9]. Nonetheless, unlike myself, he also advocates the adoption of a set of sector specific administrative procedures, respecting the common-core of administrative guarantees summed-up in a general law on administrative procedure but meant to accommodate each sector-specific procedure to the intensity of the public authority exercised in the different sectors of Public Administration's intervention and which corresponds to different *potestades administrativas*.

Della Cananea, in his chapter about Italy, explains that there certainly is not such thing as a general notion of "administrative function". Administrative functions are increasingly differentiated in nature as the growth of government has resulted in an increasing differentiation of administrative functions. So that, if one takes a look at these notions, the relevance and significance of "functions" and "powers regulated by public law" emerges. Administrative functions and powers are identified on the basis of a set of distinctive traits, including their connection with the general interests of the State or other public bodies and the existence of authoritative powers.

As a consequence of this, public law standards of legality, fairness and publicity must be respected; public power must be exercised via a procedure and the exercise of a public function has to be subject to the supervision of public institutions.

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[7] See the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration, at https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html, which followed its previous resolution of 15 January 2013. Both of them have not been followed up, so far, by a Commission proposal. See for further details D.U. Galetta, H. C. H. Hofmann, O. Mir Puigpelat, J. Ziller, *Context and legal elements of a proposal for a Regulation on the administrative procedure of the European Union's institutions, bodies, offices and agencies*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016/1, p. 313 ss.;

[8] See European Parliamentary Research Service, *European Commission follow-up to European Parliament requests 2017-2019*, Buxelles, 2020 at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642838/EPRS_STU(2020)642838_EN.pdf, p. 1091.

[9] Ley de 10 octubre 1889 – de Bases de Procedimiento Administrativo. According to E. García de Enterría, in J. Leguina Villa, M. Sanchez Moron (eds.), *La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, Tecnos, Madrid, 1993, p. 11., this was "*la primera Ley del mundo sobre el procedimiento administrativo*" (the world's first law on administrative procedure). See further M. Vaquer Caballería, *La codificación del procedimiento administrativo en España, in Revista General de Derecho Administrativo,* 2016 (available at: http://laadministracionaldia.inap.es/noticia.asp?id=1506243).

This means – according to the opinion of Della Cananea, which I certainly share – that a broader vision of administrative law has developed, according to which it is not just the law of public authorities, but "*the law which governs the discharge of public functions and thus imposes duties on public decision makers, as well as on private bodies that use public resources or provide public services*"[10].

As for Wierzbowski's chapter, he very clearly points out how *władza publiczna* in Polish law is a term meaning, in the subjective sense, all constitutional authorities: legislative, executive and judicial as well as other non-state authorities, like self-government and others, and even private entities, if they exercise superior authority due to authorization granted by the State. But he makes clear how this term is used also in the "functional sense", to refer to a kind of superior power to be exercised.

Therefore, the notion of public function in Polish law is very broad (legal literature concerning "public function" can be mostly found in Poland in Constitutional and Civil law) and may be used both in a subjective sense (more often) and in a functional sense. Also, in Poland the exercise of public function is certainly a relevant criterion for the application of administrative law to the entity exercising public power. So that, when a private entity exercises powers delegated by the government Administrative law and the Code of Administrative Procedure do apply. However, this does not impact on the remaining activities of such non-governmental entity.

To this last regard, I think that Hofmann/Hiry, when referring in their chapter to the concept of EU public function, hit a crucial goal: to clearly underline how the problem is about defending the private parties against unnecessary encroachments into their private sphere.

If, as they explain, the public function in the EU is made up of two elements - the public power, and the public interest – then we should better focus on this second one, which is obviously "value driven" and determined by the existence of a legal basis identifying the objective to be pursued, the type of act to be adopted as well as the concrete procedure to be followed in adopting the act in question.

As Hofmann/Hiry explain things, in EU law the concept of public interest is generally established with the help of value-orientation and procedure designed to achieve such values. So that what they call "*the proceduralised approach to the identification of the public interest*"[11] is as precondition of the exercise of public powers in the context of EU law.

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[10] G. Della Cananea, *ivi*, p. ???
[11] H.C.H. Hofmann, J. Hiry, *ivi*, p. ???

To put it differently, we may well say that, in the context of EU law, the notion of public law body/body governed by public law is an “elastic-band-concept”, expanding or restricting according to the sector specific needs, which have to be dealt with, and in order to prevent abuses.

The judicial review perspective is, on the contrary, the one Gordon Anthony’s paper on “Public functions” in UK administrative law choses to focus on. He tries to cast light on how the UK courts moved towards “public functions” as a means of ensuring that public law controls could apply to decision-makers who would otherwise escape scrutiny and control. He also explains the problems that have arisen as a consequence of contracting-out “public functions” and the limiting effect of aspects of UK law’s public-private divide. And how such problems have persisted under the Human Rights Act 1998 which applies to any decision-maker “*whose functions are functions of a public nature*”[12].

Obviously, this all reveals a lot about the nature of the common law and its judicial methods. To this regard, the question I would like to get an answer to is how much of what happened in the UK in the last decades was related to the fact that the UK was part of the EU and if one can expect what some others have called “*a decontamination of English law*”[13] in the years to come.

To conclude these brief introductory remarks, my impression is that we still have a problem here, which is related to the “lexical dimension” I referred to at the very beginning.

Very often, in comparative-law-exercises, one tends to create a box and put a label on the box, to shortly describe its content. But then, when one looks into the box, the real content of the box and its label appear to be as two very different things!

This is the problem about “big concepts”: as Jean-Bernard Auby ironically put it during our September-2021 seminar!

The Editor of this book seems well aware of this risk, though, and tries to avoid it by, first of all, including a subtitle with the terms in each of the national reports’ languages. This is precisely because he is well aware that the semantic load of each word in its original language is different.

Secondly, the purpose of this book is neither to attempt to prove the existence of a same concept (“big concept”) in all legal systems taken into account, nor to achieve the

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[12] G. Anthony, *ivi*, p. ???

[13] See T. F. Bathurst, *On to Strasbourg or back to temple? The future of European law in Australia post-Brexit*, paper delivered at Sydney Cpd Conference, 25 March 2017, at http: //www.supremecourt.justice.nsw.gov.au, p. 1 ss (p. 2), who refers that "*Speaking in Sydney last year, Lord Goldsmith, former Attorney General of England and Wales, embraced the Brexit result as an opportunity to set about 'the decontamination of English law*'".

definition of a transnational concept. Its purpose is rather to offer “knowledge”, to offer general coordinates of what happens in the legal system of each of the national legal orders taken into account, in the awareness that the comprehension of what “administrative public power” and “administrative authority” are, in each national legal system, cannot be achieved by sort of an artificial isolation of the concepts and requires dealing also with the “general coordinates” of each national legal systems.

Nonetheless, one may well conclude that this book is perhaps just trying to offer the impossible exercise of “comparing the incomparable”: as I provocatively wrote in the title of this introductory notes.

Or maybe not.

This final judgment, however, is certainly not my responsibility and pertains only to the readers.