BOOK REVIEW

CAROL HARLOW & RICHARD RAWLINGS,
PROCESS AND PROCEDURE IN EU ADMINISTRATION,
OXFORD, HART PUBLISHING, 1ST ED. 2014, 392 PP.

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1. The book gives a rich and critical insight into EU administration through the lens of procedure, which the authors define the "superglue" of the EU complex governance system, standing "at the heart of the European project grounding a substantial part of its legitimacy" (p. 8).

From the very start, the authors declare that they will follow the same functionalist approach adopted in their well-known book *Law and Administration*, and commit themselves to exploring the relationship between EU administration and law by focusing on procedures.

This statement, though, needs perhaps some clarifications.

First of all, the use of the terms "process" and "procedure", as the authors soon explain, is given a rather loose (and perhaps non-technical) meaning, which seems to embrace the whole dynamics of EU administration, from its structure to the implementation of policies and governance techniques, rather than to focus on the study of administrative decision-making patterns.

Hence, a more formalistic, rule-of-law-based approach is discarded as too imbued with values that do not (and should not, according to the authors) necessarily play a central role in the study. The authors argue that the emphasis on legal principles, especially those shaped by the Courts, might excessively narrow the focus of the analysis, which must include administrative practice and other values, thus following a more pluralistic approach.

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Second, the reach of the analysis is much wider that what one would assume: although it focuses on the different administrative techniques used in the implementation of policies, it does not overlook neither the structural aspects of EU administration nor an accurate insight into the different areas of policy. The authors' conviction that administrative law is policy-laden[1] is even more true for EU administrative law, where the policy dimension is almost everywhere.

The choice to employ a broad meaning of procedure allows for an in-depth study of the most important features and areas of EU administration, which adds to the merits of the book. However, while it certainly enriches the analysis, it sometimes makes it difficult for the reader to identify and follow a coherent thread throughout the book.

Although the volume is rich in connections among the different chapters, it is ideally divided into two parts. The first is aimed at studying horizontal and general features of EU administration. The second (from chapter 8 on) is devoted to the analysis of some sector-specific areas of EU administration which the authors deem particularly relevant as testing grounds of the more general trends and critical stances referred to in the first part.

Each chapter shares a common architecture, which includes an historical account of the development of each sector, aimed at giving the reader an idea of the evolving picture, and then focuses on the way the different administrative patterns and moulds were introduced and abandoned over the years, or gradually transformed by law and by practice. The tone is both informative and critical.

The rich account of both general and sector-specific EU administration depicts a "sprawling" system of growing complexity, fragmentation and contradictions, which is the result of an ever-increasing production of rules - which in turn are often the result of delegated rule-making functions or of soft law - and of instruments for implementing them.

What emerges from the detailed picture that the authors so vividly give us of EU administration is the difficulty to conceptualize it and the misleading character of the models that

[1] C. Harlow, R. Rawlings, *Law and Administration* (2009).

have so far been used to capture its features. One of the merits of the book is to show how every area of EU policy implementation presents a different mixture of the administrative techniques "horizontally" described in the first chapters. The pluralism of the system is visible in the structural fluidity of EU administration, which is ever less classifiable as simply "direct" or "indirect".

2. However, the authors believe that some instruments may help the system to progress towards a more principled, accountable and democratic governance.

The main ones are procedures, which stand as the "superglue" of EU administration, and the three Cs of Cooperation, Coordination and Communication.

The second chapter focuses on the way administrative procedure has changed over the years, because of the development of principles and standards, such as reasoned decision-making and the duty of sincere cooperation. Examples are given in order to show how principles and standards are often developed by the same EU administrative bodies through practice and rule-making functions.

However, throughout the book the authors seem to have mixed feelings on procedure, and sometimes express an open skepticism about its capacity to improve EU administrative techniques and in particular to drive them towards more principled and transparent dynamics.

On the one hand, as the same authors recognize, there is a close link between substance and procedure. Procedural rules serve the fundamental purpose of structuring administrative discretion and uniforming administrative behaviour, especially in the many fields where functions are still shared between national and EU administration and cooperation is needed most (such as cohesion policy, public procurement, and competition).

Conversely, as the authors duly show, the proliferation of procedures and procedural rules can be a source of opacity, lack of transparency and complication of EU administration, be it direct, indirect, shared or composite.

As the authors point out, the current regulatory framework is often contradictory, as in the public procurement field (which is

dealt with in the sixth chapter)[2]. Here, some given pathways, or procedural patterns, "steer" the Member States while still leaving them room for choice, whereas in other cases legislation strengthens formal procedural requirements to the extent of leaving virtually no discretion to national administrations. The authors also argue that the last wave of codification is aimed not only at coordinating national procedures but also at redesigning the whole regulatory framework according to the Union's industrial and economic policy. The picture, however, is not entirely coherent. The 2014 Directives, partly in an effort to address the requests for greater simplification emerged from the long consultation process, contain contradictory provisions. On the one hand, they provide a more loose and flexible regulation, but on the other hand tighten up mandatory requirements, with the predictable result of boosting the specialist legal advice market and leaving even more room for interpretation to the CoJ.

On the one hand, the authors think that procedure can help a pluralist and fragmented structure to find a common set of principles and standards, aimed at fostering its transparency, democracy and ultimately its legitimacy. They seem to acknowledge the importance of improving the quality of administrative procedures, especially in fields like competition or management of cohesion policy, or in the rule-making functions, where cooperation between European and national administration is strongly needed and networks operate.

On the other hand, they do not hide a certain disfavour towards the over–complexity that procedures may generate and warn against standardization and ossification that might ensue the proliferation of procedural codes (in the final words of the book, they suggest that the "superglue" of procedure be thinly applied).

In the last chapter, the authors address the call for a generalised Administrative Procedure Act and reaffirm what they have already had a chance to say, i.e. that what the EP has

[2] It actually seems that the public procurement sector – an area which the authors identify as one where "the rich interplay between domestic administrative process and EU law procedural requirements" could not be better illustrated – is not much about EU administration, but rather about Europeanisation of national procedures.

promoted so far is a rather minimalist legislation[3], which fills few gaps in the existing framework by mainly reasserting principles, therefore leaving unaddressed some of the existing problems, such as composite decision-making procedures. The authors' view is that a comprehensive codification of procedural rules would foster "eurolegalism" and would over-standardise the EU administrative process, thus seriously jeopardising the pluralism and the administrative richness of existing administrative practice.

The issue is complex and we cannot deal with it at length, but it seems that a certain degree of standardization in EU administrative procedures is currently needed, as the research conducted by ReNEual, followed by the draft of six Books of Model Rules, has recently shown[4]. As the authors argue, rule-making functions are currently kept outside the process of consultation and show a patchy presence of openness in procedures.

We are well aware that the presence of many areas where procedures are shared between EU and national administrations makes it difficult to think of a unitary set of procedure rules, horizontally applicable to every policy sector, but the experience of most European countries which long ago adopted general procedure acts is on the whole positive, and has shown a general improvement in participation, openness, reason-giving and overall consistence of administrative procedures.

The authors on the one hand seem to advocate the creation of more procedural rules which may favour transparency and participation, while on the other hand fear the proliferation of more red-tape and the creation of ever thicker and more impenetrable procedural nets.

The trade-off between the risks of over-proceduralization and the actual lack of transparency is not always clearly addressed, though, and the path towards the achievement of a right balance is only feebly traced, leaving room for further exploration.

[3] EP Resolution of 15 January 2013 with Recommendation to the Commission on a Law on Administrative Procedure of the European Union (2012/2024 (INI)).

[4] The research ended with the proposal of Six Books of Model Rules for EU Administrative Rules, available at www.reneual.eu/publications/ReNEUAL.

3. This leads us to our second point. One of the threats that the authors see in an increased formalization of procedures is the uncontrolled growth of litigation and the risk of a further spread of eurolegalism, which is often evocated throughout the book as a "spectre", and on which the authors (well-known advocates of green-light theories[5]) seem again to have somehow contradictory thoughts.

We know that, according to Kelemen[6], eurolegalism is "a mode of governance that emphasises detailed legal norms backed by the threat of public and private enforcement through the courts." According to our authors, a process in which "proceduralism sets the framework for law games and courts lay the groundwork for proceduralism."

The risk envisaged by Kelemen is the development of a right-based approach to policies and a drive to increase access to justice, which, in turn, would result in an over-juridification of administrative techniques and the proliferation of what Harlow and Rawlings often cite as the "law-games". While Kelemen does not entirely believe that eurolegalism has necessarily negative consequences[7], Harlow and Rawlings tend to see it as a threat to an effective progress of EU administrative law.

The role of the courts and the risk of over-judicialization of EU administrative law are often addressed by the authors.

Throughout the book examples are given of the wide use of private enforcement of EU law, as in competition or in the environmental field, but at the same time in other chapters the "soft-bite" of rights on administrative procedure is emphasized, such as in the executive law-making field or in the same competition sector, where a too deferent judicial approach is criticised by the authors, who wish that a more intense review were exercised by the courts.

The third chapter is entirely dedicated to the role of EU courts and Ombudsmen, which are in charge, respectively, of

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[5] As the authors highlight in their *Law and Administration*, cit. at 1, 38, whereas red light theories prioritise courts, green light theories prefer democratic or political forms of accountability.

[6] Especially in R.D. Kelemen, *Eurolegalism and Democracy*, in 50 J. of Comm. Mkt. Stud. 55 (2012).

[7] "The impact of the growing role of the courts, lawyers and litigation in Europe is multifaceted, with both negative and positive consequences."

"fire-fighting" and "fire-watching" functions, both vital for the accountability of EU institutions and administrative bodies and, especially the EO, for the progress of EU administration towards a more democratic and transparent model.

As the authors argue, European courts play a fundamental role as "gap-fillers" and actors of the consolidation of key principles such as proportionality, reason-giving, and due process rules, plus the duty of fidelity. However, according to the authors, courts exercise too much discretion, especially in modulating the intensity of their review, which often is too "light-touch", especially while dealing with economic regulation. Also, their discretion is too often coupled with a certain opacity in reason-giving.

Whilst the authors make a point of "not being understood to be dismissive of the judicial contribution" (7), they argue that the courts too often concentrate on formal aspects of procedures and especially on the compliance with formal procedural requirements and this can lead to the further spread of "Eurolegalism".

Alongside the Courts, which are focused on what the authors describe as fire-fighting, lies the European Ombudsman, who stands between administration and adjudication procedure and provides individuals with the possibility to complain against maladministration and to stimulate a change of behaviour in administrative bodies. We might well agree with the authors when they argue that the role of the Ombudsman is becoming ever more crucial, not only to prevent maladministration, but also to help spread principles and standards of good administration.

The complementary role of CoJ and EO are put to the test throughout the book, as in the chapter dedicated to the infringement procedure, as well as to the financial sanction procedure, where the authors argue that the courts have been crucial in setting the standard of a rigorous and bipolar framework, whilst being less determined in granting access to documents. Fundamental is also the EO's role in introducing guarantees in the infringement mechanisms and promoting openness and procedural fairness as well as greater political accountability.

What still needs to be done, according to the authors, is giving more impact to the values of good administration

embodied in the Charter of Fundamental Rights. Hence, the future challenge to the Court of Justice is its will to promote those values and protect procedural principles as human rights. Moreover, the authors advocate the "progression of good governance principles into a constitutionalised fundamental right" and the transformation of the right to good administration into a human right (89) and, in one of the concluding chapters, claim that EU courts have exceptionally played the role of creators of principles and procedural standards in the field of human rights, as the *Kadi* judgments clearly exemplify, with their full-review approach. Here the authors seem to advocate a stronger judicial intervention, regardless its eurolegalist implications.

Another aspect which the book touches upon time and again is the growth of an expert-based regulatory context, in which the role of the courts is presently too weak and nonetheless issues of justice may easily remain unaddressed.

The authors hint at the prospect of the development of judicial networks, as a complement to the C of cooperation, and at the creation of specialised courts, which might best tackle the growing technicalization of some administrative decisions. However, national procedural autonomy is still an obstacle to the creation of a formal court network.

On the whole, it cannot be denied that more procedural rules - whose adoption would certainly add to transparency, openness and reason-giving - could lead to an increase in litigation, but in our view the risk is worth being taken.

Having said this, one can certainly share the authors' view that a desirable objective is a mixture of complementary tools of accountability, of which the legal and judicial ones should be only a part.

The sector-specific analysis offers a clear example in the case of Europol (chapter ten), whose responsibilities as a "true regulatory agency", or a hub of law enforcement information gathering are likely to increase in the future. Whereas rule-making functions are growing, still uncertain is the prospect for greater democratic accountability, either through a parliamentary network, or through the development of a clearer relationship with the Council, the Commission, the EP and the national parliaments, as well as with the EO.

The central role of the Ombudsman, who can conduct enquiries on its own initiative as well as dealing with complaints, is therefore rightly emphasized throughout the book.

Other means of accountability, working inside or alongside the administrative decision-making process, ought perhaps to be more explored. Among these, it is worth mentioning the growing phenomenon of boards of appeal and review which have recently been established inside EU agencies and the new financial supervisory authorities (the provision of an administrative body of review by Regulation 1024/2013 is an example, but also the Board of Appeal of the Chemical agency or of the Plant Variety Office be mentioned).

More accountability of EU administration would also derive from the improvement of the existing internal reviews and other bottom-up instruments of administrative justice.

The blurring of the boundary between administration and adjudication, which is a feature of UK administrative law, might be welcome in the EU legal order as well, provided that appropriate measures of political, democratic and not only strictly legal accountability are put in place. To this aim, the authors contribution could be in the future extremely precious.

4. Another important theme, which the book often touches upon, is executive law-making and the expanding deployment of soft-law (3), particularly crucial since the EU administration is a fundamentally a "regulated, regulatory bureaucracy" (335).

The authors deal at some length with the foundations of executive law-making and in the first place with the Meroni doctrine, that still has an underpinning role, and with the dynamics of committee procedures, sparing no criticism on the lack of transparency that still characterizes them (101).

They further deal with the Lisbon provisions on delegated and implementing acts and again express serious doubts that the new procedure may enhance transparency, and promote input values such as participation and democracy in decision-making.

The chapter on executive law-making aims at discussing, or rather questioning, "the assumed progression from output values of efficiency and effectiveness to demonstrate values of openness and participation" (94).

The authors' conclusion on the point is that the Lisbon Treaty promised more than it could be afforded in terms of participation and open decision-making and argue that this is perhaps the field where the use of administrative procedure to channel civil society participation has resulted in the most ambiguous outcome.

The authors highlight the important provision of access to the law-making process but at the same time illustrate how the Courts took contradictory judgments, showing an all but liberal approach, as in the recent *Bavarian Lager* case.

If the Courts' role in promoting openness is still far from being settled, an important contribution is coming from the European Ombudsman, not only with reports following complaints and with own initiative inquiries, but also with the adoption of the Code of Good Administrative Behaviour, which has promoted the values of transparency and openness.

In the second part of the book, the authors offer a number of interesting examples of the expanding role of soft-law instruments. The analysis spans from the infringement process (chapter 7) to competition (chapter 8) and agencies' rule-making and supervisory activity (chapters 10 and 11). It interestingly shows how soft law, from a tool for furthering integration is turning into a new governance method in its own right, often used to bypass the official community method, and to disguise EU expansionism. Its proceduralization, though, is not always satisfactory and does not guarantee full accountability and transparency.

The authors spare no criticism towards the attraction of the EU legal order to what they often define as fashions, such as better regulation, Open Method of Coordination, new public management and soft law.

In the infringement process complex there is a combination of different techniques and compliance-promoting tools, often provided for by secondary legislation, such as guidelines.

The modernisation process in the competition sector has seen the Commission making frequent use of soft law. Enforcement is regulated by complex decision-making patterns, dominated partly by legislative procedural rules and partly by soft law in the form of guidance and best practice.

As for enforcement procedures, the proliferation of soft law and the centralization of decision-making powers on the college of Commissioners is likely to prompt growing litigation ("uniquely litigious environment" 220) and new challenges to the intensity of judicial review performed by EU Courts.

The field of financial services regulation (chapter eleven) after the recent crisis has been witnessing a significant extension of supervisory powers of bodies such as ESAs, the EBA and, lastly, the ECB, moving from a light-touch supervision to the exercise of strong regulatory and decision-making powers.

The more recent empowerment of the ECB with stronger supervisory and enforcement powers once more calls into question the fitness of accountability mechanisms.

The authors are well aware of the implications that opaque rule-making procedures and an uncontrolled use of soft-law may have on accountability, compliance with the rule of law and with the overall legitimacy of such important administrative techniques.

If perhaps a strictly "Eurolegalist" approach might seem inadequate, nonetheless this is an area where ensuring compliance with the rule of law keeps being of the highest importance and the reach of judicial review is fundamental, as the on-going debate on the role of the Courts towards soft law clearly shows[8]. Given the importance of the legal effects of the different sources of law in the Lisbon Treaty - and the absence of clear indications regarding soft law - the contribution that the Courts can give in this field cannot be overlooked[9]. Moreover, if the adoption of Codes of Behaviour and other Manuals of Procedures (i.e. in the competition field) may help to foster due process requirements, openness and

[8] An account of which can be found in O. Ştefan, *Helping Loose Ends Meet? The Judicial Acknowledgment of Soft Law as a Tool of Multi-Level Governance*, forthcoming in Maastricht J. of Eur. and Comp. L., electronic copy available at http://ssrn.com

[9] As testified for example by the Short selling case (C-270/12), in which the CoJ stated that ESMA can legitimately exercise regulatory decision-making powers which do not correspond to any of the situations described in articles 290 and 291 TFEU, therefore recognising the existence and the lawfulness of binding regulatory general measures, justified by the high degree of professional expertise that these bodies hold in the field, which in turn explains their delegation to intervene in the pursuit of the objective of the financial stability of the Union.

participation, more effort is needed - as the authors highlight - to steer procedural legislation towards the provision of a more democratic participation process, not limited to interested stakeholders, but open to third parties and civil society.

The initiative of the EP towards the codification of procedural rules and the introduction of other procedural reforms may seem limited, but it moves in the right direction and seems an important step towards the achievement of more democratic accountability in EU administration and the promotion of input values, such as citizen participation and openness to civil society instead of output values imbued with managerialism, as the authors advocate for example in the infringement field.

5. Our final remark regards the place of the three Cs - cooperation, coordination and communication - in the emerging architecture of EU administration. Are they really objectives, as the authors seem to argue, or rather tools finalised at improving the integration process and achieve a better governance of an ever-complex and fragmented evolving picture?

In the authors' view, the three Cs stand as the key principles, objectives and values of EU administration. However their strength and weight varies according to the different areas of EU administration and has been changing over the time.

The book shows how cooperation is ever more present in important policy areas, such as cohesion, competition, and even in the infringement process. Interesting examples are given in the latter, where a more proactive approach is currently being pursued, through the creation of multifunctional networks and the promotion of what is defined as the "cooperative enterprise" of infringement procedure, and negotiation plays a very important role, aimed at achieving voluntary compliance.

Again, cooperation is currently strongly emphasized in the competition sector, where the shift from the "direct administration model" to the decentralised one has given national systems a key role in the enforcement of EU law, at the same time empowering the European Competition Network. Networks are again the main actors in the spread of "soft harmonisation", such as the recent leniency programme.

Furthermore, the analysis shows how the three Cs operate unevenly throughout EU administrative procedure and sometimes are weaker where they would be needed most.

Cohesion policy, dealt with in chapter nine and defined as the flagship of European integration, is perhaps the area where the three Cs are more seriously put to the test, due to the complex share management implementation system, in its three components of programming, partnership and financial supervision. Programming is a key feature as it fosters integration through the principles of concentration and especially conditionality, which the authors define as a "tin opener" of national policies, for instance by linking funding to compliance with the demands of EU economic governance.

Partnership, management and financial supervision show a prescriptive approach, since they require the setting of requirements and codes of conduct. Even more prescriptive is management, where legal provisions abound through the enactment of delegated acts and the Commission is given extended implementing powers. The recent Regulation 1303/2013 on structural funds moves in the direction of increasing supervision powers through the provision, for instance, of the annual clearance of accounts. Here the authors register a tension between the will to cut red-tape and the demands for tighter financial supervision. As a result, the elegant models of shared administration give way to a "complicated and sometimes poorly coordinated web of managerial, administrative and supervisory arrangements", better defined as a "jungle of intersecting bodies, powers and procedures" (243), thus showing how the three Cs are sometimes wishful thinking rather than a realistic goal.

The improvement of procedure seems even more important for coordination, that is currently more stressed due to the Enlargement process and to the increasing need to 'steer' the Member States in different areas of policy, not least the financial one. The same is for communication, a C whose impact has been growing significantly in the last decade but still has a long way to go, especially with regard to transparency.

As it emerges from the book, the question of how to strengthen the three Cs while at the same imbuing them with the principles of good administration and democracy, is presently even more challenging given the prevailing current stress of EU

legislation and policies on coordination, testified by an increasing steering role of EU institutions, so visible in the financial field as well as in the economic governance or even in Europeanised areas of national administration like public procurement.

The authors do not have an answer for each of the issues they critically discuss, probably because they require sector-specific solutions, which are best left to more specialised studies. For these, however, as well as for any future analysis of European administrative law, the book is an essential starting point.