BOOK REVIEW

ADMINISTRATIVE PUBLIC POWER: COMPARATIVE ANALYSIS IN EUROPEAN LEGAL SYSTEMS, EDITED BY EDUARDO GAMERO-CASADO (NAVARRA: THOMSON REUTERS-ARANZADI, 2021)

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As recognized by the Editor in the book's Foreword, at the heart of this work lies a «concept that is not unequivocally labelled» in the legal systems included in the scope of the analysis, which is part of a broader comparative research aimed at enquiring on the exercise of public functions as a criterion for the application of administrative law. On the one hand, the awareness of the existence of such labelling risks – which are, to a large extent, intrinsic in every comparative effort, since they concern the relationship between law, language, and legal translation – is reflected by the book's subtitle, which explicitly refers to *public function, öffentliche Verwaltung, puissance publique, potestà amministrativa, potestad administrativa* and *wladza publiczna.* On the other hand, the issue is posed as a *caveat* in the Introduction of Diana-Urania Galetta, who raises the fundamental question – and provides methodological coordinates to answer it – whether we are «comparing the incomparable».

The objective of the analysis carried out in the book is twofold: from a theoretical point of view, it aims at identifying the scope of the concept of administrative function in each legal system; from a practical point of view, it expounds how such concept operates as a criterion for the application of a specific legal regime, *i.e.* administrative law. This latter objective is further articulated in several issues, which, considered altogether, push the analysis at "the boarders" of administrative law, by focusing on: *i)* the application of administrative law to the activity of legal persons subjectively included in the public sector, while governed by private law (*e.g.* public corporations, foundations and associations);

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ii) the subjection of private bodies exercising public functions to administrative law principles and rules; *iii)* the inclusion, within the concept of administrative functions, of several activities, such as the granting of subsidies and the awarding of contracts, characterized by the production of favorable effects. In the three cases, administrative functions are arguably accompanied by a movement of the administrative law regime, respectively in the sense of its return (after attempts to escape from it), its extension, and its evolution.

These and further questions are variously addressed by outstanding European scholars in the seven Chapters that compose the book, which are shaped in the form of national reports, although they do not follow a rigid and pre-fixed structure. Chapters' content and extent are, in fact, heterogeneous, reflecting the specificities of each legal system (more precisely those of Spain, France, Italy, Germany, Poland, the United Kingdom and the European Union), and allowing the reader to grasp a genuine inner vision of the topics, one that does not bend to a rigid and schematic juxtaposition.

In the first Chapter, Eduardo Gamero-Casado expounds the concept of *potestad administrativa* in Spanish law. The analysis begins with a systematic classificatory effort, where the Author clarifies that a *potestad* is a power granted by the law that is exercised unilaterally to satisfy the interest of third parties, which can be qualified in terms of *potestad administrativa* when such power is conferred to satisfy the general interest, the realization of which is qualified as a legal non-renounceable duty. As further explained, *potestad administrativa* is characterized by several features (one-sidedness, promptness, enforceability) and shall be exercised in compliance with legal requirements in terms of competence and procedural guarantees, which may in part vary, depending on the *potestad* being exercised (which can for instance be classified, based on its effects, as either favorable or unfavorable). Specific attention (Paragraph IV) is finally dedicated by the Author to the distinction between the titularity of a *potestad administrativa* and its exercise, an issue with regard to which the conferral of public powers to private persons (both private individuals and public sector entities with private law legal personhood) shows all of its relevance and complexity. After a rich diachronic analysis, the Author reaches the conclusion that the concept of *potestad administrativa* currently encompasses very different manifestations, which share common

features and must comply with core principles of administrative law, while still differing with reference to several aspects of the applicable legal regime.

In the second Chapter, Jean-Bernard Auby's analysis begins by recognizing that the concept of *puissance publique* played a fundamental role in the historical building of French administrative law, both from a theoretical point of view and from a practical one – two aspects which were genetically intertwined in the institution of the *Conseil d'État* and in the affirmation of its jurisdiction. However, the Author further clarifies that, although the concept still represents an important component of several constructions French administrative lawyers resort to for determining the legal regime of specific institutions or situations, *puissance publique* plays an overall limited practical role in modern administrative law. Auby explains how the central stage has rather been contended, and then occupied, by the concept of *service public,* which currently plays a greater practical role. The Author concludes that *puissance publique* nevertheless remains conceptually unavoidable for understanding French administrative law and – we might add – for comparing it with other legal systems.

The third Chapter, written by Giacinto della Cananea, introduces the concept of administrative function in the Italian legal system by placing it in the context of the multifarious duties of the government, which, from a diachronic perspective, have both changed in nature and increased in quantity. The Author observes how, besides the core functions of the State, the beginning of the twentieth century featured a significant growth in the field of public services; della Cananea explains that, on the one hand, only among the former an authoritative trait can be properly identified, and, on the other hand, administrative functions through which powers governed by public law are exercised, only constitute part of a broader category. The Author further clarifies the latter aspect by expounding the two criteria employed by Italian administrative law Scholars, jurisprudence, and the legislator to define administrative functions, *i.e.* the subjective criterion (centered on the exercise of a function by a public authority) and the objective one. The second criterion, which, among other things, allowed the Italian legal system to achieve better coherence with EU law, constitutes the conceptual link in force of which several hypotheses in which private bodies carrying out objectively administrative functions, can be included among the subjects exercising functions

governed by public law. The exercise of such functions, as explained by della Cananea, entails a series of consequences in terms of legal regime (such as compliance with standards of legality, publicity, fairness, and procedural guarantees) and of judicial protection. The Author concludes his analysis by observing that a broader vision of administrative law, *i.e.* one that is anchored to the exercise of a public function (regardless of the nature of the agent), is not only advisable, but also necessary.

In the fourth Chapter, Jens-Peter Schneider differentiates among several legal concepts related, in German administrative law, to that of public function. The Author distinguishes tasks (*Aufgaben*) and powers *(Befugnisse*) among the duties of the public administration (*öffentliche Verwaltung*) and clarifies that while both *Beamte* and *Verwaltungshelfer* can discharge public duties, the exercise, on a regular basis, of public powers is reserved to the former, while the latter may only carry out preparatory activities, often characterized by a technical nature. Nonetheless, also private parties (*Beliehene*) can be authorized by law, or on the basis of a legislative provision, to exercise administrative powers. Furthermore, by linking the exercise of public functions to the concept of State authority (*Staatsgewalt*), and, through the latter, to the principle of democratic legitimation (characterized by different levels of intensity), the Author emphasizes the deep relationship existing between constitutional law and administrative law. As it is well known, such relationship is not clearly an exclusive prerogative of the German legal system, but it has undeniably been masterfully theorized by German legal Scholars. Through an analysis of several legislative provisions and of their consolidated interpretation, the Author explains that, according to German law, most public law rules (*e.g.* those codified in the *Verwaltungsverfahrensgesetz, i.e.* the Federal Administrative Procedure Act, and in the *Verwaltungsgerichtsordnung, i.e.* the Administrative Courts Proceedings Act) are still based on certain formal requirements, which can narrow their effective scope of application. Notwithstanding such critical aspects in the application of public law rules, which derive from the ambiguity of the concept of *öffentliche Verwaltung,* the Author concludes that a common trend towards an expansion of the legal protection against the various forms of administrative functions can be detected in German law.

The fifth Chapter, authored by Marek Wierzbowski, expounds the concept of public function in the Polish legal system. The analysis begins, even in this case, with an issue of lexical ambiguity. In fact, the Polish term *wladza publiczna* can, on the one hand, be interpreted in a subjective way, bearing an all-encompassing attractive force which includes in the concept every public authority (from the judiciary, to local entities) as well as private entities charged with public functions (superior authority) by way of an authorization of the State. On the other hand, the term can – although this occurs less frequently – be interpreted in a functional (or objective) sense, meaning the exercise of a superior public power (regardless of the nature of the agent exercising such power). This premise is important and necessary, because it allows the reader to understand how broad the concept of public function is in Polish law, and how limited is its theoretical relevance in the construction of Polish administrative law. The Author, for instance, explains that if «you look into handbooks of Administrative law, you would rarely find the expression public function or public power» (p. 165). Finally, the concept also plays a limited role in practical terms, considered that the Code of Administrative Procedure does not refer to public function nor to administrative function for delineating its scope of application, making instead reference to proceedings carried out by public authorities (or, at times, other – also private – specified entities performing public tasks).

Gordon Anthony explains in the sixth Chapter how and under which points of view public functions are relevant in UK administrative law. Coherently with the common law legal tradition of the United Kingdom, the Author moves from caselaw (rather than theoretical systematizations) and adopts the perspective of judicial review, in which the concept of public function has traditionally played – and still plays – a limited role. More precisely, being the UK system of administrative law mainly built on the principle of the sovereignty of parliament, from which derives the *ultra vires* doctrine, the concept of public functions emerged in the caselaw mainly – if not only – in the specific context of decision-making by private – or non-statutory – bodies. To determine the nature of the functions exercised in such controversies, courts resorted to the source of power test, which was however ambiguous in some of its applications. In fact, while the test meant that a decision taken on the basis of a statutory

authorization could surely be considered an exercise of a public function, it also meant that where the basis was a contract, the function would only be considered as private in nature. The drawbacks in terms of judicial protection and accountability deriving from the public-private divide, as associated with the source of power test, are neatly pointed out by the Author, who subsequently explains how the enactment of the Human Rights Act of 1998 (HRA) offered an opportunity to address the issue in different terms. The Act, in fact, considers a public authority – subject to obligations and judicial review under the HRA – «any person certain of whose functions are functions of a public nature». Notwithstanding some creative precedents, duly analyzed in the Chapter, the Author concludes that, especially where public functions are contracted out to private entities, «an element of dogmatism has meant that gaps in the law have, in fact, become even more pronounced» (p. 189).

Finally, in the seventh Chapter, Herwig C.H. Hofmann and Jasmin Hiry address the concept of public function in EU law, acknowledging, first of all, the peculiarities of discussing such issue in a legal system which is built on the principle of conferral. The principle implies that, for a public function to be identified in EU law, a public power, which requires acting in the public interest, shall be conferred. Two elements are therefore necessary: a European public power, and a European public interest. Since this broad definition applies both to the legislative and to the administrative powers conferred to EU Institutions, the Authors deepen the analysis on the concept of administrative function in EU administrative law. They point out how, in EU's multi-level structure, much of the implementation (and therefore of the administrative function) is carried out by national authorities. The analysis, of course, recalls the notions of indirect, direct and co-administration in EU administrative law, to the elaboration of which, most of the Authors of this book have significatively contributed. The Authors finally look at the limits of the notion of administrative function, from the perspective of the limits of delegating the latter within the normative and institutional framework of EU law.

The book does not include a conclusive chapter carrying out, for instance, a comparative overview of the results presented in the seven chapters, as it can be found in other recent publications on subjects closely related to the one addressed here. This does not,

however, leave any gap in the analysis, and this is so for several reasons. Firstly, as already mentioned at the beginning of this review, the book is part of a broader research project, to which the book undoubtedly contributes deeply, by expounding a core, complex and often under-explored concept. Secondly, both the Editor's Foreword and Galetta's Introduction provide a useful framework, and individuate some common threads that lead the reader along the Chapters. Elaborating on this, we could in fact observe that: the concept of administrative function seems nowadays anchored to an objective dimension in most of the considered legal systems (with the exception of Poland); the concept shares the main features of the concept of public function (where it is theorized), although it presents some other traits that are peculiar to it; the concept is not only theoretically relevant, but entails several practical consequences in terms of the applicable legal regime and of judicial protection; elements of formalism and dogmatism in the notion of public function tend to restrict the scope of application of administrative law. Thirdly, and conclusively, from a practical point of view it would have been a hard task that of comparing the results presented in the Chapters, expounding the similarities in the notions and in the legal regimes, as well as the peculiarities that justify the presence of differences. It would have been even more difficult to explain the legal, historical and cultural reasons of such commonalities and diversities.

The circumstance that the book leaves some of these questions open to the reader does not diminish the value of the reached outcome, it confirms, rather, the fact that it addresses a fundamental concept in administrative law, paving the way to further comparative researches.