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*The Jean Monnet Center for  
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JMWP 11/13

Giulio Napolitano

**Conflicts in Administrative Law:  
Struggles, Games and Negotiations  
Between Political, Institutional and Economic Actors**

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## THE JEAN MONNET PROGRAM

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### **TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE**

Jean Monnet Working Paper 11/13

**Giulio Napolitano**

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Prologue:  
**Towards a Multipolar Administrative Law:  
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20<sup>th</sup> century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (“*Verwaltungsrecht als konkretisiertes Verfassungsrecht*”), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

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**CONFLICTS IN ADMINISTRATIVE LAW:  
STRUGGLES, GAMES AND NEGOTIATIONS  
BETWEEN POLITICAL, INSTITUTIONAL AND ECONOMIC ACTORS**

By Giulio Napolitano\*

**Abstract**

Administrative law solves conflicts. But, at the same time, it's a battlefield. Principles and values do exist. And judicial review plays an important role in crafting and enforcing them. Nonetheless, a significant part of administrative law is in the hands of multiple political, institutional and economic actors, who struggle, interact and bargain. Each of them acts as a rational agent, trying to maximize its welfare through the manipulation of administrative law.

Outcomes of this multipolar struggle and, subsequently, rules of administrative law differ from one legal order to another. But logics are common to different administrative law systems around the world. And some preliminary hypothesis about most successful strategies - like power to rule, coalition capacity, costs allocation - can be generalized or tested in different contexts.

Conflicts in administrative law, of course, are not a single battle war. Each move of one actor follows the moves of the others. This is why administrative law is a repeated interactions game. Each move is incremental and path-dependent. Legal devices and mechanisms set up in the previous round cannot be easily and fully dismantled. As a consequence, understanding administrative law in complex legal orders and societies requires a microanalysis approach: "Devil is in the details".

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## 1. From “Peaceful” to “Conflictive” Administrative Law

According to the Weberian conception, the bureaucracy was intended as a rational machine, with linear decision-making processes. Administrative law provided public administrations with the legal tools to accomplish their tasks in an ordered manner. This is why it was represented as a set of stable principles and rules. Judicial review played a fundamental role in crafting those principles and rules, both in countries where a special judge for administrative disputes was established and in countries where it was not.<sup>1</sup> Bilateral conflicts between the citizens and the State arose in the society. Administrative law was expected to solve them in a peaceful and effective way.

Constitutional reframing (especially in European countries) and rights revolution partially changed the “flavor” of administrative law, rebalancing the opposite positions of the State and the citizen, not its fundamental development’s mechanisms. Values of public law and citizens’ rights were put at the center of the stage. But administrative law was still conceived as an external factor, evolving mainly through judicial interpretation and enforcement. Recent trends towards privatization didn’t alter such a narrative: the fundamental issue became the judicial extension of public law remedies to the newly privatized areas and the discovery of common values to public and private law.<sup>2</sup>

This paper is a contribution to the reverse of the traditional representation, in the direction of a multipolar view of administrative law. The public administration is not any more a “machine”. It’s part of a wider collective arena, in which public and private parties compete, interact and bargain.<sup>3</sup> Exchanges and disputes are both regulated by administrative law. But administrative law is not simply an exogenous factor; it’s also an endogenous factor. It’s a place and an instrument of conflict in itself, resulting from the moves of different players. The struggle for administrative law is more intense and

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<sup>1</sup> On these different paths, see B. Sordi, “Révolution, Rechtsstaat, and the Rule of Law: historical reflections on the emergence of administrative law in Europe”, in S. Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishing, Cheltenham, 2010) pp. 23-36.

<sup>2</sup> M. Taggart (ed.), *The Province of Administrative Law* (Hart, Oxford, 1997); C. Harlow, “The Hidden Path of the State and the Publicisation of Private Law”, in D. Dyzenhaus *et al.* (eds.), *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Hart, Oxford, 2009) pp 75-98; J. Resnik, “Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century”, 11:1 *International Journal of Constitutional Law* (2013) pp. 162-199.

<sup>3</sup> S. Cassese, “New Paths of Administrative Law. A Manifesto”, 10 *International Journal of Constitutional Law* (2012) pp. 603-613; Id., “L’arena pubblica. Nuovi paradigmi per lo Stato”, *Rivista trimestrale di diritto pubblico* (2001) p. 601.

complex than in any other sector, as far as at least three different kinds of conflicts, political, institutional and economic, occur in this area.

Being a place of conflicts and negotiations, administrative law must be intended as more manageable and flexible, than traditional doctrines of stability and persistence would retain. Values and principles do exist. And certainly they do represent a limit to such flexibility. But a significant part of administrative law is at disposal and in the hands of different political, institutional and economic actors. Each of them acts as a rational agent, trying to maximize its welfare through the manipulation of administrative law.<sup>4</sup> Outcomes of this multipolar struggle and, subsequently, rules of administrative law differ from one legal order to another.<sup>5</sup> But strategies and logics of this fight are common to different administrative law systems around the world. And some preliminary hypothesis about some successful strategies - like power to rule, coalition capacity, costs allocation - can be generalized or tested in different contexts.

## 2. **A Typology of Conflicts**

The dynamics of collective action at administrative level are characterized by the existence of a multiplicity of actors. Bureaucracy is a typical multi-principal agent. At national level, different political actors compete in order to assume the guidance of public administrations. Even if citizens are supposed to be the original patrons of public policies and of their administrative implementation, they have no direct voice. All the relevant powers are in the hands of elected representatives. But they can embody different political visions, trying to make them prevail in the administrative arena, through specific administrative law devices.

Other principals of public administrations emerge at supranational level. A growing number of public policies is designed at global or macro-regional level by supranational institutions. They require national administrations to implement them in a coherent way, even though that can create a conflict with elected bodies at state level.

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<sup>4</sup> That's why «public finance economics and rational choice political economy are deeply entwined with the field of administrative law». See S. Rose-Ackerman, "Introduction", in S. Rose-Ackerman (ed.) *The Economics of Administrative Law*, (Edward Elgar Publishing, Cheltenham, 2007), p. XIII.

<sup>5</sup> With specific reference to the U.S., M. McCubbins *et al.*, "The Political Economy of Law", in A.M. Polinsky and S. Shavell (eds.), *Handbook of Law and Economics*, Volume 2 (Elsevier, Amsterdam, 2007), p. 1651.

Regulation and directives about the administrative implementation and enforcement of common policies represent a fundamental tool in order to achieve compliance against national drifts.

Public administrations have also multiple stakeholders. Individual citizens (and next generations) cannot easily act for the satisfaction and protection of their interests, unless they are specifically struck by an administrative decision. Economic actors of different nature and dimension, on the contrary, usually organize to influence the exercise of administrative powers, especially by regulatory agencies. But they compete and fight one against the other to obtain *ex ante* from legislatures legal tools to play future games before agencies starting from a favorite position.

All these repeated interactions among competing and often opposed actors are at the origin of three kinds of conflicts that are played on the field of administrative law: political, institutional, and economic.

### 2.1. *Political Conflicts*

Public administrations serve political interests. They have to implement acts and statutes approved by the parliaments. And they structurally depend from executives. In many countries, especially in parliamentary democracies, political influence is exerted coherently and somehow jointly by both institutions.<sup>6</sup> The situation is pretty different in a divided system of government, like the U.S., where the Congress and the President can embody different political visions and compete to make them prevail in the course of administrative action.<sup>7</sup> Such situation is at the origin of a first kind of conflicts in administrative law.

Historically, the U.S. Congress played a fundamental role in crafting the main rules of administrative law. The Administrative Procedure Act, differently from similar regulations adopted in European countries, like Germany, Italy, and Spain, was explicitly conceived as a reaction against the excessive power of the Presidential administrative system built up by President Roosevelt during the New Deal, through the

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<sup>6</sup> D.C Mueller, *Constitutional Democracy* (Oxford University Press, New York - Oxford, 1996).

<sup>7</sup> Another interesting example is the one of Brazil: M. Mota Prado, "Presidential Dominance from a Comparative Perspective: the Relationship between the Executive Branch and Regulatory Agencies in Brazil", in S. Rose-Ackerman, P. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishing, Cheltenham, 2010) pp. 225-245.

establishment of a plethora of agencies equipped with widely discretionary rule-making and adjudication prerogatives.<sup>8</sup>

Time after time, the Congress took control over the administration through several devices, in order to channel and to monitor future bureaucratic action. Such devices are both structural and procedural.<sup>9</sup> Through statutory control, the Congress designs the agency's structure and process to favor some groups and policies over others. "Stacking the deck" in favor of specific groups, removing some decisions from the choice set, requiring or forbidding the agency to consider certain issues, and placing the burden of proof on the agency or on a group that challenges the agency's decision, are among the most preferred devices. Through oversight, Congress directly monitors agency behavior to gain the information it needs to punish or correct undesirable behavior. Oversight decisions are made autonomously by Congressional committees or subcommittees.<sup>10</sup>

The last thirty years were characterized by a sort of return or revenge of the Presidential administration.<sup>11</sup> The introduction of cost-benefit analysis through the Executive Order of President Reagan in 1981 represented a turning point in that direction. This way, policy decisions were pulled from agencies into the White House, through the scrutiny conducted by the Office of Information and Regulatory Affairs and by the Office of Management and Budget.<sup>12</sup> In the last decade, the President obtained from the Congress the approval of pieces of legislation based on "black" and "grey" clauses. They are so defined because they grant wide discretion to the Executive in the implementation of statutes.<sup>13</sup> The fundamental argument is that emergency situations,

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<sup>8</sup> M. McCubbins *et al.*, "The Political Origins of the Administrative Procedures Act", 15 *Journal of Law Economics and Organization* (1990) p. 180.

<sup>9</sup> M. McCubbins and T. Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms", 28 *American Journal of Political Science* (1984), p. 167 *et seq.*; M. McCubbins *et al.*, "Administrative Procedures as Instruments of Political Control", 3 *Journal of Law Economics and Organization*, (1987), p. 243 *et seq.*; J. Ferejohn and C. Shipan, "Congressional Influence on Bureaucracy", 6 *Journal of Law, Economics and Organization* (1990), p. 1.

<sup>10</sup> K. Bawn, "Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System", 13:1 *Journal of Law, Economics and Organisation* (1997) p. 101.

<sup>11</sup> L. Lessig and C.R. Sunstein, "The President and the Administration", 94:1 *Columbia Law Review* (1994) pp. 102-103; E. Kagan, "Presidential Administration", 114 *Harvard Law Review* (2001) p. 2245; R.F. Durantand and William G. Resh "'Presidentializing' the Bureaucracy", *The Oxford Handbook of American Bureaucracy* (Oxford University Press, Oxford, 2010) pp. 545-568.

<sup>12</sup> E.A. Posner, "Cost-Benefit Analysis as a Solution to a Principal-Agent Problem", 53:1 *Administrative Law Review* (2001), p. 289; E.A. Posner, "Controlling Agencies with Cost-Benefit Analysis: a Positive Political Theory Perspective", 68 *The University of Chicago Law Review* (2001) p. 1137.

<sup>13</sup> D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, New York, 2006).

as fight to terrorism or bail-out of financial institutions, require the extension of Presidential powers and the development of a “looser” administrative law, with less *ex ante* and *ex post* constraints.<sup>14</sup> Also President Obama’s creation of a host of policy “czars” in the White House reinforced those tendencies. Taking into consideration also the presidential appointments of loyal figures into key administrative positions, it becomes evident that Presidential systems encourage the «politicization of the bureaucracy».<sup>15</sup>

In parliamentary systems, the political bond between the government in office and the majority in Parliament reduces conflicts and vanishes legislative supervision of executives, even in the exercise of administrative discretion. Nonetheless, especially in recent times, parliaments attempted to reassert their role as ruler and overseer of executive action, in fields like delegated legislation, waging war, and concluding treaties.<sup>16</sup>

The absence of a political conflict comparable with the one existing in the U.S. might explain, at least up to a certain extent, the lower intensity in regulations of some aspects of administrative law in many European countries. For instance, rule-making procedures, and especially notice and comments requirements, are far less regulated even in those European countries which adopted general regulations of administrative procedures. One possible explanation is that in European countries procedural requirements serve to protect citizens, a rather weak interest in the political/legislative arena, rather than to solve political conflicts. The paradox is that in European countries, especially in those in which the civil service is strong and tends to insulate, bureaucratic

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<sup>14</sup> E.A. Posner and A. Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, University of Chicago Law School, John Olin Law & Economics Working Paper No. 440 (2008); A. Vermeule, “Our Schmittian Administrative Law”, 122 *Harvard Law Review* (2009) p. 1095; G. Napolitano, “The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law”, in S. Rose-Ackerman and P. Lindseth (eds.), *Comparative Administrative Law*, Edward Elgar Publishing, Cheltenham, pp. 569-591.

<sup>15</sup> B. Ackerman, “Good-bye Montesquieu”, in S. Rose-Ackerman, P. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishing, Cheltenham, 2010) pp. 127-133, 131. The politicization is considered a consequence also of «legislative irresponsibility in Congress» by P.L. Strauss, “Rule-making and the American Constitution”, in D. Oliver, T. Prosser, and R. Rawlings, *The Regulatory State. Constitutional Implications* (Oxford University Press, Oxford, 2010) p. 63.

<sup>16</sup> T. Zwart, “Overseeing the Executive: Is the Legislature Reclaiming Lost Territory from the Courts?”, in S. Rose-Ackerman, P. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishing, Cheltenham, 2010) pp 148-160.

responsiveness to the society and its changing needs should be regarded as even more important than in the U.S.<sup>17</sup>

## 2.2. *Institutional Conflicts*

Public administrations are historically at the service of the State. But, in a context of supranational cooperation, national administrations may be asked to implement also global, international or macro-regional agreements, rules and policies. As a consequence, a second type of conflict in administrative law is institutional. It arises in a multilevel system of government. A growing number of public policies is supranational (global or macro-regional). But its implementation is still national. That's why supranational authorities try to regulate both organizational and procedural mechanisms through which national administrations must execute those rules and policies in order to ensure coherence and avoid any kind of drift, due to local interests pressure.

The E.U. offers an interesting example of such a conflict. Liberalization of telecoms is one of the most successful policies in the internal market framework. The E.U. adopted several directives in order to abolish exclusive and special rights existing at national level and to remove barriers across countries. But it soon realized that was not enough. Proper and coherent implementation of the common rules at national level was a key-factor for the success of the liberalization policy. That's why the E.U. asked Member States to establish national regulatory authorities. Nonetheless, at the beginning, the E.U. didn't even dare to interfere with the power of the State to craft the organizational and procedural features of administrative structures. Regulatory authorities were regulated only at Member State level, as components of the national administrative system. As a result, national regulatory authorities of telecoms were not fully independent. They had to share regulatory power with the Executive and other governmental bodies. They were not obliged to respect transparency principles and to

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<sup>17</sup> S. Rose-Ackerman, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (Yale University Press, New Haven, 1995).

observe notice and comments procedures. Opacity was instrumental to political control and mediation of interests.<sup>18</sup>

In the last ten years, such an approach was completely reversed. The E.U. found out that administrative law matters. That's why, step by step, it started to design the administrative law main features of those national regulatory authorities. It required Member States to assign national regulatory authorities an independent status, both from regulated industries and political institutions. It obliged Member States to confer to national regulatory authorities adequate financial and staff resources and to let them autonomously manage those resources. It compelled Member States to give to national regulatory authorities a set of minimal powers, at the same time requiring those powers to be exercised under notice and comments procedural rules.<sup>19</sup>

Which is the underlying logic according to which the E.U. adopted administrative law devices to ensure the loyalty of national regulatory authorities to European commitments, rather than to national interests pressure? Firstly, requiring fully independent status, the E.U. wanted to insulate national regulatory authorities from "local" influences, making them faithfully implement the European common rules. Secondly, obliging national regulatory authorities to adopt notice and comments procedures, the E.U. pursued the objective of activating "fire-alarm" signals coming from undertakings, consumers and other vested interests.

Members States were obliged to comply with these requirements. But some times tried to vanish them. Specific powers of national regulatory authorities were transferred to governmental bodies; sensible decisions were taken directly at primary law level; informal and semi-contractual procedures, even if regulatory in substance, were freed of notice and comment and notification constraints. Not always the European Commission and the European Court of Justice were able to detect and punish such opportunistic arrangements of national administrative laws<sup>20</sup>.

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<sup>18</sup> F. Gilardi, "Policy Credibility and Delegation to Independent Regulatory Agencies: a Comparative Empirical Analysis, 9 *Journal of European Public Policy* (2002), p. 873 *et seq.*

<sup>19</sup> M. Thatcher, "Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation", 25 *West European Politics* (2002), p. 125. Nonetheless, differences remain: an empirical assessment in M. Thatcher, "Regulatory Agencies, the State and Markets: a Franco-British Comparison, 14 *Journal of European Public Policy* (2007) p. 1028 *et seq.*

<sup>20</sup> One of the most important case in the telecommunication sector is related to a German Law unduly regulating next generation network on a matter which was reserved to the jurisdiction of the national regulatory authority: see *Failure of a Member State to fulfil obligations - Electronic communications -*

National administrative law matters more and more, even if in a less formalized and sophisticated way, also in an increasing number of international agreements and treaties. Structural devices, like the status and the powers of national implementing agencies, are still far away to be crafted in those frameworks. On the contrary, procedural requirements are frequently introduced. The Aarhus Convention, the Code of Conduct for Responsible Fisheries, the Cartagena Protocol on Biosafety, and the World Trade Organization Guidelines for Arrangements on Relations with Non-governmental Organizations, offer interesting examples of the widespread of a «global due process of law».<sup>21</sup>

Once again, the obligation of national governments to hear private parties is established at the global level in order to involve private parties in implementing supranational policies and push national agencies to act coherently with such policies. In some cases, foreign actors, which would have been otherwise even deprived of the right to be heard by domestic law, are the most effective in fire-alarming, having no connection with national bureaucracies and their principals.

### 2.3. *Economic Conflicts*

Public administrations do not serve only politicians and supranational institutions. Having become the «society's largest artifact», they serve private interests too.<sup>22</sup> Agencies and authorities regulating the market have to address economic conflicts among different stakeholders. Two kinds of conflict are the most relevant: between existing (often incumbent) operators and new comers; and among enterprises and consumers. But the institutional design and even the procedural rules of those agencies and authorities are in turn the outcome of an *ex ante* conflict between different economic actors in the legislative arena. The object of this third kind of conflicts is, once again, administrative law rules and institutions.

Incumbent operators ask for the establishment of vertical/sector-specific agencies, the conferral of all regulatory powers to them, and a low degree of procedural and

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*Directive 2002/19/EC - Directive 2002/21/EC -Directive 2002/22/EC - Networks and services - National rules - New markets (European Commission v Federal Republic of Germany)*, ECJ, 3 December 2009, C-424/07.

<sup>21</sup> S. Cassese, "A Global Due Process of Law", in G. Anthony *et al.* (eds.), *Values in Global Administrative Law*, (Hart, Oxford, 2011) pp. 20-30.

<sup>22</sup> Cassese, *supra*note 3.

transparency constraints. All these factors will favor spontaneous alignment and regulatory capture. New comers, on the contrary, will ask for wide intervention of horizontal agencies, like the antitrust authorities, and for stricter notice and comment procedures. All that will prevent regulatory capture, allow regulatory competition between sectors specific and antitrust agencies, enhance representation of alternative operators interests.<sup>23</sup>

Sometimes, both incumbent and alternative operators can ally at the expense of consumers or third parties interests. For instance, they can agree in order to obtain from regulatory agencies a full transfer of investments costs to final consumers. That's why also consumers or environmental associations ask for institutional and procedural devices as an *ex ante* insurance against a regulation distorted in favor of enterprises and firms. Two of them are particularly relevant. The first is the establishment of consumers' watchdogs in the institutional framework of regulation. Consumers' representative bodies, public or quasi-public in nature, must be heard or give advice before every regulatory decision is taken.<sup>24</sup> The second one is "deck-stacking". Statutes must recognize *ex ante* the right of consumers or environmental associations to benefit of notice and comments procedures in the same way of regulated industries.<sup>25</sup>

As a consequence, the administrative law environment in which every regulatory agency will play can be intended as the outcome also of private interests' influence. The choice for one solution or the other will reveal, with a significant degree of likelihood, which type of private interest prevailed in the legislative arena.

### **3. Successful Strategies**

Administrative law is a battlefield for conflicting political, institutional and economic actors. What is relevant is that there are some regularities in those conflicts. Fundamental moves of every player are constantly repeated. In such a context, some strategies appear to be extremely successful, deeply influencing the transformations of administrative law: among them, power to rule, coalition capacity and costs' allocation.

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<sup>23</sup> J.R. Macey, "Organizational Design and the Political Control of Administrative Agencies", 8 *Journal of Law, Economics, & Organization* (1992), p. 93.

<sup>24</sup> G.L.F. Holburn and R. Vanden Bergh, "Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States", 126 *Public Choice* (2006) p. 45.

<sup>25</sup> McCubbins *et al.*, *supranote* 9.

### 3.1. *Power to Rule*

The first key-factor in order to prevail in the struggle for administrative law is to conquer the power to rule. The power to rule is fundamental not only for what is expressly prescribed about the use of administrative discretion (purposes, prerogatives, means of action, parameters of judicial review). Even more important is the creation of a decision-making environment capable of channeling future decisions in the desired way. Organizational design and procedural devices play a relevant role in that sense. They might allow a principal to prevail over the other. For instance, “stacking the deck” in favor of specific interests groups will allow those interests groups to over-represent their point of view in the regulatory debate, giving them an appreciable advantage at the moment in which the agency will assume its decisions. Criteria of allocation of rulemaking powers are different.

The conflict between executives and the parliaments in rulemaking is often solved through purely legal criteria, at constitutional level. According to many constitutions, the power to adopt general regulations of administrative structure and procedures pertains to parliaments. But the executives keep the administration in their hands. Through order and directive prerogatives over administration and agencies they can turn them into loyal actors. The Executive orders on cost-benefit analysis adopted by several U.S. Presidents represent a clear example of such powerful tools.<sup>26</sup>

Legal criteria may be subverted when an international agreement is signed or a supranational discipline is adopted. Executives usually play a big role both in the making of a rule “beyond the State” and in its transposition into the national legal order. This way, they can try to shape specific features of administrative law, overcoming or at least reducing the role of parliaments. From this point of view, executives may pursue intentionally a strategy of international or supranational cooperation, in order to strengthen their power at national level. In some cases, parliaments prevent such a strategy adopting acts and statutes, whose content will tie the hands of the executives in negotiating international agreements. For instance, the approval of the Dodd-Frank Act by the U.S. Congress might be considered – intentionally or not – a device to avoid a

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<sup>26</sup> Posner, *supranote* 12.

global reformation of financial institutions and to preserve the power of national legislators.<sup>27</sup>

More flexible and complicated is the criteria in a multilevel system of government. Economic arguments based on efficiency evaluations support the conferral of rule making powers to superior levels of government. The implied powers rule in the E.U. can be interpreted in these terms. Apparently, the E.U. can adopt rules only in order to harmonize the way in which market work. But it was able to derive from that also the power to design administrative institutions and procedures through which markets are regulated. Member states didn't oppose such an extensive interpretation of E.U. prerogatives: maybe because those prerogatives were exercised step by step. So they didn't realize they were losing the power to define the administrative law framework according to which institutions like national regulatory authorities were expected to play.

Nonetheless, political actors at national level may also pursue a strategy of delegation to supranational institutions. As previously remarked, in some cases, national executives might have an interest in allowing the E.U. to discipline some features of the administrative machine, depriving national parliaments of that power. In some other cases, on the contrary, national parliaments might desire that the E.U. requires the establishment of independent bodies, because those bodies will be closer to them than to executives.

No formalized criteria, of course, assign powers of influence in the legislative arena to one interest group or another. The conquest of such an informal power of influence greatly depends on their organizational capacity and negotiation ability. According to the logic of collective action, big interest groups are expected to play a much more important role in the political arena.<sup>28</sup> But also diffused interests groups, like consumers or environmental associations, can influence legislative decisions creating a symbiotic relationship with political actors. They select and signal the relevance of collective preferences that rational legislators will try to satisfy adopting acts and statutes in favor of those interests. In exchange, they will assign specific rights to those bodies, included

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<sup>27</sup> R.A. Posner, *The Crisis of Capitalist Democracy* (Harvard University Press, Cambridge, 2010) p. 165.

<sup>28</sup> M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge, 1965).

participatory rights in administrative procedures, which are necessary to implement the legislation.<sup>29</sup>

Also economic actors may have an interest in expanding rule-making and standard setting powers of international or supranational bodies. These institutions, falling outside the democratic process that takes place at national level, could fall easily under regulatory captures. Especially when, due to the difficulties of national governments in transferring binding prerogatives to international organizations, informal regulatory powers are assigned to private bodies.<sup>30</sup> This way, interest groups can influence both substantial regulations and administrative law features of implementing agencies at national level.

### 3.2. *Coalition Capacity*

No actor can win the struggle for administrative law on its own. Coalition capacity becomes fundamental to overcome the rival.

Political actors often use interest groups, regulated firms and citizens to receive fire-alarm signals. In the U.S., the Congress influences and controls agencies, requiring them to follow notice and comment procedures and through “deck-stacking” in favor of specific interest groups. The alliance between the Congress and such groups becomes fundamental to monitor bureaucratic behavior and to ensure the proper and correct implementation of acts and statutes. This way, political drift driven by diverging directives of the President or personal beliefs of bureaucrats could be avoided, or at least reduced.

The technique was imitated by supranational institutions. The E.U. obliges Member States to recognize participatory rights to private stakeholders before national regulatory authorities. This way, oversight powers of the European Commission are strengthened and somehow guided by private parties allegations. In electronic communications sector, a draft of the national regulatory measures must be notified to the European Commission. In only thirty days, the European Commission must say

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<sup>29</sup> D.A. Farber, “Politics and Procedure in Environmental Law”, 8 *Journal of Law, Economics, & Organization* (1992) p. 59 *et seq.*

<sup>30</sup> H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Hart, Oxford, 2005); M. De Bellis, “Public and Private Regulators in the Global Legal Space”, 9 *International Journal of Constitutional Law* (2011) pp. 425-448.

“yes” or “no”. That’s why private parties arguments exposed during the consultation process at national level allow the European Commission to save time and to detect in a short while suspected infringements to the European rules. In other cases, where such a complex *ex ante* procedure is not established and a contested decision is taken by a national agency, affected private parties have a double strategy at their disposal. They can bring the national agency before the national court, a special administrative law one (like in France and in Italy), or a common law one (even if often specialized). Or, on the contrary, they can invoke the intervention of the European Commission, which will open an infringement procedure against the Member State.

Also economic actors create coalitions with political and institutional actors. Interest groups help legislators in selecting collective preferences and in statutes drafting. In exchange, they obtain the conferral of participatory rights before the agencies, which will have the task of implementing and enforcing those statutes. Protecting their rights and interests, interest groups will help political principals to monitor bureaucratic behavior. Interest groups influence the legal design of regulatory frameworks also at supranational level. Liberalization policies are most effective in those sectors where competitive dynamics and economic actors’ pressures are stronger. They give evidence not only of technological opportunities play to promote innovation, but also of regulatory devices that must be fine-tuned to enhance competition policies. And they offer themselves as watchdogs of new legal solutions.

In such a context, triangle coalitions are the most effective. A recent case in Italian legislation shows that very clearly. The Parliament, against the opinion of the Executive and of the national regulatory authority (Agcom), passed a law obliging the latter to unbundle the services of network maintenance. The incumbent, owner of the network, succeeded to align the interests of the Executive and of Agcom to its own, inducing the European Commission to open an infringement procedure against the rule voted by the Parliament under the pressure of alternative operators.

### 3.3. *Costs Allocation*

The struggle for administrative law is highly costly: politically, because of transaction costs and consensus disadvantages; economically, in terms of efficiency losses,

organizational and monetary resources, cost-opportunities. The chances of success are greater for those actors who make better investments, internalize costs or transfer them to other actors.

When an administrative law statute is enacted, legislatures have to balance *ex ante* political costs and *ex post* agency losses<sup>31</sup>. Let's take the problem of discretion. The more discretion is regulated and limited, the less bureaucrats can drift or be influenced by other political, institutional and economic actors. But limiting *ex ante* administrative discretion is costly, in political terms. If decisions that will be taken disfavor some interest groups or are unpopular, blame will be addressed towards legislators, not towards bureaucrats. Moreover, from an efficiency point of view, limiting discretion will reduce flexibility in answering to unexpected situations. That's why in some cases it might be preferable to run the risks of agency losses, trying to reduce them through a system of effective controls<sup>32</sup>.

Fire alarms signals are supposed to be less costly for political actors than police-patrol ones. Indirect controls, through fire alarming, of bureaucratic behaviors are costly for private actors, which bear the burden of participation. This way, political actors can check the way in which agencies implement statutes, without paying the costs of direct controls (like congressional enquiries). But such a mechanism of costs shifting works properly when private actors can easily internalize them: *e.g.*, because they can obtain a direct advantage from influencing in the desired way the economic regulation of an agency. That's not the case with public administrations and agencies producing public goods, like security or defense. Benefits are so widespread and uncertain that nobody would bear the costs of participation. Moreover, participation takes time, delays decisions, and favors bargains, which might damage the interest protected by the statute.<sup>33</sup>

In some other cases, police-patrol controls may be more advantageous for political actors. In sensible cases, Congressmen desire to appear personally engaged in reviewing

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<sup>31</sup> M.J. Horn, *The Political Economy of Public Administration* (Cambridge University Press, Cambridge, 1995).

<sup>32</sup> From different viewpoints, see J.L. Mashaw, "Prodelegation: Why Administrators Should Make Political Decisions", 1 *Journal of Law, Economics, & Organization* (1985) p. 81 *et seq.*; R.D. Coote, *The Strategic Constitution* (Princeton University Press, Princeton, 2000).

<sup>33</sup> R. Stewart, "Administrative Law in the Twenty-First Century", 78 *New York University Law Review* (2003) p. 437.

administrative action through enquiries and oral examinations against bureaucrats suspected of serious infringements of law and economic damages to the population (e.g., when oversight agencies didn't prevent hazardous behaviors of financial institutions). Some kinds of police-patrol controls are functional also to the increase of costs for the reviewed agencies. For instance, Executive order on cost-benefit analysis is instrumental not only to direct supervision of regulation by Presidential offices. It's also functional to a deregulation purpose. As a matter of fact, cost-benefit analysis is not neutral. It makes more costly to regulate than not to regulate. Regulatory measures must be mathematically advantageous. Inaction, on the contrary, is not to be justified. Increasing the burden of one side of administrative action, the legal order incentives bureaucrats to follow the opposite strategy.<sup>34</sup>

Also a fire-alarm system of control is costly for agencies. In environmental protection, according to Aarhus Convention principle, international agreements and the E.U. ask national governments to respect public consultation duties before assuming a decision. In the transposition of those provisions, some governments argued that participation is costly not only for private parties but also for public administrations who have to consult them and track records. So they decided to charge private actors for participating. According to the European Court of Justice, the "price" of participation must not be too high, in order not to discourage participation.<sup>35</sup>

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<sup>34</sup> R.L. Revesz. and M.J. Livermore, *Retaking Rationality. How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (Oxford University Press, Oxford, 2008).

<sup>35</sup> *Failure of a Member State to fulfil obligations - Assessment of the effects of certain projects on the environment - Directives 85/337/EEC and 97/11/EC - National legislation - Participation by the public in certain assessment procedures upon payment of fees (Commission of the European Communities v Ireland)*, 9 November 2006, ECJ, C-216/05.

#### 4. **Understanding Change in Administrative Law: Path-dependence and Interstitial Adjustment**

Conflicts in administrative law are not a single battle war. Each move of one actor follows the moves of the others. That's why administrative law is a repeated interactions game. Each move is incremental and path-dependent. Devices and mechanisms set up in the previous round cannot be easily and fully dismantled.

Let's take the example of independent authorities. Once they are established in order to insulate the implementation of specific policies from government's influence or local interests' pressure, it becomes difficult to abolish them: even when the rule-making power comes back into the hands of national legislators or executives. As a consequence, reactions must be fine-tuned and sophisticate. The preferred solutions will be, for instance, the transfer of a specific power from the regulatory agency to the executive, or the submission of some sensible prerogatives of the independent body to *ex ante* directives or *ex post* approval by a political actor.<sup>36</sup>

Also procedural rights are difficult to be withdrawn: even than organizational devices. Once they are recognized, even if some times for purely instrumental reasons of fire-alarm signaling, they become somehow sanctified as intangible rights.<sup>37</sup> That's why adjustments and reactions must be interstitial: right to be heard and other voice's prerogatives of private actors cannot be nullified. Changing time limit for comments, addressees of them, burden of proof for the acting agency, third parties and other institutional interventions, are among the most preferred solutions.

All that explains why the study of change in administrative law in complex legal orders and societies requires more and more a micro-analysis approach: "Devil is in the details".

The image of administrative law as a place of conflict in which political, institutional and economic actors fight, compete, and bargain must not be over-emphasized. Other visions of administrative law survive and in many cases offer better explanations of the true essence and proper dynamics of legal orders. This's why at least two caveats are necessary.

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<sup>36</sup> Posner, *supranote* 12.

<sup>37</sup> S. Elias, "Righting Administrative Law", in D. Dyzenhaus *et al.* (eds.), *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Hart, Oxford, 2009) pp. 55-74.

First, selfish inspirations and strategic capacities of the different players of administrative law should not be over-assessed. Altruistic purposes inspire their action; not necessarily self-maximizing powers' motivations. Administrative law is not only a place of conflicts. It's also a place of values, principles and rights. It's a tool of economic, social, and cultural progress. It's the object of hopes and dreams (even if administrative lawyers, fortunately, cultivate many other hopes and dreams). Also the rationality of political, institutional and economic actors is limited. Rules of administrative law enacted with one purpose may fulfill the opposite one, even if such an outcome was unintended. And the evolution of those rules once they come into action is difficult to be predicted in advance.

Second, political, institutional and economic actors are not the only relevant players of administrative law. Bureaucrats and judges influence deeply the development of administrative law too. They are not just neutral, mechanical, and passive actors, as ideological or rhetorical conceptions widespread especially in Europe would make us believe in. Both bureaucrats and judges have selfish interests and personal preferences, which they try to maximize taking advantage of the discretionary and interpretative margins at their disposal. Moreover, they often have a superior expertise, through which they can influence political, institutional, and economic actors' moves or make them fail (here it is another explanation of their limited rationality). This is why, in the conflicts for administrative law, bureaucrats act some times as faithful soldiers and some other times as an autonomous army; and judges may play as peace keepers<sup>38</sup>, but also as fire-burners.

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<sup>38</sup> *E.g.*, mediating the strategic needs of both political branches for control of agency action: see L. Schultz Bressman, "Procedures as Politics in Administrative Law", 107 *Columbia Law Review* (2007) p. 1749.

