

Matthias Ruffert (ed.). ***The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe***. Munich: Sellier: European Law Publishers, 2007. Pp. 326. €39.00. ISBN: 9783935808910.

During the last two decades, the administrative law of most European states has considerably changed, and is still changing. 'Governance', 'Steuerung', 'New Public Management', 'critique managériale' and 'privatization' but also 'constitutionalization' and 'Europeanization' are important keywords which describe the heterogeneous details of this ongoing development. It appears, however, that a common European debate in this area is still missing. Some scholars specialized in the administrative law of some pertinent legal orders have started a transnational project to

advance that debate and to work towards a surplus of results compared with the isolated discussions at the national level. This volume contains the analyses and reflections presented at their first meeting. At first view, the idea of just another publication of conference proceedings might not appear attractive. But a closer look reveals that this is not the classical lining up of superficial, vaguely related conference papers. The edition strictly follows a well-conceived concept, which seems to be dominated by a certain reformer perspective spread among contemporary administrative law scholars. The individual contributions are mostly elaborate and linked by a golden thread. Following a thorough introduction, a second, comparative part describes and analyses the changes in administrative law in different administrative law systems. An extensive third part deals with the underlying conditions for administrative law reform and with the changing perspective of scholarship. The final fourth part concentrates on three key patterns of change.

In his introduction, Matthias Ruffert illustrates the underlying idea that there is a real *transformation*, not just an evolution of administrative law. He advocates the thesis that administrative modernization, constitutionalization and Europeanization, with their manifold facets, have influenced administrative law and legal scholarship in different legal orders in similar ways, with comparable results. Ruffert focuses on the developments in German, English and French administrative law. After a short presentation of the different backgrounds and starting points, he first introduces the reader to the common phenomena of modernization of administration (pursuit of efficiency, privatization, deregulation, increased creation of independent administrative units [agencies], but also a quest for transparency, open government and orientation towards the citizen, increased use of mechanisms of cooperative decision-making and self-regulation). Frequently, he highlights the debate on the concept of '*Steuerung*' ('steering') in Germany. Then he describes the phenomena of constitutionalization and Europeanization, which have indeed deeply

influenced the development of administrative law. Obviously, without a written constitution enjoying primacy, there cannot be a real constitutionalization in England. Ruffert presents, however, the interesting idea that the Human Rights Act of 1998, which gives effect to the European Convention on Human Rights within the British legal order, might lead to a similar development. Concerning Europeanization, he works out three different kinds of changes: those brought by legal acts of the European Community, those following the jurisprudence of the European Court of Justice on the requirements of effective implementation of Community law, and those caused by a transfer of legal concepts from one legal order to another via Community law<sup>1</sup> (e.g., the principle of proportionality). As a reaction to this considerable change in administrative law, Ruffert calls for a change of perspective and methods in legal scholarship and a transnational, European debate.

Ruffert's remarks necessarily rely not only on qualitative observations but also on a quantitative assessment of the significance of the observed phenomena and developments. Already for this reason, not all colleagues will agree with him in all respects. Does the concept of '*Steuerung*' present a revolutionary new concept or just one innovation among others in today's administrative law? Will privatization and New Public Management lose their attractiveness after the disappointing experiences in some states? Is constitutionalization a new phenomenon, given that it started in Germany as long ago as the 1950s? Can the (possible) impact of the British Human Rights Act, which is an ordinary statute without primacy, really be compared to it? On that which concerns the Europeanization of administrative law, one might emphasize that there was such a strong resistance on the part of many scholars during the 1990s, in particular in Germany, that it was not certain whether European law would prevail in the end. However, with such questions and arguments,

we are already in the midst of the scientific discussion. Ruffert gives thorough reasons for his interesting statements and often reinforces them by the many references to well-chosen guiding literature in German, English and French administrative law. For the references alone, this introduction should be studied with care (the same is true, however, for some other contributions to this volume, in particular those by Voßkuhle, Caillosse and Hoffmann-Riem).

The second part begins with a contribution by Jeffrey Jowell on the '*universality of administrative justice*', which focuses, however, on the developments in English administrative law. Jowell explains how its principles, which despite the different backgrounds often show parallels to those in other administrative legal orders, were derived initially from poorly grounded concepts of fairness or reasonableness without much regard to a constitutional context or to the specific characteristics of public law. In English law, the justification of judicial review still appears to be unclear and disputed. Jowell supports the idea of a normative justification based on the necessary elements of a modern European constitutional democracy such as the rule of law, equality and the need to respect human rights. He does not hide the fact that this comes down to a considerable shift of the concept of sovereignty of Parliament away from that set out by Dicey, given the implied presumption that Parliament respect the rule of law, etc. In a constitutional state it would be easier to justify such a theory. Jowell reasons that administrative justice is imperative in a democratic legal order, even if there is (limited) room for divergence. He follows a comprehensive understanding of democracy, which is widespread but questionable because it confuses distinct elements: democracy, rule of law, respect of human rights and also human dignity are essential components of a modern Western legal order, but are nonetheless independent principles. So why not base the normative justification explicitly on all of them?

Pascale Gonod presents some interesting remarks on the *reform of administrative law in France* which confirm some of Ruffert's

<sup>1</sup> Sophie Boyron describes this phenomenon in her contribution to the volume as *cross-fertilization* (at 285).

observations about modernization of administration, constitutionalization and Europeanization, but from a critical perspective. She points to the high degree of complexity of modern administrative law, which has made it 'unteachable'; to the loss of significance of the specific features of the French administrative courts (and, in particular, of the role of the Conseil d'Etat) due to structural reforms and the influence of the ECHR, the ECJ and the Conseil constitutionnel; to the 'atomization' of the administrative machinery by the creation of autonomous agencies and authorities, by decentralization and by deconcentration; and to regulation and contractualism as new phenomena of public intervention, which make the distinction between public and private law fragile.

Andreas Voßkuhle presents a particular methodological reform approach of some German scholars: the so-called '*Neue Verwaltungsrechtswissenschaft*' ('New Science of Administrative Law'). These scholars are dissatisfied with the prevailing legal methodology, in particular the 'Juristic Method', because it concentrates very much on the 'regulative law' (which uses the traditional means of command, interdiction, etc.) and the paradigm of lawfulness/unlawfulness, and because it appears to neglect the findings of other scientific disciplines which also deal with the function of public administration (for example, sociological findings about informal and cooperative administrative action). Voßkuhle also doubts that it can cope with the phenomena of Europeanization and internationalization of administrative law. He calls for a methodological reorientation from an application-oriented science of interpretation to a law-making-oriented science of acts and decisions, with scientific rationalization of non-normative factors of decisions as an important aim. Central methodological elements shall be (1) the perspective of 'steering' (taking into account the subject, the objects, the objectives and of course the instruments of steering), and with regard to that, (2) an exact analysis of the social, political, economic, cultural, technological and ecological reality, (3) an orientation on the effects and consequences of

measures (by prognosis, learning from experience and comparison), (4) inter- and multidisciplinary exchange with other scientific disciplines (Voßkuhle calls for the development of adequate rules of procedure that will structure the knowledge transfer in terms of a transdisciplinary meta-theory), (5) structuring the discussions by working with key terms and guiding visions (which in fact are already employed in abundance) and (6) working with reference fields which allow a general orientation. All this shall not replace, but will rather complement, the 'Juristic Method'.

This short review cannot be the place to discuss and evaluate this complex new methodological approach with all its advantages and disadvantages, its partly well-grounded criticism of the predominant methods, its interesting ideas and the many (grounded and ungrounded) objections. Perhaps the potential of the concept of 'steering' is overestimated. However, given that reforms have been based on it, this concept is obviously of importance. Besides, Voßkuhle himself warns not to overestimate it. Maybe there is a risk that the limits between legal interpretation and legal politics are blurred. Arguments drawn from neighbouring sciences such as political science, economics or sociology cannot replace or countervail those based on generally acknowledged legal methodology. Administrative science and administrative law science may complement each other but must not be melded or confused. A legal norm has to be interpreted as the legislator has laid it down, not as it should be within the perspective of other sciences. If the correct interpretation leads to an inopportune or unrealistic result, the norm has to be changed, not its interpretation. In many cases, however, the findings of other disciplines are essential for the interpretation or application of administrative law, because the legal norm refers to them (explicitly or implicitly) or opens the option to take them into consideration. In other cases, used with caution, they can serve as *auxiliary arguments* in the context of a teleological interpretation. Besides, legal interpretation should be clearly distinguished but not isolated from legal

politics. For the purpose of the latter, these arguments will be valuable. So much depends on the way in which the new approach is implemented in practice: as an enrichment of methodology, refining and complementing in an auxiliary manner the well-established methods, or as a surrogate jeopardizing the normative approach? In any case, the 'New Science of Administrative Law' is not an approach whose significance is limited to the German law. It should be scrutinized in a transnational European discourse.

In the third part, the disillusioning but astute remarks of Jacques Caillosse on the relationship between *administrative law and social sciences* contribute to this discourse. Caillosse is sceptical about the idea that the making of administrative law might be based on social sciences. He also recalls the disrespectful attitude of legal science and social sciences towards each other in France. He critically discusses the devaluation and depreciation of law by the social sciences, the tendencies of stereotyped dissociation in political science, the reproach of being unrealistic, ineffective and counterproductive and the attempts to submit the law and the lawyers to overemphasized principles of market economy. He also describes, analyses and criticizes profoundly the ignorance of legal scholarship (including the Conseil d'Etat and its members) about social sciences, which he qualifies as '*positivisme technicien*'. However, at the end, with regard to recent developments, he is moderately optimistic. By the way, an analysis of the articles in the law journal *Public Law* presented by Yoonhee Tina Chang and Lindsay Stirton results in the observation that in Britain too there has not been much inter-disciplinary engagement – and even a decline – in the last 25 years.

Wolfgang Hoffmann-Riem, another protagonist of the '*Neue Verwaltungsrechtswissenschaft*', backs the position of Voßkuhle and emphasizes the *potential impact of social sciences* – not only on the making but also on the application of administrative law. He points out that nowadays findings of social sciences are sometimes considered in legal doctrine and practice, but mostly with an arbitrary,

selective approach. He gives examples for new legal developments, for which the findings of social sciences are relevant: the transition from the welfare and intervention state to the 'ensuring state' ('*Gewährleistungsstaat*'), the approaches of 'steering' and 'governance' and dealing with risks and insufficient knowledge. He mentions numerous approaches and theories in various disciplines which he thinks are important for administrative law (the word 'important' is used frequently). He discusses broadly the relevance of extra-legal factors in applying law, sometimes formulating expectations which the average lawyer without a second university degree in a neighbouring science will barely be able to meet (see at 226 *et seq.*). Hoffmann-Riem concedes that one cannot expect the impossible from those who apply the law. So he forwards the burden to legal scholarship. According to him, it is the task of legal scholars to prepare factual knowledge for standard situations and to include such knowledge in legal doctrine. 'Information on the reality of a norm should be and can be included in legal doctrine' (at 242). Of course, there are examples for such contributions to administrative law doctrine.<sup>2</sup> Besides, the requirement appears to be justified on that which concerns particular norms that are controversial, difficult to execute, are outdated or unrealistic. However, is it realistic as a general rule? Moreover, what would be the impact of such an impact of social science on legal education?

Andrew Le Sueur reports on the *rise of informal dispute resolution* in the field of administrative law in *England*. This development is supported by a government strategy of 'proportionate dispute resolution', which promotes tailored dispute resolution services so that different types of disputes can be resolved

<sup>2</sup> See, for example, V. Schlette, *Die Verwaltung als Vertragspartner. Empirie und Dogmatik verwaltungsrechtlicher Vereinbarungen zwischen Behörde und Bürger* (2000). This publication on empirics and doctrine of administrative contracts is, however, a *habilitation* thesis of more than 750 pages – certainly (even potentially) more the exception than the rule.

quickly without recourse to the expense and formality of courts and tribunals where it is not necessary. It is, however, questionable, to what extent the increased use of informal methods will work and, if they are compulsory, whether they will be compatible with Article 6(1) of the European Convention on Human Rights.

Athanasios Gromitsaris analyses the position of *administrative law within the legal system and in relation to practice in Germany*. He points out that the high level of human rights protection, which is explicitly required by the German constitution, gives German administrative law a less procedural and a rather substantive orientation. This might read oddly at first for a German lawyer but is correct. Substantive orientation, including a particularly thorough control of substantive ('material') legality by the administrative courts, is indeed a striking feature of German administrative law, in particular in comparison to English law. On the other hand, there are deficits in the enforcement of formal and procedural rules and the protection of procedural rights, which German scholars tend to ignore. As Gromitsaris points out, in Germany, violations of formal and procedural rules will not necessarily lead to an annulment of the administrative decision, in particular not in planning law. The administration may cure procedural defects still during trial. Gromitsaris shows sympathy with the idea that procedure is as important as substance. This will meet the objection that procedure must serve to achieve objectives or protect values but is never an objective or value in itself. It must always be seen – and justified – in context with the substantial positions it is supposed to push through. There is, however, a more obvious reason for criticism, which Gromitsaris is too restrained (or polite?) to express: one could question if the existence of legal procedural norms, widely lacking enforcement, is compatible with the very idea of the rule of law. Gromitsaris has certainly touched a sensitive point, where normativity and reality have to be reconciled.

Concerning legal practice, Gromitsaris deals with the intertwinement of public and

private law (in particular administration under private law) and the problems raised by informal administrative action. He stresses more clearly than some German colleagues that there is still the problem of how to effectively protect the interests of third parties and to prevent the informal circumvention of formally valid legal rules.

In a short commentary, Eberhard Schmidt-Aßmann also deals with the situation of administrative law within the legal system and in relation to practice. He stresses that administrative law is and must be in a permanent process of change. He highlights the overall positive effect of constitutionalization but also associates it with the danger of petrification or paralysis of administrative law. He is optimistic about a fruitful relationship between legal scholarship and practice, even if there are complaints about insufficient reception of new scholarly doctrines. One could add that scholarly doctrines have become so numerous, diverse, complicated and often distant from legal practice that without appropriate imparting, for which the scholars, not the practitioners are responsible, reception cannot be taken for granted any more.

The fourth part is about mediation, regulation and Europeanization as key patterns of change in administrative law. Sophie Boyron describes how *administration-based mediation* has developed in England and France (but not in Germany) and how all efforts to establish a practice of court-based mediation have failed until now in all three countries. Yet she presents and discusses an understanding of the introduction of mediation as a 'necessary adaptation to accommodate the emerging representation of law as a network' (a new paradigm which is said to compete with the classical pyramidal representation of legal orders). She considers that the changes in administrative law might have created a certain determinism: mediation becomes the method of dispute resolution which is considered to be better suited to the changing administrative landscape. However, in many details, Boyron shows the weakness of this method, its limited suitability for disputes with a certain

profile, the conceptual problems to integrate it into the system of administrative law, the conflicts with principles such as transparency, accountability and fair trial. Overall, her contribution creates the impression that the potential of mediation as an institution of administrative law has been overestimated. Is this really a key pattern of a transformation of administrative law?

Jens-Peter Schneider briefly describes the emergence of *regulation* (understood in the narrow sense of mostly sector-specific rules establishing markets and specific public obligations with regard to competition and certain social interests) as a new type of administration in Germany and the problems of the traditional 'bureaucratic model' of administrative law to cope with it. Concerning Europeanization, he does not write about the many influences of European law on the general administrative law of the member states and their role within the transformation of administrative law, but only deals with some developments in economic law. With regard to some examples of recent specialized EC legislation, which require vertical and horizontal collaboration and cooperation of administrative authorities, he presents the daring general conclusion that administrative integration has already reached a stage where it is appropriate to speak of the emergence of a joint European administration ('*Europäischer Verwaltungsverbund*').

More convincing is his *request for more intense collaborative research in European public law*. Schneider presents the Study Group on a European Civil Code as a model. This very active and apparently well-organized network of approximately 100 academics from across the EU aims to produce a codified set of principles for core areas of European private law, which shall reflect the shared legal principles but also constitute the most suitable private law rules for Europe-wide application.<sup>3</sup> Recently, in the field of labour law, a similar group, the European Labour Law Network (ELLN) has been created, which aims to for-

mulate a restatement of European labour law.<sup>4</sup> In the field of public law, such well-organized networks of intense European cooperation do not exist. This is a consequence partly of the traditional mindset, which centred on the individual nation-state, and partly of language problems (English is not a suitable lingua franca for working accurately in the field of comparative public law, but many scholars have insufficient language skills in French or German) and partly of the ruptures in public law scholarship (in particular on that which concerns the attitude towards the new developments in public administration and towards the Europeanization of public law). There is, however, an association of European public law scholars (*Societas Iuris Publici Europaei* – SIPE)<sup>5</sup>, which could be the starting point for the establishment of such networks. The same is true for the *European Public Law Group*, which has been an important promoter of comparative public law and transnational cooperation for a long time.<sup>6</sup> So it is only a question of time and initiative. It is worth adding that the ruptures in public law scholarship might hinder, but also favour the establishment of networks of intense collaborative research, given that in the ongoing process of European integration, it is obviously advantageous to build up transnational schools and alliances.

This volume contains a plenitude of analyses, reflections and statements, which may stimulate a transnational, European debate on the ongoing changes in administrative law. Hopefully the transnational project, which Matthias Ruffert and his colleagues have started, will produce more such publications. In this context it may be permitted to formulate suggestions: The next volume should have an index. With regard to the coherence of the contributions, it is essential to know who writes where

<sup>4</sup> See for details the website of the network, [www.elln.eu](http://www.elln.eu).

<sup>5</sup> [www.uni-potsdam.de/sipe-office/index.htm](http://www.uni-potsdam.de/sipe-office/index.htm).

<sup>6</sup> See in particular the multilingual *European Review of Public Law/Revue Européenne de Droit Public (ERPL/REDP)*, which is published by the European Public Law Center in Athens, [www.eplc.gr](http://www.eplc.gr).

<sup>3</sup> See for details the website of the study group, [www.sgecc.net](http://www.sgecc.net).

and exactly from which perspective about the same phenomena or developments. In addition, a systematically structured bibliography (as is common in French legal science) would be helpful to boost the transnational debate. Finally, it would be interesting to learn about the situation in other EU member states. With regard to the enormous evolution of administrative law in some European states during the last two decades, it is questionable whether the conventional narrowing of the perspective towards the English, French and German law is still justified. What about the developments in the Mediterranean states, Scandinavia, the new member states? There are some reasons to extend the transnational project.

### **Individual Contributions:**

Part I. Introduction:

*Matthias Ruffert*, The Transformation of Administrative Law as a Transnational Methodological Project;

Part II. Administrative Law Transformations in the Different Administrative Legal Systems:

*Jeffrey Jowell*, The Universality of Administrative Justice?;

*Pascale Gonod*, 'La réforme du droit administrative': bref aperçu du système juridique français;

*Andreas Voßkuhle*, The Reform Approach in the German Science of Administrative Law: the 'Neue Verwaltungsrechtswissenschaft';

Part III. The Framework for Administrative Law Reform and the Changing Perspective of Administrative Legal Scholarship:

*Yoonhee Tina Chang and Lindsay Stirton*, Administrative Law and the Social Sciences from a British Perspective: Policy-Oriented Approaches as an Illustrative Case Study;

*Jaques Caillousse*, Droit administrative et sciences sociales;

*Wolfgang Hoffmann-Riem*, The Potential Impact of Social Sciences on Administrative Law;

*Andrew Le Sueur*, Administrative justice and the Rise of Informal Dispute Resolution in England;

*Athanasios Gromitsaris*, Administrative Law within the Legal System and in relation to Practice;

*Comment by Eberhard Schmidt-Aßmann*: Administrative Law within the Legal System and in Relation to Practice;

Part IV. Key Patterns of Change:

*Sophie Boyron*, Mediation in Administrative Law: The Search for Experimental Administrative Law;

*Jens-Peter Schneider*, Regulation and Europeanisation as Key Patterns of Change in Administrative Law.

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