EU PROCEDURAL SUPRANATIONALISM: ON MODELS FOR GLOBAL ADMINISTRATIVE LAW

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Abstract

Lost in translation. On the two sides of the Atlantic, a common research is complicated by problems of translation. Common is the effort to detect regulatory paradigms upon which to develop a global administrative law, conceived as a response to accountability gaps in global governance. Different is the understanding of a set of interrelated concepts, recurrent in the debate: «public interest», «administrative discretion» and «administrative accountability». This problem of translation often leads to misunderstand the potential of «the other» model. Due to the radical distrust for administrative agencies, American scholars tend to favor models that put emphasis on accountability mechanisms (such as judicial review) or enhancing responsiveness mechanisms (such non-decisional participation, transparency, the giving of reasons). However, reinforcement of accountability in one direction almost inevitably entails a loss in other directions, most notably policy efficacy and coherence. The case of US regulatory process, with its problems of "politicization" and "ossification", provides some evidence in that respect. And still, just as Europeans should not superficially judge the US regulatory system as ineffective and inadequate for the global dimension, similarly Americans should not reach the hasty conclusion that the EU regulatory system owes its efficacy to an essentially technocratic experiment.

The core claim of this paper is that the EU regulatory system provides, in a global administrative law perspective, two fundamental lessons.

First, it strikes a complex institutional balance, based on an interesting paradox. On the one hand, responsiveness is strengthened by coupling a supranational regulator (the Commission) with a transgovernmental administration (a dense network of 1500 committees). This peculiar mix of supranationalism and transgovernmentalism enhances accountability in both the directions: bottom-up, committees composed of national officials are established to control the Commission on behalf of Member States; top-down, the Commission itself, together with the Council and the Parliament, controls the committees, and thereby national regulators. On the other hand, however, that same mix has also an accountability-weakening impact: in so far as the Council delegates to committees its power to check European regulation, the Commission gains room for bureaucratic drift, by «colluding» with national representatives; also, these domestic officials, responsible towards their national apparatuses, can claim – at least, under certain circumstances – that the Commission has decided without taking into account their position. In this paradoxical equilibrium between policy responsiveness and regulatory efficacy lies the secret of the European successful regulatory experiment.

The second lesson concerns "procedural supranationalism". The way the Commission and national regulators interact at the European level is structured through a peculiar set of procedures, different in the various stages decision making. These procedures are, however, characterized by a common feature: they are structured in order to reconcile the need for protecting national interests with the need for insuring the prevalence of common interests. This "procedural supranationalism" represents a mechanism of power-sharing foreign to the US tradition of separation of powers and, still, successful in promoting and constraining supranational regulation. European "procedural supranationalism" can, thus, be conceptualized as a way (potentially global) to structure and shape administrative discretion beyond the State.