

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper LAW No. 2001/12

**Law and Public Management:
Starting to Talk**

*Workshop held at the European University Institute
11-12 May 2001*

Part I

Edited by:
ALEXANDRA GEORGE, PEDRO MACHADO
and JACQUES ZILLER

BADIA FIESOLANA, SAN DOMENICO (FI)

Alexandra George, Pedro Machado & Jacques Ziller (eds.)

All rights reserved.

No part of this paper may be reproduced in any form
without permission of the authors.

© 2001 A. George, P. Machado and Jacques Ziller
Printed in Italy in December 2001
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

TABLE OF CONTENTS

I.	Introduction (<i>Jacques Ziller</i>)	p. 3
II.	Law, Conservatism and Innovation: a Management Perspective (<i>Les Metcalfe</i>)	p. 5
III.	Public Management from a Lawyer’s Perspective: a View from the United States (<i>Peter Strauss</i>)	p. 11
IV.	European Administrative Law and Public Management: Mutual Exclusion or Mutual Learning? (<i>Alberto Gil Ibañez</i>)	p. 15
V.	Discussion (<i>Edited by Pedro Machado, Alexandra George and Jacques Ziller</i>)	p. 35
VI.	Workshop programme	p. 41
VII.	List of participants	p. 43

I - INTRODUCTION

Jacques Ziller

This paper originated with the first workshop on Law and Public Management held on 11-12 May 2001 in Florence. Academic lawyers dealing with public administration, and their practising colleagues in public administration, rarely take the time to really *talk* to organisational theorists interested in public management and public managers in order to understand the two groups' definitions of concepts, methods and roles. My idea in initiating this series of workshops is to create a forum in which this talking can start.

On the legal side, confusion is increased because only one word – “law” – is used to indicate an academic discipline that has some pretension of being a science, the profession of law professors and practising lawyers as different as advocates, judges or legal counsellors in public administration or in business administration, and also the content of constitutions, statute law and other legal sources (such as the case law originated by courts or other public authorities). There is also confusion on the public management side: some academics and practitioners see a big difference between public administration and public management, others consider that the difference lies not in the object, but in the approach used by those who study or practice. The introduction of reforms under the “New Public Management” label has introduced confusion between an ideological spill-over of the Thatcher era and the application of organisational theory to the study of public administration, a trend that is as old at least as the fame of Herbert Simon publications after World War II¹. Even more than others, lawyers tend to identify “public management” with “New Public Management”. This makes discussions more difficult and seems to be a particular threat to specialists in administrative and constitutional law.

The appropriate method in which to develop – using the tools of law – more adapted responses to the challenges of change in public administration seemed to be small, flexible workshops that allowed for dense discussion. In this way, organisational theorists and academics working mainly in the field of public law came together to start to talk.

The first workshop was divided into two themes, each providing input for a different Working Paper in the series of the Law Department of the European

¹ SIMON, H.A., *ADMINISTRATIVE BEHAVIOR*. (New York: Macmillan, 1947).

University Institute.² “Starting to Talk” provides some foundations for a better understanding across disciplinary boundaries.

Professor Les Metcalfe from the European Institute of Public Administration in Maastricht offered the major contribution from the perspective of public management; the legal perspective was represented by all other participants, including an American viewpoint from Columbia Law School’s Professor Peter Strauss. Their presentations have been transcribed here in order to give the reader a sense of the oral discussion. Dr Alberto Gil Ibañez was working at the EUI as a Jean Monnet Fellow on a paper directly related to this theme that will soon be published in Spanish.³ The paper published in this working paper is a summary of that work.

The discussions that followed the three presentations have been summarised and rearranged by Pedro Machado, Alexandra George and myself. This has put some order and clarity into a very lively set of dialogues, interruptions, questions and answers. They have been edited in order to avoid repetition, and have sometimes lost some of their liveliness as a result. It has also become impossible to quote the authors of every single statement : *scripta manent*, but *verba volent*! My apologies to any participant who feels that something important has been lost in the process.

As a Working document of the EUI Law Department, this text does not have the editorial ambitions⁴ of a book or an article in a referred journal, it should be only taken as a testimony of work in progress.

² See *LAW AND PUBLIC MANAGEMENT - NETWORK MANAGEMENT*, EUI Working Papers, November 2001.

³ *El Diálogo necesario entre derecho administrativo e gestión pública (la contribución de la “gobernanza”) - Hacia un nuevo paradigma pluridisciplinal para mejorar la eficacia, eficiencia y legitimidad de la Administración pública española.*

⁴ I deliberately decided to leave some references uncompleted in order to accelerate the publishing process and not to excessively burden the participants to the Workshop after the event had taken place.

**II - LAW, CONSERVATISM AND INNOVATION:
A MANAGEMENT PERSPECTIVE**

Les Metcalfe

In early 1992 there was a general expectation that the EU's internal market would be completed more or less on time by the end of the year. Seen from the Commission, the completion of the internal market was defined in terms of the transposition of the relevant European legislation in the member states. The competences required would then be in place. But this optimistic perspective overlooked a significant discrepancy between a legal and a managerial understanding of what was involved in implementing the single market and in particular what was meant by "competences". The transposition of European laws was no guarantee of adequate capacities to implement them effectively. On the contrary, the internal market generated a substantial workload without a corresponding process of capacity building. It partly revealed and partly created a management deficit with which the EU was, and still is, ill-equipped to deal.

The discrepancy between legal and management perspectives was masked by different interpretations of a key term - competence. For lawyers the term "competence" refers to concepts of legitimate power or legal authority whereas in the management field the same term refers to the strategic management capacity to ensure effective performance. This, for example, is how it is used in discussion of the "core competences" required to ensure the long term viability of an organisation facing a changing environment where operational efficiency alone cannot guarantee effectiveness.

These two concepts of competence are related but by no means identical. The one defines a distribution of management prerogatives, the "right to manage", while the other defines the requisite management capacities for ensuring that results are achieved, the "capacity to manage". The extent of the gulf between management and law in the EU has gradually become more apparent because of unexpected policy failures such as the mad cow disease crisis – where supposedly reliable systems proved to be seriously flawed with hugely costly consequences. The current enlargement process makes it even more important that serious political concern about the management deficit is not deflected by an unwarranted presumption that legal competences are automatically matched by appropriate management capacities. Thus a first barrier preventing lawyers and public managers from talking more constructively to each other lies in different usages of similar terminology. The solution to one problem is presumed also to be the solution to both.

A second barrier derives from the way in which some of the central concerns of management are perceived as unimportant and peripheral from a conventional legal perspective. Perhaps all professions try protect and extend their own territory by stereotyping each other in out-of-date terms. Much of standard accounting theory, for example, works with organisational models and concepts that hark back to the days of Taylorism in the early C20th. Anyone who doubts this should examine the ideas of activity based management (ABM) underlying the current reforms of the Commission. ABM began life as activity based accounting, a method that sought break down complex activities into simple components and attribute costs to them in order to evaluate their contribution to performance. This may have the unfortunate consequence of giving priority to disaggregation over integration.

The conservative influence of law on the organisation of public administration and the practice of public management stems from a similar tendency to impose obsolescent ideas. Keynes' observation about about practical men who believe themselves exempt from theoretical influences springs to mind. One element in this is the policy administration dichotomy which compartmentalises and separates policy formulation and policy implementation conceptually and institutionally. This lends support to the view that EU management is a tedious of giving effect to policies on the basis of legally defined detailed programmes. Such a stereotype implies that management only comes into the picture after the much more interesting policy-making process has engaged the creative attention and professional skills of lawyers, economists and political scientists. What is often now referred to a command and control view of management has several familiar characteristics. Management, it suggests, is:

1. *Routine*: it picks up where the policy-making process leaves off and implements its outcomes;
2. *Hierarchical*: it is a top-down process conducted within the framework of a unified structure of authority; a single organisation or organisations subordinate to a central authority
3. *Executive*: it is an executive process of operational management that presumes predefined goals rather than a strategic management process that is centrally concerned with the development and formulation of new policies and revising objectives in the light of new information and changing interests.

4. *Subject to upward accountability:* hierarchical organisations are presumed to be subject to hierarchical forms of political accountability. This ignores the increasing diversity of public organisations and the need to match that diversity with appropriate forms of accountability.

Over-attachment to centre-periphery models of organisation rests on misconceptions about both public management and the role of law. Public managers tend to perceive law as conservative, a source of bureaucratic constraints and thus a significant impediment to their actions. Law is not viewed as a source of innovation because it is held to be a ‘conservative force’ that is destined to preserve the status quo. Yet the internal market programme would not even have been possible without the European Court of Justice’s landmark judgements – particularly the *Cassis de Dijon* ruling – identifying the lack of legal justification for a centralised hierarchical process by which to harmonise regulation. These rulings made it possible to establish a decentralised process of harmonisation within the internal market, thus opening the door to further modifications of the way in which regulatory processes work. rather than requiring central management it legitimised a decentralised method – in the process shifting the burden of management responsibilities.

In fact it is more fruitful to pose the question of how to ensure coordination in a network context than how to retain or claw back central control in a decentralised system. The old approach to technical harmonisation misdefined the problems of policy management and over-burdened the centre with tasks it lacked the capacities to perform. This new approach provided feedback and permitted “management by exception” rather than detailed programming from the top. Only errors and deviations need to be dealt with in the policy process and this change in the dynamics of the system greatly reduces workloads and increases efficiency.

A related problem is the capacity to respond to unexpected circumstances. This assumes that capacities are distributed through a network rather than centralised in a hierarchy. Two crucial questions arise. First, which organisational models are suitable to cope with distributed capacities among networks of organisations? And, second, how are they linked? EU policy management typically depends on inter-organisational networks rather than management within organisations. This is a fundamentally important distinction, especially in the light of the German Government’s recent proposal to transform the Commission into a centralised government. From a public management point of view, it would be preferable for EU governance to remain pluralistic; to recognise the role of networks and provide the capacity to make them work rather than try to compress them into a hierarchical form. But to do so requires the establishment of a theoretical framework for designing networks capable of

functioning across national boundaries and levels of government. This is a daunting task because the division of labour demands consideration of the location of interfaces, the identity of interdependent organs, and the ways in which interdependence can be managed.

The EU faces the difficulty of constructing large-scale networks that perhaps contain hundreds of organisations. The Commission does not have a good method of mapping component organisations with the networks, and each country hosts organisations that have the same role as equivalent organisations in other countries. Against this backdrop, network management looks beyond competencies to capacities and questions of co-ordination; it tends away from the old style of public administration, under which “co-ordination” would effectively mean “central control”. Network management requires a different public management approach that is closely related to a form of external governmental *steering*. In this sense, steering becomes imbued with a meaning that is broader than “strict administrative control”; it is more adequately defined as a “directed influencing” of societal processes in a network of many other co-governing actors. Thus, as networks lack a “top”, hierarchical, central, top-down steering does not work in the network context. The monocentric and monorational model of co-ordination and management cannot be applied to a network.

The more complex EU integration becomes, the more we see recognition of a strong need to find other methods of co-ordination. *A fortiori*, we also need the establishment of a legal framework that will enable such co-ordination. However, public managers tend to assume that lawyers are litigators. This emphasises the role of courts, rather than perceiving courts as the final arbitrators who can respond to the errors and deviations that arise from network management.

Lawyers ask questions about power and legitimacy. Public managers tend to reply by stressing the need to avoid thinking about steering as being insulated from accountability issues. The crucial question then becomes how to create an accountability framework. This is the more important because – from a public management perspective – an accountability framework is important if performance criteria are to be established. So public managers need to think about the design of an accountability framework; that is, about how to design the rules of the game within which the network operates.

The question of accountability is all the more pertinent because public management is not part of a business that serves clients, but is instead a process that deals with *subjects*. Thus New Public Management’s attempts to emulate business-like management strategies are not always appropriate. Does a professional organisation with a predominantly professional client relationship

(such as welfare services), have an accountability system that is appropriate to that sort of organisation? *Contingency theory* makes a significant claim about this issue. For public management to work properly, it says, the legal framework has to match the type of accountability system to the type of organisation. A correspondence between the type of accountability and the type of organisational system is needed; thus bureaucracy requires a system of accountability from above. If this correspondence is not established, it becomes very unclear what sorts of objectives the organisation should be pursuing. This leads to *organisational anomie* in which nobody knows which rules or accountability systems are to be applied.

On this issue, public managers claim that the solution to the problems citizens address to public authorities depends much on the interlocutors. Two cases can be provided to illustrate this, one dealing with child abuse, the other with a drugs program.

The first was a multi-agency decision-making process resulting in an over diagnosis of child abuse cases. What the problems were and how they were diagnosed depended on who got there first. Police saw the problem in a certain way and their performance was judged on whether they got things into court. Social workers tried to deal with the problem in the best interest of the affected citizens. These were evidently conflicting perspectives, and the management problem was how to deal with these different organisations with different performance criteria.

A similar conclusion was drawn from the drug program analysis. Although the program sought to establish an integrated framework, a problem of capacities became evident when analysing it. It was discovered that the actors did not have the capacities to manage the program because the different organisations – police, hospitals and social workers – were finding it difficult to work together. Although they dealt with similar problems, the propensity was to end up with conflicts between the different actors engaged in the analysed drug program.

**III - PUBLIC MANAGEMENT FROM A LAWYER'S PERSPECTIVE:
A VIEW FROM THE UNITED STATES**

Peter Strauss

In thinking about the relationship of public management and law, it might be useful to start by reminding ourselves of educational differences. Training for both disciplines is given at the graduate school level in America, in professional schools as distinct from the academic faculties of Arts and Sciences. Increasingly, both kinds of school draw on the disciplines of the social sciences for their theoretical base, and both imagine themselves (as faculties of engineering do in relationship to the hard sciences) as teaching a kind of applied science. Yet the applied sciences being taught are different ones; moreover, different economists teach at law schools that at schools of business or public management; and to the extent either type of school undertakes to train its students about the other discipline, it does so in its own way. Rather than bringing in professors or teaching materials from their University's law school, the American schools that teach business and public management have their own instructors and their own teaching materials for acquainting their students with law; and the same pattern prevails, in the opposite direction, at law schools. Thus, as students, the public managers and lawyers of the future not only are taught differing frameworks to use when approaching similar issues, but to the extent the other framework is acknowledged, teaching about it occurs in the students' own perspective rather than in the perspective of the "other." One can surmount these difficulties by taking *both* degrees; but this further expense in time and money is availed of by few even when the schools accommodate it (as mine does) by halving the additional time involved. The problems of dialogue between public managers and lawyers is therefore deeply rooted in the different educational approaches adopted in each sort of professional school, and the perspective that a particular professional school seems to be drawing on at any particular moment.

In practice, I encountered these difficulties when I was General Counsel to an important federal agency, which also had at the Commission level an Office of Public Policy staffed by economists and public managers. The competition between our offices for the Commission's ear was considerable; and the agency's largely scientific staff was uncertain whether either economists *or* lawyers should have much influence. On the one hand, they thought the role of lawyers should be limited to helping with implementation and solving problems through litigation. On the other, it was important to guard against the sometime tendency of lawyers to allow the litigation tail to wag the policy dog – a

tendency likely to be the more pronounced if lawyers were denied a capacity to speak directly to policy issues.

From a legal perspective, an essential aspect of effective governance is the ability to obtain the *capacity* (budget) needed to implement *competencies* (jurisdiction). The making of rules/regulations is currently the main forum for this discussion in the United States. The intellectual activity tends to be focused on policy analysis of its economic facet, yet an inherent conservatism seems to prevail when thinking about cost-benefit analysis. Casting a cost-benefit analysis in strict financial terms becomes another way of defending the *status quo* without addressing the crucial issues of incommensurability and immeasurability that are posed when an economic analysis is applied to certain public goods (for example, the value of wilderness).

The contemporary American scene is witnessing a growing attempt to replace command-and-control management styles with management approaches stressing cooperation and facilitating business initiative. Command-and-control is lawyers' home territory; a more cooperative managerial approach does not necessarily exclude law, but law's "policing" function is subordinated when the emphasis is on cooperation and alternative dispute resolution.

Consider as an example recent developments in the field of occupational health and safety. The traditional American method was to give inspectors a book of rules and send them into the field to find violations. A more recent approach resembles the Swedish model in which inspectors discuss workplace safety issues with employers and identify ways in which to improve standards. A program called "Maine 200" demonstrated this changed approach. The responsible agency identified the 200 industries with the worst workplace safety records in Maine. It offered to suspend the usual approach of hostile inspections and fines for industries that agreed to work with agency inspectors improve their practices in whichever ways were best suited to their workplaces. Virtually all the 200 firms accepted the offer. Within three years, their workplace injury rates had dropped by half. The agency then tried to take the idea nation-wide. Although the United States Chamber of Commerce was able to secure an appellate order blocking the initiative, this was for procedural not substantive reasons. Maine 200 remains, in my judgment, a signal public management advance.

The challenge faced by lawyers in this context is to construct imaginative styles of public behaviour that do not become invitations to manipulate the system for advantage or delay. That is, strategic behaviour must be avoided. Lawyers need to think about the adverse consequences of legal norms; they need to strike a proper balance between the strict enforcement of law and the environment in which legal norms should be applied. The design of legal

frameworks must assume that people are willing to co-operate. This preserves the balance between those who do wish to co-operate, and providing reactive means by which to prevent strategic delays caused by those who are uncooperative. This is a social engineering problem well suited to the legal profession and its skills.

On the other side, the challenge faced by public managers lies in accommodating their ingrained approaches to increasing (and, in my judgment, justified) public scepticism about the sufficiency of expertise as a basis for administrative action. In the wake of the American New Deal, in the middle third of the Twentieth Century, administrative law theory tended to put expertise on a pedestal; in practice this granted control of administrative decision-making to experts. Over-reverence of expertise is now strongly criticised, and this has contributed to a growing distrust of the technical knowledge model in the United States. American administrative law must thus face the challenge of increasing public participation in its decision-making process, and it becomes the role of public managers to strike the proper balance between the views of experts and the opinions voiced by lay people.

To go full circle: it is almost inevitable that law schools to train students to see failures, and do not train them well to see how structures and expectations lead to normative behaviour on a day-by-day basis. The coercive function of law must remain – that is, there must be concrete consequences for some types of behaviour – but it is also important to observe how this occurs. It is equally important to look at the law, as it is to look at the society in which the law will be applied and enforced.

A precise resolution of the problem of matching accountability to the type of organisation will probably not be provided. Jerry Mashaw's work on the administration of the welfare system provides evidence for this claim. In the context of "bureaucratic justice" – using the example of payments to people whose disabilities render them unable to participate in the workforce – the author has identified three possible approaches to making eligibility decisions.

The first, which he calls *bureaucratic rationality*, takes the managers' perspective and stresses three goals:

1. to make decisions with a narrow range of error;
2. to make decisions at low cost relative to the benefits being bestowed;
3. to distribute the inevitable errors of inclusion and exclusion evenly.

The second, “professional” perspective focuses on how to maximise the relationship between the person claiming to be disabled and a professional who provides services. Professional relationships offer their own security against error, and may also result in client appreciation. The imposition of strict accountability rules can interfere with the professional relationship, making service less attractive to good professionals and undermining the acceptability and accuracy of their services.

The third, “fairness” perspective focuses attention on the applicant seeking benefits. She wants to be dealt with fairly: to have her claim freely voiced, to be listened to with dignity, to have procedures that fully explore and tend to credit her claim; and so on.

Mashaw demonstrates that each of these three perspectives is entirely legitimate, but that each also imposes requirements that could not be fully accomplished without subtracting from the others. They are incommensurable. One can reasonably seek only continuing attention to resolution of the tensions they reflect, not a fixed and final outcome. Understanding this may help us see that one should not think of lawyers as experts who find point solutions, but rather as professionals who can assist in crafting frameworks for the ongoing work of public administration.

**IV - EUROPEAN ADMINISTRATIVE LAW AND PUBLIC MANAGEMENT:
MUTUAL EXCLUSION OR MUTUAL LEARNING?**

Alberto Gil Ibañez

Public management theorists have usually disregarded the importance of law and judicial decisions. We may remember just one example of what political scientists think about rules:

“...whenever things go wrong, politicians respond with a blizzard of new rules. A business would fire the individuals responsible, but governments keep the offenders on and punish everyone else by wrapping them up in a red tape...we embrace our rules and red tape to prevent bad things from happening, of course. But those same rules prevent good things from happening”⁵.

Are they wrong? Probably not. On the other hand, lawyers – at least, those from the "civil law" world – have looked down on any attempts to change administrations without taking legal rules and judge-made law seriously. Indeed, some lawyers look down on public management literature as using too many words to simply say that managers should use good thinking and common-sense.

One should not be surprised if lawyers mistrust or react negatively towards new public management theories and administrative reform projects. Those theories and reforms are often left aside, ignored, or even proposed for elimination in some way. While lawyers argue that both citizens and the administration are subject to the rule of law, public management underlines that citizens deserve to have an efficient and effective administration. Can these two statements be made compatible? In other words, how can we combine “due process” and rules, with the emphasis on goals, performance, and results?

Public law and public management are likely to have different paradigms and rationalities, with different characteristics. However, contrary to what is usually stated, public management needs law, just as law needs to take public management techniques into consideration. In fact, the challenges that public administration encounters in Europe during this third millennium are big enough to require not only rivalry but also co-operation between disciplines. Co-

⁵ OSBORNE, D. and GAEBLER, T., *Reinventing Governement*, (Massachusetts: Addison-Wesley, 1992), p. 111.

operation between lawyers, political scientists, economists, and so on, has always produced very interesting results. Furthermore, when law has opened itself to other disciplines, it has always won in terms of credibility, dissemination and efficacy, in spite of the fears of some.

However, law has not yet deduced all the possible consequences of public management. Law usually disregards public management as being just something coming from business, more of the “command and control” style, or as something that affects only the internal management of public affairs, without any relevance to law. The same trend may be observed in reverse when we hear and read public management texts; they tend to ignore the importance of law for achieving their goals. *Governance* is a third guest, the third line of a triangle, useful to bridge the existing gap.

1) Challenges and Nuances about Administrative Law

a) SUCCESS AND CRISIS OF ADMINISTRATIVE LAW

Administrative law governs the organisation of the public sector, that is, the interactions between public administration and citizens, and between different public authorities. The twentieth century has been a time of great success for administrative law in Europe (the Welfare State), and also a time for one of its major crises. In fact, with the flourishing of the Welfare State, the volume and scope of administrative law enlarged tremendously during the second half of the twentieth century. Even the somewhat classical presumption in the United States, that the study of administration should be based on management rather than on law, has clearly changed. The recognition of administrative law can now be observed in the "common law" countries as well. It is now probably broadly accepted that the government cannot, in all respects, be equal to citizens because it has to govern.

However, in a parallel process, it is not surprising that administrative law was somehow affected when the high public deficit produced the crisis of the Welfare State. There are several reasons for arguing that a crisis occurred. First, law has become so complex that its application is now a challenge. In fact, although the place of law is growing in our societies – “law is everywhere” – it is arguable whether such law can be effectively applied. While law is relatively easy to make, it is more difficult (and costly) to implement. There is indeed a growing diversity of forms of law. We have traditionally been able to distinguish between statutes (determined through legislative processes), regulations (made by public bodies with the legal authority to do so), and norms and contracts (which emerged through interactions in civil society). However, current trends show a variety of collectively determined rules and regulations, as well as regulative forms. This is particularly true in Europe.

Second, there are three co-existing processes of privatisation, **at least**: economic, legal privatisation (the application of private law solutions and tools) and political (the crisis of state legitimacy and pressure from new forms of co-organisations and direct participation of interested parties). These processes have already produced some changes in the classical perception of administrative law. Finally, the concept and role of public administration has undergone a profound evolution.

b) SOME NUANCES ON CLASSICAL ASSUMPTIONS ABOUT ADMINISTRATIVE LAW

It would be unfair to state that nothing has changed within public law – and more particularly within administrative law – in the last two decades. It is true that its evolution differs from one country to another, but some changes can nevertheless be identified. These make administrative law more flexible and prepared to communicate with other disciplines. In fact, there are some classical administrative law assumptions that are no longer accepted without discussion (that is, they are no longer accepted at face value):

- *On the rule of law and the principle of legality*

The “rule of law” is a principle that lawyers have usually tended to underline strongly. However, the concept of the rule of law is not unanimously accepted now and is also contested among lawyers. An important consequence of the rule of law is that all the activity of the administration and the executive power is subordinate to the power of law, the legislative. The statement: “the rule of law, not of individuals”, implies security against arbitrary power.

However, the rule of law is now seen as only one side of a balanced constitution, which naturally needs a more complex equilibrium of powers in modern times. In such a balance, democracy and freedom are expected to take precedence over the rule of law. Moreover, many rules do not now respect some of the formal classical elements of the rule of law, such as: ‘abstract character’, ‘generality’, ‘clarity’ (understandable by those who are expected to obey them) or ‘stability’ (they cannot change so fast that they cannot be learned and followed). We can cite the European Treaties as an example. These have been dramatically amended six times in 15 years: the European Single Act (1986), Spanish and Portuguese Accession, the Maastricht Treaty, the Nordic/Austrian Enlargement, the Amsterdam Treaty and the Nice Treaty (2001).

- *“Law is the only way to ensure democratic control, accountability and legitimacy”*

Legitimacy does not only depend upon constitutionality and procedural fairness but also on effectiveness. There is a clear assumption that legal and

judicial control is no longer either the only or the most important means of controlling the functioning of public administration. We also find political accountability and media control. Without denying the importance of the principle of legality, legitimacy cannot be reduced to such a principle. Democratic legitimacy also covers the relationship between citizens and elected agents, and more recently the acceptance and participation of those affected by administrative decisions (“governance”).

- *“Law is a set of rules according to which the State exercises coercive power in dealing with its own citizens”*

This is what classical theory would tell us. But this only shows us a type of law, which we can call “naked law”. Modern and less modern analyses prove that law is almost powerless when it is not supported by public sentiment. As Wittgenstein would put it, a rule may not be considered to exist if it does not convene public agreement in responsive action.

- *“Law does not have anything to do with the daily management of public offices”*

Law not only fixes the main organisation and structure of public offices (usually called “public service law”), it also develops important procedural principles that directly affect how administrations and administrators work (for example: good administration, proportionality, the right to be heard, the right to access, and so on). These principles influence officials’ mentalities and attitudes, and they preside over relations between administrations and citizens. One cannot speak about assessment of performance and efficiency without knowing those principles.

- *“Law is rigid and it does not allow for flexibility”*

The apparently ‘rigid’ character of public law has caused many public organisations to try to escape from the dominance of administrative law, creating new forms and entities subject to private law that are considered to be more flexible. However, this process is changing because there is an increasing convergence on flexible forms of law between the private and public. In fact, following the evolution of society and the complexity of societal relations, law has started to be more open to flexibility and flexible forms. Labour law probably started this process, but others followed. Reluctantly or not, most lawyers accept that there is no contradiction between law and flexibility.

- *“Administrative law functions in a vacuum”*

Law has been taken, in a narrow sense, to mean legal texts and judicial case law. However, many legal scholars are not only interested in law as such, but also in its design, quality, and the process by which it is made (why a certain text and not another?). Along the same line, the process of implementation, application and administrative enforcement is receiving increasing attention.

This makes law operate within a circle, where the evaluation of its effectiveness and efficiency should produce new and better rules. Moreover, legal orders are competing among each other, and this means they are no longer fixed monopolies on closed territories.

Are these changes enough? Are they preparing administrative law for the process of learning?

2) The Challenge of Administrative Law

If administrative law has always been ready to adapt to new realities (first, the demands of more guarantees for citizens coming from the liberalism and, second, the socialist claims of deeper intervention in the economy), and it is now in a process of change, what is the problem? What makes the present situation different?

It seems clear that the administrative law corresponding to the modern state is still to be written. This prediction will be still more accurate if we take into account a post-welfare state, within a context of rapid change, global economy and supra-nationalism. What role should administrative law play in that context?

Perhaps the key words are ‘complexity’ and ‘rapid change’. The challenge of complexity and instability of social practices poses deep and important problems for traditional administrative law to tackle. However, law has been said to be unprepared to face new challenges of complexity. In fact, in order to cope with complexity, legal systems usually become more complex. This makes them difficult to know, barely understandable (even for lawyers), and impossible to implement. Law should not make complexity more complex, but rather more manageable. *The problem is how to make simple, what it is inherently complex.*

In any event, complexity and rapid change are not problems that can be solved by simply putting law aside. For law to be considered ‘part of the solution and not part of the problem’, it has to innovate and learn from other disciplines. Have the above-mentioned nuances to classical statements prepared administrative law to innovate? In fact, the answer to whether this crisis of administrative law is simply provisional can be found in the capacity of administrative law to adapt to new realities and to learn from other close disciplines how to deal with complexity.

3) (New) Public Management: Evolution and Relation with Law

a) FROM BUREAUCRACY TO PUBLIC MANAGEMENT-ORIENTED ORGANISATIONS

How far is Weber's statement that 'bureaucracy is the means of transforming social action into rationally organised action' still valid? He would probably be shocked today with the current trend of allowing transparency and the direct participation of citizens and informal organisations in the decision-making process. Moreover, the classic assumption that 'public administration is a professional organisation that serves with objectivity the general interest' is today in crisis. Indeed, an objective human resource policy has been impossible to pursue in some traditionally legally bounded public administrations as many categorical measures were taken to satisfy the particular interests of some 'Grand Corps'. At least in some countries, there is a real danger that some candidates, after passing difficult exams and becoming a special civil servant, feel that they are more in the service of a particular 'corps'. Moreover, the advantages of the "statutory" system have been counterbalanced by its shortcomings, and notably by its lack of flexibility.

During the second half of the twentieth century, the world became much more complex and inter-linked. Moreover, the worldwide economic crisis of the 1970s produced a major concern with public deficits. This situation made it clear that the administration could not continue growing; it had to be more efficient, effective and economic. While administrative science respected the bureaucratic model and was then suitable to be accepted by administrative law, public management challenged the concept of bureaucracy in order to cope with the new situation.

Undoubtedly, society has changed too much to leave bureaucracy untouched. We are surrounded by constant change and innovation. Any person – even we lawyers – can share most public managers' views that good governance needs entrepreneurial government (which is different from running a private business). Moreover, the managerial approach to public administration quite soon made it clear that private business management techniques needed some adaptation to the public sphere. This produced Public Management, sometimes presented with the 'added' prefix 'New', and lately broadly included in the theory of governance.

b) SCOPE AND NATURE OF PUBLIC MANAGEMENT

The scope and nature of public management is not without controversy. Public management can be defined as 'the managerial tools, techniques, knowledge, and skills that can be used to turn ideas and policy into programs of action'. Or, in more broader terms as:

'[t]he part of public administration that overviews the art and science of applied methodologies for public administrative program design and organisational restructuring, policy and management planning, resource

allocations through budgeting systems, financial management, human resource management, and program evaluation and audit'.⁶

There are even broader definitions. For instance, Kickert defines management in the public sector as 'characterised by strong context-dependency, high complexity and a typical sort of governance...is the management of complex inter-organisational networks'.⁷ Metcalfe also distinguishes public management as a micro process ('to adopt or adapt business or other management ideas to upgrade micro-organisational capacities') and macro process ('to develop new and quite distinctive macro-organisational capacities to deal with structural change at interorganisational level').⁸ Therefore, both Kickert and Metcalfe's definitions characterise public management as something more than 'just more about command and control', very close to the concept of 'governance'.

It is widely recognised that: '*public management cannot meet the needs of government if it remains little more than a collection of second-hand business management methods. Government, by accident or design, has far more difficult management problems than any business would attempt to tackle*'.⁹

Public administrations in Europe start looking for 'best practices' and adapt them to their institutional settings. Concomitantly, stating that 'public management is simply interested in the internal sphere of public administration' is a clearly misconceived statement, as public management also deals with external relations with citizens, who are also considered to be clients and users of public services. It is about motivation, mission, co-ordination, capacities, but also about performance, assessment, accountability, strategic planning, citizens' charters, commitments, and so on. In fact, Total Quality Management focuses mainly on customers and those who serve customers, improving the role of citizens.

c) ROOM FOR FRICTION: INTERACTION OF VIEWS AND RECIPES BETWEEN PUBLIC MANAGEMENT AND LAW

⁶ Cf. Preface and Chapter I, in OTT, S.; HYDE, A.; SHAFRITZ, J. (eds.) *Public Management: The Essential Readings* (Chicago: Nelson-Hall, 1992) pp. ix, 1.

⁷ Cf. KICKERT, W. "Complexity, Governance and Dynamics: Conceptual Explorations of Public Network Management" in KOOIMAN, J. (ed.) *Modern Governance. New Government-Society Interactions* (London: SAGE, 1993), 191-204, p. 191, 192.

⁸ METCALFE, L. "Public Management: From Imitation to Innovation" in KOOIMAN, J. (ed.) *Modern Governance. New Government-Society Interactions* (London: SAGE, 1993) 173-189, cit., p. 183.

⁹ Cit., p. 173

In spite of changes, evolution and nuances, some potential for friction remains between law and public management. In fact, contrary to what happened with the administrative science school, public management has produced increased difficulties in communicating with law. This is especially due to the fact that, by encouraging autonomy for public service managers, entrepreneurial initiative, performance and results, ‘new public management’ runs against the grain of law. The points of hostility include:

- The ‘difficult’ concepts of ‘client’ and ‘product’. The usual concepts of ‘customer’ and ‘product’ always reveal problems for lawyers, since they tend to see instead ‘citizens’ (subjects and owners of “rights”) and ‘public services’ (universally provided at equal quality standard). Thus, lawyers point out that it is not only the customers’ interests that are at stake, but also the interests of third parties. In fact, issues such as protection from abuse and public products are complex ones, because there are a large number of interests that must be taken into account.
- Whereas lawyers are more interested in liability problems, public management problems focus on accountability: the accounting for the actual performance compared with the pre-established standards.
- While law is more focused on monitoring corruption and unfairness, management is concerned more with quality, outcomes and performance. However, the more we constrain the capacity of public managers, the worse they do; the worse they do, the more it induces the imposition of new forms of control. This vicious circle has to be broken.

One of the areas in which the conflict between law and public management is most clearly perceived is the *process of administrative reform*. In fact, the influence of legal public officers on either the success or failure of administrative reforms is usually underestimated. Public management theorists generally regard legal officers’ influence as negative, for it tends to be conservative and, under their view, too focused on litigation. It is not by chance that New Public Management Reforms have encountered more success where the percentage of legally trained civil servants is much lower.¹⁰

However, there is nothing wrong with telling a political superior that she or he cannot do something illegal. The other side of the coin is that administrative

¹⁰ In the United Kingdom, the number of legally trained top civil servants was being reduced to 4% in the 70s (see CASSESE, S. “La costruzione del diritto amministrativo: Francia e Regno Unito”, in CASSESE, S. *Trattato di Diritto Amministrativo*, Vol I (Milano: Giuffrè, 2000), p. 67).

reforms are usually designed without taking their legal implications into consideration. In fact, reforms often do not give their perceived opponents the chance to participate actively from the beginning. The consequence is that those who do not participate feel it is legitimate to oppose the functioning of the reform. Governance-participation is still pending in some public administrations. But is there a way of working together?

4. Working Together

a) ECONOMY, EFFICIENCY AND EFFECTIVENESS: ONLY 3 ES?

One of the most well known statements of public management is the three Es: economy, efficiency, and effectiveness. These principles have been the main basis for both criticism and support. One of the problems has been in identifying the conceptual scope of the terms. What do they mean? Public administration is part of a political and social setting. What are the performance indicators of a society? The citizens' happiness? The number of suicides per one thousand inhabitants? Consumers' security? The contribution to world peace? The number of people needing psychological and physical care? Crime and order? Wealth? GNP? Level of education? Unemployment? The murder rate? The stress of managers? The cost of medical care? Social justice? Numbers of successful businesses? Number of NGOs? Creativity? Co-operation? Level of corruption? Participation in political elections? Participation through other means? Everything together?

More neutrally, *efficiency* has been defined as the relationship between input and output, and *effectiveness* as the relation between output and effects. Of course, taking one answer or another (or a group of answers) will influence the resulting theoretical model. We could say that an effective and efficient administration would be one that is considered to be effective and efficient by everybody, regardless of a citizen's position within a given society. This is of course a theoretical model, but it has potential value as a point of reference for any general statement made in any branch of knowledge.

b) EFFICIENCY, EFFECTIVENESS AND LAW

When it comes to law, the problems of meaning and values increase. These principles are now integrated in the legal order and are even applied by judges. Thus, what do *efficiency* and *effectiveness* mean to a public administration from a legal point of view? To follow all the procedural requirements stated by law in order to guarantee the fairness and equity of a public procurement process? Or, to simply select a well-known enterprise quickly in order that it does the work for a reasonably market-based price? And what if a public manager participating in the procurement selection is discovered to have economic interests in the

enterprise that is finally chosen? Could any modern society support a government that shows great efficiency in providing modern transport to rich and close-to-centre areas, while it leaves others with old-fashion means and narrow mountain roads?

In fact, some national Constitutions recognise *effectiveness* as a legal principle applicable to public administration (cf. Article 103 of the Spanish Constitution), interpreted by some European Constitutional Courts (cf. Spanish Constitutional Court, SSTC 22/1984, 17th of February; 27/1987, 27th February; 178/1989, 2nd November), and legally stated in Statues concerning the functioning of Public Administration (Spanish *LOFAGE*, and article 3.1 of Statute 30/92, 26th November of the legal regime of Public Administration and common procedure).

Nobody now doubts that whatever the public administration has to do (competence/power), it has to do it effectively. Moreover, there is no problem in legally recognising that the public expenditure has to respect the principles of economy and efficiency (Article 31.2 of Spanish Constitution recognises both principles as a right of citizens). The legal principle of *effectiveness* does not contradict *legality* because, on the one hand, only actions respecting legality can be effective. On the other, only actions that reach a certain degree of effectiveness can be considered to be legitimate.

But what can a court do when faced with an action that lacks effectiveness and efficiency? Indeed, even legal scholars recognise that the law is not itself enough to guarantee administrative effectiveness, and they claim the need for techniques such as Total Quality Management (techniques that, one might say, are far from the expertise of courts). In fact, the proportionality principle, which is broadly applied by judges to assess the “legality” of administrative action, in fact reflects a management rationality of efficiency. This situation again shows the need for dialogue between law and public management.

c) OTHER COMPLEMENTARY PRINCIPLES

Effectiveness, economy and efficiency are principles that any administrative activity should respect. But they are also criticised for forgetting some essential features of administrative action. In fact, administration does not operate in a vacuum; it is part of a political setting whose actions affect more than its direct clients. The classical ‘three Es’ have been considered to be insufficient, even by public management scholars. Many scholars have opposed this classical system, or have complemented it with other ‘3s’ such as conduct, code of ethics and culture. Moreover, lawyers have opposed other principles, additional to the three management Es, such as ethics, equity and equality. And

the Commission's White Paper, prepared by Neil Kinnock [COM (2000) 200], underlines efficiency, but also accountability, service and transparency, as guiding principles.

In sum, the three Es' rationality should no longer be an obstacle to communication between public management and other areas of knowledge.

5. The Fashionable 'Governance': Making the Bridge?

Governance is increasingly used to refer to the interaction between government and society, public and non-public actors. Formal democracy (through electoral votes) is not considered to be enough in modern and complex societies. Therefore, democratic legitimacy has to be combined with effective participation by those affected by public decisions (stakeholders), which can take the form of 'co-' arrangements. Thus, governance is presented as something that goes beyond the traditional set of steering, management and control. While public management has had, in some way, the bad reputation of treating citizens as normal business clients, governance has managed to gain prestige by upgrading the role of citizens to co-participants in the exercise of power. However, one has to remember that the participation of citizens has already been promoted by the Total Quality movement and the Citizens' Charters as a way of improving the performance of public administration. In fact, if the administration provides services, it is logical that the acceptance, rationale and opinion of the addressees of the service have to be taken into account, also about quality concerns.

Citizen participation in administrative procedures is nothing new to legal systems and lawyers. Indeed, it has been recognised in legal texts, including Constitutions, notably as a derivation of the procedural 'right to be heard' (cf. Article 268 of Portuguese Constitution, Articles 9 and 105 of the Spanish Constitution, and 3.2 of the Italian Constitution of 1947). Nevertheless, for a long time citizen participation stopped at the doors of the administration. The owners of sovereignty and the electors of members of parliament were called *administrés*, meaning passive subjects of administrative authority. The situation seems to have changed. In fact, the theories of deliberative and participatory democracy are not only part of governance movements, but they are increasingly supported by legal academics who have suggested the form of participatory proceduralism.

In a context of rapid change, the democratic legitimisation of administrative action through law is not considered to be enough. It has to be combined with a more concrete legitimisation provided by the direct participation, information and support of those affected and concerned by such

an action. However, governance is not without difficulties. It has been criticised for giving more power to some elites or interest groups (a charge that runs parallel to that of excluding poor and unorganised groups). This can create friction with law.

Nevertheless, the State cannot be either law-maker or law-enforcer without taking into account the interests, opinions and knowledge of private bodies. In fact, in modern times we could say that without participation there cannot be efficient institutions.

6. Law as a Learning Process: In Search of a Model for Communication.

a) LAW AS A FRAME AND AS A TOOL

Maybe the relationship of public management and governance with law and regulation would become smoother if we distinguished between frame-law, and law as regulatory tool. In fact, nobody doubts that a nation-state needs a Constitution, which is considered to be a fundamental framework of public authority and the relations between the latter and citizens. This *frame* reflects the relation between law and politics and, in a large sense, it is formed not only by the official Constitution but also by those important statutes and norms that directly develop it and the case-law that interprets such fundamental law. In this sense, one important value is *stability*, as law represents a way of understanding democracy; it is also democracy's major protector. Frame-law defers to instrumental law even in the kind of language it uses. It concerns value-judgements and emotive statements, such as principles, sovereignty, country, justice, people, human rights, and so on. In sum, it constitutes 'the system'. In this sense, one (for example, public management and governance) cannot escape law.

However, law can also be considered to be a *tool* with an instrumental role for policy design and policy implementation. This is usually confused with 'regulation', although it can be formed by a variety of legal instruments. Its role is more of transformation and intervention. The important value here is flexibility and adaptation

Law is supposed to frame administrative action. Public administration is subject to frame-law, and it simultaneously creates its own legal tools for action. In fact, legislative delegations of power to administrative or executive branches are unavoidable in the modern state. However, one can observe that the evolution of public administration during the second half of the twentieth century has somewhat upset that picture. For instance, although a clear category and hierarchy of norms is still lacking in the EU legal system, most acts adopted

through the normal decision-making processes can be characterised as tools, or executive rule-making, of administrative intervention.

Law as tool can be divided into: ‘top-down rules’ and ‘bottom-up rules’. Top-down rules can reflect the information and values of officials who are usually sociologically and spatially remote from the contexts in which those rules will be applied. These also inspire a synoptic rationality, a comprehensive approach to problem-solving that takes the form of what is normally understood as ‘command and control’ rules. Bottom-up rules are meant to reflect the information and values of those who are affected, and they are intended to stand the positive and negative effects. In this sense, law appears more as an open self-correcting system and more open to learning.

In any event, no matter whether the policy-maker chooses legal regulation or other techniques, s/he must respect the fundamental legal frame. In other words, even escaping from law as tool one cannot enable one to avoid having to obey law as frame. Therefore, the question is not so much about accepting or escaping from law, but about creating a system that can assess the fairness and effectiveness of the tools used, depending on the sectors and areas, the room for discretion, and the quality of the rules and their alternatives. In fact, some areas (welfare programs) are more suitable than others to be governed by rule. This may be due to the fact that there is a common agreement about the equitable criteria in order to allocate resources.

Moreover, it is broadly accepted in both North America and Europe that a test has to be made before launching a new rule: there is a clear need, there is not a less restrictive means to do it, and it has to be based on a cost-benefit analysis (cf. in Europe: the debate around the principles of subsidiarity and proportionality, in US: the 1981 Executive Order).

b) LAW AS A TOOL: WHEN USING RULES?

Law searches for justice and fairness. Thus, we create rules in order to avoid arbitrariness. However, a system of law that was originally developed to reduce uncertainty itself becomes a new source of uncertainty when it is too complex or when its development is left to a private litigation strategy. Moreover, new challenges force governments to change: they have to prevent problems before they occur or it may be too late and too costly to react, in both political and economic terms (take the ‘mad-cow’ disease as an example).

But how good is law as a tool for foresight? And for anticipating the future? In fact, law has traditionally been considered to be a reactive tool more than a pro-active one. Reality is too complex for rules to foresee any possible

behaviour and situation. Furthermore, rules impede public managers from being responsive and from adapting new solutions to new situations, taking into account the special needs and circumstances of a particular case. In addition, rules tend to eliminate creativity.

In this long-standing polemic, one can see that both sides are simultaneously right and wrong. History shows that both exaggerated discretion and very detailed and expansive regulatory policy produce undesired effects; they shift the balance to the other side. In fact, the legal decision-making process is now also a learning process. The importance of mutual learning, co-operative learning, and information exchange therefore becomes crucial. . The real challenge is to prevent problems from arising without taking the easy path to blockade.

c) FACING RISKS AND LIABILITY

Law has been traditionally used to address tort and liability problems in both the private and public domains. In fact, the liability of public administration is a complex problem that has been the subject of special attention in legal doctrine, even if the responses are diverse in different countries. The public liability issue has been given special attention in European law, mainly after the judicial doctrine initiated by the *Francovich* case.

There is indeed nothing new about the need for a clearly defined system to distribute responsibility between administrations in order to provide a guarantee for citizens; it is ultimately those citizens who are affected by the acts or omissions of the government. Yet the possibility of damages caused to third parties is a question that is usually disregarded in the studies of new types of organisations, as we will attempt to show later.

However, even in an area that is so clearly “legalised/juridified”, law may require the help of other instruments. In fact, new types of risks are creating unexpected problems. The new-types of risks may differ from the former ones, both in quantity and quality. As Mad-Cow Disease is showing, it is difficult to identify liability in those cases.

In the case of extended-risks, courts have tried whenever possible to identify public administrations or important companies as liable in order to ensure payments of large sums. However, this situation may produce unintended side effects, such as more unemployment, more public deficit, more taxes, and so on. Sometimes liability litigation (mass tort or “class actions”) has been criticised for failing to deliver the right compensation to the right victims, and for not achieving corrective justice. Important public goods have sometimes been subordinated to the interests of individual claimants, disregarding other

law's supposed beneficiaries. Moreover, there is a risk of injustice when plaintiffs seek unlimited compensatory and punitive damages on the basis of changing and easily manipulated scientific evidence. The difficulty of assessing risk tort liability has motivated the adoption of new modes of judicial management in the US legal context.

Finally, in the EU, there are increasing situations of co-liability that may make it more difficult to find appropriate forms of compensation. In fact, while the problem of concomitant liability across levels of government is not new, it is still pending a proper solution in the EU, because this multi-level government is based on an integrated legal order that lacks an integrated judicial system.

7. The Regulatory Circle: Law, Governance and Public Management

Even when governments need to use rules, there is still the problem of what sort of rules they should use and, more concretely, what contents and what procedures. But also, as a tool of governance and as substantive regulation, legislation has to anticipate the problems of its implementation. This creates the regulatory circle. First, there is a phase of rules design, which is followed by a process of implementation and enforcement, and then a phase of assessment and re-evaluation of results that should produce new and better rules. In this process governance and public management also have an important role to play.

In fact, rules can be a tool of a hierarchical form of government, but also the result of interaction between different interested actors and public administration. There is not a sharp line drawn between two separate worlds (as one sometimes hears, “not as rigid as that”). In fact, rules can perfectly well be part of a learning process. Thus, the regulatory circle implies: experimentation (first rules), learning from the results (enforcement and application), and innovation (redesigning the rules) in order to adapt to a changing environment.

a) THE RULES' DESIGN: CREATIVITY IN LAW

Broadly-stated, bad design makes management and implementation difficult. However, the process of rule making can be creative and innovative. In any event, rules need to have a certain quality.

In fact, rules need not only respect ‘frame-law’ and procedures, but also need a certain level of internal and external quality (Total Quality Management). In both Europe and North America, courts are paying increasing attention to how rules are made and their quality. A possible consequence of this type of reasoning may be that enforcement is limited to those cases in which the rule is of ‘adequate’ quality. Otherwise, the lack of enforcement and application would be an ‘understandable’ consequence of that lack of calibre. In this context, there are certain criteria that a rule must fulfil in order to be considered suitable for enforcement:

- A rule must reflect clearly stated knowledge and be solidly based on scientific knowledge or experimental data.
- It must include achievable standards, otherwise practice will adjust these in order to make them less demanding.
- The rule should take account of the administrative measures and expenses that its application will entail. The rule must take account of the cultural environment in which it has to be applied. Good rules try to respect the values of the people whose behaviour they try to influence. Otherwise implementation of those rules will require prior work to change values, and this might not be at all easy to achieve.

And more specifically to EC law:

- The rule needs to take into account the different realities (climate, geography, and so on) to which it applies.
- It needs to take into account the main interests of Member States and other affected parties.
- Rules to be applied to a single issue must not be too many or too complex.
- Clear drafting and good translation.

**b) IMPROVING QUALITY-DESIGN THROUGH PROCEDURES AND PARTICIPATION:
LAW AND GOVERNANCE**

Bad rules are more likely to be noticed than good ones. Rules have to innovate. Nevertheless, rules are the result of a process, and bad rules will normally be the consequence of bad processes. On the one hand, governance theories have contributed to the introduction of the principles of transparency and participation in regulatory policies. On the other, the importance of

procedures is justified by the need to generate knowledge. There is a push towards a more consensual approach in decision-making that could lead to more co-operative forms of law-making, or ‘negotiated’ law. In other words, there is need to ensure the opportunity for the proper participation of both those affected (stakeholders), and those who have something to say due to their expertise.

This new conception goes beyond the classic legal conception of procedures. However, there is always a potential danger of imposing procedural models that fail to take into account the need for efficiency that the new reality dictates. There is, of course, the danger that precisely too much participation could make procedures ineffective because they are too complex and lengthy (thus creating the same kind of effect that the submission to classical procedural law was creating for public administration). Moreover, there is the pending question of what capacity administrations require in order to accommodate increasing participation. The Commission is a good example of that shortcoming.

Indeed, the European Commission is aware of this problem and is asking for a more efficient coalition of interest or co-ordinated networks. It has thus been suggested that effective participation be reduced to a number of private actors. In fact, only those who have something relevant to contribute must be consulted in the European decision-making process (unlike in the US where all ‘interested’ persons must be consulted). Apart from the role of Member States (both through working parties and comitology), the EU does not have a legal right entitling those affected by rules to participate in the process of their adoption. The discretion of the EU institutions is quite high in this respect. In spite of the Commission opening the door to consultation of experts and NGOs, there is a true right to be consulted. This situation contradicts the important procedural guarantees of those affected during the implementation and enforcement process. Furthermore, and strangely enough, the growing openness of the administrative decision-making process contradicts a relatively closed system of access for affected parties to the judicial system of monitoring the legality of the adopted acts.

Moreover, new information technologies (NIT) are creating a new challenge to regulation. In fact, although information technologies are increasingly recognised by procedural law in the administration domain, we can wonder whether the actual decision-making process is prepared to allow the participation of NIT experts as well as practitioners. There has been some literature concerning the influence of computing on the work of public organisations and managers. However, the effects of automation on administrative procedures and the decision-making process have been less broadly studied.

Ultimately, the question may be: could too much information make the process of learning impossible?

c) THE PERFORMANCE OF LAW: BETWEEN ADMINISTRATIVE LAW AND PUBLIC MANAGEMENT

Law also has to perform good results. On the one hand, public administration needs more than law to motivate its employees towards higher standards of performance. On the other, law has to be applied and enforced, and both the contents and quality of law affect the motivation of enforcers.

Voluntary compliance can benefit from governance contributions and networks. However, there is also a closer relation with public management as a tool for managing law. In fact, if we were referring before to a need for a certain quality of design, we now ask for good quality implementation. For this purpose, we have to be aware of the capacity of administrations, and also the possibility of including performance indicators in the process of assessing the application of law.

The law in the books is not very useful if it is not properly applied in practice. There are different reasons why a rule might not be adequately applied. What interests us here is the administrative lack of capacity. Administrations might sometimes lack knowledge, material means, financial means, personnel means, effective structures, or just an adequate management policy.

Lack of capacity can be understood as including a lack of specialised staff, economic resources and efficient management. In this sense, treating lack of capacity as involving only staff and economic resources misplaces the real problem. A change in the management of the policies can sometimes be not only more efficient but also required to make efficient application of the law possible.

Law usually neglects the problem of the lack, or limited capacity, of administrations to apply it effectively and ensure its application. However, law is as related as public management to institutional capacities and structures. In fact, the different capacity constraints of public administrations will eventually determine whether the real speed of integration will be homogeneous or diverse, even more than political commitments.

Simultaneously, there is still the need to ensure that procedural guarantees accord with effectiveness and performance. In this sense, one consequence of the dialogue between law and public management might be that legal procedures could either be made compatible with, or include performance indicators of, the

law application process. This context will make law more sensitive to the process of assessment. In fact, law has to look around for best practices in order to improve its performance.

In summary, citizens now fear not only unfair administrative practices, but also an administration that is inefficient, late, costs too much and whose activity does not represent the interests of the affected parties. New avenues that reflect both public management and legal discourses are therefore needed for public administrative action. Administration cannot now be simply defined under an ‘organic’ view; it needs a ‘functional’ perspective as the administrative functions are performed by several actors, some of which operate in a network and on a *polycentric* basis. The new role for the administration will therefore be to ensure the participation of the parties concerned, the responsibility and guarantees towards third parties, and assessing the final results and the fairness of the whole process in a context where hierarchical and horizontal forms of governing will have to coexist. For this purpose, law – and particularly administrative law – needs to co-operate with markets and society. Public management and governance can be very helpful in that direction, and they can learn a good deal in the process. In fact, given that ‘law is everywhere’, governance and public management have to take law seriously in order to be successful in pursuing their goals.

V - Discussion

Edited by Pedro Machado, Alexandra George and Jacques Ziller

Lawyers and professionals in public management

Lawyers' obviously consider public managers' perception of them to be mere litigators as extremely patronising. Lawyers tend to stress the question of power and legitimacy rather than the problem of capacity.

The general trend is to consider law as something conservative. We should also see law as triggering innovation or processing innovation.

Public managers are interested in trying to find solutions to problems like those identified in the papers of professors Metcalfe and Strauss, in which performance criteria are not commensurable. And it is in this domain that law can provide some useful concepts, such as *shared responsibilities*.

In summary, a misconception about management is that it is all about goal seeking. 'Push the lawyers aside and just go for the objectives!' could be the *leitmotiv* of such an assumption. This is clearly a misconceived way of viewing public management. It is essential to public management that the establishment of a legal framework supports the management of the network. What will it do to a network to say the structure of the network is formalised and clearly defined by law? This is very important and tends to get lost in the discussion because of the excessive focus on the issue of flexibility inside networks in contrast to rigid hierarchical systems. When talking about hierarchies, Herbert Simon always referred to two different concepts of hierarchy:

- Ranks, levels of subordination. Under this conceptualisation, there is a system of appeals to higher authorities in the hierarchy.
- The other way of dealing with hierarchies is through the existence of a system with subsystems, which involves other subsystems, and so on. If a system can be structured to put closely interdependent agencies together, only the residual interdependence must be addressed. It could eventually be labelled as *subsidiarity*. In any case, the authority structure is absent.

The American experience ultimately confirms Herbert Simon's opinion of *the business school as a problem of organisational design*. Briefly stated, his concern was focused on the following question: how should the contributions

from standard university disciplines be introduced and integrated in order to deal with practitioners' problems? How do we combine them to deal with practical problems? (To use a metaphor, how do we combine them like oil and water? Unless we keep stirring, they separate.) So there is a constant need to keep pushing public management together and to synthesise both fields.

Where, is the complementarity between public law and public management? Provided that lawyers transcend their classical role of establishing an authoritative hierarchical framework, they have a fundamental role in designing the accountability framework within the network, while public managers have a fundamental role in the development of the network.

Talking about administrative law without differentiating between operating and regulatory function is problematic. A distinction between management and regulatory function must be put forward.

We lawyers should all make a big effort, as lawyers, not to 'compartmentalise': when we say 'law cannot do this; we mean a specific area of law cannot do it. In public international law for instance, confidence-building measures, reprisals are major legal tools whereas judge-made law especially that of the ICJ are much less relevant to day-to-day practice. We do not project this when we use 'law' as a global word.

Law and lawyers are not necessarily the same. The way public administration in Germany and France acts is to be explained by its early formation. Lawyers trained in how to write judgements constructed Prussian administration: the whole system is geared towards this and explains some of the analysis of Max Weber that gives a good idea of a well functioning command system. In France, public administration traditionally is not an administration of lawyers: administrators tended not to have been trained as lawyers, but as engineers. The state apparatus was based upon engineers who had relationships with other engineers from other industries. This model is co-operative administration, and has nothing to do with command administration. The French Conseil d'Etat said the civil code was not applicable to administration, so judges dealing with public administration effectively rewrote the code in their own terms. French administrative law is not only based on a top down approach; it includes contract and torts, therefore much oriented towards collaborative legal tools. France and Britain have something in common in the internal corporatist system. In France the traditional model rests upon engineers talking to each other, in Britain upon public school alumni talking to each other. In Germany the professional origins of lawyer-administrators are much more spread out geographically and so talking to each other would not work, written procedures are necessary in order to get standardised approaches to policy problems.

Law and institutional design

Institutional design could be defined as changing the rules of the game: management is about changing the rules of the game, not just playing within the rules.

Both the Commission and a lot of doctrinal work forget that when we are discussing this we have a very specific constitutional setting: in order to make institutional design and change the rules of the game, it is almost impossible to change the constitution. So you cannot use the treaty making power to do this sort of institutional design. There is a failure in the way in which the constitution can be changed. We tend to isolate constitutional and administrative law too much and forget about the differences. One of the big differences between Britain, the US and the EC lies in the constitutional constraints: when the Thatcher government decided to implement their public management reform programme, it was quite easy because the Prime minister's *Royal prerogative* lets him change the organisation of the executive at whim.

Designing accountability systems

The design of accountability is the other crucial issue that is severely neglected in the EU. It is vital that the organisations involved in networks achieve the objectives described in, for example, the working plans, and simultaneously provide constant information to an external (supervisory) organisation or to outside actors about what is happening. The effectiveness of the accountability system of an organisation such as the European Agency for the Evaluation of Medicinal Products rests partly on the constant feedback that it receives from doctors who are administering drugs, as well as feedback from patients.

The accountability system has to be measured in terms of its effectiveness. A problem with "new public management" is that it seems to deal with insidious effectiveness problems, so choose one, give it objectives, and measure against objectives. But this effectiveness approach corrupts the overall objectives of the system. You cannot focus on only objectives or effectiveness, but have to take both into account. A current position of lawyers is to not think about it at all and assume it is self-implementing.

From a public management point of view, it becomes evident that the change of paradigm in law modifies the behaviour of the actors in the system. Maine²⁰⁰ demonstrates the distinction between *quality control*, under which the system is scrutinised in terms of its deficiencies and these are then overcome,

and *total quality management*, under which the operation and monitoring of the entire system are constantly maintained above a minimum standard. The attempt by lawyers to design co-operative decision-making processes matches the public management desire – especially with respect to network management – to have a system that operates without the use of threats or strict enforcement tools. This proves that compliance can be achieved without imposing sanctions or even threatening sanctions. It confirms a rising public management criticism of ‘command and control’ regulations (such a regulatory strategy amounts to a failure in many parts of the EU because it means that there is not an effective compliance or coercive system, even if people assume that there is).

There is a useful distinction between “rule of law” and “due process of law”. This is due to the nature of US constitutional law c.f. English unwritten constitutional law. Due process of law, an enormous concept, is already more in the working of law than the rule of law, which is a framework.

Competencies, legal authority and co-ordination

In the European context, there is an ongoing debate about the competencies and legal authority of Member States in relation to the EU. There is a relationship between these, and the absence of hierarchy begins to be acknowledged in both contexts. In management terms, it is not just a *problem* but also an *opportunity*, especially as lawyers are beginning to accept non-hierarchy (although they discuss it endlessly in terms of *power* and *legitimacy*). But, the opposite danger involves an artificial synthesis between the legal and management views. This would be the outcome of engaging too much law when approaching co-ordination questions – notably those of capacity and efficiency – and thus disregarding the problems of power and legitimacy. From a legal perspective, one cannot lose sight of power and legitimacy when addressing co-ordination in a management context.

“Regulation” (i.e. in French, as opposed to *réglementation*) has been replaced by regulation including institutional design. But public lawyers would associate institutional design with constitutional law. This would not happen so much in private law. Lawyers have been trained and are living hard with this distinction. Public management has as much to do as administrative law. If we forget about the constitutional law we are completely stuck.

The European Union's management deficit

The European integration policy process has a strong tendency to increase complexity without increasing capacities. To increase complexity is to increase the number and diversity of the member states. Yet, the capacities to respond to

an increasingly complex environment are lacking. One can take certain benchmarks from organisational theory. Herbert Simon talked of a *nearly decomposable system*, which is close to an economist's idea of a "perfect market": no firm is big enough to have any influence on market prices. Firms thus become price takers rather than price makers. A second level of complexity is *imperfect competition*, which is product differentiation. There is a limit to which organisations in the network can pursue their own lines and politics, and find a market niche. There are arguments about jurisdiction. The more important thing concerning EU competition is the risk of oligopolies that give rise to strategic behaviour.

For instance, there has been an increase in the complexity of the agricultural system, as strongly highlighted by the recent Foot-and-Mouth Disease crisis. Small abattoirs in Britain were shut down and animals were moved between different parts of the country. This increased dependency on different parts of the system. Suddenly the disease was spread throughout the country. But this was not a situation of uncertainty; it rather amounted to one of *turbulent environment*. Uncertainty is created as players react to each other when the environment is changed. In the Foot-and-Mouth Disease case, there was not just uncertainty but also ambiguity. The nearly decomposable system allows different parts to be isolated from each other. Communication with linked parts of a system (interdependence) leads to complexity. If ambiguity arises – therefore obliging the reformulation of the 'rules of the game' – management and law converge closely. Management is usually adept at the micro level, but not wholly suitable when dealing with macro level issues. The issue of capacity building cannot be disregarded. For instance, if the EU wants to move in the direction of enlargement, it will not achieve it effectively without building capacities. Building capacities is a political problem. Building complexity has political rewards.

Organisational networks as economic systems can perform effectively for a long time. A policy or regulatory network is superimposed on this. If this is accomplished, networks are relevant to both the capacity and capability sides. Helen Wallace claims that people used to say there is "the Community method" of making decisions. The archetype is the common agricultural policy, which transfers competencies to EU institutions, and leaves aside capacity issues. This is either the way something operates or the way people believe it will operate. Everything else is a temporary intermediate case. At the end, it was becoming like a nation state government. On the contrary, Wallace says these are just different ways of dealing with different kinds of problems. Wallace has provided broad labels for different configurations. Public managers ask: "What are the organisations?" and "What are the different kinds of relationships that the actors therein engaged assume exist?"

Networks are commonly assumed to be related to the absence of rigid hierarchies. If one of the features of networks is their flexible and informal process, the crucial question addressed by public management is that of responsibility. It is essential to define reciprocal responsibilities. To put it differently, the responsibilities of the different organisations involved in a network must be defined. A legislative framework explaining what the roles and responsibilities are going to be is therefore important. Otherwise, the *management deficit* will persist at the EU level, especially as it has been possible to talk about legal competencies without saying what they require in terms of capacity.

Network management

See the other Working Paper resulting from this Workshop published in the same series under the title Law and Public Management - Network Management.

VI – WORKSHOP PROGRAMME

The titles are not related to papers, they are only an indication as to the direction in which statements are supposed to lead the workshop's participants; timing is only indicative, as the biggest part of the workshop should be devoted to discussion.

FRIDAY, 11 MAY

Welcome and Introduction, Prof. Jacques Ziller, EUI/Florence

SESSION 1 : Law and Public Management: Getting to Talk to Each other

Introductory statements:

Law Conservatism and Innovation: a Management Perspective,
Prof. Les Metcalfe, EIPA/Maastricht

Public Management from a Lawyer's Point of View : an United States' Perspective, *Prof. Peter Strauss, Columbia Law School/New York*

Discussion

SESSION 2 : EU Law and Public Management

Introductory statements:

European Administrative Law and Public Management: mutual exclusion or mutual learning? *Dr. Alberto Gil Ibañez, Jean Monnet Fellow EUI/Florence*

La régulation juridique d'une administration en réseau : le cas de la Communauté européenne, *Dr. Loïc Azoulay, Université de St. Etienne/St. Etienne*

Discussion

SESSION 3 : Law and Network Management

Introductory statement:

The Concept of Network in Legal Litterature – A Survey
Pedro Machado, EUI/Florence

Discussion

SATURDAY, 12 MAY

SESSION 4 : Managing Networks in the European Union

Introductory statement :

Law and Public Management – Starting To Talk

European Agencies: A Legal form for Network Management ? *Dr. Edoardo Chiti, Università di Lecce/Lecce*

Discussion

**SESSION 5 : European Law and European Public Management:
Complementary Approaches**

Summary conclusions, discussion chaired by Prof. Jacques Ziller, EUI/Florence

VII – List of Participants

Speakers (introducing the discussions, presenting papers):

Dr. Loïc Azoulay, Université de St. Etienne/St. Etienne

Dr. Edoardo Chiti, Università di Lecce/Lecce

Dr. Alberto Gil Ibañez, Jean Monnet Fellow EUI/Florence, Executive Adviser
at the Spanish Ministry for Economy/Madrid

Mr. Pedro Machado, EUI/Florence – assistant to Prof. Ziller for the Workshop

Prof. Les Metcalfe, Professor of Public Management, European Institute of
Public Administration/Maastricht

Prof. Peter Strauss, Vice Dean and Betts Professor of Law, Columbia Law
School - Visiting Fellow EUI/Florence

Prof. Jacques Ziller, Professor of Comparative Public Law, EUI/Florence

Observers (taking part in the discussions):

Prof. Eric Boe, Professor of Public Law, Institutt for offentlig rett, Oslo

Prof. Fabrizio Cafaggi, Professor of Private and Comparative Law, Università
di Trento

Ms. Susana de la Sierra Moron, PhD 2nd year, EUI/Florence

Dr. Salvador Estapé, Director-General, Generalitat of Catalunya

Ms. Alexandra George, EUI/Florence – assistant to Prof. Ziller for the
Workshop

Mr. Navraj Ghaleigh, PhD 2nd year, EUI/Florence

Ms. Angeles Mazuelos Bellido, PhD 3rd year, EUI/Florence

Ms. Maria Verdelho Alves, PhD 2nd year, EUI/Florence

Prof. Neil Walker, Professor of European Law, EUI/Florence