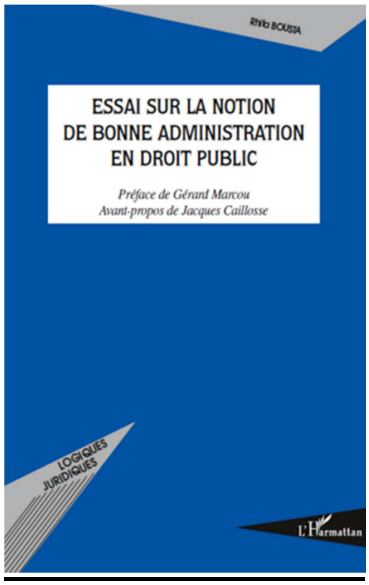
Compréhensive Abstract of the book: R. BOUSTA, "Essai sur la notion de bonne administration en droit public", L'Harmattan, 2010, 560p.



Abstract by Dr. Rhita BOUSTA

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Abstract:

Good administration can be considered as a legal notion. Far from being a passing fad, it is right at the heart of public law. Drawing from European law and the Spanish, British and French legal systems, this thesis shows that good administration is indeed a legal notion, and defines exactly what it encompasses. After inducing what good administration means (*Part 1*), the thesis demonstrates what it contributes to public law (*Part 2*).

PART ONE: DEFINING THE NOTION OF GOOD ADMINISTRATION

Direct and indirect references to good administration (*Chapter 1*) help specify what the notion encompasses exactly (*Chapter 2*). Legal provisions directly referring to "good administration" are mainly found in EU law, where the notion is often expressed as a general principle. But the provisions show just how adaptable it is. Quite symptomatically, EU judges tend to mix it up with the principle of diligence (or solicitude). As for the "right to good administration" dealt with in article 41 of the Charter of Fundamental Rights of the European Union, it is merely a non-exhaustive list of pre-existing rights which all seem to be part more intuitively than demonstrably of "good administration".
Furthermore, even though cases of the "right to good administration" are mentioned, there is no explanation as to what this means exactly. Thus, even if the development of citizens' rights is indisputable and has to be promoted, the movement does not seem to stem from the acknowledgement of "good administration".
Because the notion is so imprecise, one may wonder what explicit references to "good administration" actually help achieve, in the British and Spanish law for example. Linked with *New Public Management*, "good administration" is a generic notion. This is mainly due to the pragmatic nature of the Anglo-Saxon legal system, which focuses more on practical redress for cases of maladministration than on general systemic principles aiming at defining good administration. Neither the British Ombudsman nor British doctrine try to codify these principles.
As for British case law, it uses "*principles of good administration*" in a global, and even ancillary way, whereby it helps to extend the jurisdictional control of public administration (*judicial activism*). In addition, the statutes of the autonomous communities of Spain refer to "*buena administración*", without clearly defining it. Furthermore, even though Spanish judges were the first ones to refer to the Charter of Fundamental Rights of the European Union when it was adopted, when they mention to the "*right to good administration*", it seems mainly rhetorical.

The imprecision of "good administration" can also be noted in the many different cases of "maladministration". The expression was used for the first time in positive law in the law establishing the *Parliamentary and Health Service Ombudsman*, a British Ombudsman in charge of remedying cases of injustice resulting from maladministration. Maladministration is not defined by the law and is left to the discretion of the institution, which means that it is a flexible notion, as supported by doctrine. When it was transcribed into other legal systems, in the European community for example[1], it did not become less ambiguous. Like the British lawmaker, EU law relies on the European Mediator, who makes up the content of maladministration through his or her recommendations. Attempts to codify good administration by the British (*Draft principles of good administration*)
and European Mediator (European Code of Good Administrative Behaviour) are laudable, but nevertheless limited.
Furthermore, cases of maladministration are rarely converted into characterized violations of the principle(s) of good administration acknowledged by case law, as shown in EU law for instance[2]. Similarly, British judges and the Spanish constitutional court often refuse to take into account allegations of cases of maladministration recorded by Ombudsmen. As for French judges, any claim opposing a recommendation made by the Mediator of the Republic would be dismissed as not receivable.

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Even though the notion of good administration may be heterogeneous in many ways, it is still possible to use an inductive and comparative method to elaborate a notional unit, which may be defined as the reasonable adaptation of means which an administration has at its disposal. In contrast with "good

governance" and "good government", it only designates the proper use of means and is to be seen from a functional perspective. Therefore, it is quite clear that it is linked to discretionary power.
The idea of balance is also at the heart of the notion. Far from being an "empty shell" filled as citizens "dealt with at a given time" make demands, good administration designates the best balance between the interests of the citizens and those of the administration. The balance is struck when the different interests and elements needed to choose the best means are shared out reasonably. Avoiding excessive formalism, the notion of good administration is put into practise through "good formalism" when a non contentious administrative procedure is rolled out. The study of "*due process of law*" and "*procedimiento debido*" links the notion to the need for a material approach to the procedure, which should not be seen as a mere matter of form. Good procedure, which is also found in
European law, can therefore be considered as a corollary to good administration.

To sum up, even though the extensive approach to "good administration", which is quite common, may seem appealing, it would be more convincing to adopt a restrictive approach. Once defined, it can be differentiated from principles bearing the same name and other notions, such as good governance, the good administration of justice, quality or legitimate expectation. Inducing the definition of good administration makes it possible to truly see what the notion contributes to public law.

PART TWO: WHAT THE NOTION OF GOOD ADMINISTRATION CONTRIBUTES TO PUBLIC LAW

Firstly, the notion of good administration introduces a model of administrative functioning (*Chapter 1*). Secondly, the notion helps reflect upon and renew the judicial review and the concept of law (*Chapter 2*).

Unlike a shared intuition, the notion of good administration, which is in essence objective, is, at least as it is defined here, difficult to convert to subjective law and even more so in fundamental law. The optimism it generates as a result of imprecise usages has to be analysed critically. The aim is not to adopt a pessimistic position with no scientific reflection but, on the contrary, to favour the recognition, like the Council of Europe itself, of a right to good administration with its own content, to be distinguished from existing rights. It needs to be seen whether the current "*right to good administration*" dealt with in article 41 of the Charter of Fundamental Rights of the European Union is relevant. The restrictive approach which guides the definition here means that good administration is seen here as an objective duty rather than as a subjective right.
The notion also constitutes a standard, in particular for judges. It is expressed in case law as the "normality" of administrative functioning. The culture of *Common law* and the Spanish law are particularly relevant here. The standard and the casuistry which goes with it cannot be studied without reflecting upon Roscoe Pound's works. Furthermore, the Spanish Constitution and law foresee that the public administration will be held liable depending on whether it works in a "*normal or abnormal*" manner. Doctrine links this expression to the constitutional principle of effectiveness of administration, the main expression of good administration.

Since good administration is part of a wider reflexion process on standards in public law, it helps systemize cases of administrative negligence. One may therefore analyse the classifications of these cases in a critical manner: this involves analysing both the ambiguous references to abnormality in Spanish and British law (*duty of care*, *reasonableness*, etc.) and classifications in the French doctrine. Violation of good administration therefore constitute a "meta-criterion" for classifying cases of service-related faults, alongside "maladministration", which is not the antonym of good administration. Expressly acknowledging good administration would make it possible to re-establish the liability of public administrations in cases where no-fault liability is sometimes preferred, out of deference for the administration.

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As an objective notion which is an integral part of administrative law, good administration has an impact on legality in the broad sense of the word.
It enriches the jurisdictional control of administrations, which comes as no surprise. Spanish judges have expressly referred to good administration, associating it with the rationality of decision-making, which is rather significant. In the control of procedural propriety and rationality in particular, it makes up one of the judge's interpretation tools. Implicitly contributing to the control of legality in French, it enriches the content of the latter, by questioning the relevance of some poor categorisations. Thus, the distinction between so called "internal" legality and "external" legality can be put into perspective with a substantial approach to procedure and form derived from the notion of good administration as used in European, British and Spanish law. This is also true for the binary approach which opposes the control of legality to the control of opportunity, which is not assimilated to the political appreciation of the decision made by the administration, but targets the decision-making process (*proceso*) expressed in the motives.
Focusing on the means at the disposal of the administration, the notion of good administration helps intensify the control of motives and, more broadly, the discretionary power of the administration. But it does not mean that the judge's opinion replaces that of the administration, as shown in the limited effect of the EU principle of good administration. The legal nature of good administration, devoid of moral judgement, contributes to the necessary adaptation of jurisdictional control.
As one of the tools used to control legality, the notion of good administration is part of a wider process of perpetual reflection upon law. It highlights the role of administration in the production of law. Thanks to it, internal measures, such as guidelines and circulars, have a legal basis. As for the very notion of discretionary power, as it is conceived in France, it is enriched in a sense. Far from being the antonym of "circumscribed powers", discretionary power is defined as a means of good administration. In this regard, a lot can be learned from the British idea of discretionary power.
On a wider scale, the notion of good administration emphasizes the value of effectiveness by contributing to the juridicization of "flexible law". It is part of a process which questions a purely formal and binary vision of law (application / non–application) which does not take the imperatives of other fields into account much. The adjective "good" must not be seen as the expression of happiness in law but means that law has to adapt to its purposes by adjusting to social reality. This idea of law, which is more common in EU, British and Spanish law (even though each of these systems is different), is still not always accepted in France unfortunately.

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One may therefore wonder what French judges would gain from expressly defining the notion of good administration in the more restrictive sense of the term. Furthermore, public administration would be improved if it had the clear obligation to use its means in an optimal manner. Tightening the framework of its remit and its way of working would also have undeniable advantages for citizens.
Though EU law has a lot to teach in this matter and makes it possible to define the notion of good administration, it also has its weaknesses, which can be criticised to elaborate a sufficiently limited and therefore innovative definition of the principle and the right to good administration. This thesis shows that elaborating legal notions through a comparative analysis is not just a simple academic exercise, but an operation which is necessary to understand Law and strengthen the tangible evolution of rights.