



Good administration “*around the track*” of the Portuguese and the EU constitutional discourses – “*Winds, to entertain our minds*”...?¹

Sophie Perez Fernandes*

ABSTRACT: To mark 40 years of the Portuguese constitutional project and the 30 years of its interaction with the European (also constitutional) project, the text seeks, through the theme of good administration, to give practicality to the theory of inter-constitutionality – as it is a proposal construed by Portuguese doctrine, which seeks to explain the relationship between the EU legal order and the constitutional legal orders of the Member States. The hermeneutic exercise undertaken aims to extract from the Portuguese constitutional text, through the cross-interpretation of Article 268 CRP with Article 41 CFREU, elements for the construction of a concept of good administration relevant in the Portuguese constitutional legal order that, without prejudice to other dimensions/projections, is also open to the subjective/protective dimension of good administration highlighted in the EU constitutional legal order. Assuming the European integration process is a dynamic factor of constitutional development, the present analysis regards the systemic differences in the field of good administration as inviting discursive conciliation with an aim to articulate a unity of meaning in the matter of good administration.

KEYWORDS: inter-constitutionality – good administration – administrative citizenship – fundamental rights – administrative procedure.

¹ The present text is dedicated to Maria José Guerreiro who, in 2004, deepened our love for literature, especially for the rich Portuguese literature, introducing the work of Fernando Pessoa with a still today unforgettable lesson of *Autopsychography*.

* Professor at the School of Law of the University of Minho. PhD member of the Centre of Studies in EU Law (CEDU) of the University of Minho.

Autopsychography

The poet is a feigner	And those who read his words	And so around his track
Who's so good at his act	Will feel in his writing	This thing called the heart winds,
He even feigns the pain	Neither of the pains he has	A little clockwork train
The pain he feels in fact.	But just the one they're missing.	To entertain our minds.

*Fernando Pessoa*²

I. From the intricate relationship between Constitutional Law and Administrative Law to their mutual “passage” by effect of the European integration process

The choice of good administration for a debate that intends to mark the 40th anniversary of the Constitution of the Portuguese Republic (CRP), including the last three decades of its interaction with the European project – which is also a constitutional project – finds its first reason in the intricate, and occasionally inextricable relationship between Constitutional Law and Administrative Law.³ One would dare to say that, despite his q.b. of complexity, the “*umbilical cord*”⁴ that unites Constitutional Law and Administrative Law is almost of intuitive perception. As Francisco Lucas Pires famously stated, the State and the Constitution went through Modernity “*hand in hand*”.⁵ Now, as a fundamental text defining the legal status of the public power and the subjects of law, considered by themselves and in their relations with the public power, and being the Administration seat of public power (administrative power) with which the subjects of law relate, the Constitution cannot but refer to it. As Afonso d’Oliveira Martins explained at another constitutional anniversary, “[a] *Constitution that does not deal with Public Administration, administrative power and their power relations will not be able to translate the spirit of this constitutionalism [the Euro-Atlantic modern constitutionalism] and affirm*

² First published in *Presença* 36 (Coimbra: 1932); translation by Richard Zenith, *Fernando Pessoa. A Little Larger Than the Entire Universe. Selected Poems* (Penguin Books, 2006), 314.

³ On the subject, see, among others, Vital Moreira, “Constituição e Direito Administrativo”, in *Ab Uno Ad Omnes: 75 anos da Coimbra Editora, 1920-1995*, org. Antunes Varela et al. (Coimbra: Coimbra Editora, 1998), 1141-1142; José Joaquim Gomes Canotilho, “O Direito Constitucional passa; o Direito Administrativo passa também”, in *Estudos em Homenagem ao Prof. Doutor Rogério Soares*, Studia Iuridica 61, Boletim da Faculdade de Direito da Universidade de Coimbra (Coimbra: Coimbra Editora, 2001), 705-722; Afonso d’Oliveira Martins, “Constituição, Administração e Democracia”, in *Nos 25 anos da Constituição da República Portuguesa de 1976. Evolução Constitucional e Perspectivas Futuras*, (Lisboa: Associação Académica da Faculdade de Direito de Lisboa, 2001), 463-466; Diogo Freitas do Amaral, *Curso de Direito Administrativo – Vol. I*, 3rd edition (Coimbra: Almedina, 2008), 185-187; Ana Raquel Gonçalves Moniz, “O *Administrative Constitutionalism*: Resgatar a Constituição para a Administração Pública”, in *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho. Volume IV – Administração e Sustentabilidade: entre Risco(s) e Garantia(s)*, org. Fernando Alves Correia, Jónatas E. M. Machado and João Carlos Loureiro, Studia Iuridica 105, Boletim da Faculdade de Direito da Universidade de Coimbra (Coimbra: Coimbra Editora, 2012), 387-420; Jorge Miranda, *Manual de Direito Constitucional. Tomo I-1. O Estado e os sistemas constitucionais*, 10th edition (Coimbra: Coimbra Editora, 2014), 24-25.

⁴ Peter Haberer, “Verfassungsprinzipien “im” Verwaltungsverfahrensgesetz”, in *Verwaltungsverfahren – Festschrift zum 50-jährigen Bestehen des Richard Boorberg Verlags*, ed. Walter Schmitt Glaeser (Stuttgart/München/Hannover: Boorberg, 1977), 93, *apud* Vasco Pereira da Silva, *O Contencioso Administrativo como “Direito Constitucional concretizado” ou “ainda por concretizar”?* (Coimbra: Almedina, 1999), 6.

⁵ Francisco Lucas Pires, *Introdução ao Direito Constitucional Europeu (Seu Sentido, Problemas e Limites)* (Coimbra: Almedina, 1997), 7 (free translation).

itself as a Constitution proper of a State governed by the rule of law".⁶

Any organizational structure that is said to be "*governed by the rule of law*", whether a State or a Union, will therefore have in its constitutional text, the first source of regulation of its Administration and thus, the first source of revelation of its Administrative Law. Administrative Law is first "*constitutionalised Administrative Law*": the constitutional text includes rules regarding the organization and the functioning of the Administration, as well as its relations with other subjects of law,⁷ especially individuals. The Constitution draws up a model of Public Administration and of protection of the rights of individuals in legal-administrative relations - the validity of Administrative Law depends on the concretisation of this model. Recalling the famous expression of Fritz Werner, Administrative Law is "*Constitutional Law concretised*". But, just as the expression articulates the constitutional dependence of Administrative Law, it also conveys the administrative dependence of Constitutional Law:⁸ the concretisation of those constitutional options depends on Administrative Law for its effective realisation. It is therefore not possible to entirely separate Constitutional Law from its effectiveness through norms, concepts, and institutes of Administrative Law.

To these intricate relationships of mutual dependency between Constitutional Law and Administrative Law adds – as Gomes Canotilho explained, surpassing Otto Mayer's formula: "*Constitutional Law passes and Administrative Law remains*" – their permeability to the "*emergence of new elements and mechanisms of evolution of modern society*" in the face of which both, after all, "*pass*".⁹ In particular, the impact generated by the emergence of what Francisco Lucas Pires described as the: "*first truly postmodern political form*"¹⁰ – the European Union – and the progressive construction, autonomisation and constitutionalisation of its legal order – the EU legal order early described by the Court of Justice of the European Union (hereinafter, CJEU) as a "*new legal order*", stemming from an "*independent source of law*", founded on the "*basic constitutional charter*" (i.e, the Treaties)¹¹ – soon left marks in both Constitutional and Administrative Law. The political and legal dynamics of the European integration under way for more than 60 years requires a "*rethinking*"¹² of the State and Administration, as well as a repositioning of Constitutional Law and Administrative Law.

The early coexistence of different structures of information, decision-making and administrative action led to the creation of the ideal conditions for national and EU legal-administrative systems to influence each other.¹³ The so-called "*Europeanisation*

⁶ Afonso d'Oliveira Martins, "Constituição, Administração e Democracia", 463 (free translation).

⁷ Diogo Freitas do Amaral, *Curso de Direito Administrativo – Vol. I*, 3rd edition, 186, and *Curso de Direito Administrativo – Vol. II*, 3rd edition (Coimbra: Almedina, 2016), 29-31.

⁸ Thus, Vasco Pereira da Silva, *O Contencioso Administrativo como "Direito Constitucional concretizado" ou "ainda por concretizar"?*, 6-7.

⁹ José Joaquim Gomes Canotilho, "O Direito Constitucional passa; o Direito Administrativo passa também", 706-707 (free translation).

¹⁰ Francisco Lucas Pires, *Introdução ao Direito Constitucional Europeu (Seu Sentido, Problemas e Limites)*, 81 (free translation).

¹¹ See Judgements *Van Gend & Loos*, 5 February 1963, 26/62, EU:C:1963:1; *Costa/ENEL*, 15 July 1964, 6/64, EU:C:1964:66; and *Les Verts*, 23 April 1986, 294/83, EU:C:1986:166.

¹² José Joaquim Gomes Canotilho, "*Brançosos*" e *Interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional* (Coimbra: Almedina, 2006), 242; and "O Direito Constitucional passa; o Direito Administrativo passa também", 710 (free translation).

¹³ The first references to the phenomenon of convergence of the Member States' legal administrative systems under the influence of the European integration process date back to the 1970s. In 1971, Otto Bachof acknowledged the impossibility of ignoring the influence of the

of *Administrative Law*” refers to a phenomenon of “cross-fertilization”¹⁴ or “reciprocal contamination”¹⁵ between administrative rules of the EU and those of the Member States tending to their progressive and dynamic convergence and within which both EU and Member States’ Administrative Laws are simultaneously emitting recipient factors of Europeanising impulses.¹⁶ Following Jürgen Schwarze, if initially, the legal orders of the Member States influenced the construction and the development of EU Law, namely in administrative matters, there is, in a second phase, a process, in reverse, of modification of national administrative systems under the influence of the European integration process and the development of a system of interrelations between national and EU Administrative Laws.¹⁷ It is in this context that there have been multiplying references to a “*European Administrative Space*”.¹⁸

community factor on the dogmatics of Administrative Law, and in 1978 Jean Rivero reported on the emergence of a “*common European administrative law*” – see Fausto de Quadros, *A nova dimensão do Direito Administrativo. O Direito Administrativo português na perspectiva comunitária* (Coimbra: Almedina, 1999), 11-12; and Jürgen Schwarze, “The Convergence of the Administrative Laws of the EU Member States”, in *The Europeanisation of Law: The Legal Effects of European Integration*, ed. Francis Snyder (Oxford: Hart Publishing, 2000), 163.

¹⁴ See John Bell, “Mechanisms for cross-fertilisation of Administrative Law in Europe”, in *New Directions of European Public Law*, ed. Jack Beatson and Takis Tridimas (Oxford: Hart Publishing, 1999), 147-168.

¹⁵ Maria Luísa Duarte, *Direito Administrativo da União Europeia* (Coimbra: Coimbra Editora, 2008), 23 (free translation).

¹⁶ On the process of Europeanisation of Administrative Law, see *Les mutations du droit de l’administration en Europe. Pluralisme et convergences*, dir. Gérard Marcou (Paris: L’Harmattan, 1995); *Le droit administratif sous l’influence de l’Europe. Une étude sur la convergence des ordres juridiques nationaux dans l’Union européenne*, ed. Jürgen Schwarze (Bruxelles: Bruylant, 1996); Christoph Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge University Press, 2001); *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures*, dir. Karl-Heinz Ladeur (Dartmouth: Ashgate, 2002); J. H. Jans, S. Prechal, R. Lange and R. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing, 2007); in Portuguese legal literature, see Afonso d’Oliveira Martins, “A Europeização do Direito Administrativo Português”, in *Estudos em Homenagem a Cunha Rodrigues*, vol. II (Coimbra: Coimbra Editora, 2001), 999-1024; Paulo Otero, *Legalidade e Administração Pública: O sentido da vinculação administrativa à jurisdição* (Coimbra: Almedina, 2003), 457-487 and 743-748; Maria Luísa Duarte, *Direito Administrativo da União Europeia*, 23-27; Lourenço Vilhena de Freitas, *Os Contratos de Direito Público da União Europeia no Quadro do Direito Administrativo Europeu. Volume I – Direito Administrativo da União Europeia* (Coimbra: Coimbra Editora, 2012), 34-53; Fausto de Quadros, *Direito da União Europeia: Direito Constitucional e Administrativo da União Europeia*, 3rd edition (Coimbra: Almedina, 2013), 662-667; and Sophie Perez Fernandes, “Administração Pública”, in *Direito da União Europeia – Elementos de Direito e Políticas da União*, coord. Alessandra Silveira, Mariana Canotilho and Pedro Madeira Froufe (Coimbra: Almedina, 2016), 85-92.

¹⁷ See Jürgen Schwarze, “L’européanisation du droit administratif national”, in *Le droit administratif sous l’influence de l’Europe. Une étude sur la convergence des ordres juridiques nationaux dans l’Union européenne*, ed. Jürgen Schwarze (Bruxelles: Bruylant, 1996), 841-842; and “European Administrative Law in the Light of the Treaty of Lisbon”, in *European Public Law* 18 (2012), 287-290.

¹⁸ See, among others, Martin Shapiro, “The Institutionalization of European Administrative Space”, in *The Institutionalization of Europe*, ed. Alec Stone Sweet, Wayne Sandholtz and Neil Fligstein (Oxford: Oxford University Press, 2001), 94-112; Johan P. Olsen, “Towards a European Administrative Space?”, in *Journal of European Public Policy* 10 (2003), 506-531; Heinrich Siedentopf and Benedikt Speer, “L’Espace administratif européen d’un point de vue de la science administrative allemande”, in *Revue Internationale des Sciences Administratives* 69 (2003), 9-30; Herwig C. H. Hofmann, “Mapping the European Administrative Space”, in *Towards a New Executive Order*, ed. Morten Egeberg and Deirdre Curtin (London: Europe Routledge, 2009), 24-38; Rob Widdershoven, “European Administrative Law”, in *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis*, ed. René J. G. H. Seerden, 3rd edition, (Cambridge: Intersentia, 2012), 245-315;

The administrative paradigm that marked the genesis of the European integration process was, however, rapidly constitutionalised, especially after the entry into force of the Treaty of Rome, and under the decisive contribution of the case-law of the CJEU.

This is predominantly due to the assertion of the EU as a “*Union based on the rule of law*”: recalling the famous “*Les Verts*” ruling, the then “*European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*”.¹⁹ The assumption of a constitutional paradigm *i*) creates a constitutional body rooted/enshrined in the Treaties – as well as, if one is allowed to treat matters of such seriousness with contempt, acts of “*equivalent effect*”, of which the Charter of Fundamental Rights of the European Union (CFREU) assumes indisputable prominence – and *ii*) constructs concepts of Constitutional Law of national inspiration, subjecting them to a filtering process that places them at the service of the integration process – as it is the case, firstly, of the protection of fundamental rights (Article 6 TEU). The process of constitutionalisation of the Union therefore continues today to produce fruitful debates aimed at theorising the kind of constitutionalism emerging from the process of European integration. Now, in an event and subsequent publication, evocative of the 40 years of the Portuguese constitutional project and of the 30 years of its interaction with the European (also constitutional) project, it is worth noting that it has especially been the Portuguese doctrine to coin the theory of inter-constitutionality²⁰ among the proposals to explain the relationship between the legal order of the European Union and the legal and constitutional orders of the Member States.

II. The Portuguese contribution to the constitutional theorisation of the European integration process – brief overview

Introduced in the Portuguese legal literature by Francisco Lucas Pires, resumed by Paulo Rangel and developed by Gomes Canotilho, the theory of inter-constitutionality studies the “*relations of competition, convergence, juxtaposition and conflicts of several constitutions and of several constituent powers within the same political space*”.²¹ In order to explain the current stage of “*articulation between Constitutions*”, those of the Member States and of the European Union, and the “*affirmation of constituent powers with diverse sources and*

Émilie Chevalier, “L’espace administratif européen”, in *Traité de droit administratif européen*, dir. Jean-Bernard Auby and Jacqueline Duheil de la Rochère, 2nd edition (Bruxelles: Bruylant, 2015), 451-465; and, in Portuguese legal literature, Lourenço Vilhena de Freitas, *Os Contratos de Direito Público da União Europeia no Quadro do Direito Administrativo Europeu. Volume I – Direito Administrativo da União Europeia*, 47-53; and Miguel Prata Roque, *Direito Processual Administrativo: a convergência dinâmica no Espaço Europeu de Justiça Administrativa* (Coimbra: Coimbra Editora, 2011), 535-552.

¹⁹ *Les Verts*, recital 23.

²⁰ The preference for the term “*interconstitutionality*” (from the Portuguese “*interconstitucionalidade*”) – in alternative to “*multilevel constitutionalism*” (see Ingolf Pernice “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, in *Common Market Law Review* 36 (1999), 703-750, and “Multilevel Constitutionalism in the European Union”, in *European Law Review* 27 (2002), 511-529) – is also shared by non-Portuguese legal doctrine for better expressing the absence of hierarchical relations or top-down impositions in the EU constitutional discourse – see Leonard Besselink, “Multiple Political Identities: Revisiting the ‘Maximum Standard’”, in *Citizenship and Solidarity in the European Union: from the Charter of Fundamental Rights to the Crisis, the state of the art*, coord. Alessandra Silveira, Mariana Canotilho and Pedro Madeira Froufe (Peter Lang, 2013), 236-237.

²¹ José Joaquim Gomes Canotilho, “*Brançosos*” e *Interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional*, 266 (free translation).

legitimacies”, the theory of inter-constitutionality seeks to understand the “*legal and political phenomenology that is friendly to the pluralism of legal orders and normativities*”²² emerging from the European integration process. It is not, therefore, a mere juxtaposition or peaceful coexistence of constitutional norms stemming from different sources, but a phenomenon of reflexive interaction or cross-fertilisation of constitutional norms that coexist within the same political space – that of the European Union.²³ Returning to the words of the first, there is a double movement towards the “*nationalisation*” of the European constitution and towards the “*Europeanisation*” of the national constitutions “*on a path that is done by walking together*” towards a process of progressive constitutional convergence.²⁴

The constitutional theorisation of the European integration process is not alien to stylistic resources or to artistic allusions. Gomes Canotilho, for example, resorts to the metaphor of networks to explain that constitutional texts have come down from the ‘castle’ (those of the closed States) to an inter-constitutional ‘network’ without, however, losing their original identity function: “[*the network composed of national constitutional norms and European norms of constitutional value (...) does not dissolve within the network the brand lines of the Member States’ constituent formatting*”, that is to say; “*it does not cause genetic drifts in the constitutional DNA embodied in the States’ ‘Magna Carta*”.²⁵

It is also suggestive that the image of “*contrapuntal law*” proposed by Miguel Poiares Maduro: just as in the field of music, the counterpoint allows an overlapping of melodic lines that are not in a hierarchical relationship. Thus the European integration process requires that one learns to deal with a non-hierarchical relationship between legal orders and institutions and to discover how to take advantage of this legal pluralism by devising ways of reducing and dealing with potential conflicts by promoting exchanges between legal orders and by requiring the courts to design their decisions and the conflicts of interest they have to resolve in the light of a wider European context. The author thus, conceives the constitutionalism emerging from the European integration process as a plural constitutionalism as it “*rests on a plurality of constitutional sources*” and results from a “*discursive, plural and decentralized process*”, capable of respecting the identity and the normative claims of the legal orders involved. In the same way as the “*national constitutional law must conform itself to European Union law*”, EU law must also respect the “*claims of national constitutional law*”.²⁶

Stressing the value of Habermas’ discursive theory to the European integration process, Alessandra Silveira also recalls Oscar Wilde’s *Portrait of Dorian Gray* to explain that inter-subjectivity – “*the progressive decentralization of the ego and of our own understanding of the world, from the discursive confrontation with the positions of others*” – is the way to grasp

²² Paulo Rangel, “Uma teoria da “Interconstitucionalidade” (Pluralismo e Constituição no Pensamento de Francisco Lucas Pires)”, in *Themis* 2 (2000), 150; and *O Estado do Estado. Ensaios de política constitucional sobre justiça e democracia* (Dom Quixote: 2009), 178 (free translation).

²³ Alessandra Silveira, “Da interconstitucionalidade na União Europeia (ou do esbatimento de fronteiras entre ordens jurídicas)”, in *Scientia Iuridica* 326 (2011), 211-223.

²⁴ Francisco Lucas Pires, *Introdução ao Direito Constitucional Europeu (Seu Sentido, Problemas e Limites)*, 17-20 and 101-112, in particular 20 and 108 (free translation).

²⁵ José Joaquim Gomes Canotilho, “Brançosos” e *Interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional*, 269 (free translation).

²⁶ See Miguel Poiares Maduro, “Europe and the constitution: what if this is as good as it gets?”, in *European Constitutionalism Beyond the State*, ed. Joseph H. H. Weiler and Marlene Wind (Cambridge: Cambridge University Press, 2003); “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003); and *A Constituição Plural. Constitucionalismo e União Europeia* (Cascais: Principia, 2006), 9 and 38-47.

the new way of conceiving the collective identity fostered by the European integration process – the one of “*sharing the possible understanding in a context of reflexive interaction*” which allows the “*construction of European unity from the national diversity*” – and the logic of inter-constitutionality that underlies it – allowing the legal orders to deal jointly with the constitutional problems that affect all, without destroying or blocking each other.²⁷

One does not feel isolated, thus, in evoking Fernando Pessoa’s *Autopsychography* as an attempt to demonstrate, through the theme of good administration, the common link of all these constructions: the European integration process as a dynamic factor of constitutional development. Through this, perhaps, small but still significant sample, which is good administration, the present analysis seeks to give practicality to the theory of inter-constitutionality, which finds in Portuguese, its language of baptism, mainly conceiving it as a constructive dialogue of constitutional legal orders.

III. A heteropsychography of good administration as an exercise of intersemioticity – in search of an expressive constitutional silence

We propose to bring good administration to the debate insofar as it is; *i*) at the crossroads between Constitutional Law and Administrative Law and in their mutual “*passage*” caused by the European integration process, in addition to being, *ii*) through its various normative expressions, especially inviting to a practical exercise of legal interpretation in a context of inter-constitutionality.

The essential premise on which the hermeneutic exercise we intend to undertake lies is on a broad understanding of the concept of good administration of which the normative provisions under analysis are only partial normative expressions. By referring to a notion of imprecise meaning, flexible content and controversial legal value, the discourse of good administration prefers the technique of description to that of definition. The very expression “*good administration*” makes use of common language, trying to translate a certain moral judgment on human behaviour, whose apprehension requires not only legal knowledge but mostly, common sense about things of everyday life, and refers to a certain idea of normality only apprehensible casuistically and incompatible with an *a priori* and closed definition.²⁸ The use of the adjective ‘good’ refers, first, to moral, ethical, philosophical – in short, non legal – considerations which, without hindering the legal treatment of good administration, entails the recognition that its legal treatment is partial. Good administration ought to be understood as a matrix/federative concept, as it encompasses a set of legal and non-legal standards that conforms administrative behaviour, and as an open/dynamic concept, varying in each moment, place and circumstantialism.²⁹

However, legal treatment of good administration has been particularly pronounced in recent times. While its legal nature (principle, duty, right) remains controversial, good

²⁷ Alessandra Silveira, “Intersubjectividade, Interdemocraticidade e Interconstitucionalidade. Filosofia política e juridicidade europeia”, in *Pensar radicalmente a humanidade: ensaios em homenagem ao Prof. Doutor Acílio da Silva Estanqueiro Rocha*, org. João Cardoso Rosas and Vítor Moura (Vila Nova de Famalicão: Húmus, 2011), 9-27 (free translation).

²⁸ In this sense, Émilie Chevalier approaches the standard of good administration to the classic standard of *bonus pater familias*: “*une autorité censée respecter le principe de ‘bonne administration’ est une autorité censée agir en ‘bon père de famille’.*” – Emilie Chevalier, *Bonne administration et Union européenne* (Bruxelles: Bruylant, 2014), 343

²⁹ Emilie Chevalier, *Bonne administration et Union européenne*, 206.

administration, as a legal value, subordinates administrative action to a set of principles and rules, both material and procedural in nature, guided by a sense of adequacy of means in the pursuit of the public interest. Good administration does not regard so much to the objective pursued (good objective), nor to the results achieved by the Administration (good result), but rather the means used by the Administration in the pursuit of the purposes that the law entrusts to it (good use of means). Good administration, therefore, concerns the proper use by the Administration of the means at its disposal for the pursuit of the public interest. It is a matter of opening up the Administration to action schemes based on a sense of adequacy (discovered, not created) that attends to the particularities of each case, which implies the due consideration of the different elements/interests in presence, in search of a balance between the public interest in the administrative action to be undertaken and the interests of the individuals potentially affected by it, and their proper/adequate valuation in the light of their relevance to the achievement of the objective pursued.³⁰

For this reason, good administration, as a legal value, finds its axiological foundation in the ideology of the rule of law. In fact, good administration participates in the dialectical tension inscribed at the heart of the administration of modern democratic systems: the constant need to conciliate the requirements of administrative action for the pursuit of the public interest and the protection of individuals in their relations with public power, since, in a democratic system, people are the real *dominus* of public power and administration.³¹ Good administration is a particular expression of the double dimension of Constitutional and Administrative Law as the “*Law of the power and of the limitation of the power*”.³²

The inclusion of good administration in the intersection between Constitutional Law and Administrative Law is heightened when it is considered that by virtue of Article 41 CFREU, good administration came to have special visibility in the EU legal order as a form of protection of public subjective rights raised to the category of fundamental rights. According to its Explanations, the provision; “*is based on the existence of the Union as subject to the rule of law*” and represents the culmination of the silent construction³³ in the CJEU’s case-law of good administration as a “*general principle of law*”.³⁴ Under the

³⁰ Conceiving good administration as “*l’adaptation équilibrée des moyens de l’administration publique*”, see Rhita Bousta, *Essai sur la notion de bonne administration en droit public* (Paris: L’Harmattan, 2010), 167-219.

³¹ On the relation between good administration and democracy, and on the recognition of a “*right to good administration*” as a fundamental right in Article 41 CFREU, see Jaime Rodríguez-Arana, “El derecho fundamental a la buena administración de instituciones públicas y el Derecho Administrativo”, in *El derecho a una buena administración y la ética pública*, coord. Carmen María Ávila Rodríguez and Francisco Gutiérrez Rodríguez (Valencia: Tirant lo Blanch, 2011), 77-105.

³² Lorenzo Mellado Ruiz, “Principio de buena administración y aplicación indirecta del Derecho Comunitario: instrumentos de garantía frente a la ‘comunitarización’ de los procedimientos”, in *Revista española de derecho europeo* 27 (2008), 287 (free translation).

³³ See Rhita Bousta, *Essai sur la notion de bonne administration en droit public*, 24-31; and Opinion of Advocate General Yves Bot in *Salzgitter*, 11 September 2007, C-408/04 P, EU:C:2007:491, recital 264.

³⁴ Strictly speaking, in that case-law, good administration appears to be linked to other principles, such as legality, equal treatment, legal certainty and loyal cooperation. The mentioned Explanations refer to the Judgements *Burban*, 31 March 1992, C-255/90 P, EU:C:1992:153, *Nölle*, 18 September 1995, T-167/94, EU:T:1995:169, and *New Europe Consulting*, 9 July 1999, T-231/97, EU:T:1999:146. However, in none of these judgements is the “*principle of good administration*” qualified as a “*general principle of law*” – see Jill Wakefield, *The Right to Good Administration* (Kluwer Law International, 2007), 143-146. It was only after the proclamation of the CFREU that the case-law would, in particular in the Judgement *max.mobil*, 30 January 2002, T-54/99, EU:T:2002:20, refer expressly to good administration as being “*one of the general principles that are observed in a State governed by the rule of*

heading “*Right to good administration*”, Article 41 CFREU says the following;

- “1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices, and agencies of the Union.*
2. *This right includes:*
 - (a) *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - (b) *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - (c) *the obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
4. *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language”.*

Now, on the Portuguese side, the CRP does not, strictly speaking, expressly mention good administration as a fundamental principle of Public Administration; in positive law, good administration became part of the “*set of standard rules of Portuguese administrative law*”³⁵ through Article 5 of the Administrative Procedure Code (CPA)³⁶, to which we will return later. In particular, Articles 266 and 267 CRP, which gather the fundamental principles regarding administrative action and administrative organization, do not refer expressly to good administration, nor does Article 268 CRP on ‘*Citizens’ rights and guarantees*’ which provides as follows:

- “1. *Citizens have the right to be informed by the Administration, whenever they so request, as to the progress of the procedures and cases in which they are directly interested, together with the right to be made aware of the definitive decisions that are taken in relation to them.*
2. *Without prejudice to the law governing matters concerning internal and external security, criminal investigation and personal privacy, citizens also have the right of access to administrative files and records.*
3. *Administrative acts are subject to notification of the interested parties in the form laid down by law, and when they affect rights or interests that are protected by law, must be based on express and accessible grounds.*
4. *Citizens are guaranteed effective jurisdictional oversight of those of their rights and interests that are protected by law, particularly including the recognition of the said rights and interests, the impugnation of any administrative act that harms their rights and interests, regardless of its form, the issue of positive decisions requiring the practice of administrative acts that are required by law, and the adoption of adequate provisional remedies.*
5. *Citizens also have the right to challenge administrative norms which have external force and harm those of their rights or interests that are protected by law.*
6. *For the purposes of paragraphs (1) and (2) the law shall lay down a maximum time limit*

law and are common to the constitutional traditions of the Member States” (recital 48), mirroring in a way the statement in the Explanations of Article 41 CFREU.

³⁵ Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, in *Comentários ao novo Código de Procedimento Administrativo*, coord. Carla Amado Gomes, Ana Fernanda Neves and Tiago Serrão, 2nd edition (Lisboa: Associação Académica da Faculdade de Direito de Lisboa, 2015), 169 (free translation).

³⁶ Approved by the Decree-Law No. 4/2015, of January 7th.

*for responses by the Administration*³⁷

It is in this context that we propose to re-appropriate one of the best known literary pieces in Portuguese, dedicated to the process of poetic/artistic creation – *Autopsychography* by Fernando Pessoa. Taking advantage of the words of the Poet, faced with its different normative expressions, citizens will feel neither of the ‘good administrations’ that the EU and the Portuguese constitutional legal orders intended, but probably just the good administration they are missing.. – a result which goes in the opposite direction of the one intended through promoting good administration in any modern democratic system committed to the respect for the rule of law.

Following closely the lesson of Gomes Canotilho; “*inter-constitutionality suggests inter-semioticity*”, that is, the investigation and the discovery of rules concerning the creation and the interpretation of constitutional texts (in a network), and their respective discourses and practices, towards a “*European legal hermeneutics*”. According to the author, European inter-semioticity will point to a “*hermeneutical tact of a comprehensive justice in the context of pluralistic communities where various conceptions of good are disputed*” and, therefore, implies articulation in the search for those rules. To this end, European legal hermeneutics cannot be anchored in “*formalisms, positivisms, decisionsisms and statisms*” but rather, “*move forward with interpretations that are open to values*”, offering; “*spaces for the pluralism of interpreters, open and rationally critical*”.³⁸

Any exercise (or pretension of exercise) of inter-semioticity must, first of all, obey the logic that underlies it: that of inter-constitutionality. It is therefore, necessary to promote an interactive and constructive dialogue of legal orders tending to the emergence of common standards (“*shared understanding*”), while also preserving the constitutional autonomy of each legal order that integrates the whole. As for the subject under consideration – good administration –, this implies taking advantage of the normative pluralism enshrining good administration, in order to seek within the diversity found a unity of meaning that does not distort the genetic code of any of its distinct partial expressions. To that end, we propose to withdraw from the Portuguese constitutional text, read in the light of another constitutional text with which it relates ‘in network’ – the CFREU with the same legal value as the Treaties, which together form the “*basic constitutional charter*” on which the EU is based – an interpretation which is open to the concept of good administration which derives from the EU legal order. It is a matter of understanding our constitutional text as from its articulation with the constitutional text of the Union, that is, from the consideration of the CFREU (of otherness), rearticulate the CRP (the identity) in a discursive process that allows the constitutional ego to discover another version of itself and that, thus, assumes “*normative interaction [as] enriching constitutional identity itself*”.³⁹

Again, by the words of the Poet; “[*there*] are two ways of saying – speaking and being silent. Arts that are not literature are projections of an expressive silence. It is necessary to look in all art that is not literature the silent sentence that it contains...”.⁴⁰ If we are allowed to have Law

³⁷ Translation by *Assembleia da República* (the Portuguese Parliament) [available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>].

³⁸ José Joaquim Gomes Canotilho, “*Branços*” e *Interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional*, 277-279 (free translation).

³⁹ Alessandra Silveira, “*Da interconstitucionalidade na União Europeia (ou do esbatimento de fronteiras entre ordens jurídicas)*”, 214-215 (free translation).

⁴⁰ Fernando Pessoa (Álvaro de Campos), “*Outra Nota ao Acaso*”, First published in *Presença* 48 (Coimbra: 1936) (free translation).

as an artistic expression that is not literature, the endeavour we propose to achieve will, perhaps, reveal the “*expressive silence*” or discover the “*silent sentence*” of our (Portuguese) constitutional text. The exercise of inter-semioticity that we set out to accomplish is aimed at avoiding that. – and again with Fernando Pessoa –, due to its various (partial) normative expressions, good administration ends up being reduced in reality, “*around its track*”, to a “*little clockwork train*”, a playful object linked to sensibility and passion, to the “*heart*”, which does nothing more than “*wind to entertain the minds*” of its recipient – the citizens. This reading would transform those provisions into an expression of a process of pretence of a normative (not poetic) nature, and even of constitutional and fundamental status.

IV. For a good administration that “*guides, nourishing reason*”

The inclusion of the “*right to good administration*” in Article 41 CFRUE is not a coincidence, but rather joins a series of national⁴¹, European⁴² and international⁴³ initiatives which, with different degrees of recognition and development, seek to outline the main elements of good administration. Within the EU, the first references began in the CJEU’s case-law and are associated with the efforts of the European judge to fill the gaps in written law with regard to procedural guarantees.⁴⁴ It is not surprising, therefore, that the use of the language of subjective rights in Article 41 CFREU that, under the heading “*Right to good administration*”, recognises seven fundamental rights for

⁴¹ On good administration in several Member States of the EU, see Juli Ponce Solé, *Deber de buena administración y derecho al procedimiento debido. Las bases constitucionales del ejercicio de la discrecionalidad y del procedimiento administrativo*, 1st edition (Valladolid, Lex Nova, 2001), 134-143; and Emilie Chevalier, *Bonne administration et Union européenne*, 145-154. With interest, a study published in 2005 by the Swedish Agency for Public Management concludes that a set of principles of good administration are widely accepted in the different Member States of the EU, with varying content and interpretation, most of which are of a constitutional nature and/or are enshrined in codes of administrative procedure – see Statskontoret, *Principles of Good Administration in the Member States of the European Union*, 2005 [available at <http://www.statskontoret.se/globalassets/publikationer/2000-2005-english/200504.pdf>].

⁴² The work carried out within the Council of Europe since Resolution (77)31 of the Committee of Ministers on the protection of the individual in relation to the acts of administrative authorities, 28 September 1977, culminated in 2007 with the adoption of a Code of good administration appended to the Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on good administration, 20 June 2007.

Within the EU, emphasis should be placed on the contribution of the European Ombudsman who, in assessing “*cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union*” (Articles 20/2/d, 24/3 and 228 TFEU, and 43 CFREU), contributed to the case-by-case identification and further codification of principles of good administration in the “*European Code of Good Administrative Behaviour*”, approved in 2001 and republished in 2013. The European Ombudsman also published in 2012 a summary of the “*Public service principles for the EU civil service*” [both documents available at www.ombudsman.europa.eu].

⁴³ The promotion of good administration at the international level is more implicit, resulting from efforts to develop the concept of *good governance* – see Emilie Chevalier, *Bonne administration et Union européenne*, 112-126.

⁴⁴ See Judgement *Technische Universität München*, 21 November 1991, C-269/90, EU:C:1991:438, recital 14: “*However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.*”

“every person” in their dealings with the institutions, bodies, offices and agencies of the Union:

- i) the right to have his or her affairs handled impartially and fairly;
- ii) the right to have his or her affairs handled within a reasonable time;
- iii) the right to be heard;
- iv) the right to have access to his or her file;
- v) the obligation to state reasons;
- vi) the right to compensation;
- vii) the right to interact in the chosen official language of the Union.⁴⁵

Article 41 CFREU does not provide for protection to every person in his or her relations with public power of the Union in isolation. For example, together with the rights enshrined in Articles 42 and 43 CFREU – the right of access to documents of the institutions, bodies, offices and agencies of the Union and the right to refer to the European Ombudsman⁴⁶ –, Article 41 CFREU contributes to the establishment of an *administrative citizenship of the Union*, based on the consideration of the person as a subject who actively participates in the exercise of public power, as opposed to its portrayal as a mere passive object of the same.⁴⁷ Furthermore, although Article 41 CFREU does not expressly refer to it, the right to an effective remedy is not overlooked

⁴⁵ On Article 41 CFREU, see, among others, Klara Kańska, “Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights”, in *European Law Journal* 3, vol. 10 (2004), 296-326; Isaac Martín Delgado, “La Carta ante las Administraciones Nacionales: Hacia la europeización de los derechos fundamentales”, in Eva Nieto Garrido and Isaac Martín Delgado, *Derecho Administrativo Europeo en el Tratado de Lisboa* (Madrid/Barcelona/Buenos Aires: Marcial Pons, 2010), 89-148; Rhita Boust, “Who Said There is a ‘Right to Good Administration’? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union”, in *European Public Law* 3, vol. 19 (2013), 481-488; Paul Craig, “Article 41”, in *The EU Charter of Fundamental Rights. A Commentary*, ed. Steve Peers et al., (Oxford: Hart Publishing, 2014), 1069-1098; Loïc Azoulay and Laure Clement-Wilz, “Le principe de bonne administration”, in *Traité de droit administratif européen*, dir. Jean-Bernard Auby and Jacqueline Duteil de la Rochère, 2nd edition (Bruxelles: Bruylant, 2015), 671-697; and, in Portuguese legal literature, Cláudia Viana, “Artigo 41.º - Direito a uma boa administração”, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, coord. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 483-489; and Alessandra Silveira and Sophie Perez Fernandes, “Do direito fundamental a uma boa administração no sistema jurídico europeu: análise crítica da vinculação mitigada dos Estados-Membros (ou da perplexidade sobre os caminhos que se bifurcam)”, in *Revista de la Facultad de Ciencias Jurídicas y Sociales, Universidad Nacional del Litoral* (Santa Fé/Argentina: forthcoming).

⁴⁶ See Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.05.2001, pp. 43-48; and Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman’s duties, OJ L 113, 04. 05.1994, pp. 15-18, last amended by Decision 2008/587/EC, Euratom of the European Parliament of 18 June 2008, OJ L 189, 17.07.2008, pp. 25-27.

⁴⁷ See Jacques Ziller, “Droit à une bonne administration”, in *Jurisclasser Libertés* 1040 (2007), para 72 (free translation); Guy Braibant, *La Charte des droits fondamentaux de l’Union européenne* (Éditions du Seuil, 2001), 212, and ours “Os atributos de uma cidadania administrativa na Carta dos Direitos Fundamentais da União Europeia”, in *UNIO e-book. Vol. I – Workshops CEDU 2016*, (2017): 107, <http://www.unio.cedu.direito.uminho.pt/Uploads/E-book%20-%20Vol.%201%20-%202016.pdf>.

The lodging of complaints to the European Commission will not be considered here, since it is still not provided for in the Treaties, only being covered by the institution’s rules of procedure – see Rules of Procedure of the Commission [C(2000) 3614], OJ L 308, 08.12.2000, pp. 26-34, in particular Article 6 of the Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public appended to the rules of procedure.

as it is an ‘important aspect’⁴⁸ of good administration. It is not a ‘gap’⁴⁹ in Article 41 CREU, but rather an “*implicit reference*”⁵⁰ to Article 47 CFREU resulting from the option of the drafters of the CFREU in (consistently) including the right to an effective judicial remedy in Title VI thereof relating to “*Justice*”. The combination of the two provisions makes it possible to infer the broader recognition of a “*right to administrative justice*” which includes both *ex ante* and *ex post* elements of administrative justice – the first relating to the most important aspects of administrative procedure and the second concerning the right to an effective judicial remedy and the existence of non-judicial mechanisms for the settlement of disputes with the Administration.⁵¹

The novelty brought by Article 41 CFREU lies, first, in the implicit option of enshrining principles and rules of Administrative Law established in the EU legal order and (more or less) associated with good administration, not in terms of objective legality of public interest, but in the language of subjective rights.⁵² In other words, in Article 41 CFREU, good administration is recognised, not as a principle to be observed and implemented, but as a set of rights to be exercised by individuals and respected by the authorities responsible for the exercise of public power.⁵³ In addition, the provision explicitly places good administration under the aegis of fundamental rights. Although the fundamental nature of a right might be controversial,⁵⁴ nor should it necessarily coincide in EU law with the laws of the Member States, it is difficult not to conceive Article 41 CFREU as an expression of a certain consensus to recognise, within the scope of a “*right to good administration*”, the fundamental nature of each of the rights set out therein. Their fundamental nature is not merely formal because they are enshrined in a catalog of fundamental rights with legally binding force, but also because the CFREU placed those rights “*at the highest level of values common to the Member States*”. Therefore, it would be; “*inexplicable not to take from it the elements which make it possible to distinguish fundamental rights from other rights*”.^{55/56}

⁴⁸ See Explanations relating to Article 41 CFREU.

⁴⁹ Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne*, 218 (free translation).

⁵⁰ Denys Simon, “Le principe de ‘bonne administration’ ou la ‘bonne gouvernance’ concrète”, in *Le droit de l'Union européenne en principes. Liber Amicorum en l'honneur de Jean Raux* (Rennes: Éditions Apogée, 2006), 174 (free translation).

⁵¹ Interpretation proposed by Klara Kańska, “Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights”, 297-298.

⁵² See Klara Kańska, “Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights”, 300; Jacqueline Dutheil de la Rochère, “The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration”, in *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, ed. Anthony Arnall, Piet Eeckhout and Takis Tridimas (Oxford: Oxford University Press, 2008), 168; and Sabino Cassese, “Il diritto alla buona amministrazione”, in *European Review of Public Law* 3, vol. 21 (2009), 1041.

⁵³ Taking advantage of the language employed in Articles 51(1) and 52(5) CFREU.

⁵⁴ See, among others, José Carlos Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 5th edition (Coimbra: Almedina, 2012), 111-133.

⁵⁵ Opinion of Advocate General Philippe Léger in *Hautala*, 10 July 2001, C-353/99 P, EU:C:2001:392, recitals 80 and 81.

⁵⁶ The rights enshrined in the catalog of Article 41 CFREU have become formally recognised as fundamental rights insofar as they are provided for in a provision which (i) is superior in nature within the EU legal order, (ii) has immediate binding legal force before the public authorities (Article 6/3 TEU), (iii) is subject to the revision procedures set out for the Treaties (Article 48 TEU), and (iv) materializes structuring values for the protection of the individual in his or her relations with the public authority (ultimately founded in Article 2 TEU); (v) moreover, as it is a matter of fundamental rights, any measure restricting the exercise of the rights enshrined in Article 41 CFREU will be subject to an increased regime for their justification (Article 52/1 CFREU).

Apart from Article 41 CFREU, the most visible (but not the only!)⁵⁷ dimension of good administration within the EU legal order is that of the protection of the fundamental rights of “*every person*” in his or her dealings with the public power. Thus, Article 41 CFREU not only emphasizes the role of the law, but above all the role of the exercise of rights by the respective holders – “*every person*” – in promoting quality in the exercise of public power. The provision conceives the exercise of the fundamental rights provided for therein as a factor of rationality of administrative decisions, of transparency of administrative action, of participation in the decision-making process and of control of administrative action. Within Article 41 CFREU, good administration appears as the depository of the particular configuration of relations between individuals and the public power emerging from the rule of law and its specific purpose of guarantor of freedom through the recognition and protection of fundamental rights.⁵⁸ To conform the exercise of public power (objective dimension), good administration drawn from Article 41 CFREU is based on the protection of rights (subjective dimension), pursuing the ultimate objective of creating/inspiring a climate of trust in the exercise of public power in the Union.⁵⁹

Proceeding to the same exercise ‘on the Portuguese side’, it is possible to find, in our own Charter of Fundamental Rights, a provision allowing a reading of good administration similar to that outlined in Article 41 CFREU, that is, a (legal) concept of good administration of subjective/protective dimension or projection, integrating (not only, but also) right(s) to be exercised by individuals and respected by the authorities responsible for the exercise of public power. Under the heading “*Citizens’ rights and guarantees*”, Article 268 CRP recognises the following subjective legal positions for individuals in their dealings with the Administration:

- i)* the right of access to procedural administrative information;
- ii)* the right of access to non-procedural administrative information;
- iii)* the right to notification of administrative decisions;
- iv)* the right to reasoned administrative decisions;
- v)* the right of access to administrative justice.

Perhaps as evident as the differences in content between the two provisions are the “*equivalent intentionality*”⁶⁰ inherent in them and the language used in both. Both Article

⁵⁷ In this sense, the European judge has already pointed out that “*the principle of sound administration, (...) does not, in itself, confer rights upon individuals except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union*” – see Judgements *Tillack*, 4 October 2006, T-193/04, EU:T:2006:292, recital 127, and *SPM*, 13 November 2008, T-128/05, EU:T:2008:494, recital 127; and the *Order SPM*, 22 March 2010, C-39/09 P, EU:C:2010:157, recitals 65, 69 and 70. Thus, even within the EU legal order, good administration goes beyond the “*expression of specific rights*”, those referred to in Article 41 CFREU: the fundamental subjective rights provided for in the provision embody a principle of good administration which is broader in scope.

⁵⁸ See Theodore Fortsakis, “Principles Governing Good Administration”, in *European Public Law 2*, vol. 11 (2005), 208.

⁵⁹ Considering the principle of good administration, together with the principles of transparency, equality of arms and precaution, among the “*trust-enhancing principles*” arising from the ECJ’s case-law in order to “*strengthen the accountability of the Union and the Member States to the citizens*”, Koen Lenaerts, “In the Union we trust: trust-enhancing principles of Community law”, in *Common Market Law Review* 41 (2004), 336-340.

⁶⁰ Mário Aroso de Almeida, “O Provedor de Justiça como garante da boa administração”, in *O Provedor de Justiça – Estudos – Volume Comemorativo do 30º Aniversário da Instituição*, Provedoria de Justiça

41 CFREU on the “*Right to good administration*” and Article 268 CRP on “*Citizens’ rights and guarantees*” support the construction of a status of “*administrative citizenship*” based on the consideration of the person as a subject who actively participates in the exercise of public power, as opposed to its portrayal as a mere passive object of the same.⁶¹ To that end, both provisions use the language of fundamental subjective rights, being the analogous nature to the rights, freedoms and guarantees [Article 17 (2) CRP] of the rights provided for in Article 268 CRP widely recognised.⁶² Also in common, both provisions provide for *ex ante* and *ex post* elements of administrative justice. The right to an effective judicial remedy is referred to in Article 41 CFREU in a remissive way. Referring to the right to compensation in paragraph 3, the provision refers implicitly for the rest to Article 47 CFREU. The approach is more detailed in Article 268 CRP which, in paragraphs 4 and 5, identifies specific judicial mechanisms that implement the right already provided for in Article 20 CRP, without ruling out other procedural means, such as civil liability actions of public authorities, moreover included in Article 22 CRP.

Just as some of these differences ought to be relativised – such as the omission (otherwise self-explanatory) of any linguistic right under Article 268 CRP –, this should not be an obstacle to the reflexive articulation of Article 268 CRP with Article 41 CDFUE with which it relates ‘in network’. Thus, and regardless of the constitutional openness to the European integration process [Article 7 (5) and (6), and Article 8 (4) CRP] and the establishment of an open clause on fundamental rights protection [Article 16 (1) CRP], it is possible to extract from the Portuguese constitutional text, through the cross-interpretation of Article 268 CRP with Article 41 CFREU, elements for the construction of a concept of good administration relevant in the Portuguese legal constitutional order that, without prejudice to other dimensions/projections, is also open to the subjective/protective dimension of good administration especially highlighted in the EU constitutional order.

This reading allows, from the outset, one to reinforce the fundamental nature of the rights enshrined in Article 268 CRP, which may have an impact on the debate regarding the legal consequences of the breach of the obligation to state reasons or even the violation of the right to be heard – which, although not provided for in Article 268 CRP, is nevertheless implicit in the objective set forth in Article 267 (5) CRP for the law of administrative procedure to ensure that; “*citizens participate in the taking of decisions or deliberations that concern them*”.⁶³ In addition, due to the umbilical connection between the promotion of good administration within the EU and the institutionalisation of the European Ombudsman, entrusted with the task of receiving complaints concerning;

- Divisão de Documentação (Lisboa, 2007), 19 (free translation).

⁶¹ See José Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada – Volume II*, 4th edition (Coimbra: Coimbra Editora, 2010), 820 (annotation to Article 268 CRP).

⁶² See, among others, José Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada – Volume II*, 820; and José Carlos Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 187. Corroborating this interpretation from the analysis of constitutional case-law on the rights and guarantees enshrined in Article 268 CRP, see Raquel Carvalho, “Os Direitos e Garantias dos Administrados na Jurisprudência do Tribunal Constitucional (Breve Análise Jurisprudencial)”, in *Juris et de jure. Nos vinte anos da Faculdade de Direito da Universidade Católica Portuguesa – Porto*, coord. Manual Afonso Vaz and J. A. Azeredo Lopes (Porto: Universidade Católica Portuguesa Porto, 1998), 785-822.

⁶³ On the subject, see Miguel Prata Roque, “Acto nulo ou anulável? – A jus-fundamentalidade do direito de audiência prévia e do direito à fundamentação. Acórdão do Tribunal Constitucional n.º 594/2008, (2.ª Secção) de 10.12.2008, P. 111/07”, in *Cadernos de Justiça Administrativa* 78 (2009), 17-32.

“instances of maladministration in the activities of the Union institutions, bodies, offices or agencies”,⁶⁴ the articulation of Article 268 CRP with Articles 41 and 42 CFREU is likely to strengthen the role of the Portuguese Ombudsman (Article 23 CRP) as a guarantor of good administration.⁶⁵

It should also be noted that the reflexive reading of Article 268 CRP with Article 41 CFREU does not call into question the content of Article 5 CPA of 1991.⁶⁶ Announced in the Preamble as the first of the “significant innovations” introduced in the framework of the general principles of administrative action, Article 5 CPA is not, however, due to its content, particularly innovative, without prejudice to the “inversion of terms” which it proceeds in comparison with its predecessor,⁶⁷ Article 5 CPA is in a line of continuity in relation to Article 10 CPA, in addition to referring to the constitutional principles of efficiency, of bringing services closer to local people and of avoiding bureaucratisation, as the Preamble itself states.⁶⁸ The legislator of 2015 chose, in the wake of the Portuguese legal tradition, to associate good administration with administrative efficiency⁶⁹ (based on the principle of pursuing the public interest),⁷⁰ inscribing in Article 5 CPA good administration as a “general principle, without committing itself to the thesis of the fundamental right”⁷¹ which derives from EU law and is especially based on Article 41 CFREU.

The discursive dissonance between the two provisions has been widely raised

⁶⁴ With the exception of the Court of Justice of the European Union acting in its judicial role – see Articles 20/2/d, 24/3 and 228 TFEU, and Article 43 CFREU.

⁶⁵ See Mário Aroso de Almeida, “O Provedor de Justiça como garante da boa administração”, 32-39.

⁶⁶ Article 5 CPA thus provides for the “Principle of good administration”: “1. Public Administration should be guided by criteria of efficiency, economy and speed. 2. For the purposes of the preceding paragraph, Public Administration must be organized in such a way as to bring the services closer to the populations and in a non-bureaucratic way.” (free translation).

⁶⁷ Inversion registered by João Pacheco de Amorim, “Os princípios gerais da atividade administrativa no projeto de revisão do Código do Procedimento Administrativo”, in *Cadernos de Justiça Administrativa* 100 (2013), 18; and Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, 182.

⁶⁸ See recital 5, 1st and 2nd paragraphs, of the Statement of Reasons of Decree-Law No. 4/2015.

⁶⁹ See Pedro Costa Gonçalves, “Âmbito de aplicação do Código do Procedimento Administrativo (na versão do anteprojecto de revisão”, in *Cadernos de Justiça Administrativa* 100 (2013), 9; Vasco Pereira da Silva, “O Inverno do nosso descontentamento’ – As impugnações administrativas no projeto de revisão do CPA”, in *Cadernos de Justiça Administrativa* 100 (2013), 122, and “Primeiro comentário acerca do projeto de revisão do CPA (a recordar um texto de Steinbeck)”, 85-86; Fausto de Quadros, “As principais inovações do projeto do Código do Procedimento Administrativo”, in *Cadernos de Justiça Administrativa* 100 (2013), 130-131; Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, 192-197.

⁷⁰ To Marcelo Rebelo de Sousa and André Salgado de Matos, *Direito Administrativo Geral. Tomo I: Introdução e princípios fundamentais*, 2nd edition (Lisbon: Dom Quixote, 2006), 206, the duty of good administration is the “duty to pursue legally defined public interests in the best possible way” (free translation). Diogo Freitas do Amaral maintains the definition of the duty of good administration as “the duty of the Administration to pursue the common good in the most efficient way possible” after the entry into force of the CPA of 2015 – see Diogo Freitas do Amaral, *Curso de Direito Administrativo – Vol. II*, 2nd edition (Coimbra: Almedina, 2011), 46, and *Curso de Direito Administrativo – Vol. II*, 3rd edition, 35 (free translation). The lesson of Diogo Freitas do Amaral is closely followed as regards Article 5 CPA, when it was still under discussion, by João Pacheco de Amorim, “Os princípios gerais da atividade administrativa no projeto de revisão do Código do Procedimento Administrativo”, 18-19. On the principle of the pursuit of public interest and the duty of good administration, see also Rogério Ehrhardt Soares, *Interesse público, legalidade e mérito* (Coimbra, 1955), 179-205.

⁷¹ Fausto de Quadros, in *Comentários à revisão do Código do Procedimento Administrativo* (Coimbra: Almedina, 2016), 25 (free translation).

among the Portuguese legal doctrine.⁷² We do not, however, consider this dissonance as problematic. Other than the distinct normative dignity of each of these provisions within their respective legal order – one of them, Article 41 CFREU, with constitutional value, the other, Article 5 CPA, inserted in ordinary legislation –, the intentionality that underlies them is not identical. As it is included in an instrument designed for the protection of fundamental rights, Article 41 CFREU is tendentious in discursive terms, addressing “*every person*” directly and aiming to secure the protection of their rights, and then to the Administration and the exercise of its function. The same discursive tendency is found in Article 5 CPA, but in reverse: it is a provision inserted in the “*special law*” which, implementing the constitutional command inscribed in Article 267 (5) CRP, regulates the “*processing of administrative activities*”, which explains the reason why it is addressed directly to the Administration and the exercise of its function (as defined in Article 2 CPA), and then to individuals and the protection of their rights. These are, respectively, the rationales underlying the more subjective/protective dimension of good administration highlighted in Article 41 CFREU and the more objective dimension of good administration inscribed in Article 5 CPA. In other words, if Article 5 CPA is a “*false friend*”⁷³ in relation to Article 41 CFREU. It did not, in reality, intend to be its ‘true friend’ as Article 41 CFREU mainly with Article 268 CRP.

Finally, the reflexive articulation of these two provisions – Article 41 CFREU and Article 268 CRP – makes it possible to take advantage of the former beyond the limits of its wording. Indeed, it cannot be ignored that the scope of application of Article 41 CFREU is limited to the activities of the “*institutions, bodies, offices and agencies of the Union*”, with the exclusion, therefore, of the administrative authorities of the Member States, even when they act within the scope of application of EU law within the meaning of Article 51 (1) CFREU⁷⁴ – nor the reluctance, particularly as evidenced by the CJEU’s case-law,⁷⁵ to go beyond a literal interpretation of the

⁷² See Vasco Pereira da Silva, “Primeiro comentário acerca do projeto de revisão do CPA (a recordar um texto de Steinbeck)”, in *Cadernos de Justiça Administrativa* 101 (2013), 85; Pedro Cruz e Silva, “Uma análise (também crítica) do “novo” princípio da boa administração no projecto de revisão do Código do Procedimento Administrativo”, in *Anuário Publicista da Escola de Direito da Universidade do Minho – Tomo II, Ano de 2013 – Ética e Direito*, coord. Joaquim Freitas da Rocha (Braga: Departamento de Ciências Jurídicas Públicas da Escola de Direito da Universidade do Minho, 2014), 130-133 [available at www.direito.uminho.pt]; Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, 184-192; Mário Aroso De Almeida, *Teoria Geral do Direito Administrativo. O Novo Regime do Código do Procedimento Administrativo*, 2nd edition, (Coimbra: Almedina, 2015), 66; Diogo Freitas do Amaral, *Curso de Direito Administrativo – Vol. II*, 3rd edition, p. 36.

⁷³ Miguel Assis Raimundo, “Os princípios no novo CPA e o princípio da boa administração, em particular”, cit., p. 185.

⁷⁴ On the Judgement of the Court in *Fransson*, 26 February 2013, C-617/10, EU:C:2013:105, recitals 17-23 and 29, see, among others, Angela Ward, “Article 51”, and Koen Lenaerts and José Antonio Gutiérrez-Fons, “The Place of the Charter in the EU Constitutional Edifice”, in *The EU Charter of Fundamental Rights. A Commentary*, ed. Steve Peers et al. (Oxford: Hart Publishing, 2014), 1413-1454 and pp. 1566-1568, respectively; Daniel Sarmiento, “Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe”, in *Common Market Law Review* 50 (2013), 1267-1304; and, in Portuguese legal literature, Alessandra Silveira, “Cidadania Europeia e Direitos Fundamentais”, in *Direito da União Europeia – Elementos de Direito e Políticas da União*, coord. Alessandra Silveira, Mariana Canotilho and Pedro Madeira Froufe (Coimbra: Almedina, 2016), 51-67.

⁷⁵ Only on one occasion did the ECJ consider Article 41 CFREU applicable in the context of a national administrative procedure – see Judgement *H. N.*, 8 May 2014, C-604/12, EU:C:2014:302, recitals 49-50. The ECJ has, however, followed the opposite direction in the case-law that followed,

provision in that regard.⁷⁶ As a result, the effectiveness of the provision is, in practice, severely impaired, since the whole field of action of the main apparatus responsible for the application of EU law – the Member States – falls outside its scope of application. However, the interpretive solution proposed here would allow the spontaneous assimilation/integration of Article 41 CFREU within the Portuguese legal order.⁷⁷ After all, it would not be consistent for “*Portuguese citizens, as European citizens, to have a right to good administration before the Administration of the Union, but to not be able to make a similar requirement in relation to their national Administration.*”⁷⁸ In a context of inter-constitutionality in which all the legal orders involved the Union and the Member States are simultaneously emitting and recipient factors of Europeanising impulses. The latter need not necessarily come from a *top-down* imperative, but they can and should also result from a *bottom-up* willingness.

stating that “[i]t is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union” so that individuals cannot derive from it rights which are enforceable against Member States, even where they act within the scope of application of EU law – see Judgements *YS*, 17 July 2014, C-141/12 and C-372/12, EU:C:2014:2081, recital 67; *Mukarubega*, 5 November 2014, C-166/13, EU:C:2014:2336, recital 44; *Khaled Boujlida*, 11 December 2014, C-249/13, EU:C:2014:2431, recitals 32-33; and *WML*, 17 December 2015, C-419/14, EU:C:2015:832, recital 83.

⁷⁶ On the contrary, some legal literature has advocated the extension of the scope of application of Article 41 CFREU to the administrative authorities of the Member States when they act within the scope of application of EU law – see, among others, Isaac Martín Delgado, “La Carta ante las Administraciones Nacionales: Hacia la europeización de los derechos fundamentales”, 118-132; Diana-Urania Galetta, “Le champ d’application de l’article 41 de la Charte des droits fondamentaux de l’Union européenne sur le droit à une bonne administration, à propos des arrêts *Cicala* et *M.*”, in *Revue trimestrielle de droit européen* 1 (2013), 77-85; and Alessandra Silveira and Sophie Perez Fernandes, “Do direito fundamental a uma boa administração no sistema jurídico europeu: análise crítica da vinculação mitigada dos Estados-Membros (ou da perplexidade sobre os caminhos que se bifurcam)” (forthcoming). This is also the proposal put forward by some Advocates General – see, among others, Opinions of Advocate General Melchior Wathelet in *Mukarubega*, 25 June 2014, C-166/13, EU:C:2014:2031, recital 56, *Khaled Boujlida*, 25 June 2014, C-249/13, EU:C:2014:2032, recital 47, and *WML*, 16 September 2015, C-419/14, EU:C:2015:606, recitals 136-138; and Opinions of Advocate General Paolo Mengozzi in *CO Sociedad de Gestión y Participación SA*, 12 February 2015, C-18/14, EU:C:2015:95, note 48, and *Bensada Benallal*, 13 January 2016, C-161/15, EU:C:2016:3, recitals 38-34.

⁷⁷ Some Member States have voluntarily accepted the application of Article 41 CFREU for the resolution of situations that, due to its restricted scope of application, would be exclusively subject to their respective legal orders. Some cases have already found echo in the ECJ’s case-law, of which are examples the Judgements in *Cicala*, 21 December 2011, C-482/10, EU:C:2011:868, recitals 12 and 26-30, and *Romeo*, 7 November 2013, C-313/12, EU:C:2013:718, recitals 18 and 24-37, both concerning the Italian legal order. The Spanish courts have nevertheless been the first to take into account the CFREU since its proclamation, even in situations not covered by the scope of application of EU law; Article 41 CFREU is among the provisions thus considered, either in relation to the “*right to good administration*” in general or in some of the specific rights provided for therein – see Isaac Martín Delgado, “La Carta ante las Administraciones Nacionales: Hacia la europeización de los derechos fundamentales”, 113-114 and 127-129. The supreme administrative court of Lithuania, in decisions dating from 2010 and 2012, also ruled on the principle (of domestic law) of good administration having Article 41 CFREU as a source of authority, but referring to the provision in a subsidiary way – see Court of Justice of the European Union, *Reflets n.º 1/2013, Édition spéciale Charte des droits fondamentaux de l’Union européenne*, Research and Documentation Directorate, 34-35 [available at www.curia.europa.eu].

⁷⁸ Fausto de Quadros, in *Comentários à revisão do Código do Procedimento Administrativo* 24 (free translation).

V. Concluding remarks

Good administration is still a matter that is fragmentarily provided for within the European pluralistic legal order, since it is within the areas of confluence of administrative action and decision-making of the Union and of the Member States. However, this does not imply that good administration is, nor that it should be understood to be, contradictorily regulated. Rather, the various normative expressions of good administration, intrinsically plural within the political-legal space of the Union, are articulated, or ought to be articulated in order to complement each other. Only thus, and in what concerns in particular the discursive discrepancy between Article 41 CFREU and Article 5 CPA, the main interested party – the *Pessoa* (person) – will be allowed to “feel” in the “two good administrations” that he/she expressly reads, not the good administration that he or she does not have, but the one that is due to him or her. Ultimately, the identified “discursive discrepancy” is not, in itself, dissonant or problematic but rather, inviting to an exercise of inter-normativity, based on an interactive and constructive dialogue of legal orders tending to the emergence of common standards of good administration without, however, distorting the constitutional autonomy of each legal order that integrates the whole. In other words, systemic differences can not hinder the articulation of a discursive unit in matters of good administration. In a context of inter-constitutionality, systemic differences in matters of good administration should, above all, be inviting to an effort of *discursive conciliation* of public law (Constitutional and Administrative Law) so that good administration ceases to be “a little clockwork train that winds around his track to entertain our minds and becomes a useful tool to guide the Administration and assist the citizen”.

It is not overlooked that the interpretation proposed here entails the risk of making good administration omnipresent. It is a reading that does not intend to make good administration an isolated principle but rather, associates good administration with the principles of (Constitutional) Administrative Law as a whole. In addition to the fact that good administration is a notion that the law can only imperfectly grasp, since compliance with non-legal standards also contributes to good administration, this globalising vocation is intrinsic to good administration. It is ultimately intended to deconstruct the image of a bureaucratic, distant, inaccessible and rigid Administration and to foster practices that support a reliable, open, transparent and accountable Administration, capable of creating/inspiring a climate of trust and credibility in the performance of administrative functions. Thus, “the trust of the people” is, remembering Eduardo García de Enterría words; “the very essence of the democratic system”.⁷⁹ In a democratic system, good administration will therefore, be the one that builds this relationship of trust, but also keeps it constantly alive. In any organizational structure that is governed by the rule of law, the endeavour begins with the Law in matters of good administration. Law should also address the citizen and provide him with the tools enabling him to feel like the true holder of public power.

⁷⁹ Eduardo García de Enterría, *Democracia, Jueces y Control de la Administración*, 4th edition, (Madrid: Editorial Civitas, 1998), 105-106 (free translation).