Actors and Roles in EU Law

The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration

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Functional comparison of administrative laws – Development of EU administrative law based on a state-matrix of general principles – Jürgen Schwarze's approach – Choices of object, objectives, method, assumptions and normative implications – Structural features of the EU administration versus the binary liberty-authority of core principles of national administrative law – Liberal normativist approach – Contemporary critical examination of the legacy of comparative administrative law

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Introduction

EU administrative law owes much of its foundations to the functional comparison of the member states' administrative laws. Courts and scholars were the main actors that initially delineated an emerging field of law, grounded and developed it. They progressively singled out, from the undifferentiated 'Community law', the body of principles, rules and practices that structure the functioning of EU, national and mixed structures and processes of decision-making and information-gathering that aim at implementing EU laws and policies. The very identification of an EU administration and of the law that governs it meant the identification, first, of *distinct public powers* within a functional polity whose institutions did not express a visible separation between the legislative and the administrative, or between an executive and an administration; and, second, of a *distinct law* where, nevertheless, elements of an administrative law were almost indistinguishable under the new legal order of Community and European law. Following closely the footsteps of the Court of Justice, legal scholars differentiated discretion and rules, drew on the case law to establish how the exercise of public authority was bound to respect pre-existing rights and legal norms, and, thus, elaborated the principles and rules that, like national administrative laws, protected the legal sphere of those affected by unilateral exercises of public authority and, hence, preserved their ability to freely pursue their own goals, kept public authority in check, prevented arbitrariness and, at the same time, enabled public bodies to pursue their legally delimited public policy goals.

Delimiting the administrative law of the Community meant identifying the elements of separation of powers and of subjection of government to law that had matured in the state setting since at least the 18th century. EU administrative law also became, like its national counterparts, the law that curbs the authority of the administration and defines the limits of its autonomy: the law that settles in a dynamic way the terms of the legal relationships that administrative action generates and the tension between authority and liberty, as mediated by legal norms and controls. Because of the work of the court and of legal scholars, the EU administration could be thought of in the terms of liberal constitutionalism (limited government under the rule of law) and of normativism (legal norms as a core vehicle of limited government).[1]

It is hard to conceive of a public law order created by states that shared the premises of liberal constitutionalism without core elements of that common heritage being brought to bear in the relationship between government and law. And yet this development is also paradoxical. On the one hand, the liberal

[1]On liberal normativism *see further* M. Loughlin, *Public Law and Political Theory* (Oxford University Press 1992) ch. 5 (tracing the origins of normativism in the UK legal thought) in particular p. 101-104 and p. 206-210.

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constitutional premises and assumptions on the relative role of law and administration presumed the separation between the state and the society. They were premised on the identification of an administrative function characterised by its authority (*puissance publique*), or by the pursuance of the public interest, and on the delimitation of public and private spheres. On the other, the institutional and legal reality to which these premises were transposed was very distinct. First, the Community (and later Union) was a functional polity whose interventionist institutional and decision-making structures were created for the establishment and functioning of a common market, which defied the clear-cut identification both of that authority and of those distinct spheres. Second, those structures were primarily meant to transform the state legal orders, to the extent required by integration, including their administrative laws and organisation – *not* mainly to contain the exercise of public power vis-à-vis private actors, whose legal spheres were in need of protection. Third, for that reason, they presupposed an imbrication of the newly established administrative structures and those of the member states, and it was mostly in this vein that legal persons could be unilaterally affected by public authority stemming from the Community (outside of the limited scope of the European Coal and Steel Community, instances of direct Community/private legal interaction were relatively rare). Finally, those structures were also heavily reliant on the involvement in decision-making structures and procedures of private actors active in the internal market. In other words, in most cases, what could be identified as EU administration (functionally and organically) presupposed, first, the *interpenetration* between different public structures and spheres of authority (EU and national), rather than separation (between the public and the private spheres), and, second, *collaboration* between different public bodies and private actors, rather than authority in tension with the liberty of those affected. The combination of these traits meant that, while one could identify elements of administrative law in such multi-layered settings, these could not have the same meaning and scope they had in state legal orders. At the very least, the public authority they governed had no parallel in the state setting and the liberty they could protect was not the liberty of citizens.

This article analyses how the functional method of comparison – deployed by the Court of Justice and by legal scholars alike – *hid* these contradictions and how it delimited the very framing of EU administrative law, its normative premises and outlook, without ever addressing the incongruities that stemmed from vertical comparison. It traces the initial usages of the functional method to show how courts and scholars – in particular, Jürgen Schwarze – set the foundations of EU administrative law, as a field of law and as an academic discipline. The method both shaped and reflected a specific way of building and of conceiving the EU polity, which – as well as being only partial – also neglected the specificities of the exercise of public power in the EU.

The article starts by distinguishing the roles of the Court of Justice and of scholars, their respective challenges, constraints, and responsibilities in developing EU law, to focus then on an analysis of the pathbreaking work of Jürgen Schwarze. A meta-legal perspective on the first scholarly treatise in this field analyses the choices of object and objectives that the author deployed to identify EU administrative law, as well as the implied assumptions and the normative implications of those choices. The same analysis highlights the premise of the functional method – the similarity of problems – and the structural gap in applying it to vertical comparison. The article argues that the establishment of functional equivalents anchored a way of developing EU administrative law that stood on shaky ground, as did the doctrinal construction it supported. These origins may explain a prevailing way of thinking about EU administrative law that needs to be revised, and possibly complemented, in view of the evolution of EU law and integration. While analogies with state law, and the constructive role they had, were essential in the development of EU law, there is often little critical distance to the degree to which the analogy is justified.[2] The analogy, however, was a tool of polity building in a state-like direction that is increasingly contested and, insofar as it continues to inform our understanding of the present EU, it may obfuscate the tensions within its constitutional and institutional setting and the political-economic power structures that it sustains.

Before continuing, two notes are due. First, my analysis does not purport to cover comprehensively EU administrative law scholarship, which has taken different routes since the late 1980s, when Schwarze's volume on European administrative law was first published in German. But the breadth of this book and its pioneering character – together with its multiple translations – made it influential in delineating and developing the field. The book set basic premises of EU administrative law, with which scholars continued working and its reach arguably stretched beyond the limits of scholarship. That volume provides, therefore, a solid basis for a more detailed analysis of the premises and troubles of the functional method of comparison. Second, my critique of this specific way of constructing the EU legal order is only possible with the benefit of hindsight. It nevertheless reveals the partiality of EU administrative law as-it-is and brings out that 'something deeply unreflective about EU law' which was part of an epoch and is arguably no longer tenable.[3] The critical distance between the scholarly foundations of EU administrative law and to their legacy, 30 years on – which

[2] *See* N. Walker, 'Beyond the Holistic Constitution?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism* (Oxford University Press 2010) p. 291 at p. 294, arguing (in relation to EU constitutionalism) that 'how deep the analogy runs and what is lost – or gained – in translation . . . is rarely the subject of sustained analysis'.

[3] I am drawing here on observations made by Loïc Azoulai in the Leuven Workshop of 2021.

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this article aims to provide – is a necessary first step to reconsider, where needed, the paths taken hitherto in the construction of the EU legal system.

The constructive role of comparison: building a law, shaping a polity, grounding a field of scholarship

EU administrative institutions, created to support the effective implementation of EU law and transcending the boundaries of national administrations, were from the outset a core aspect of integration, even if they remained largely 'hidden' in the first decades.[4] Their emergence gave rise to new centres and forms of exercise of public power, as well as to new legal administrative relationships established mostly between member states' administrations and EU institutions, but also, in limited fields, between the latter and private legal persons. Legal scholarship was relatively slow in identifying this phenomenon. The difficulties in delimiting the administrative traits of institutions that both resembled and were distinct from those of national administrations, as well as in identifying an administrative function distinct from other functions exercised by the EU institutions, may partially explain this relative neglect.[5] Nevertheless, there were early accounts that framed the powers of the institutions in terms of a state-like separation of powers, identifying among them a 'common administration', and noted the significance of this apparently trivial characterisation for the role of stabilisation and development that law acquired in EU integration.[6] The first reference publications pertaining to administrative law appeared in the late 1970s and in 1980s, by scholars who favoured comparison between the legal orders of the member states to establish the grounds of a 'common administrative law' or as a means of overcoming the fragmentary nature of EC law.[7] They prepared the ground for subsequent endeavours by scholars educated in the continental legal tradition who sought to build a cohesive system of EU administrative law – or its main building

[4]S. Cassese, *The European Administration* (International Institute of Administrative Sciences 1987); E. Chiti, 'La costruzione del sistema amministrativo europeo', in S. Battini and M.P. Chiti (eds.), *Diritto Amministrativo Europeo* (Giuffrè 2013) p. 45. Referring to the 'hidden' executive, *see* L Azoulai, 'Pour un Droit de l'Exécution de l'Union Européenne', in J. Dutheil de la Rochère (ed.), *L'Exécution du Droit de l'Union, entre Mécanismes Communautaires et Droits Nationaux* (Bruylant 2009) p. 1.

[5]J. Schwarze, *European Administrative Law*, 2nd edn. (Sweet & Maxwell 1992[2006]) p. 21-24.

[6]P. Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', 26(1) *Revue Internationale de Droit Comparé* (1974) p. 5 at p. 7-8.

[7]Schwarze, *supra* n. 5, p. 54, 71-75, 1457; J. Rivero, 'Vers un Droit Commun Européen: Nouvelles Perspectives en Droit Administratif', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Bruylant 1978) p. 389. *See further* the sub-section 'Legal scholarship', below.

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blocks – by resorting to categories and principles of national administrative law.[8] They followed in the footsteps of the Court of Justice, to the extent that its case law resorted to comparative law (or at least to comparative references) when establishing 'general principles common to the legal systems of the Member States'.[9]

The Court, the law and the polity

From the outset of European integration, the Court adopted a large conception of the sources of law the observance of which it was mandated to ensure. It showed:

> a great liberty in the choice of elements which [could] define the content of the Community's 'legality' ... it resorted largely to general principles of law, i.e. the common ground of ideas of order, justice and reason which ground the juristic civilization to which Member States belong ... it thus opened the path to the protection of fundamental rights of the citizen of the Community and defined, in the same spirit, the norms of an ordered Community administration as much as the requirements of proper judicial protection.[10]

The Court searched for the legal solutions that both best suited the objectives of EU integration – being bound, like any institution, to contribute to their realisation (Article 4 EECT; Article 13 TEU) – and that could be considered acceptable for the national legal orders (even if shared only by a relatively small number of member states).[11] In doing so, the Court had clearly both a political and a legal role. This is widely accepted today and has been the object of a large literature.[12] For current purposes, it is nevertheless noteworthy that, in the 1970s, there was a sharp awareness of the peculiar institutional position of the Court, which does not appear in the founding scholarly works of EU administrative law, even if they were anchored on the case law. In the words of Pescatore, judge and scholar:

[8]The immediate follow up was the treatise by M.P. Chiti and G. Greco, *Trattato di Diritto Amministrativo Europeo* (Giuffrè 1997).

[9]E.g. ECJ 12 July 1957, Joined Cases 7/56 and 3/57 to 7/57, *Algera and Others* v *Common Assembly*, ECLI:EU:C:1957:7; ECJ 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame and Others*, ECLI:EU:C:1996:79, para. 27.

[10]Pescatore, *supra* n. 6, p. 10-11 (all translations are mine).

[11]K. Lenaerts and K. Gutman, 'The Comparative Law Method and the Court of Justice of the European Union Interlocking Legal Orders Revisited', in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law* (Oxford University Press 2015) p. 141 at p. 152 and 153. That the Court is bound to the realisation of the objectives of the Treaty is stressed by Pescatore while ensuring respect for the law and of the 'legalité communautaire', *supra* n. 6, p. 10.

[12]*See*, among many, S. Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press 2018); also the earlier work of H. Rasmussen, *On the Law and Policy of the European Court of Justice* (Nijhoff 1986).

> the Court should not be compared to national jurisdictions, even to supreme courts, which can and must count with the dynamism of political power fully in control of its instruments, capable at all times of acting according to social needs, thus providing the national judge with the legislative key to solutions which, for its part, the Community judge must forge with his own hands if he does not want to fail in his task.[13]

Arguably, this position did not only reflect a particular view on the role of the Court, expressed by a highly influential voice in the development of EU law.[14] It set the background for the importance and specific role that comparative law had, when used by the Court. Comparative law was *not* – and it did not purport to be – a 'scientific' enterprise, bound by rigorous methodology that could pose limits to normative proposals.[15] It was a tool used by the institutions that gathered within them professionals from different legal systems and that were bound by the objectives of integration spelled out in the Treaties. This setting led to a greater freedom in the search for solutions that were considered suitable for the development of EU law. The Court often resorted to national laws without expressly invoking them, except in the most difficult instances: when faced with a lacuna.[16] Thus, in an early judgment that became a reference in EU administrative law writings, the Court stated:

> the possibility of withdrawing [administrative measures giving rise to individual rights] is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.[17]

[13]Pescatore, *supra* n. 6, p. 14.

[14]A similar view can be found in P. Reuter, 'Le recours de la Cour de Justice des Communautés Européennes à des principes généraux de droit', in *Mélanges Offertes à Henri Rolin. Problèmes de Droit des Gens* (Pedone 1964) p. 263-283. On how that view is in line with Pierre Pescatore's view of the Court, *see* V. Fritz, 'Activism On and Off the Bench: Pierre Pescatore and the Law of Integration', 57(2) *Common Market Law Review* (2020) p. 475 at p. 486.

[15]P. Pescatore, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés Européennes, à des normes déduites de la comparaison des droits des États membres', 32(2) *Revue Internationale de Droit Comparé* (1980) p. 337 at p. 353. He stressed that 'the contact and the osmosis between the different legal systems of the Community are done through people' (p. 353).

[16]Reuter, *supra* n. 14, p. 273.

[17]ECJ 12 July 1957, Joined Cases C-7/56 and C-3/57 to C-7/57, *Algera and Others* v *Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7, at para. 55.

The method, if one existed, was not one of confronting different legal orders with a view to retaining only the common denominators. The purpose, where stated, was 'researching the spirit of national laws, their orientation and their evolution' in a search for the solutions that represent 'a completion and a technical progress' and that 'coincide with the economic principles of the Treaty'.[18] From general references to 'principles' or 'conceptions' common to all or some member states (often only explicit in the opinions of Advocates General), the Court derived the general principles that became also part of Community law, such as legal certainty, the right to be heard or proportionality. These stood alongside EU-specific, equally judge-made, legal principles (chiefly among them, direct effect and primacy), as well as the structural (e.g. attributed competences) and material (e.g. non-discrimination) principles that stemmed from the Treaties. The Court thus supported a dynamic of mutual interaction, cross-fertilisation and transformation, which would become more complex with successive enlargements and with the expansion of EU competences.

Comparative law, including of administrative legal norms and principles, had also an important systemic function: it supported the establishment of a general part of EU law. This was largely absent from the written sources of Community law, more concerned with setting out detailed technical-economic rules that could make common markets function.[19] The foundational rules of Community law that could address general questions (such as the role of fundamental rights), therefore, stemmed from the member states' legal orders, always subject to the condition that the solutions thus devised were considered compatible with the structure and the purposes of the Community.[20] The extent to which such solutions involved some degree of legal and political compromise is hitherto difficult to assess, given the secrecy of judicial deliberations and the absence of dissenting opinions.[21]

The setting, role and purposes of resorting to comparative law enabled a creative process through which the Court made fundamental choices for the development of Community law and could jump over the difficulties that comparison could pose. Its task was, after all, not scientific. The Court's mandate justified this idiosyncratic way of proceeding: insofar as it needed to ensure that 'the law' (*le droit*) was observed and avoid situations of *non liquet*, it had a legal duty to overcome possible contradictions between legal orders.[22] Such creative process was

[18]Reuter, *supra* n. 14, p. 273-274, 276.

[19]Pescatore, *supra* n. 15, p. 356-358.

[20]*See*, among many others, ECJ 17 December 1970, Case 11/70, *Internationale Handelsgeselschaft*, ECLI:EU:C:1970:114.

[21]The important work being done at the historical archives of the EU is, nevertheless, relevant in this regard.

[22]Pescatore, *supra* n. 15, p. 355. The observations of Reuter are similar in this regard. For a reflection in the case law, *see* ECJ 12 July 1957, Joined Cases 7/56 & 3-7/57, *Algera* v *Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7.

purportedly not the result of any specific 'jurisprudential policy, nor of a particular intention of the Court, but both of an initial choice of the governments [i.e. their subjection to law] and of the requirements of the judicial function [construction of the meaning of terms, definition of general principles and of their relative importance]'.[23] As Paul Reuter had noted, the interpretation of the Treaties entailed at different points a fundamental choice: to resort to national law, or to create a new notion, be it on the basis of general principles of law or on another basis.[24]

The explicit reference to the non-scientific character of the use of comparative law in the hands of the Court, combined with its role as an EU institution bound by the pursuance of the Community objectives, confirms that comparative law was essentially a tool of integration. It was a tool to transform Community law progressively in the direction of a legal order ever more distinct from international law, given the member states' subjection to the jurisdiction of a court.[25] Frequently, the solutions found required 'an elaboration where the ideas that bring to life the legal systems of the six Member States are confronted with the economic demands specific of the Communities, as expressed in the fundamental principles of the Treaties'.[26] The emphasis on comparative law could perhaps highlight the first side of the equation, even where complemented by the qualification of the need to find solutions 'suitable to the purposes of integration'. Be that as it may, the judges did not 'have the sense of being innovators'; as far as one testimony can support a general claim, they perceived their role as 'a matter of solidarity with the constitutional systems that have in common the fact of being grounded in the practice of liberal democracy and on the respect for the human person in all their essential prerogatives'.[27] As the next section will show, legal scholarship was imbued with a similar sense of solidarity. But scholars, unlike judges, were obviously not bound by Treaty goals or by legal prohibitions of *non liquet*.

Legal scholarship

When legal scholars started inquiring into the possibility of administrative law emerging beyond the state, it was to that same task of creating a general part

[23]Reuter, *supra* n. 14, p. 278-279, who interestingly remarks 'at the end of ten years of such judicial task, Community law appears richer, better structured than the image one could get from a primitive reading of the Treaties, but it does not depart from the latter' (p. 279).

[24]Reuter, *supra* n. 14, p. 274.

[25]Such was Pescatore's view (Fritz, *supra* n. 14, p. 487), but see also Reuter, *supra* n. 14, p. 278-279, even if acknowledging that the fundamental structure of international law remained in the Communities, given the limited scope of application of Community law (p. 283).

[26]Reuter, *supra* n. 14, p. 276.

[27]Pescatore, *supra* n. 15, p. 358, referring to the role of comparative law in the development of fundamental rights.

of EU law that they turned. The common constitutional or legal traditions of the member states that the Court had referred to in its judgments provided the needed basis for this work, sanctioned by the authority of judicial sources. The task of a court was one thing – confronted with a legal duty to decide cases, the fulfillment of which entailed fundamental choices in the development of a nascent legal order; it was quite another for legal scholars to engage in a scientific task of 'discovering' or setting the grounds for a new field of scholarship.

Neither the Court nor legal scholars overlooked the constitutional and structural differences between state administrative institutions, on the one hand, and EC administrative institutions, on the other. But no matter the different structural roles of judges and scholars, comparison seemed to all to be the undisputable road to take. The same state-born 'legal package' applied to a very different reality, context and to a specific set of legal relationships emerging, at the time, mostly from economic law. It was bound to have a different meaning and effects in an economic Community made of different states, intended to create a common market. This consideration and concern, visible in the work of Paul Reuter, appears to have gradually lost relevance, or at least there are no visible traces that this was a factor influencing the work of the administrative law scholars who, by resorting to comparative law, laid the foundations of a new scholarly field.

The pioneers of Community comparative administrative law showed little (if any) critical distance from the lead the Court of Justice took to vertical, functional comparison, whereby solutions to legal problems arising out of supranational or transnational situations were solved by drawing on the rich 'repository' of national law.[28] Legal doctrine both endorsed and reinforced the way EU administrative law was progressively emerging, as a result of judicial fiat. This became a persistent trait. As EU administrative legal scholarship evolved, it remained engaged in convincing the sceptical majority of administrative lawyers that administrative law had trespassed the boundaries of the state.[29] Where analogies could be drawn, this claim was justified. But the consideration of how solutions and doctrinal categories known from national law (or recognisable by administrative lawyers) were being adapted to fit and sustain the economic demands of European integration, as set out in the Treaties, was secondary, at least in the foundational period.[30] It was taken for granted that they needed to be adapted, assessed against the needs of

[28]On the method of functional comparison and its 'vertical' use, *see further*, the section below on 'the role of the functional method'.

[29]A. Sandulli, 'Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo', in L. Lucia and B. Marchetti (eds), *L'Amministrazione Europea e le Sue Regole* (Mulino 2015) p. 273 at p. 289.

[30]On the different periods of evolution of EU administrative law (and not of its scholarship), *see* E. Chiti and J. Mendes, 'The Evolution of EU Administrative Law', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 3rd edn. (Oxford University Press 2021) p. 456.

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integration as they stemmed from the Treaties. It was a matter of reason, and the Court had said as much. But how such needs were decided, how this operation took place and with which effects, remained largely in the shade. These questions had little or no practical relevance in setting out the foundations of EU administrative law, possibly because they were too uncertain to allow a solid assessment.

The work of Jean Rivero set the first stone, in a study published in 1978 that searched in the diversity of the legal orders whether a 'common European law' could be possible.[31] Such common law could be made of 'similarities which ... would constitute, beyond the peculiarities characteristic of each State, their collective patrimony, a kind of Corpus gathering the fundamental legal themes from which the national laws would detail their variations'.[32] His was a contribution in a collective endeavour to search, in different fields, for a 'a newly emerging "common law of Europe"' that, nevertheless, considered the increasing divergences between member states.[33] Rivero identified the commonalities between the administrative legal orders of the then nine member states, at the level of 'the problems that they seek to address, [of] the ideology from which they derive their solutions, or [of] the concrete results they achieve'.[34] But he noted too the important differences that interceded between the national legal orders (such as the scope of acts subject to the jurisdiction of administrative courts, and the different type of legal actions available vis-à-vis administrative action).

His assessment was clear. These differences could not deny the fact that the legal orders of the then nine member states all shared the same constitutional and ideological foundations of liberal democracies: 'Rule of law, Rechtstaat, principe de legalité, it is through the diversity of languages the same fundamental idea that expresses itself'.[35] However, the diversity of legal techniques that interceded between the concrete problems posed and the ideology from which a solution derives was more striking than the common traits between the nine legal orders.[36] Those commonalities – 'same societies, same ideology, same concrete effects' – Rivero argued, could not be enough to ground a common European law. The differences were clearer in 1978 than in the 1950s and 1960s, because of the accession of two common law jurisdictions and one Scandinavian country.[37]

[31]Schwarze, *supra* n. 5, p. 93-94, 1441.

[32]Rivero, *supra* n. 7, p. 389.

[33]M. Cappelletti, 'Introduction', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Bruylant 1978) p. 1 at p. 3.

[34]Rivero, *supra* n. 7, p. 390.

[35]Ibid., p. 390-391, adding that: 'If one of the countries was groaning under the yoke of an administrative dictatorship, it would be known!'

[36]Ibid., p. 391.

[37]Pescatore in 1980 noted that first accession largely enhanced the interest for comparative law (*supra* n. 15, p. 350). Rivero mapped the essential differences (p. 393-402).

The differences and commonalities had hardly been studied – administrative law lagged largely behind private law when it came to comparative studies[38] – but Rivero was convinced that Community law (among other factors) could overcome that state of affairs. Not least because of the need to find a common legal language, it could spur a movement of convergence. While this could not lead to uniformity (to the common European law that Rivero inquired about), differences in the solutions given to legal problems could progressively be overcome, as the Court of Justice identified common denominators and defined new concepts that would imbue and unify national administrative laws.[39]

This premise opened the way to resorting to comparative administrative law in subsequent works. That was the case for Jürgen Schwarze's landmark monograph.[40] Schwarze argued that the commonalities between the member states' legal orders had been sufficiently established, by referring to the arguments of Rivero.[41] But, unlike Rivero, Schwarze did not use comparison to gauge the possibilities of a *horizontally* common administrative law in Europe. Schwarze's inquiry was whether it was possibile to establish an administrative law of the European Union, at the EU level and within EU law, that, applying also to the EU institutions, would vertically integrate the laws of the member states.[42] Rivero's hypothesis of a *common* European law in relation to administrative law was different from Schwarze's hypothesis of a *Community* administrative law. This difference was both crucial and overlooked in the foundations that Schwarze built.[43]

Schwarze's European Administrative Law and the legacy of comparative administrative law

The foundations of a scholarly field: the choices made

Jürgen Schwarze's two-volume work, first published in German in 1988, was the first attempt to systemise EU administrative law. It set the foundations of a scholarly field, even if others had earlier begun research on the administrative law aspects of

[38]Rivero, *supra* n. 7, p. 391.

[39]Ibid., p. 405-406.

[40]See the Schwarze's references to Rivero: Schwarze, *supra* n. 5, p. 8, 94 and 1440-1441, where the essential premises of Rivero's argument are reiterated.

[41]Schwarze, *supra* n. 5, p. 94.

[42]That EU law was also administrative law was an important but marginal consideration in Rivero's contribution (Rivero, *supra* n. 7, p. 405-06), but central to Schwarze's work (p. 4 of the monograph cited below).

[43]*See*, in particular, the section below on 'the role of the functional method'.

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Community law.[44] His book covered the legal orders of the then 12 member states and, taking a cue from Rivero, set out to establish whether a common administrative law had already developed in the then Communities.[45] Conversely, he analysed the EU legal order through selected legal regimes in which the Community administrative institutions were engaged to show that EU law reflected general principles of administrative law. The mapping work is impressive and even today remains unparalleled in scope and ambition. Since the 1990s, an analysis that includes all legal orders of the member states, combined with EU law materials, became a much more challenging task as the number of member states expanded and included significantly different legal traditions. But, even back then, Schwarze's work succumbed to the dauting challenge he undertook: the material is analysed and presented as a set of overlapping layers; comparison, as well as its evaluation, is often found wanting, making it more a 'preliminary step' in comparison than a comparison proper.[46] For current purposes, however, the handbook ambitions of the volume, its merits and flaws matter less than the choices of object, objectives and method, as well as the respective assumptions and the normative implications. The analysis that follows deals with the object and objectives; the method is examined in the next section.

Schwarze focused on the judge-made principles both to assert the existence of a Community administrative law and to establish 'a doctrinal content of the case law' by resorting to comparison.[47] In his view, the 'general thinness' and 'sketchy' character of the then-existing written rules that governed the activity of the supranational administrative institutions justified taking general principles as the *object* of his analysis.[48] The general principles that the Court of Justice had established were 'the core and the point of crystallization for European administrative law'.[49] Nowhere in the book does one find an explanation of this point. At first sight, such claim could appear self-evident, given the general role of general principles of

[44]Schwarze's initial two volumes (*Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, Nomos, 1988) were later translated into English (in 1992 in an edition by Sweet & Maxwell) and French (the two volumes were published by Bruylant in 1994). This analysis draws on the English translation that was reprinted in 2006 (Schwarze, *supra* n. 5). On precedent work, *see* Chiti, *supra* n. 4, p. 53-56, 65-67 and Sandulli, *supra* n. 29, p. 287-288.

[45]Schwarze, *supra* n. 5, p. 95 and 1440.

[46]E.g. Schwarze, *supra* n. 5, p. 1370-1371 (on the rights of the defence) or p. 1430-1432 (on legal protection afforded through procedure). But see p. 539-543, and the detailed evaluation (by comparison with succinct observations concluding other chapters) of the principles of legal certainty and protection of legitimate expectations (p. 1156-1172). On 'preliminary step', *see* K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn. (Oxford University Press 1995) p. 43 ('merely to juxtapose without comment the law of the various jurisdictions is not comparative law: it is just a preliminary step').

[47]Schwarze, *supra* n. 5, p. 9.

[48]Ibid., p. 54 and 59.

[49]Ibid., p. 7, 38.

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law in any legal order and the fact that the Court had been 'discovering' such principles. Yet, this very choice had clear normative implications, on which Schwarze did not elaborate. Given the general principles on which he relied – among others, legal certainty, the protection of legitimate expectations, proportionality, fair procedures, which the Court had established – it implied transposing to EU administrative law the same premises and normative foundations of state administrative law. That meant transposing a dialectical relationship between the exercise of public power and the protection of individual rights. While that was an element that the Court had been developing, it was only one feature of a possibly emerging legal order and far from preponderant. Schwarze's claim meant assuming, from a scholarly perspective, those normative foundations and applying them to a field of law where, at the time, they hardly fitted. The relationships with individuals were limited in scope (a point that Schwarze of course recognised), and mostly mediated by the national legal orders and authorities through the interpenetration noted above. It is noteworthy that the very possibility of transposing this logic to the Community level was contested at the time, not least due to the lack of vertical relationships between administration and citizens and the limited administrative prerogatives of the Community.[50]

The reason for this choice of object can implicitly be found in the very goals of the scholarly enterprise. He set out to pursue two related *objectives*: 'establish ... the extent to which a European administrative law can now be said to exist and what possibilities and limits condition its further evolution'.[51] From this perspective, he claimed, written rules were insufficient: they were 'far from offering comprehensive and uninterrupted coverage of the whole area of [EC] administrative activity'.[52] This position entailed a clear normative assumption on the performance and relative position of two core institutions – the Council and the Court – and on the quality of the law that they produced. Written law 'barely [contained] sufficient legal rules to ensure administrative implementation' and, moreover, reflected the weaknesses of the Council's decision-making capacity.[53] By contrast, the Court not only had been given 'a powerful position' in the Treaties, but also, until then, it had exercised its function of 'ensuring the

[50]A perspective voiced in M.S. Giannini, 'Profili del diritto amministrativo delle Comunità europee', a piece originally written in 1967, but that only in 2003 was accessible in a re-publication in 4 *Rivista Trimestrale di Diritto Pubblico* (2003) p. 979, as well as by other authors in Germany (*see* Schwarze, *supra* n. 5, p. 21, fn. 21, referring to the transposition of the concept 'administration'). For a critique of Giannini but also questioning the transposition of the authority-liberty binary to EU administrative law, *see* B.G. Mattarella, 'Il rapport autorità-libertà e il diritto amministrativo europeo', 56(4) *Rivista Trimestrale di Diritto Pubblico* (2006) p. 909.

[51]Schwarze, *supra* n. 5, p. 6.

[52]Ibid., p. 38-39.

[53]Ibid., p. 55 and 63.

protection of the law in an exemplary fashion'.[54] *Les Verts* and *Johnston* supported the argument. *Les Verts* had famously (and recently, at the time of writing) declared that 'the Community is a community based on law' provided with a 'basic constitutional charter represented by the Treaty' and requiring judicial review of secondary law.[55] *Johnston* had established that the requirement of effective judicial review – an expression of the common constitutional traditions of the member states and stemming from the European Convention on Human Rights – meant that the individual had judicial protection against acts of the member states breaching Community law.[56] Building on these premises, it was a general administrative law perspective on EC law (*das allgemeine Verwaltungsrecht*) that Schwarze sought to establish. This purpose mirrored the one that Pescatore, judge and legal scholar, had identified in 1980 when discussing the Court's resort to comparative law.[57] This would be, at the same time, the basis for creating the foundations of general EU administrative law.

Circularity and blind spots

There is a lot to unpack in these choices, less as a critique of a work that is the product of its time than as a means to unveil the assumptions that underlie the construction of EU administrative law, as pursued by Schwarze and followed by others. First, although Schwarze's primary objective was to delimit and map the extent of a European administrative law, his focus on general principles of law left little room for doubt as to the conclusion. The Court had asserted 'an impressive array of general administrative law principles' based on a functional comparative method. Since these provided the roadmap to the whole inquiry, the conclusion that the Community had developed an administrative law 'entirely comparable with those of the Member States', even if still in the process of completion, could hardly be surprising.[58] He asserted the existence of a specific kind of EU administrative law. The conclusion, however, was entailed in the premises: 'whether and to what extent such common standards of administrative law have already developed within Europe and in particular within the framework of the European Community can *of course* be demonstrated only through a review of the principles of administrative law',[59] that is, the same principles that constituted the 'core and the point of crystallization of EU administrative law'.[60]

[54]Ibid., p. 59 and 62.

[55]ECJ 26 April 1986, Case 294/83, *Les Verts* v *European Parliament*, ECLI:EU:C:1986:166.

[56]ECJ, 15 May 1986, Case C-222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206.

[57]It is striking that there is no reference to this work by Pescatore in Schwarze's book.

[58]Schwarze, *supra* n. 5, p. 95, 5-6, 1433 and 1440.

[59]Schwarze, *supra* n. 5, p. 95, emphasis added.

[60]*See above* n. 49.

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Second, the choice of principles over written rules was consequential: it was a choice of institutions and of their role in creating law. Undoubtedly the subjection of the Communities to the jurisdiction of a Court was one of the core and unique features of the Community by comparison to other international organisations, and a focus on the case law was only natural for an administrative lawyer. But the weaknesses of the Council that Schwarze identified were also the ones that could reveal more starkly the specificities of the Community legal order, with its mixed international and supranational character, and of its administrative law, composed of the legal orders of the member states.

Third, the admiration for the role of the Court illustrates the interplay between legal scholars and the Court of Justice in setting down the 'building blocks' of the administrative law of the then Community.[61] If comparison was a matter of 'practical necessity', as it would feed European Community law with 'appropriate supplementation and growth', doctrinal development was essential to 'guarantee ... the necessary *efficacy of administrative measures* [as well as] the level of transparency and comparability of administrative action required for the *protection of the citizens*'.[62]

The fourth and last point is a consequence of all the others. The very language Schwarze used revealed his own normative assumptions, which functional comparison buttressed. He would contribute to fashioning the emerging law in the same terms that administrative scholars knew from their legal orders. The role of the legal scholar was to 'facilitate the practical application of law', 'alleviating the everyday work of the European institutions and the national administrations, as well as promoting the legal protection of the *Community citizen*'.[63] In doing so, it was a specific normative worldview – the one stemming from the administrative law of the liberal state – that the legal scholar transposed to EC law, closely following the steps of the Court. His focus on general principles and on the case law led him to identify the reconciliation of the rights of individuals with the pursuance of an effective and efficient community administration as the main normative concern of EC administrative law.[64] But the Community setting changed the terms of the legal relationships, which were mostly mediated by the member states' administrations and, hence, triangular and composite, more than bilateral. This approach meant lending a constitutional language to an

[61]On the role of the Court, *see* M.P. Chiti, 'I Signori del Diritto Comunitario: La Corte di Giustizia e lo Sviluppo del Diritto Amministrativo Europeo', 3 *Rivista Trimestrale di Diritto Pubblico* (1991) p. 796; C. Harlow, 'Three Phases in the Evolution of EU Administrative Law', in P. Craig and G. de Burca (eds.), *The Evolution of EU Law*, 2nd edn. (Oxford University Press 2011) p. 444.

[62]Schwarze, *supra* n. 5, p. 4, 7, and 1433-1434 (emphasis added).

[63]Ibid., p. 7, and 1433-1434 (emphasis added).

[64]Ibid., p. 9, 73.

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administrative law whose liberal constitutional grounding could only be asserted via the legal orders of the member states and that the Court was gradually introducing through its 'discovery' and establishment of general principles of law.

Schwarze did not ignore the fact that he was proposing to elaborate a state-like body of law that would apply to administrative institutions with different functions and structures. But he downplayed the core specific characteristics of the European administration that had been the main focus of earlier works. In his work, the detailed analysis of supranational administrative institutions was sacrificed in a magnum opus that was aimed at laying the ground for a new field of law and mapping the mutual influences between national legal orders, on the one hand, and the Community legal order, on the other.[65] Unlike previous analyses, his study reserved only a minor role to administrative institutions and to the specificity of the EC administration. Cassese, most notably, had questioned whether an EU administration existed or whether the 'Brussels bureaucracy [was] only a mechanism aimed at ensuring cooperation between national administrative bodies'.[66]

The fact that administrative collaboration was a distinct characteristic of the implementation of EU law was largely ignored in Schwarze's work,[67] as was the question of whether that specific structure could require distinct legal foundations for the law that he was helping to develop. No matter the structure of the EU administration that had led to the emergence of the specific body of law that Schwarze undertook to identify – an administration mostly grafted on national administrative institutions and with very limited scope for direct legal relationships with legal and natural persons (competition and civil service) – and no matter the constitutional embedding of that administration, the purpose of the law governing it was presumed and asserted to be the same that administrative law had known hitherto: to guarantee the efficacy of administrative action and ensure 'the protection of citizens'.[68]

Having established the extent to which EU administrative law existed, the book's second objective – the identification of the possibilities and the limits that may condition the further evolution of this law – was synthetically summarised in the conclusions. Those possibilities and limits would stem from the continued interaction between national and EU law, between written norms and general principles, through the continued undisputed authority of the Court to develop the law of the Community (which the German Constitutional Court had also

[65]Ibid., p. 1434.

[66]Cassese, *supra* n. 4, p. 9 and also S. Cassese and G. della Cananea, 'The Commission of the European Economic Community: the Administrative Ramifications of its Political Development (1957-1967)', 4 *Jarhbuch für Europaïsche Verwaltungsgeschichte* (1992) p. 81.

[67]Also in the second edition: Schwarze, *supra* n. 5, p. cxii-cviii; clxix-clxxxi; ccxxiii.

[68]Schwarze, *supra* n. 5, p. 95.

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acknowledged). Irrespective of a doubtful general consolidation, general administrative law principles would remain pivotal for that interaction, and ultimately constitutional and administrative law would be integrated. Schwarze concluded his magnum opus with a clear message: '*all hopes*, with the exception of partial and sectoral legislative codifications, rest upon a gradual, cautious and pragmatic further development of case law in the Community', a point which he reiterated (with some caveats) in the book's 2006 edition.[69]

The role of the functional method

Similar problems: the premise for functional equivalence

The functional method of comparison was the cement that made this construction hold. Largely because of its premises, this method reinforced the circularity between the object chosen (general principles of law) and the objective of the whole enterprise, i.e. ascertain the existence of an EU administrative law. Crucially, in the delimitation of that law, the functional method avoided the specific structural features of the EU administration that placed collaboration and interpenetration at its heart, and at the heart of integration.

Schwarze's praise for functionalism followed the work of Zweigert and Kötz.[70] His methodological choice was straightforward: because similar legal principles may appear in different legal systems under different doctrinal categories, forms and concepts, the 'functional method *must* ... *be the cardinal principle* when applying comparative law in the field of administrative law'.[71] Function was, therefore, the *tertium comparationis*, the common denominator that can ensure comparability between the two objects.[72] Now, adopting this position assumed that the problems in want of a solution were the same (as Rivero had indicated in relation to the legal orders of the member states), while the techniques to arrive

[69]Schwarze, *supra* n. 5, p. 1465 (emphasis added), and ccxxvii-ccxxxi (complementing it with proposals for codification).

[70]'The principle of functionality is generally recognized as the basic methodological principle of every comparison of laws': Schwarze, *supra* n. 5, p. 82. He largely cites K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privaterechts*, Vol 1: Grundlagen, 2nd edn. (Tübingen, 1984), the volume where these two leading scholars had made that exact claim.

[71]Schwarze, *supra* n. 5, p. 1445 (emphasis added) (*see also* p. 82-85). *See* R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (Oxford University Press 2006) p. 339, critiquing claims of monopoly as indications of 'a lack of conceptual clarity, or a lack of theoretical sophistication, or both' and pointing out that the lack of specification of the term hinders also the critique of functionalism itself (p. 343).

[72]E. Örüsü, *The Enigma of Comparative Law* (Martinus Nijhoff 2004) p. 21.

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at similar solutions could differ.[73] If the general part of EU administrative law was going to be built on the principles that the Court had declared, that would be done by asserting the equivalence of the functions that those principles fulfilled in the then 12 member states and in EC law. While this proposition was set against a hostile scholarly reception to the possibility of administrative law existing beyond the state, the judicial precedent made it not such a daring step to take: the Court had established those principles as part of EC law on precisely the same grounds.

The political and institutional differences between national and supranational public entities were not an obstacle to comparison. The reason was given by the functional method itself: according to its proponents, 'great differences in ... historical development, conceptual structure, and style of operation' of legal systems do not preclude the similarity of the problems and of the solutions found in the different legal systems.[74] The assumption that general principles of administrative law had emerged to solve similar problems guided Schwarze's analysis to his conclusions.[75] The method furthermore determines that the norms found in the relevant legal systems need to be stripped from the specific doctrinal content of each legal order and analysed with respect to their function. This first step opened up the possibility of comparison. In a second step, the results obtained through comparison were subject to 'critical evaluation' to ascertain which solutions are preferable.[76] In a setting of vertical comparison, i.e., involving an international organisation, the standard of assessment of the different solutions was given by 'the aims of the organization in question' – in this case, the Treaty-set goals of integration. Here, again, the Court provided the argument. As seen above, the general principles of law drawn from the common constitutional traditions of the member states need to be ensured 'within the framework of structure and objectives of the Community'.[77] From these premises, how exactly Schwarze applied this method and what kind of functionalism he followed is difficult to ascertain.[78] Yet, what he did is clear: he looked for functional equivalents that

[73]Rivero, *supra* n. 7, p. 390-391. From the perspective of the functional method, *see* K. Zweigert and H. Kötz *An Introduction to Comparative Law*, 2nd edn. (Oxford University Press 1995) p. 34.

[74]Zweigert and Kötz, *supra* n. 73, p. 39, who – reasoning in relation to private law – identify as a general rule for the comparatist a 'praesumptio similitudinis', i.e. the presumption that 'developed nations answer the needs of legal business in the same or in a very similar way' (p. 40). This has been one of the most contested points of functionalism: *see*, for a brief account, A. Peters and H. Schwenke, 'Comparative Law beyond Post-Modernism', 49(4) *International and Comparative Law Quarterly* (2000) p. 800 at p. 827.

[75]Schwarze, *supra* n. 5, p. 1444 (and clxxxi).

[76]Ibid., p. 82-85.

[77]Ibid., p. 84-85, citing *International Handelgeselschaft*. *See* the section on 'the constructive role of comparison' above.

[78]Schwarze is far from being alone in this regard: *see* Michaels, *supra* n. 71, p. 362-363.

EC law offered as a way to identify universalities in the midst of (presumably) marginal differences.

The logical gap of the functional method in a vertical comparison

The functional method applied to vertical comparison concealed the difficulties and the logical gap of Schwarze's scholarly endeavour. It invited the comparatist to 'eradicate the preconceptions of his native legal system' and to focus on the areas of the foreign legal system to 'find the analogue to the solution which interests him'.[79] In administrative law, it had been used only for comparisons of *state* legal orders. If Rivero had demonstrated the commonalities between the legal orders of the nine member states in 1978, why those commonalities could be vertically transposed to the EU was far from straightforward. This is an important question, which Schwarze largely avoided. The judge could eschew the academic niceties, and possibly needed to do so given the imperative to avoid *non liquet*, as invoked by Pescatore in 1980.[80] But could the scholar avoid the difficult question that vertical comparison raised?

Schwarze acknowledged that some of the principles he chose (such as the principle of legality) needed to account for the fact that their main function was not the protection of the individual's legal sphere before the exercise of sovereign powers, but securing the vertical division of powers between the member states and the Commission.[81] He recognised the difficulties of identifying a distinct 'administrative' object that could allow scholars to identify specific administrative-law-content of principles declared by the Court as general principles.[82] He also acknowledged that structural differences between the Community and national legal orders impeded certain parallelisms (for instance, a democracy-inspired principle of legality was absent in the Community).[83] But, could such differences have prevented the use of the same concept in EU law and the presumption that it had an administrative law content? When the Court pronounced that equality is a basic principle of Community law, did this principle have the same function in the competence-delimited action of the Community and in the administrative laws of the member states? Had it evolved in that direction? What is its function and in relation to whom is it determined?[84] The

[79]Zweigert and Kötz, *supra* n. 73, p. 35.

[80]See n 22 above.

[81]Schwarze, *supra* n. 5, p. 253.

[82]Ibid., p. 718, 861 and 864 (in relation to proportionality).

[83]Ibid., p. 223.

[84]For his assessment of the comparative study on equality, *see* ibid., p. 670-74, referring to the origins of a principle in EC law – litigation or preliminary reference questions – or how it was specifically received (e.g. the influence of the nationality of the Advocates General, *see* p. 939-940, in relation to legal certainty and legitimate expectations).

specificities of the principles that Schwarze analysed remained to a significant extent unaddressed, at least beyond a descriptive level, even if that was his quest.[85]

The fact that these principles applied to areas of economic law and entailed often triangular legal relationships between legal persons of private law or natural persons, member states and Community institutions was a consideration that appeared in the specific analysis of some of the principles, but not a structural element of the analysis.[86] In 1988, by drawing on the underlying premises of the general principles of law that the Court had established through comparison, Schwarze identified in the EC the same opposition between the unilateral exercise of public authority, on the one hand, and the freedom of citizens, deserving legal protection at the administrative level, on the other, largely toning down the odd traits of EC law that did not fit this narrative. Without ignoring the limits of his construction, Schwarze, however, largely fell into the same fallacy that Giannini had identified in the late 1960s: he relied on the performative – or constitutive – value of language, but the fact that the names or nouns used may be the same while their content or substance may be different was downplayed in the analysis.[87] Even where the differences were duly noted, these were never considered to imperil the purpose of his endeavour, i.e., create the doctrinal development, through systematic analysis of the hitherto sparse materials, that could ensure the efficacy of administrative action and the protection of citizens.[88]

These citizens or individuals were, at the time, mostly companies subject to competition enforcement rules, to state aid decisions, or claiming against states the benefits of market freedoms that Community law recognised, or civil servants litigating against the institutions that employed them. Protecting their legal spheres was a problem that EC law needed to address and for which it had developed rules, norms, and principles. This became an important core of EU administrative law, or at least of its establishment. But that this tension between liberty and authority should be a staple of the establishment and development of EU administrative was far from straightforward. The same logic was extended to any legal or natural person in matters that either involved the EU administrative bodies in one way or another, or the member states' administrations acting in an EU capacity. The ethos of this reasoning was distinctly liberal: the purpose of administrative law principles was to 'protect the freedom of the individual against

[85]*See*, e.g., ibid., p. 677-678, 709. With regard to proportionality, for example, Schwarze noted the differences between the principle as elaborated in German law and in EC law (p. 855), but these were not an obstacle to analysing it from that same angle (p. 853-864).

[86]*See*, e.g., ibid., p. 858.

[87]Even if of course aware that 'legal principles can assume different forms and take on different meanings according to their legal context': ibid., p. 97. The references in the text are from Giannini, supra n. 50, p. 984, 987.

[88]Schwarze, *supra* n. 5, p. 7.

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the restrictions imposed by public authorities' and the 'sovereign (i.e. public-law) relationship between the administration and the citizen' could then be the centre of the investigation undertaken with regard to these principles.[89] By the same logic, member states confronted with the authority of the EU institutions had also been recognised as having a fundamental right to be heard. Whether states – not natural or legal persons – confronted with an authoritative act of a body or institution, created under a treaty to which they are parties, should be granted a right to be heard with the same scope and meaning that this had acquired under 'the common constitutional traditions of the member states' did not trigger much reflection. Such an extension of the right to be heard, stemming from an acritical transposition of the liberal thinking of protecting legal spheres against a unilateral exercise of authority, is an awkward construction. States are political entities that, even if confronted with the unilateral power of the EU institutions, are an intrinsic part of the European Union, and, presumably, have other means to make their positions heard in decision-making procedures. At the very least, such an extension would require careful elaboration.[90]

The incompleteness of EU law that stemmed from its purpose-oriented and sectorial focus – the 'unscheduled incompleteness of the Treaties'[91] – had found a path for completion. The Court had grafted the normativism that underpinned the administrative laws of the member states onto the new legal system that evolved through litigation and judicial integrative craft. The rule of law and 'the liberty' of citizens were respected at EC level as much as at national level. If they lent legitimacy to state power, they had the same effect in relation to supra-national power, 'improving the legitimacy of the Community in the eyes of the citizens and thus politically promoting integration to a significant extent'. Such was the 'integrative function of European constitutional and administrative law'.[92] At the same time, this development had allowed the Court to contribute to 'the realization of substantive justice', the importance of which Schwarze emphasised by citing a colleague: it 'signifies and legitimates an effective human unit, which the Community now represents above and beyond being a mere collection of states'.[93] The 'human unit', however, was not the main or only subject of EU law.

[89]Schwarze, *supra* n. 5, p. 861 (here with reference to the principle of proportionality) and p. 1174 (in relation to principles of the administrative procedure), respectively.

[90]In a way, it transcends the separation between the public and private spheres typical of liberal constitutional thinking. I owe this point to Michal Krajewski.

[91]Ibid.

[92]Schwarze, *supra* n. 5, p. 1465.

[93]Ibid., p. 1464. The citation is from U. Everling, 'Der Gerichtshof als Entscheidungsintanz', in J. Schwarze (ed.), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (Nomos 1983) p 137.

In the shade of functional comparison

The legacy of comparative administrative law

The emphasis placed on commonalities with national administrative law and the easiness with which administrative law language was mobilised, avoiding the difficulties posed by the vertical use of the functional method, provided a partial view of EC administrative law, i.e. the view conveyed by the Court when setting out general principles of law. These were the principles that could, at the same time, transpose to EU law the binary logic of administrative law, opposing the private sphere to public power and, to a great extent, bypassed two structural characteristics of the EU administration: public-private collaboration and the interpenetration of public authorities.

Schwarze's work became, nevertheless, the 'indisputable pioneer' of EU administrative law as a scholarly field (not least due to its French and English translations).[94] He had shown, less through comparison than through the juxtaposition of national legal orders, and analysis of the EU case law, that the EU had a layer of general principles of law equivalent to those underpinning the administrative legal orders of the member states. These set the foundations on which subsequent scholarship would build: from then on, it was largely accepted that the EC legal order had premises and objectives similar to the constitutionally framed administrative laws of the member states.[95] No matter the empirical reality to which this framing was applied, that there were 'citizens' to protect via EC administrative law became a fundamental premise of administrative law scholarship.

Others followed suit, adopting different approaches to the study of the EU's administrative law and administrative institutions, but building on the premise that the new administrative law in the making was, as Schwarze had claimed, very much comparable to national administrative laws.[96] They facilitated the recognition of the 'knowns' in EU law that administrative lawyers could explore. During the 1990s, the institutions created to carry out the EU administrative functions (in particular, comitology committees and EU agencies) gradually acquired centre stage in academic analyses, as administrative scholars sought to establish the scientific grounds of EU administrative law beyond its general principles. They

[94]E.g. J-B. Auby and J. Dutheil de la Rochère, 'Introduction', in J-B. Auby and J. Dutheil de la Rochère (eds.), *Traité de droit administratif européen* (Bruylant 2007); Harlow, *supra* n. 61, p. 445.

[95]*See*, further, Chiti and Mendes, *supra* n. 30. For a different method, *see* G. della Cananea and M. Bussani, 'The "Common Core" of Administrative Laws in Europe: A Framework for Analysis', 26(2) *Maastricht Journal of European and Comparative Law* (2019) p. 217.

[96]This and the following two paragraphs are from J. Mendes, 'The EU Administrative Institutions, Their Law and Legal Scholarship', in P. Cane et al. (eds.), *Oxford Handbook on Comparative Administrative Law* (Oxford University Press 2020)

delimited the concepts and principles and characterised the techniques of a new field of law, in an effort of synthesis, solidification and normative development. As a result, a new academic discipline progressively developed around the legal constructions and mechanisms designed to implement EU law.[97] They composed a patchwork that easily escaped the systematisation known in continental systems of administrative law. At the same time, the law that was emerging both impacted thereon and had features that administrative lawyers recognised as similar to national legal orders. Both factors prompted legal doctrine to seek the scientific systematisation that could both stabilise existing law and ground future developments.[98] Comparative administrative law (somewhat scattered and implicit) at the service of integration assisted in the massive work of unveiling, studying, and systematising the variety and intensity of EU public action that went much beyond that envisaged in the Treaty, as well as the relevance of the administrative institutions that emerged in the context of EU integration.

The awareness of the distinctive features of the EU institutions and of the polity in which they were embedded became stronger than in Schwarze's work. Nevertheless, the vocabulary and concepts of national legal doctrine remained dominant, even while seeking to adjust the normative solutions known from national laws to a rapidly evolving system. Comparison was thereby relegated to an implicit meta use. It shaped the different perspectives on how EU administrative law was best systematised, explained and developed, as scholars delimited the object of EU administrative law by drawing on categories of national administrative law (administrative acts, contracts, liability, procedure). Identifying such legal categories – encoding the material that EU law provided via implicit comparison – and drawing on administrative law principles enabled legal scholars to identify the harbingers of the administrative law of the EU, often elicited from the case law. The way in which the legal system that was thus being built transformed the administrative laws of the member states was a discussion that (with exceptions) tended to remain a largely separate debate under the epithet of Europeanisation of administrative law.[99] Some highlighted that the competition and free market principles changed the 'general interest' (*intérêt general*) ethos of national administrative law.[100] Others argued that the main purpose of EU administrative law was the control of member states.[101]

[97]Auby and de la Rochère, *supra* n. 94, p. 6, 19.

[98]Chiti and Greco, *supra* n. 8, 'Introduzione'.

[99]Even where featuring in handbooks, as in Auby and Rochère, 2007 and 2014. *See also* J.B. Auby (ed.), *L'influence Du Droit Européen Sur Les Catégories Du Droit Public* (Dalloz 2010) and M. Bobek, 'The Europeanisation of Public Law', in A. Von Bogdandy et al. (eds.), *The Max Planck Handbook in European Public Law, Vol. I: The Administrative State* (Oxford University Press 2016) p. 631, ⟨https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757116⟩, visited 16 November 2022.

[100]Auby and Rochère, *supra* n. 94, p. 15.

[101]M. Shapiro, 'The European Court of Justice' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 1999); Harlow, *supra* n. 61, p. 445.

Others still pointed, crucially, to the multipolar character of the EU composite administration, with structures that were unique to the EU, and that EU law had changed the conventional paradigm of administrative law, anchored in binary relationships between public authority and private persons.[102] But, when analysing general doctrinal categories and principles, most stressed that EU administrative law had developed to protect the rights and legally protected interests of individuals against the exercise of authority, to steer the reasonable exercise of administrative power, and to subject it to apposite controls. Such was the legacy of comparative administrative law. By 2006, in his introduction to a reprint of his monograph, Schwarze could ascertain that such premises, emerging from the interaction of legal orders, were no longer contested.[103]

The doctrinal concern to develop the scientific categories of EU administrative law, as it were, by 'transplanting' national concepts appears to have prevailed over an analysis of the normative effects that the EU legal regimes were generating in the context of European integration, with fundamental impacts on the allocation of public authority, both among public and private entities. The way EU law empowered private persons against the state administrations and relied on their collaboration to advance integration was, with few exceptions, a marginal consideration in the doctrinal elaboration of EU administrative law. It did not challenge the fundamental binary conceptual framework that emerged from functional comparison: like national administrative law, EU administrative law protected citizens against the possibility of arbitrary exercise of public powers, while structuring the legality of the latter. This fundamental premise pervaded in most studies that brought to the fore the specific traits of the EU administration.

A functional polity, complexification and diversity

Comparative administrative law served thus as a tool of 'social engineering' and underpinned the progress of the EU legal order in a specific direction.[104] That was the direction that the Court had set in the 1960s: an autonomous legal order, capable of conferring rights that individuals can invoke before courts, involved also the exercise of administrative power; that fact alone required that the courts have at their disposal the technical means to ensure the corresponding legal protection of the individual sphere (no matter the specific legal techniques through which such power was channelled in the EC). The same style of liberal normativism that prevailed in a state setting became also characteristic of a

[102]S. Cassese, 'L'Arena Pubblica. Nuovi Paradigmi per lo Stato', 3 *Rivista Trimestrale di Diritto Pubblico* (2001) p. 601.

[103]Schwarze, *supra* n. 5, p. clxxxii.

[104]On social engineering through comparative law, *see* Michaels, *supra* n. 71, p. 351-352.

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functional polity whose pillars had been set in the founding Treaties in the 1950s.[105]

What remained in the shade, at least in the work of Schwarze – and paradoxically, considering his stated method of comparison – was the emphasis on *function*. Not the function of the principles he analysed, but the function of the public powers they applied to and that were to be harnessed through the same legal techniques known in the state laws. What also remained in the shade were the political and economic imbalances that those powers generated, very likely distinct from those that characterise the relationships between a citizen and a state. As a result, that the administrative powers of the EC institutions and bodies were (and remain) limited in scope when compared to the 'staatlichkeit' of national administrations did not fundamentally influence his proposed doctrinal construction.

The EU and its administrative structures were (and remain) dependent on their ability to achieve a conception of welfare that the Treaties support and that is defined and re-defined as member states and EU institutions develop and implement those Treaties. While the second prong of administrative law – the need to ensure the efficacy and effectiveness of administrative action, that Schwarze also duly emphasised – is clearly a fundamental component of the legal systems of the member states, that the very viability of European integration ultimately depends on effectiveness, i.e, on its ability to deliver the public goods that it stands for, is a fundamental difference to the state settings, arguably downplayed in Schwarze's work. Subjecting EC administrative power to the strictures of law in the same way as national administrative power, by deploying the same principles and concepts, was as much a matter of protecting the 'citizen' or the 'individual' as it was a matter of constraining state powers and correcting possible flaws or hindrances to the full effectiveness of EU law and integration.

Ipsen – both a predecessor and contemporary of Schwarze – had contrasted the functional aspect of integration to its lacking institutional character. Unlike Schwarze, he emphasised the functional character of integration in two regards: only the public functions pertaining to economic integration were detached from the state and brought to the supranational realm; the activity of the Community was directed at creating and ensuring a common market – at making it *function*. This perspective allowed Ipsen to deny the Community the same characteristics of 'staatlichkeit' that Schwarze brought to the fore by placing in the spotlight the integrative function of law as the Court was developing it. Building on the steps the Court had taken, Schwarze provided the scholarly grounds to transfer to the EC/EU the 'towering methaphysical status' of government and law, an element of the constitutional discourse that would soon pervade EU law.[106] However, this

[105]On the use of the term style, *see* Loughlin, *supra* n. 1.
[106]Loughlin, *supra* n. 1, p. 112.

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legacy meant overlooking – in his work and in that of many of his followers – the specific functional context to which the state-like principles and norms were being transposed.

When governance practices and scholarship became prominent in the early 2000s, academic attention turned to the normative processes that occur without the intervention of courts, which nevertheless were part of the EU administration since the very outset. The material available to administrative lawyers was much greater than that dealt with by Schwarze. The focus shifted to the heterarchical relationships between public powers, private actors, interested parties and interest groups, established often outside the boundaries of law. Scholars saw there the blurring (if not the breaking down) of the divide between the private and the public sphere that, in EU law, had possibly always existed, or that, at least, had become clear when the new approach to standardisation was adopted in the 1980s. While the boundaries of law remained uncertain, some administrative lawyers relegated such developments to the realm of non-law, their scholarship continued largely unencumbered by these developments. But most engaged in the analysis of these processes, whether by using a different language with little critical distance from institutional discourses, or by attempting to weave them into the categories of EU administrative law that had hitherto been established. In this respect, the legacy of a comparative law approach lingered on: as much as the 'governance turn' – favoured by the EU itself – was challenging national structures of administrative law, changing its organisational forms, procedures, and ways of action, it also defied the premises that the combined work of the courts and of administrative law scholars had constructed for EU administrative law. While private actors became ever more central, in different degrees and shapes, to EU public action, EU administrative law remained anchored in the separation between the public and the private spheres that its principles conveyed. While cooperation and informality led both to a proliferation of composite procedures and, often, to the frequent hybrid use of hard and soft law, and ensuing difficulties in identifying the locus of authority, solutions thereto kept on being found in the application of the general principles of law.

The early 2000s brought another structural challenge to the premises of EU administrative law as a scholarly field. Enlargement, in particular the inclusion of the former 'Eastern bloc', questioned the scholarly presumption of similarities between the legal orders of the member states that continuously fed the development of a general EU administrative law.[107] It invited a new approach to the use of comparative law: no longer focused on commonalities – which at a sufficient level of abstraction can always be found[108] – but on the differences that have always

[107]Schwarze, *supra* n. 5, p. ccvi-ccvii.
[108]Bobek, *supra* n. 99.

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existed, to understand the variety of conditions and solutions given to common problems under common EU-established legislative frameworks and common understandings of general legal principles.[109] Enlargement only made the existing diversity more visible and the study of that diversity more pressing.

Two decades later, comparative administrative law applied to EU law must no longer start by discussing the possibilities of comparison that the EU opened in a field that half a century earlier appeared resistant to comparison. Arguably, the integration function of general administrative legal principles, as characterised in the work of Jürgen Schwarze and others, no longer needs to be demonstrated. In many respects, the 'perfectioning' role of administrative law fulfilled its purpose through the 'art of bending the executive [and administrative] power to respect the law'.[110] Nevertheless, how EU administrative law is functioning, beneath its common layers, remains largely unknown, as do its possible different variants. An investigation of degree and depths of diversity, across states and across policy areas, may also show whether the faith placed on general legal principles to ensure 'the ability of European law to meet new political, economic, and social challenges' was, with hindsight, justified.[111]

Different approaches to the study of EU administrative law are arguably needed to rethink and open new paths for its legal-doctrinal construction. Its general part, despite common principles, concepts and language, still suffers from structural deficiencies of legal translation.[112] Translation enabled the construction of a general part of EU administrative law built by deduction through comparison grounded on the political-constitutional premises of liberalism. Even if collaboration and interpenetration are today undisputed traits of EU administrative law, how to square them with state-like characteristics that this law also acquired is not always straightforward. In a context of deep transformations, where political, socio-economic and technological changes challenge some of the core tenets of public law, alternative paths for conceiving and constructing EU administrative law may be needed. How far EU administrative law, built deductively from the

[109]The diversity of administrative legal systems in Europe was well noted in Rivero, *supra* n. 7. On the importance of diversity for contemporary studies of administrative law, *see* F. Velasco Caballero, 'Introdución al Derecho Administrativo', in J.M. Rodríguez Santiago et al., *Tratado de Derecho Administrativo. Volumen I. Introdución. Fundamentos* (Marcial Pons, 2021), p. 39.

[110]For a similar claim in relation to French administrative law, *see* J.-B. Auby, 'La Bataille de San Romano. Réflexions sur les Évolutions Récentes du Droit Administratif', *L'Actualité Juridique – Droit Administratif* (2001) p. 921 at p. 926. On perfectionism, *see* J. Bomhoff, 'Perfectionism in European Law', 14 *Cambridge Yearbook of European Legal Studies* (2012) p. 75.

[111]J. Schwarze, 'Enlargement, the European Constitution, and Administrative Law', 53(4) *International and Comparative Law Quarterly* (2004) p. 969 at p. 984.

[112]F. Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"', 22(4) *German Law Journal* (2021) p. 593.

general principles of law, can still provide a normative framework that reflects the reality to which it applies; which phenomena specific to EU law may remain in the shade of the current normative and conceptual frameworks that EU administrative law conveys; and how EU administrative law is shaping the socio-economic and political-administrative relationships that fall under its scope, are questions that arguably must take centre stage today.

Counterfactual in the guise of conclusion

It is perhaps difficult to essay the counter-factual: how could EU administrative law look without the symbiosis of judicial and scholarly developments that has characterised it since the outset? Without it, it is perhaps doubtful that one could refer today to EU administrative law with the same easiness one uses when dealing with administrative law *tout court*. Schwarze's work (as much as the scholarship of others later on) was essential to the very identification of administrative law in the midst of a still rather amorphous EC law in the late 1980s. It showed that the EU had an administrative dimension more relevant than the Treaties permit to be envisaged. More importantly, the subjection of EC administrative power to general principles of law became indeed an essential aspect of the EC's legitimacy. The legitimacy it drew from compliance with rule of law tenets and rights protection became a component of its functional legitimacy: the results it sought to achieve would be regarded as illegitimate and possibly unacceptable if administrative power were not subject to similar strictures as those that bounded national administrations and subjected them to judicial review.

If EU law protected market freedoms from undue state protectionism, it also needed to protect the exercise of EU-derived rights from the administrative power exercised by the EU, where it existed, and by the member states when implementing EU law. That was the effect not only of a judicially-generated law, but also of a legal scholarship that decisively contributed to solidifying that law within a specific conceptual framing. Much because of this combination, a bilateral logic of protecting the liberty of the private sphere against a purportedly unilateral exercise of authority became a core tenet of EU administrative law, even if the contours of this authority and the institutional and administrative structure on which it relied were decidedly different from any that had hitherto existed. The Court's institutional position and duties were radically distinct from those of legal scholars: the Court was bound by a duty of *non liquet* while exercising a Treaty mandate. But this difference did not prevent the scholars engaged in the establishment of a scholarly field from using the same method of functional comparison that the Court used, without addressing its flaws.

With time, the EU administration progressively gained competences that led it to engage with natural or legal persons, more often and in different forms, namely

through the intermediation of member states' administrations in different configurations of composite procedures. If in the late 1980s, Schwarze had noted that 'as a continuously evolving legal order, European Community law is particularly dependent upon appropriate supplementation and growth',[113] the developments it has witnessed since then would have probably been more difficult, if not impossible, without the legal guarantees that general principles of administrative law provided to those concerned by integration. In this sense, comparative administrative law that led to the 'discovery' of general principles of law in the common legal traditions of the member states and to the scholarly establishment of EU administrative law had a dimension of policy development akin to the establishment of direct effect and primacy. Such was the integrative function of constitutional and administrative law that Schwarze had identified.

Yet, the avoidance of the difficult questions of vertical comparison was a double-edged sword, as my critique of Schwarze's construction revealed. On the one hand, it allowed Schwarze to avoid the thorny question of the existence of an administrative law beyond the state (denied by most scholars at the time) and engage in a rule-of-law development within the EU. On the other, it was an important impairment in a work with constructivist ambitions. It avoided the difficult inquiry of which adaptations could or should be required, considering the specific reality, norms and institutions to which the familiar administrative law principles applied, and which legal effects such transposition engendered. Had it been accompanied by an inquiry into the conditions under which functional similarities could be asserted, the effects of asserting similarities, of the specificity of the administrative structure and relationships to which it applied, the scholarly construction based on functional equivalents would have found obstacles difficult to surmount, but obstacles that it needed to heed to be built on solid ground. These difficulties remain largely unaddressed today. The multipolarity of the EU composite administration has been the object of many important contributions which have revealed the specificity of the exercise of administrative powers in the EU, namely interpenetration and collaboration. Yet, under the shade of the foundational years, they mostly move within the general part of EU administrative law, as constructed through functional vertical comparison, and of its conceptual framework.

In the early 2020s, the EU has acquired administrative functions in areas that before 2009 had been core to the sovereignty of states (banking supervision and border control). That has meant a centralisation of administrative power in EU institutions and bodies, but it also largely happened through the strengthening of administrative collaboration and operational capacity based on national administrations. Such developments have been crucial to secure responses to the sovereign

[113]Schwarze, *supra* n. 5, p. 4.

debt crisis and to migration pressures that have been contested for their legality, respect for the common legal traditions of member states and the constitutional foundations of the EU polity, which general principles of law contributed to strengthen. They arguably require a reassessment of how the doctrinal categories that both courts and scholars have built by transposing normativism and its premises to the EU remain fit for purpose, i.e. the extent to which they serve to frame and categorise the relationship between supranational and transnational public institutions, state institutions, private actors and society at large, in a way that is consonant with the constitutional foundations that the EU legal system purports to uphold. The dispersal of authority in procedures where different authorities are deeply intertwined, to the extent that the location of authority and, hence, legal responsibility, may be difficult to establish, or the capacity of legal norms and procedures to define substantive limitations to the action of public authority, are just some of the issues that cannot be addressed within the mindset of the liberty-authority tension that, despite the composite and multipolar settings within which it lives, continues to frame the general part of EU administrative law. As Elise Muir and Robin Gadbled write in the introduction to this special issue, the rapid transformations of the object of EU law, and the temporal distance that scholars can now have to how their field was constructed, necessarily involve self-reflection on how theoretical assumptions and methodological choices have shaped our frameworks of analysis. EU administrative law is no exception.

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