Comparative Administrative Law in the EU: Integration Function and its Limits

Joana Mendes[1]

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Abstract:
This chapter identifies the integration function of comparative administrative law, as that results from early writings on the resort to comparison by the European Court of Justice and on the relevance of comparison in the foundations of EU administrative law, as set out in the influential work of Jürgen Schwarze. It stresses the interplay of courts and scholars in imbuing EU administrative law with state-based traits of EU law, the role of this development in upholding the legitimacy of EU law, the tensions it introduced and the limits of the integration function of comparative administrative law. It concludes that legal scholars should take a critical distance to the role that comparison has had in fashioning EU administrative law in a state-like manner, and query the extent to which they remain actual in the current legal context.

Keywords: comparative administrative law, EU administrative law, EU integration, method, general principles of law, proportionality

1. Courts, Scholars, and the General Principles of EU Administrative Law

The story of the establishment and development of EU Administrative Law has been told many times and in different ways.[2] The progressive recognition of a fully-fledged administrative law of the European Union (EU), as a distinct body of law generated by EU integration, is an essential part of the transformation of EU law: from governing different scattered aspects of market integration to a legal order that progressively acquired some of the characteristics of a state-based public law. In a sense, the story is simple. On the one hand, the administrative institutions created since the outset to support the process of EU integration required rules on their organisation and functioning. On the other, the legal acts that the Member States' administrations adopted within the scope of EU integration postulated, in accordance with their constitutional strictures, the legal protection of the citizens whose rights were thereby affected – a legal protection that, since the outset, became also a matter of Community law. The Court of Justice (ECJ) extended the same strictures to the limited areas where the Community institutions adopted individual decisions without the involvement of the Member States' administrations. These premises were the starting point for the development of general principles and legal norms that apply to the EU

[1] Professor of Comparative Administrative Law, University of Luxembourg. This chapter is part of an ongoing work on the legacy of comparative administrative law in the EU legal order.

[2] See, among many, E Chiti and J Mendes, 'The Evolution of EU Administrative Law' in P Craig and G de Búrca (eds.) *The Evolution of EU Law* (Oxford University Press, forthcoming), and the references to the pertinent literature. Essential, in this regard, is, inter alia, C Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 261.

administration and to the Member States' administrations when implementing EU law, either generated directly by the EU institutions (in directives or regulations and in case law) and applicable to the EU and to the Member States' administrations, or by the Member States in application of EU law. Yet, this gradual transformation remains a fascinating leap, in which comparative law played a fundamental role.

It is equally well-established that comparative administrative law was at the basis of the definition of the parameters of legality of the EU administration, being at the core of the progressive delineation of its administrative law.[3] Courts and legal scholars drew on norms and principles stemming from national legal orders to fill in the lacunae that fragmentary EU norms, governing specific policy fields, left open both in terms of the organisation and functioning of the EU-specific administrative institutions and in terms of the legal protection of those affected. The Court of Justice drew on comparison to establish the "constitutional traditions common to the Member States" and choose the solutions that were best suited to the strictures of the Community legal order, to its functions and goals. Just how this happened, remains mostly shrouded in the secrecy of judicial deliberations and the internal workings of the Court. Yet, legal scholars found in this method the basis for the doctrinal construction of EU administrative law.[4] The Court's case law was not only a source of the law that was being studied and developed, but also provided the framework and the method for the legal analysis.

This chapter revisits part of this story to stress the integration function that comparative administrative law fulfilled and its role in shoring up the EU's legitimacy. To this end, it returns to the positions of both judges and scholars, as evidenced in early writings and highlights the use that both the Court of Justice and legal scholars made of comparative administrative law to establish and develop the foundations of EU administrative law, namely through general principles of law (Sections 2 and 3). It argues that this development of EU administrative law introduced a core tension between, on the one hand, the state-based traits of public law, which comparative law favoured and remains one of its features, and, on the other, the functional law of integration, which is its ever-present foundation. In essence, administrative law principles that were conceived to control and limit the public power of the state in relation to citizens whose legal sphere must be protected from arbitrary interferences, were transposed to a legal order which had a specific and ultimately interventionist purpose: the creation of an integrated market. It, therefore, established legal relationships among States, among them and supranational bodies, and included private persons in multipolar relationships. Those principles were, in addition, transposed to a legal order

[3] See, among many, H P Nehl, 'Administrative Law' in J Smits (ed) *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2012, 2nd edition) 21-35, and references.
[4] Chiefly after J Schwarze, *European administrative law* (Sweet & Maxwell, 1992[2006]), 2nd ed.

where, absent the same legitimacy assets as a state legal order, they became one of the main tools of legitimating public action and of perfecting an emergent legal system looking for its autonomy. That tension is a source of instability in EU administrative law (and of EU law more generally), insofar as its categories evolve as a function of, on the one hand, the strictures of public law as a means of controlling the exercise of public power and of protecting the rights of individuals, and, on the other, of the pursuit of effectiveness of EU law and of the requirements of integration as concretely perceived at each point in time (Section 4).[5] The chapter concludes that the time has come to take stock of the role that comparative administrative law has had in shaping EU administrative law, to gain a deeper understanding of how it has fashioned legal relationships in the EU and to address the tension between normativism and functionalism that continues to pervade EU law (Section 5).

2. The Integration Function of Comparative Law

Comparative administrative law was in its infancy at the time it started being mobilised by the ECJ in the development of EU law. The statist nature of administrative law had been an important obstacle to comparison. Early comparatists looked for the possible commonalties between the administrative legal orders of different States that could overcome the blockages to comparison, and saw in the law of the Communities a factor of development of the field.[6] The early case law of the ECJ and the first analyses on the role of comparative law in the development of Community law confirmed as much. In institutions populated by civil servants from different legal systems, comparison was not used as a scientifically developed methodology. It was rather part of the daily work of their respective legal services, both implicitly and explicitly, be it when proposing the legal structures of EU integration or when looking for solutions that could mitigate legal disputes arising from the application of EU law.[7] The stress was put on similarities. Those that could be detected between the legal orders of the Member States enabled the ECJ to ascertain otherwise inexistent common grounds for the transposition of national law onto EU law, albeit adapted. This interaction between national and supranational law was not specific to administrative law, but comparison had in public law a particularly relevant role: it showed to national courts, to concerned persons, and also to Member States that the EU's public authority, as exercised by its institutions, in collaboration with, or independently from, Member States, was subject to the legal strictures

[5] J. Bomhoff, 'Perfectionism in European Law' (2012) *Cambridge Yearbook of European Legal Studies* 14, 75.
[6] 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) 389-406.
[7] 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' (1980)32 *Revue Internationale de Droit Comparé*, 2, 337-359.

that they knew from national legal systems abiding by the rule of law. Herein lay the integration function of comparative administrative law.

Jürgen Schwarze, whose work seminally showed the interaction between comparative administrative law and EU law, attributed such integration function specifically to the general principles of law that the ECJ had established since its early case law and later famously held to be "inspired by the constitutional traditions common to the Member States".[8] That was clear in instances of lacunae: comparison avoided situations of non-liquet. The *Algera* judgment provided a paradigmatic example. Confronted with the question of whether the revocation of administrative acts granting individual rights was possible the Court held that this was

> *"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."*[9]

Importantly, this judgment is illustrative not only of the integration function of general principles but also of the Court's use of national laws. Since the early days of integration, the Court sought inspiration in the Member States' law without expressly explaining the methodology underlying its reasoning. According to an early commentator, explicit references to comparison occurred in instances where the Court was no longer confronted with written norms that it had to interpret, but to decide a matter in the absence of written norms, as in the case of *Algera*.[10] *Transocean* is another classic reference of the use of comparative law, equally illustrative of the Court's covertness. Here, the Court established the existence of a 'general rule' that 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'.[11] The source of such rule was nowhere to be found in the judgment, but the Advocate General's comparative-based reasoning gave important indications. This way of proceeding lent EU law the normativism characteristic of national administrative law.[12] Generally, making sense of the EU legal order as an autonomous legal order created to anchor economic integration and setting the path for its normative development presupposed making parallels with the state setting, which arguably favoured the use of

[8] Schwarze (n 4), 1455-65. Case 11/70, *Internationale Handelsgeselschaft* EU:C:1970:114, para 4.
[9] 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*, EU:C:1957:7, at 55.
[10] 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), 263-283, at 273.
[11] Case 17/74 *Transocean Marine Paint v Commission* EU:C:1974:106, [15]. Opinion of AG Warner, delivered on 19 September 1974, EU:C:1974:91.
[12] J Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field: Normativism, Functional Comparison and Integration' (on file with the author)

comparison.[13] Yet, beyond instances of lacunae and explicit references in advocate generals' opinions, the Court's use of comparative law remains rather obscure – in particular the processes through which it finds the most suitable solutions to the specific characteristics of the EU legal order – and appears more pervasive than the judgments and opinions reveal.[14] The paucity of explicit references to the comparative method in judicial reasoning contrasts still today with its practical relevance, as confirmed in contemporary writings.[15]

But comparative law (in general, beyond administrative law) had a more systemic integration function. As narrated by Pierre Pescatore, it enabled the Court to construct the solutions that could be extended to the whole of the Community and to address the problems "of general and fundamental nature to which Community law, in its technical positivity, does not have an answer".[16] Comparative law had, in this respect, a double role. First, it helped the Court search for "middle ground" ("moyenne raison") solutions that could be acceptable throughout the Community and easily translated from legal system to legal system. The Court needed to consider the effect of precedent of its decisions and, as a result, weigh the repercussions that its judgments have not only in the national legal order implicated in each case but also in the laws of the other Member States. The individual judges in the Court were, in this sense, an essential link to the national legal communities.[17] Secondly, comparative law was the basis to create in Community law the equivalent to a general part of that legal order: Community law was a "complete system" with its own normative autonomy, but lacked a sufficiently developed set of "conceptions and fundamental rules such as those that feature, for example, in national constitutions or in the general parts of the codes".[18] Comparative law offered the basis to construct such a general part, largely absent from the Treaties. It grounded solutions that could be transposable to Community law, which meant that were suitable to its framework and objectives. It served the progressive perfection of an incomplete legal order.[19] The characteristics of its legal order arguably mirrored the incompleteness of the EU integration project, which needed to be overcome to establish 'an ever closer union'.

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[13] E.g K. Lenaerts, 'Some Reflections on the *Separation of Powers* in the European Community' (1991) *Common Market Law Review*, 28, 11.

[14] K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) *International and Comparative Law Quarterly* 52, 873–906 pp. 874-876; T von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) *Fordham International Law Journal* 37, 1311, 1317-1318.

[15] *Idem*, *ibidem*.

[16] 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', (1980) 32 *Revue Internationale de Droit Comparé* 2, 337-359, at 355, and 356-58.

[17] *Idem*, 355-356.

[18] *Idem*, 357.

[19] Bomhoff (n 5), characterising the strength of perfectionism's pull in EU law as a particular reflection of the internal dynamics of legal thought.

General principles of law were core in this regard, as clearly indicated by Schwarze. They fill gaps "not necessarily evident from the outset", but those that "appeared out of the unscheduled incompleteness of the Treaties only when one applied an evaluative approach".[20] Such incompleteness, he argued, was in tension with the claims of autonomy of the EC legal order ever since *Van Gend en Loos* and *Costa v ENEL* and led to a conundrum. Community law was an autonomous legal order that could rely neither on "its own legal tradition" (inexistent given its novelty) nor on "*direct recourse* to other legal systems" given its autonomy.[21] General legal principles provided a way out and contributed to overcoming the "fragmentary nature" of Community law.[22] They were a basis to establish the absent general part of Community law, scattered through different policy fields with different characteristics reflected in the corresponding Treaty provisions.[23]

This dynamic was fundamental both to the evolution of EU law – as the judgment in *Internationale Handelsgeselschaft* powerfully showed – and to the delineation of the administrative law of the EU (as well as to the recognition of EU administrative law and as a scholarly field). It was well-established that some Treaty provisions (such as the grounds of judicial review in actions of annulment, first inserted in the Treaty establishing the European Coal and Steel Community (Article 33) and then transposed to the Treaty establishing the European Economic Community (Article 173) stemmed from national administrative law (French administrative law, in this case);[24] other Treaty provisions were as such unknown in the legal orders of the Member States, but had a partial correspondence with their administrative laws, such as the duty to give reasons, which was eventually given contours similar to those it had in national legal orders.[25] These elements provided conflicting signs: on the one hand, the Treaty gave a positive legal foundation to the method of comparison (mostly implicit, with the exception of the reference to "general principles common to the laws of the Member States" shaping the non-contractual liability of the Union in current Article 340 TFEU); on the other, while comparison could help in situating the EU's novelty in relation to national legal orders, that novelty also indicated that there are limits to comparative administrative law as a support of legal frameworks that only partially find a correspondence with state public law.

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[20] Schwarze (n 4) 1458.
[21] Schwarze (n 4) 1457, emphasis added
[22] Idem, ibidem.
[23] Schwarze (n 4), 38.
[24] Among many, Rivero (n 6).
[25] C Hen, 'La Motivation des Actes des Institutions Communautaires' (1977) *Cahiers de Droit Européen* 1, 49. J Mendes 'The Foundations of the Duty to Give Reasons and a Normative Reconstruction', in E Fisher, J King, A L Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press, 2020), 299-321.

This ambivalence is very well captured by the straightforward, yet capacious formula used by the Court when explicitly resorting to the common constitutional traditions of the Member States. What the Court establishes as part of such traditions "must be ensured within the framework of the structure and objectives" of the Community or of the Union.[26] This technique was most prominently invoked in matters of fundamental rights, but had, arguably, a trickle-down effect in administrative law, not least by way of what, in each instance, judges and scholars require as a condition of effective judicial review. Undoubtedly, the constructive role of the Court relying on comparative law has been essential to generate a body of law that could be more distinctively identified as "administrative". It provided procedural guarantees that could ensure due process in administrative decision-making and it developed the means through which administrative action became subject to judicial control, starting from the bare bones that the Treaty provided. Judges and scholars alike have argued that such constructive role stems from the Court's mandate to ensure that the law is observed.[27] Such mandate gives it discretion on how to bridge the distance between the common legal traditions of the Member States and the needs of the EU legal order in accordance with the Treaties, and defines the scope and boundaries of the maturation of EU law: it expands it by 'perfecting' its tools and the reach of the administrative rule of law, but only within the limits of the specific features of EU law which it delimits by reference to the scheme of the Treaties. Such specificities, inter alia, have justified the assertion that the Treaties provide a 'complete system of legal remedies' where effective judicial review is ensured, irrespective of the perennial difficulties of private standing.

In sum, due to its integration function, comparative law assisted in the development of EU law as a *legal order*, that is, of a complete system, with its own objectives, sources and normative autonomy.[28] In doing so, it also enabled progressively the identification and distinction of its constitutional law and of its administrative law, which is more a product of scholarly interpretations of EU law, and possibly, of its subsequent influence in shaping EU law, than a readily identifiable feature of the law of European integration.

3. Law and Legitimacy at the Intersection Between the National and the European

The attractiveness of the state paradigm as a foundation for normative developments was too strong, not only for lack of other terms of comparison but also because it anchored both the legal legitimacy and the social acceptance of the Communities' public authority. In fact, comparative

[26] Case 11-70, *Internationale Handelsgesellschaft*, EU:C:1970:114paragraph 4.
[27] Pescatore (n 16), 355.
[28] *Idem*, 357.

administrative law was more than a pillar of the normative development of a legal order. It shielded the EU legal order from legitimacy gaps that could stem from the lack of protection of the Member States – insofar as they were confronted with unilateral exercises of public power by the EU institutions – and of the legal persons affected by decisions and legal acts either adopted solely by the EU institutions or (more often) in various combinations of joint EU and Members States' action.

As much as the recognition of the protection of fundamental rights as a feature of the EU legal system had reassured the German federal constitutional court in *Internationale Handelsgeselschaft* (and, more broadly, public law lawyers and scholars), principles and norms of administrative law also ensured that the Member States and the persons concerned by the administrative action of the Community (soon to become a Union) had effective legal tools that defined limits to the exercise of public power, subject to the efficiency of administrative action. The general principles of law defined the objective legality of the actions of the institutions and enabled the protection of the individual. Jürgen Schwarze, by compiling them in his seminal volume "European Administrative Law", made that visible to a skeptical community of legal scholars for whom administrative law beyond the state remained (in the 1990s) an impossibility.[29] In Schwarze's view, the Court had achieved "a remarkable feat of development", ultimately resulting in "a high standard of legal protection for the Community *citizen* against the exercise of Community power" in balance with the requirements of public interest.[30] The missing link for the identification of administrative law had been found. It complemented the earlier works that had essentially focused on the existence of administrative institutions in the then Communities, operating as a structure of the relationships essentially established between the Community and the national level.

Schwarze's observation that the development of administrative law was essential to secure the autonomy of the EU legal order is, arguably, telling. If the Community needed to have "its own implementation mechanisms" to guarantee supremacy and direct effect,[31] such mechanisms needed to be given foundations of legitimacy, since they could not a priori claim the legitimacy that state administrations benefited from. The parallels that both scholars and the Court forged with national polities based on a functional method of comparison were essential.[32] But comparison, being ancillary to the autonomy of EU law, also, indirectly, shows the limits of that same autonomy: if the judicial development of legal protection resulted from legal claims of Member States and private litigants, which the Court filtered through the filter of the specificities

[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), 273-294.
[30] Schwarze (n 4)1464, emphasis added.
[31] Schwarze (n 4), 8.
[32] Chiti and Mendes (n 2).

of the EU legal order, this same dynamic arguably delimited how far the scope of the judicially-made law of the EU administration could strecht. At the same time, the fact that comparison defined, to a great extent, the scope of the study of EU administrative law, insofar as the same approach was taken up by scholars, set important boundaries to scholarship, which in significant respects has not developed a doctrine that is independent from the categories provided for by national law and by the Court.[33] The principle of good administration, by and large, is an example of the lack of doctrinal distance from judicially inspired developments and, indirectly, from the litigation strategies that may underlie it.[34]

Be that as it may, the parallels that could be drawn from comparative law became an essential feature of the EU legal order, today reflected in the Charter (namely, the right to good administration in Article 41, and the right to an effective judicial remedy in Article 47) and extended to the Treaty (inter alia, by defining effective judicial protection as a duty of the Member States in matters falling within the scope of EU law). Comparative administrative law, in this regard, has fulfilled its function of grounding the progressive improvement of EU law. Cumbersome comparative studies no longer need to anchor litigant's claims and judicial arguments supporting legal protection; they can simply resort to the Charter. The administrative rule of law that Schwarze indicated to be in need of completion at the end of the 1980s appears, at this level at least, to have reached a state of perfection, in what comes to its constitutional credentials of anchoring and limiting public power. Approached, however, with this lens – the lens of national law – much of the complexity and multiple interactions that shaped EU administrative law remained hidden.[35]

4. The Limits of Comparative Administrative Law's Integration Function

While the Treaties and the logic of integration defined the boundaries of how far EU law could reproduce or resemble state public law, the tensions and possible balances to strike between the normative and functional aspects of EU law remain to this day largely unaddressed. The mix between, on the one hand, state-based public law largely stemming from the work of the court and of scholars, and, on the other, institutions and procedures set in motion to enable effective problem-solving capacity, by managing the interdependence of states,[36] remains unstable. While defining the boundaries of the EU's administrative function and delimiting to which

[33] F. Brito Bastos 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' (2021) *German Law Journal* 4, 593-624.

[34] HP Nehl, 'Good Administration as Procedural Right and/or General Principle?', H Hofmann and A Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar, 2009), pp. 322-351

[35] See, further, Chiti and Mendes (n 2). EU administrative law scholarship reflects the dissonance between EU specific and national inspired frames of reference, as argued by Brito Bastos.

[36] A Menon and S Weatherill, 'Legitimacy, Accountability, and Delegation in the European Union' in A Arnull and D Wincott *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), p. 113-131

manifestations of EU public powers can legal principles apply without distorting the respective character and purpose (and without stretching too far the content of those principles) is unproblematic in many instances, that is far from clear in others.

The dispute between the German Federal Constitutional Court and the Court of the Justice in the *Weiss* case regarding the application of the principle of proportionality in judicial review of monetary policy decisions is a recent prominent example. The exceptionality of the judicial clash does not detract from its illustrative character for current purposes. Judicial review of monetary policy decisions is to a great extent an underdeveloped matter in public law that arose prominently within the EU in exceptional circumstances (*Gauweiler*, adjudicating on an ECB measure announced at the height of the sovereign debt crisis) and, more recently, in relation to another non-conventional monetary measure adopted outside of a crisis situation (*Weiss*). Comparative law could not provide a basis for suitable answers, but neither did EU law in this instance when confronted with the convoluted political and legal context and the legitimacy concerns arising out of the ECB's action. While the CJEU's use of proportionality can be seen to be in line with its case law that subsumes the review of this principle under the standard of 'manifest error of assessment' (which it applies to instances of discretion, in varying degrees), it amounted in essence to the result that the national court contested, problematic from the perspective both of competences and of the rule of law: the ECB gets to determine the boundaries of its mandate.[37]

The different approaches to proportionality were perhaps a detail in a multifaceted dispute, but the judicial clash nevertheless highlights the limits of general principles of law in anchoring the legitimacy of public action by EU institutions and bodies, in particular when legitimacy is frail on other grounds. This is not a matter of detail when one considers that proportionality is one of the main tools of judicial review (the most invoked) in matters raising technically complex assessments.[38] One may praise it for its flexibility,[39] but at which point does the principle lose its core content and function? The question encompasses of course also national law applications of the principle (of any general principle of law which, per definition, is flexible and adaptable), but has a different relevance in the EU's constitutional framework. Here, the balancing between benefits and sacrifices may not be accompanied by a specification of the interests at stake, in which case lack of clarity on what is being weighed blurs the function of proportionality; that is particularly problematic if the judgment of proportionality pertains to the exercise of EU competences and, hence, defines the legal boundary of the EU's intervention with consequences

[37] The argument is deeper than just one of judicial deference (see, e.g. M. Dani et al. "'It's the political economy..!" A moment of truth for the eurozone and the EU' *International Journal of Constitutional Law* (forthcoming).
[38] M P. Chiti, M Macchia, A Magliari, 'The Principle of Proportionality and the European Central Bank' (2020), 26 *European Public Law*, 643-678, at 861.
[39] Idem, ibidem.

to the relative scope of action of Member States, EU and private actors.[40] Another specificity is that proportionality is often conflated, in the practice of judicial scrutiny, with compliance with the duty to give reasons, which in the EU has a constitutional relevance unknown in national law.[41] National parallels – as many lawyers did not hesitate to argue in defence of the Court of Justice's application of proportionality – are of very limited (if any) use, when seeking to understand the principle's legal dimensions and the constitutional implications of its iterations.

Now, one may argue: a central bank is an institution whose authority is outside of the scope of administrative law and should not be subject to its strictures in the same terms as administrative action. The extent of judicial review was, in fact, core to the judicial dispute in *Weiss*. But where can the line be drawn between the areas of public action where the tension between liberty and authority, rights and effectiveness in the pursuance of public interest, the public interests of the EU and those of the Member States, should be mediated by administrative law, or considered to be within the scope of administrative-law-based or inspired controls, and those that fall outside? Different legal systems provide legal doctrines in this regard (political questions, 'actes de gouvernment'). But which criteria can apply to the EU, its institutions, bodies and offices, to define such a border, is far from clear. Just as arguments on the EU's democratic deficit, these are questions that are, in essence, questions "about the nature, functions and goals of the [EC/EU]",[42] for which comparison is an imperfect gauge. They are ultimately questions about the relationship between law and political and administrative power, which in the EU is in many respects not comparable to its exercise in a state setting, as much as it has acquired some of its traits.

Today, in an institutional, legal and political context distinct (and perhaps more complex) than the one where the general principles of EU law matured, the common legal traditions of the Member States hardly provide a solid basis for pressing questions of legitimacy that arise at the boundaries of the administrative rule of law that courts and scholars have developed and relied on for the past decades. How they did before, and to which effects, is a question that merits being analysed with the benefit of hindsight. Hindsight provides the distance from the institutional dynamics that legal scholars analysed and helped developing – the distance that was arguably absent in the formative years of EU administrative law. The point of such an inquiry is not to question the legal 'acquis' that EU administrative law has generated – the control of public

[40] On the impact of lack of specification of the interests at stake, see idem, 850, and V Kosta 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy' in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law* (Oxford, OUP, 2019), 198-219.
[41] On conflation, Chiti, Macchia, Magliari (n 38), 850. On the specificity of the duty to give reasons, see Mendes (n 25).
[42] G Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) *European Law Journal* 4, 5.

authority in the EU[43] - but to understand the function, limits and constitutional effects of a body of law largely based on a transposition of principles, norms and concepts that originated in the state setting, while applying to realities where the Member States authorities were the 'administrés', and where the citizens whose rights demanded protection were mostly legal persons engaging either with their national administrations – more often than not, in the face of an interwoven sequence of decisions from the EU and other national administrative bodies – or with the EU's direct administration – also spearheading a composite decision-making procedure.

5. Comparative Administrative Law and Integration: Moving Forward

While comparative administrative law assisted in creating the general part of EU law, moving forward, how can it help the subjection of public authority to law in areas such as the management of structural funds, the operational activities of Frontex at the EU borders, or under the myriad of complex legal regimes set in place to ensure financial stability in the EU? What does that subjection – an essential premise of any liberal-democratic system – mean in the EU specific constitutional setting? In all these areas, in many different guises, and despite the centralisation that has occurred, the Member States remain fundamental political actors in the implementation of the legal regimes that they also, to a great extent, shape. How far that interdependence, under the aegis of more or less powerful EU institutions or bodies (both in terms of *potestas* and of *potentia*), can be controlled or mediated through legal principles transposed from the state law is a crucial inquiry. It is fundamental to assess, moving forward, not only the 'acquis' achieved through the development of general principles of administrative law - mostly in interaction between courts and scholars drawing on comparative law – but also its significance in relation to the current state of development of EU law. Arguably, more important than extending their reach (for instance, in relation to soft law) is to gain a deeper understanding of how they have shaped the legal relationship between Member States and EU institutions, between them, individually and jointly, on the one hand, and private persons, on the other. Who are the citizens or legal persons whose rights and legally protected interests enjoy and should enjoy legal protection from administrative law principles or norms in the context of EU integration, to which effects and with which constitutional implications?

The extent to which administrative law – drawing still on nationally-inspired frames of reference or already adapted to the specificities of the EU legal order – can provide normative answers suitable to bridge demands for effectiveness in the definition and realisation of public interests, on the one hand, and legal protection that the legal order recognises to those affected,

[43] Chiti and Mendes (n 2).

on the other, may be limited. But inquiries that confirm or deny this hypothesis – and take stock of the degree of maturity that EU administrative law has reached, of the tensions and interactions it entertains with EU constitutional law and with the actors that mobilise it – are only possible if scholars move beyond the certainties that have allowed them to resort to the categories of administrative law that they have been working with for at least four decades. Whether and to which extent state-based legal techniques have been suitable to understand administrative power as it developed in the EU is a debate that is only now starting. [44] Arguably, it requires addressing upfront the tension between functionalism and normativism that continues to pervade EU law, including its administrative law, and that is largely the result of the contribution of comparative law.[45]

While the constitutional dimension of EU public law does not exhaust the realm of the administrative, and comparison remains a source of knowledge,[46] we may have reached the end of the road with regard to relying on general principles of law as a means to secure the path to the perfection of EU law because of the fragility of its constitutional setting. Much depends on the specificities of integration in each policy field that require an adaptation of the fundamental premise of liberal-democratic systems, on which current EU administrative law draws. How far can the common legal traditions of the Member States weigh in is, as far as the case law is concerned, a matter subject to methodological choices that remain still largely shrouded in the secrecy of judicial deliberations. They are in part dependent on the specificities of the cases that come before the court, on the litigation strategies of those who have direct access to the Court or seek access though preliminary reference procedures, on the filtering role of national courts. This is a crucial question for the development of EU law, which scholars have not yet systematically addressed.

[44] See also Brito Bastos (n 33).
[45] Mendes (n 12).
[46] G. della Cananea and M. Bussani, 'The 'Common Core' of Administrative Laws in Europe: A Framework for Analysis' (2019) 26 *Maastricht Journal of European and Comparative Law* 2, 217–250 and, generally, the COCEAL project (information available at http://www.coceal.it/index.php?option=com_content&view=article&id=13&Itemid=109).