Administrative Law in the EU: the Liberal Constitutional Paradigm and Institutionalism as an Imperfect Alternative

Joana Mendes

- forthcoming in Carol Harlow (ed.) *A Research Agenda for Administrative Law,* Edward Elgar[1] -

1. Public law in the EU

In 2003, Sabino Cassese proposed a change of paradigm of public law which took due account of the changes in the morphology of public power.[2] He called for the use of more sophisticated instruments of analysis of public power, instead of the tendency to just funnel new paradigms through the old models, hence reducing their novelty and implications. He also noted the danger that those new instruments might be subject to "easy manipulation… under the pressure of interests".[3] EU administrative law – both as law and as a scholarly field – has, to a significant extent, suffered from this tendency, given the weight that the analogy with the categories of state public law has in its construction (both in case law and in scholarly writings). This is perhaps more evident in its 'general part', i.e., the general legal principles and norms common to the various sectors of EU administrative power. But it is, arguably, these that more forcefully convey the ethos of EU administrative law, grounded on a model of liberal constitutionalism. It has also a systematic relevance, since they both constitute a reference point to support new solutions but can also constrain novelty, as Cassese noted.

Despite the distinct character of the EU, the state-law setting kept on exercising a fundamental attraction, when it came to devising solutions for legal problems posed by the exercise of public powers in the EU over the years of EU integration. That the EU administration is a reality distinct from national administrations, which it incorporated and changed, has been sufficiently acknowledged in a rich literature that spans at least three decades.[4] That did not prevent

[1] I pointed to the possibility of Santi Romano's institutionalism providing a suitable way of understanding EU administrative law in a first essay that is forthcoming in the Liber Amicorum Marco D'Alberti (G. Amato et al, eds.). The chapter develops further some of the points first outlined there and it is part of an ongoing work. Section 3 is mostly taken from that text, while Sections 4 and 5.1 extend and adapt some of its parts.

[2] S. Cassese, 'L'Arena Pubblica. Nuovi Paradigmi per lo Stato', *Rivista trimestrale di diritto pubblico*, 3 (2001), 601-650 (the reference to the 'transformation of [the] morphology [of public power]' is at 650).

[3] *Idem*, 650.

[4] See, among others, S. Cassese (ed.) *The European Administration* (International Institute of Administrative Sciences, 1987); E. Schmidt-Assmann, "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft", 31 *Europarecht* 3 (1996), 270-301; E. Chiti and C. Franchini, *L'integrazione amministrativa europea* (Il Mullino, 2003); H. Hofmann and A. Türk, 'The Development of Integrated Administration in the EU and its

judges and scholars from making sense of administrative power in the EU with the tools known from national legal orders. Their combined efforts supported the ideal of an integrated administration constitutionally framed by an administrative rule of law, in line with the tenets of liberal constitutioanlism.

This model has always had limits. The tensions between that ideal and the reality of administrative power have largely animated the scholarly efforts to analyse and further develop EU administrative law. But those limits and tensions are perhaps more visible today. As the EU moved into policy areas that were until roughly a decade ago the premise of 'core state powers'[5] – such as physical border controls or the regulation of financial stability, including bank supervision and resolution – the intricate division of competences between national and EU authorities became more prominent and complex. The difficulties of identifying the authors of decisions, their degrees of discretion, ascribing errors and securing the conditions of accountability have increased, or, at least, seem more visible. These difficulties reveal more a law – or legal regimes – conditioned by the political difficulties of integration and by the specific structures that anchor the exercise of public authority in the EU, than a law that can be progressively perfected by resorting to legal reasoning, norms and principles to expand its reach over public power.

Against this background, I argue in this chapter that the normativist approach to EU administrative law that has largely shaped its judicial and scholarly development is limited, despite its contribution in bringing about an administrative rule of law in the EU (Sections 2 and 3). Phenomena that, while present in other legal systems, are core to the functioning of the EU legal order cannot be suitably tackled with conceptions of public law inspired by the binary logic of protecting individual legal spheres from the exercise of public authority that has largely grounded administrative law in the state settings (Section 4). I propose then an imperfect alternative perspective on public law, drawing on the institutionalism of Santi Romano (Section 5).

2. The *Law* of the EU administration: the path taken

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 created to

Consequences' (2007) 13 *European Law Journal* 2, 253-271; C. Franchini (2014), "Les notions d'administration indirecte et de coadministration", in J. B.Auby and J. Dutheil de la Rochère (eds.), *Traité de droit administratif européen* (Bruylant, 2014, 2nd ed.) 335-355, P. Craig, *EU Administrative Law* (Oxford University Press, 2018, 3rd ed.).

[5] P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2018) 56 *Journal of Common Market Studies* 1, 178-196.

implement EU laws and policies – EU administrative law – has emerged and evolved as an imbrication between, on the one hand, norms specifically created to govern the implementation of sectorial EU laws and policies, and, on the other, general principles of administrative procedure and judicial review.[6] This was an administrative law constructed on the premises of the state paradigm of liberal constitutionalism, applied to an institutional structure that serves a multitude of functional purposes: the creation and preservation of the internal market, the delivery of a diversified set of collective goods and policies that progressively became a competence of the EU, the state-like functions that the EU later acquired (external action, single currency, the control of territorial borders). Resort to state-like categories enabled the construction of a general part of EU administrative law that, in turn, permitted its doctrinal development beyond the sector-fragmented and deeply technical areas which composed EU law.[7]

That framing meant transferring to the law of the EU and of its administration the tenets of normativism, whereby legal norms structure and limit the powers of administrations, general principles of procedure protect the rights and legally protected interests negatively affected by the unilateral exercise of public power, and courts scrutinise possible breaches of law. Judicial review ensures both that administrations stay within the limits of what the Treaty and the legislature determined and that the private legal sphere of those affected is preserved from possible illegal encroachments. From this perspective, EU administrative law emphasises the legal controls over public power to ensure the protection of the private sphere, which must be compatible with the spheres of autonomy that the administration should retain. At the same time, the delimitation of the EU administration, as a distinct organisation and function within the EU, progressively contributed to conceive the EU in terms of separation of powers. Legislative norms – a privileged source of legality – pre-determine the core aspects of administrative action. Administrative powers are subject to fundamental rights recognised by the common traditions of the Member States (later enshrined in the Charter), to the higher Treaty norms, under the watchful eye of the Court. The Court reviews the legality of administrative action, while attuning the intensity of judicial review to the degree of discretion that the relevant legal norms intended to recognise to the administration.

In the midst of the complex structures and procedures that composed the EU administration (exemplarily mapped by a rich literature), one could devise the contraposition

[6] E. Chiti and J. Mendes, 'The Evolution of EU Administrative Law', in Paul Craig, Graínne de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP, 2021), pp. 456-491.

[7] J Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field: Normativism, Functional Comparison and Integration' (*European Constitutional Law Review*, forthcoming).

between the exercise of public authority and the private legal spheres whose liberty must be protected. Notwithstanding the heterarchical relationships that stem from the EU administrations' imbrication with that of the Member States and also with private actors, the premises of procedural protection and judicial controls remained anchored in that bilateral tension between authority and liberty, typical of the hierarchical relationship that framed the development of administrative law during the 19th century.[8] The same logic applied, counter-intuitively, also to the relationships between the Member States and the EU. In this logic, Member States were also given a right to be heard in the same terms as private actors whose legal sphere requires protection before the exercise of public power (state aids and infringement procedures). [9]

The authority-liberty binomial presupposes a logic of protection against the unilateral exercise of public authority which contrasts, however, with the configuration of public authority in the EU 'public arena', characterised by multiple public and private actors involved in socio-economic and legal relationships. Their interactions are characterised by negotiations and cooperation, which precede and determine the formal acts eventually adopted – those that the courts get to review.[10] Clearly the opposition between authority and liberty, where one exists, is then not between public and private, but between different constellations of public-private interests, linked by complex multilateral relationships, wherein public actors defend public interests with inevitable private ramifications and often act either prompted by private actors or in close articulation with them.[11] Through the judicial filter, their claims are often framed in terms of the general principles that oppose private to the public or the public to the public.

As the general principles established by the case law became part of EU primary law, either enshrined in the Charter of Fundamental Rights (such as those clustered under good

[8] Cassese, n 2, 602-606, while making a diagnosis for Italian administrative law and referring to the influence of the judicial lens on administrative law.

[9] See e.g. Opinion of AG Sharpston in Case C-114/17P *Spain v.* Commission ECLI:EU:C:2018:309, para 78 to 82 (recalling that 'observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a *measure adversely affecting* that person, a fundamental principle of EU law which must be guaranteed *even in the absence of any rules governing the procedure in question*', refering to Case C-135/92 *Fiskano AB v Commission* ECLI:EU:C:1994:297, and, indirectly to a string of earlier Cases, including C-85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, and C-234/84 *Belgium v Commission* ECLI:EU:C:1986:302). For infrinegment procedures, see, e.g., Case C-160/08 *Commission v Germany* ECLI:EU:C:2010:230, paras 41 and 42, refering to the need to "protect the rights of the Member State concerned").

[10] Cassese, n 2, 607.

[11] See Cassese, idem, 620 (noting also the consequences of negotiation for legality), 629-630 (where, drawing on an example taken from the regulation of telecommunications, he rightly notes the coincidence between the European interest that the Commission protects and pursues, on the one hand, and the private interest of the company (the 'citizen'), on the other, and their divergence in relation to the national public interest).

administration as fundamental rights in Article 41), and as the distinction between different types of public powers subject to the Treaty founding principles made its way to the Treaty, one could state that positive law had finally reached the point that earlier scholars of EU administrative law had envisaged in the late 1980s. As in the Member States, also at the EU level, administrative law could be conceived as a concretisation of constitutional law.[12] Constitutional norms and principles provided the normative yardstick that the administrative action of the EU should strive to achieve.[13] This was normativism taken to its fullest consequences.

Many of the phenomena that characterise the EU administration – interpenetration of authorities usually analysed as composite administrations or procedures, public private collaboration in norm-setting, the centrality of soft law – continue to be analysed today within the normative and conceptual framework given by normativism. This does not mean, however, that the protection of private legal spheres through procedural principles and judicial remedies, and the subjection of public powers to principles of legality, is the suitable frame to understand the specific complexity of EU administrative law. Those phenomena have a structural relevance in the EU that they may not have in territorially anchored state administrations, which the concepts and principles of national administrative law could arguably not capture.[14] Some of them at least (soft law and the public-private technical standards that are essential to the internal market) cannot easily be explained in the tenets of normativism.[15]

3. The achievements

Now, to the extent that similarities could be established – and, at least insofar as private legal spheres were impacted by the exercise of public authority, they could – transposition was due. There is little doubt that a public power had developed at the EU level which needed to be subject to legal control, that the Court of Justice resorted amply to techniques of judicial review and established principles that stemmed from national administrative law, fulfilling the mandate that the Treaties gave it. Such control – together with the establishment of administrative power – has

[12] J. Schwarze, *European administrative law* (Sweet & Maxwell J, 1992[2006]), 2nd ed.

[13] D. Curtin, H. C. H. Hofmann, J. Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19(1) *European Law Journal*, pp. 1-21.

[14] In a similar sense, arguing that transposition of national law overshadowed the distinct characters of the EU administrative legal order, see F. Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' (2021) 22(4) *German Law Journal*, pp. 593-624, proposing a method that perfections the dogmatic categories of EU administrative law, which the author draws from the German new public law scholarship.

[15] See, further, Section 4 below.

been one of the main purposes of EU administrative law over the past decades, reflecting to a great extent the emergence and development of Western administrative laws.[16]

From this perspective, EU administrative law has largely attained its goals**.** The 'art of bending the executive [and administrative] power to respect the law' is today largely achieved, to paraphrase Jean-Bernard Auby in his elegant diagnosis of French administrative law in the early 2000s.[17] That success is to a large extent due to the general principles of administrative law that, stemming originally from national laws, protect the legal sphere of the legal persons confronted with the exercise of authority by the EU (even if they function differently in different sectors of EU law). Many of them (such as the often-invoked proportionality) constitute core tools for the judicial review of administrative action. That the administrative rule of law has been achieved to a significant extent in the EU is no small feat. Existing lacunae keep on being filled on the 'humus' that comparative administrative law provided, by now already resorting to an established catalogue of fundamental rights and to the techniques of judicial review that the Courts solidified over the years.[18] The convergence among Member States legal orders, much by effect of Europeanisation, and between these and the EU legal order – both at the core of academic debates in the 1980s and 1990s – have also been largely realised.[19]

But that convergence occurred when deep transformations of the State and of its administrative law were under way and fundamentally affected the authority of administrative powers, the relationship that they establish with natural and legal persons by effect of its exercise, as well as the relationship between state and society that underpinned normativism (presupposing separation between the public and the private spheres).[20] Intervening in complex normative structures of market regulation, the legal norm to which administrative action must conform does not predetermine all or the essential aspects of the administrative action. These are ever more reliant on procedural norms for the definition of its content and dependent on extra-legal aspects of decision-making. Those procedural norms, in the end, frame the processes of negotiation and

---

[16] Chiti and Mendes, n 6 above.

[17] J.-B. Auby, 'La Bataille de San Romano. Réflexions sur les Évolutions Récentes du Droit Administratif' (2001) *L'Actualité Juridique – Droit Administratif*, 921-926, 926.

[18] See, e.g., Case C-130/19 *European Court of Auditors v. Karel Pinxten* ECLI:EU:C:2021:782, para 167 (right to be heard in a disciplinary procedure); Case C-152/19 P *Deutsche Telekom AG v. Commission* ECLI:EU:C:2021:238, para 105, and C-165/19P *Slovak Telekom, a.s. v. Commission* ECLI:EU:C:2021:239, para 80 (rights of defence in competition law infringement proceedings).

[19] M. D'Alberti, 'Units and Methods of Comparison', in P. Cane, H. Hofmann, E. Ip, P. Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford, 2020), 119-136, 123-129.

[20] For these transformations, see, among many, Auby n 17, with reference to French administrative law, but mapping traits that are not exclusive thereto (such as the internationalisation of the sources of law, the increasing relevance of the market, the fragmentation of the state apparatus).

collaboration that have always been the essence of the EU administration. The essential aspects of administrative action are also heavily dependent on composite administrative structures and procedures, which intermingle (in various degrees and shapes) different types of legal sources, from national and EU law, and different actors, public and private. Procedural norms, specific administrative structures and procedures are then essential to mediate the gap between the legal norms and the administrative actions which they frame. Those processes, in turn, involve administrations that are not only situated at different territorial levels. They reflect different administrative cultures, are subordinated to different governments and political priorities or, if independent from them, convey different socio-economic problems and needs, all manifested within the context of EU integration, framed by different, albeit interlocked, legal orders.[21]

Despite the existence of a very rich body of literature that analyses the EU administration, its specific traits and challenges,[22] the prevailing normativist perspective of EU administrative law (which the principles of its general part – and the case law – convey) tends to ignore the legal relevance and specificity of the complex articulation between the different administrations that are a structural part of its legal system. One example is the judgment in *Berlusconi*, where the difficulties in matching a two-layered system of judicial review with composite procedures, and the requirement to ensure effective judicial review, ultimately led the Court to assert its jurisdiction over the validity of national acts (hence, precluding review by national courts when discretion lies with EU bodies), and recognise the jurisdiction of national courts over the validity of EU acts, to the extent that these are preparatory of national final decisions.[23] From the perspective of ensuring judicial control over the legality of administrative action in the EU, this development may be praiseworthy. But how to determine where discretion is located may be far from a straightforward exercise and is key to understanding the implications of this doctrine.

---

[21] The terms interlocked is taken from K. Lenaerts 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International and Comparative Law Quarterly* 873. On composite administrative procedures, see inter alia, H. Hofmann, 'Composite Decision-Making Procedures in EU Administrative Law' in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009); S. Alonso de Léon, *Composite Administrative Procedures in the European Union* (Iustel, 2017); and F. Brito Bastos, *Beyond Executive Federalism: the Judicial Crafting of the Law of Composite Administrative Decision-making*, Florence: European University Institute, 2018.

[22] See, among many, E. Chiti, and C. Franchini, *L'Integrazione Amministrativa Europea* (Il Mullino, 2003) and, more recently, M. Ruffert, *Law of Administrative Organization of the EU. A Comparative Approach* (Edward Elgar, 2020).

[23] Case C-219/17 *Berlusconi and Fininvest v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* EU:C:2018:102, para 44, 46, 49 and 50. On the significance of this judgment for the evolution of EU administrative law see, inter alia, Chiti and Mendes, n 16 above.

4. The 'irritants'

4.1. Unspecified public interest

Fundamental aspects of the exercise of public power either remain in the shade of a normativist conception of administrative law or cannot be suitably grasped from this perspective. One is the role of public interest in the exercise of public power. While the public interest provides the *raison d'être* of public power, this is typically the purview of the decision-makers' discretion. Outside of the indications given in substantive norms and written and un-written procedural strictures, how executive bodies arrive at the determination of public interests is beyond the sphere of influence of the law.[24] Legal norms provide the grounds and limits of administrative power, within which discretion lives and should live without an intrusion of judicial review, and, hence, indirectly, of legal considerations.[25] Judicial review is presumed limited to manifest errors of assessment, whereby courts – with different degrees of stringency – verify compliance (mostly) with procedural norms to establish whether the powers exercised remained within the limits defined by law (i.e. whether they do not 'manifestly exceed the limits of discretion') and whether they constitute misuse of power.[26] The latter ground of review is largely irrelevant in current judicial practice of the EU Courts. In the former – the most significant to control the exercise of discretion – the possible lack of congruity with the public interests for which administrative power was attributed is hard to establish. This is not for lack of judicial tools or for an insufficiently stringent standard of review. Simply, the legal norms which set the boundaries of both the administrative and of the judicial intervention are not – and cannot be, given the nature of the matters subject to regulation – sufficiently determined regarding the goals to be pursued, which are often plural and conflicting. In addition, the fact that the way public interests are established and pursued often does not reach the courts (for a variety of different reasons, including the procedural norms that filter out access to judicial review) means that, to a large extent, the way legal regimes are shaped depends on administrative processes that, even if grounded and limited by law, are also jurisgenerative and

[24] On the relevance of the exercise of administrative power, see A. Cioffi, 'Due Problemi Fondamentali della Legitimità Amministrativa (a Proposito di Santi Romano e di M.S. Giannini)' (2009) *Diritto Amministrativo* 3, 601-661, 644. From a different but equally relevant perspective, see J. M. Rodrigues de Santiago, *Metodologia del Derecho Administrativo. Reglas de Racionalidad para la Adopción y el Control de la Decisión Administrativa* (Marcial Pons, 2016).

[25] J. Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 4 *Modern Law Review* 443, and references therein.

[26] See, among many, H.P. Nehl, 'Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union' in J. Mendes (ed) *EU Executive Discretion and the Limits of Law* (Oxford University Press, 2019) and references therein.

define the way public interests are protected in our societies.[27] They determine the meaning and scope of legal norms.

4.2. A conundrum: soft law

Normativism also fails to provide an adequate understanding of phenomena that, far from exclusive to it, are characteristic of the EU administration and fundamental to its operation. One such phenomenon is soft law. A literature spanning roughly three decades has noted its importance in EU law, the variety of its functions in EU integration, and its ability to produce legal effects.[28] Soft law seems to pose an intractable conundrum. On the one hand, it can impact on the legal sphere of individuals and, when addressed to Member States, it is often accompanied at least by a duty of consideration (which can be anchored in the principle of sincere cooperation).[29] On the other, its 'softness' – essential for the function it can have in different legal regimes, be it essentially of interpretative or of decisional character – means that, in principle, it does not have the ability to produce *binding* legal effects, a condition of admissibility for direct actions of annulment under Article 263 TFEU.[30] The Court has delimited the instances in which soft law instruments are reviewable acts,[31] and defined the criteria to capture in the net of justiciability those acts that are 'hard law in disguise' because they produce binding legal effects beyond their informative function or the 'power of exhortation and persuasion' which they may express.[32] The delimitation depends on an examination of the substance of the act and of its effects, in turn dependent on its content, the context of its adoption and the powers of its author may lead to the conclusion that the act has binding legal effects.[33]

---

[27] J. Mendes, 'Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board' (2021) *Modern Law Review.*

[28] The main non-sectorial studies of soft law in the EU remain F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* and L. Senden, *Soft Law in European Community Law* (Hart 2004). For a recent account see I. Maher, "Revisiting Soft Law. Governance, Regulation and Networks" in M. Eliantonio, E. Korkea-aho, and O. Stefan (eds), *EU Soft law in the Member States: Theoretical Findings and Empirical Evidence* (Hart, 2021) (including an overview of relevant literature).

[29] In some cases, their addressees must "make every effort to comply" with soft law measures, communicate whether the comply or intend to comply, and explain divergences (see Article 16(3) Regulation 1093/2010).

[30] Case C-16/16 P, *Belgium v Commission*, EU:C:2018:79, para 30.

[31] See, e.g., Case C-16/16 P *Belgium v. Commission* ECLI:EU:C:2018:79.

[32] The reference to 'power of exhortation and persuasion' is from Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudential et de résolution (ACPR)* [2021] EU:C:2021:599, para 69.

[33] *Belgium v Commission*, n 30 above, para 29 and 32. Contra, see Opinion of AG Bobek, EU:C:2017:959, see paras 151 to 165.

The relevance of soft law in the EU has increased with the progressive centralisation of administrative powers in EU bodies and institutions, which has occurred *inter alia* through the establishment of EU agencies and of 'mechanisms' that combine the EU and national authorities.[34] Its centrality in the EU administration is clear in the field of financial regulation, where European Supervisory Authorities (ESAs) have acquired significant powers of regulation and supervision, while the convergence of regulatory standards continues to depend, to a very significant degree, on the action of national competent authorities. Here, soft law plays a crucial 'bridge' role.[35] But, from the perspective of normativism, it remains mostly a para-legal phenomenon, that fits strangely within the scheme of sources of law. It must be either treated similarly to soft law, or is presumably irrelevant for law, given its lack of ability to produce legal effects.

Academics dealing with soft law point to the demands of the rule of law that require judicial review against acts that are capable of impinging in the legal sphere of individuals or of legal persons. The argument is straightforward: the EU must live up to the claim that it is a 'community based on the rule of law', subject to democratic accountability, and the CJEU must make sure that the institutions act accordingly.[36] The solution to bringing soft law 'into line', as it were, is two-fold: a relaxation of the criteria of reviewability and the adoption of procedural rules that guide their adoption in conformity with tenets of democratic accountability.[37] Such developments would alleviate the rule of law and legitimacy problems that soft law causes, and fill in the lacunae that they represent from the perspective of the legal system's coherence.[38] While these are defensible

[34] Notably in areas where integration has been particularly politically sensitive, such as banking supervision (Article 6 of Council Regulation (EU) No 1024/2013 of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29.10.2013), banking resolution (Article 1 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, OJ L 225/1, 30.07.2014), and border management (Article 4 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, OJ L 295/1, 14.11.2019.

[35] See e.g. Niamh Moloney, *The Age of ESMA: Governing EU Financial Markets* (Hart, 2018), at 145.

[36] Case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166; see also Articles 2 TEU ('The Union is founded on the values of respect […] the rule of law'), 19 TEU, and 47 Charter of Fundamental Rights.

[37] M. Eliantonio, 'Judicial Review of Soft Law before the European and the National Courts: A Wind of Change Blowing from the Member States?' in M. Eliantonio, E. Korkea-aho, and O. Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart, 2021), and references therein; see also M. Eliantonio, E. Korkea-aho, and O. Stefan, 'Introduction', 6-7 (pdf) in *idem*. Note the exclusion of soft law acts from the rules of procedure proposed by the ReNEUAL Model Rules on EU Administrative Procedure, Book II – Administrative Rulemaking, points 4 and 5 (available at http://www.reneual.eu/images/Home/BookII-AdministrativeRulemaking_individualized_final_2014_09_03.pdf).

[38] Technical standards have been the object of a similar treatment, see the opposing views of R van Gestel and H-W Micklitz, 'European Integration Through Standardization: How Judicial Review is Breaking Down the Club House

claims from a principled-normative perspective, it is rather obvious that, from this perspective, soft law is treated as if it were hard law, irrespective of its soft character. While judicial review is indeed required to avoid a circumvention of the legal form, the clarity of the 'substance over form'[39] test is belied by the difficulties in delimiting the situations in which soft law has binding legal effects, or legal effects worthy of judicial and procedural protection, that is, the difficulties in identifying the situations in which soft law acts embody more than a 'power of exhortation and persuasion'.[40] There is a risk of both over-inclusiveness – if one too readily identifies hard law in disguise, which in practice amounts to a structural institutional mal-functioning – and of under-inclusiveness – if the test does not capture significant cases in which soft law is an ingenious surrogate of hard law. The Court's failure to capture the diversity of soft law acts when searching for its ability to produce legally binding effects arguably illustrates such risk.[41] Because of its binary perspective – soft law either has legally binding effects or it does not, it either merits being subject to legal strictures or it does not, no matter the acknowledgement of different degrees of 'hardness' – normativism, as conveyed by the Court, fails to examine the institutional significance and possible uniqueness of soft law within the EU as a vehicle of compromise and, at times, as a fundamental piece of the law of integration.[42] Its concern is, rather, to draw on the tools that administrative law provides to expand where needed to support legality and the legitimacy for the exercise of authority.

Both the relevance of public interest in the exercise of public powers and the various manifestations of soft law appear at first sight to be at the margins of the law. They are, nevertheless, core aspects of administrative law that are connected: soft law is part of the exercise of public power, which, depending on the specific instances, may be fundamental for the administration's ability to function and decide. Institutionalism can be a fruitful complement to the shortcomings of normativism and provide a basis to better characterise the relationship

---

of Private Standardization Bodies' (2013) 50 *Common Market Law Review* 145 and H Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20 *Maastricht Journal of Comparative and European Law* 521.

[39] See Opinion of AG Bobek in Case C-911/19 FBF v ACPR ECLI:EU:C:2021:294; Opinion of AG Bobek in Belgium v Commission, n 30 above.

[40] See Opinions of AG Bobek in Case C-911/19 FBF v ACPR (n 39 above) and Case C-16/16P Belgium v Commission (n 30 above). See the reference to the 'power of exhortation and persuasion' in Case C-911/19 FBF v ACPR ECLI: EU:C:2021:599, para 69.

[41] On the difficulties of the Court in addressing the diversity of soft law sources, see P. Hubkova 'Judicial Review of EU Soft Law: A Revolutionary Step Which Has Not Happened Yet (Case Note on *BT v. Balgarska Narodna Banka*, C-501/18), *(2021) 55 Revista General de Derecho Público.*

[42] For a critique of this binary thinking, see Opinion of AG Bobek, in Case C-911/19 *FBF* ECLI:EU:C:2021:294, para 53.

between law and administrative powers, not least because of its openness regarding the modes of law formation and of its ability to consider how law functions and is moulded in interaction with the exercise of power.[43] It may potentially advance the understanding of how administrative law structures and should structure the exercise of administrative power, which is not only unilateral and not only binding, and can be part of the way law itself is understood, given meaning and existence.

5. An Imperfect Alternative: The Law in Santi Romano

The above analysis points to a mismatch between the structural characteristics of the EU administration and its power (the intermingling of the EU and the Member States, the ensuing relevance of negotiation and collaboration, the jurisgenerative phenomena outside of legislative norms), on the one hand, and their legal framing by a body of legal principles and norms whose core rationale lies in the protection of private legal spheres before the exercise of public powers and in their delimitation by legal norms, on the other hand. The mismatch between reality and the law was a core concern of Santi Romano (1875–1947), one of the main legal scholars of Italian administrative law of the first half of the 20th century, to whose work I now turn.[44] A guiding thread in his work, if one can be identified, was the search for a scholarly construction that reflected the cultural and political transformations of his time and could overcome the 'asymmetry between legal construction and socio-political evolution'.[45] Similarly to the Anglo-Saxon realists, he exposed a conception of law open to political and social facts and practical needs. His concern was one of legal dogmatics that could overcome legal positivism and the legal myths that ensued from the 19th century conceptions of public law, while, at the same time, advancing a construction of law that was both realist (because attentive to the social) and formalist (because approached in its own terms).[46]

---

[43] See M. D'Alberti, "Santi Romano e l'Istituzione" (2014) *Rivista Trimestrale di Diritto Pubblico,* 3, 579-592, at 587, noting such openness.

[44] Cassese, n 2 above, 602; but see A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945)* (Giuffrè, 2009), 157. Far from restricted to administrative law, his work encompassed constitutional, international, ecclesiastic and colonial law, and of course, legal theory, for which he became internationally known. Administrative law, however, retained center-stage in his scholarship (Sandulli, *idem*, 166).

[45] Sandulli, i*dem*, 169.

[46] See P. Grossi, 'Santi Romano: Un Messaggio da Riprensare nella Odierna Crisi delle Fonti' in P. Grossi, *Società, Diritto, Stato. Un Recupero per il Diritto* (Giuffrè, 2006), 143-162, at 145, 146-49, 152-157. On the tension between institutionalism and formalism, see G. Itzcovich, "Something More Lively and Animated Than the Law': Institutionalism and Formalism in Santi Romano's Jurisprudence' (2020) 33 *Ratio Iuris* 2, 241-257. On Romano's method and approach, see, inter alia, S. Cassese, 'Ipotesi sulla Formazione de l'Ordinamento Giuridico' di Santi Romano' (1972) *Quaderni Fiorentini* 1, 243-283, at 266-269. Given Romano's emphasis on legal dogmatics, my claim

His work has recently witnessed a revival of sorts, mostly because of the pluralist theory that he espoused in his main work: *L'Ordinamento Giuridico* (*The Legal Order*).[47] Pluralism, however, is only one side of his legal theory.[48] It is not pluralism, but some of the tenets of his institutionalism that may provide an analytical angle for an understanding of administrative law more in tune with the structural characteristics of the EU administration.[49] Romano's institutionalism stemmed from his awareness of the 'excess of the administrative sphere relative to the legality of the liberal state'.[50] Legal formalism had left in the shade the legal problems ensuing from the exercise of public power as manifested in an administrative state, which the categories of legal liberalism were ill-suited to capture.[51] His institutionalism espoused the central role that the State retained in a context of pluralism, the openness to jurisgenerative phenomena outside the realm of parliamentary law and the ability to widen the legal analysis to problems that normativism tended to disregard, such as the organisation and the exercise of public power.[52] Romano's work indicated that parliamentary law – the law that, together with general principles of law, limits the administration and enables judicial control – does not necessarily command, but rather provides guidance and sets programmes that give ample room for interpretation. These are the seeds that make Romano's work both a promising basis to overcome the limitations of current dogmatic constructions of EU administrative law and a controversial path. As will be seen below, the ambiguity of Romano's concept of institution and its association to the administrative state further complicates the

---

that his theory can ground the development of a different conceptual system for EU administrative law is arguably not contradictory with his rejection of conceptualist thinking.

[47] Santi Romano, *L'Ordinamento Giuridico* (Sansoni, 1946); S. Romano, *The Legal Order* (Routledge, 2017, Ed. and Trans. M. Croce). See also Marco Goldoni and Mariano Croce, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati*, Stanford University Press, 2020).

[48] On the relative merits of institutionalism and pluralism in Romano's work, N. Bobbio, 'Teoria e Ideologia Nella Dottrina di Santi Romano' in P. Biscaretti Di Ruffia (ed.), *Dottrine Giuridiche di Oggi e L'Insegnamento di Santi Romano* (Giuffrè, 1977), 25-43, who considers pluralism to be the most important part and most developed of his theory (p. 38)

[49] On his institutionalism, see M. Loughlin, "Santi Romano and the Institutional Theory of Law" in Romano, *The Legal Order,* n 47, xi–xxix and M. La Torre, *Law as Institution* (Springer, 2010), in particular Chapter 4.

[50] Itzcovich, n 46 above, 244. On the centrality of the administration and its law in Romano's work, see M. Fioravanti, "Stato di Diritto e Stato Amministrativo nell'Opera Giuridica di Santi Romano" in M Fioravanti, *La Scienza del Diritto Pubblico. Dottrine dello Stato e della Costituzione Tra Otto e Novecento* (Giuffrè, 2001), 405-449. The centrality that the state has among the institutions in Romano's later work has been a source of puzzlement regarding his whole work (see in this respect, A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945)* (Giuffrè, 2009) 178; on the fading of pluralism in Romano's latter work, see Cassese, n 46 above).

[51] On the tensions between institutionalism and formalism in the work of Santi Romano, see Itzcovich n 46 above.

[52] All these are noted by D'Alberti, above n 43, 583–86 and 591.

argument, not least because of the historical period in which Romano wrote and how his work came to be seen as a justification of authoritarianism.[53]

5.1. Law is institution

Central to Romano's institutional theory is the focus on that 'something more' than norms, which he considers to be an essential component of law. Law is more than a system of legal norms, which cannot be properly 'defined and assessed if isolated from the whole of which it is part and with which it is in organic connection'.[54] Several passages point to what that 'something more' is – the institution – even if this remains a relatively imprecise concept. He stresses that the conception of law as a legal norm must be "integrated with other elements that are usually not considered and that, instead, appear more essential and characteristic", that are "more fundamental and prior [to the norm], be it for the logical demands of the concept be it for the exact assessment of the reality in which the law manifests itself".[55] Before being norm, law is 'an organisation, a structure, and a position of the society in which it develops'.[56] That connection between the norms and the whole legal order – that is, 'the institution of which [the norms] are elements' – is essential: it is this connection that attributes the legal character to the norms.[57] There is, therefore, a legal moment that precedes the emanation of the norm, which stems from society, and is part of the law as legal order.[58] Norm and institution are two distinct moments of the law, equally needed to have a judicious understanding of its nature.

Legal norms found in a particular positive law (*diritto positivo*) are but 'elements of a vaster and more complex order, and rest on it, as it is its necessary and inescapable basis'.[59] They are 'the means or the process' through which the law 'determines, fixes, immobilises, crystallises, …, the manifestations of social life to which its efficacy extends'.[60] Here lies law's 'immobilising function', which is in syntony with its character of institution, of legal order.[61] This function, however, does not exclude the possibility of renewal or even of 'radical and profound transformations of its

[53] Romano was President of the Italian Council of State under Mussolini (1929–44). On the difficulties of making the link between the theory and the ideology, see Bobbio, n 48 above

[54] Romano, *L'Ordinamento Giuridico*, n 47 above, 97 (and 27).

[55] Romano, *L'Ordinamento Giuridico*, n 47 above, 5.

[56] Idem, 27.

[57] Idem, 27-28. For Romano, there is a "perfect identity" between the concept of institution and the law (33-34).

[58] Idem, 18-22.

[59] Idem, 97.

[60] S. Romano, *Frammenti di un Dizionario Giuridico* (Giuffrè, 1983 [1947]), 81.

[61] Idem, 82-83.

structure and of its functioning'.[62] Such transformative capacity, one presumes, is innate in the necessity that is source and part of law.[63] Necessity means 'correspondence with social needs and requirements'.[64] It is a dimension of law that conditions the legal norm, insofar as the legislature needs to reflect it in the norms that it establishes.[65] Necessity, understood in this way, poses limits to the sovereign power of the State.[66]

This conception of law as legal order is particularly relevant in the realm of constitutional law, which regards the State, its elements, structures and functions irrespective of legal relationships. But it is no less pertinent for administrative law. The latter, according to Romano, is first and foremost 'the law that establishes the organisation of the entities that exercise [the administrative function]', before it governs the legal relationships that stem from that very exercise.[67] As Loughlin noted, Romano's institutional theory of law allows for the integration of administrative measures within the legal order.[68] That integration, I submit, allows the jurist to better manage the tensions that intercede – in particular in fields of economic regulation – between norms and administrative dominance, and the ensuing relative authority of different public powers. From an institutionalist perspective, the administrative state can be approached as an unavoidable trait of contemporary polities grounded by law, and not as an element strange to a normative system where general and abstract rules are the paragon of law.

These are only a few selected aspects of a rich and complex work that has been the object of manifold – and, at times, contradictory – interpretations. Risking the oversimplification that Cassese rightly warned against,[69] I would like nevertheless to propose that one can find in these tenets of Santi Romano's institutionalism the seeds to develop an approach to administrative law that, in the European Union, can usefully complement (or even, in certain aspects, possibly supplant) the normativism that legal scholars and judges have prevailingly conveyed.[70] It may

---

[62] Idem, 86.

[63] S. Romano, 'L'instaurazione di fatto di un ordinamento costituzionale e sua legittimazione' in *Scritti minori. Vol. I, Diritto costituzionale* 107–165 (Giuffrè 1950 [1901]), 153.

[64] Idem, 153.

[65] S. Romano, 'Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano. in *Scritti minori. Vol. I, Diritto costituzionale* 179–200 (Giuffrè 1950 [1901]), 194-195, 199.

[66] Idem, 186-187 (see, in this regard, Fioravanti, n 50 above, 208-209).

[67] Romano, n 63 above, 98.

[68] Loughlin, n 49 above, xix, noting the contemporary character of Romano's theory.

[69] S. Cassese, "Le Alterne Fortune de 'L'Ordinamento Giuridico' di Santi Romano" (2018) *Rivista Trimestrale di Diritto Pubblico* 1, 433-444, at 443, pointing to the need to study Romano's work as the product of a specific historical period and to avoid searching therein "dogmas to apply to new realities".

[70] On the interplay between legal scholars and the court, see J Mendes, 'The Foundations of EU Administrative Law' (above n 5).

provide a conceptual ground to move the fulcrum of EU administrative law from rights protection and judicial control to the development of precepts directed at navigating the complexity of regulation in highly technical fields and give law a suitable steering role therein. In this regard, the element of 'the living experience' that Romano's institutionalism brings into law is particularly fitting to approach administrative law in the EU.[71] Here, administrative law and the protection it affords to legally protected interests – individual and collective – implicated in complex and multipolar legal relationships are a core part of the integration that EU law both frames and anchors.

5.2. Gaps and Difficulties

The potential of Romano's theory to establish a different approach to the gap that the liberal paradigm emphasises between the administrative state and the law is neither straightforward nor uncontroversial. The first difficulty is the ambiguity of the concept of institution and of its implications. This is related to the contentious character of Romano's institutionalism, which has been seen by many Italian scholars as a justification for the authoritarian regime established under Mussolini in the 1920s and 1930s.[72] Given my proposal that institutionalism may allow us both to bridge the distance between the legal-dogmatic construction of EU administrative law and the specificity of the EU legal order and come terms with the tensions between law and administrative power in the administrative state, it is important to address these points.

The widening of the understanding of law, beyond the normative aspects that the liberal paradigm isolated – his search for that "excess of the law" in relation to legal norms – is a central point in Romano's theory and, I propose, a useful starting point to depart from the state-like framing of EU administrative law and to understand what it is beyond the categories imported from the statist liberal paradigm.[73] But, as I briefly mentioned above, the very concept of institution is not clear in Romano's work.[74] Institution is 'an effective, real entity', not an abstraction, 'it must be apprehended not from the point of view of the material forces that produce it and govern it, not in relation to the environment in which it develops and lives as a phenomenon interdependent with others, not with regard to the connections of causes and effects that are connected to it, and

[71] That reference to Romano is in Loughlin, n 49 above, xxv.

[72] On the reception of Romano's work, see, Cassese, n 69, 433-444, noting the difficulties in making sense of it and critical of its theoretical value as legal theory [confirm].

[73] On the need to overcome the state paradigm of administrative law in relation to the EU, see S. Cassese, 'Che tipo di potere è l'Unione Europea?' *Quaderni Fiorentini* 31 (2002) 141.

[74] See Bobbio, n 48 above, 28–30, pointing to the different terms that Romano uses to refer to the institution ('structure', 'position', 'system' (see text accompanying note 56 above).

therefore not sociologically, but in and of itself, as it results from a legal system, indeed it is an objective system of law'.[75] Institution combines the normative and the factual, but it could be apprehended by staying only within the realm of the law. Because Romano denies it a pre-legal (sociological or political) character, the knowledge of the institution is acquired by applying the legal method, not by resorting to other disciplines such as sociology, philosophy or politics, but how that is done remains unsaid.[76] This lack of clarity led Giannini to propose that institution is a 'liminal legal concept', in between worlds, which can be taken as starting point (a research hypothesis) and only an '*ex post* confirmation may show its acceptability'.[77]

The ambiguity of the concept and of its practical implications go hand in hand with the criticism that Romano's work has received: a product of his time, his theory is said to have supported the political-administrative powers that be of fascist Italy.[78] The historical reading of Romano's work denies it the character of legal theory capable of being transposed to different realities than those for which it was conceived.[79] Yet, Romano's complex work has opened many fronts of academic debate and permits other readings. One such reading suggests that it provides important clues to enable the transformation of the liberal state into a democratic state.[80] That is because of Romano's grounding of the law in the social or collective needs and his view that necessity, i.e. the correspondence with social needs, is part of the law when this is understood as structure and organization, and, it is, hence, imbricated in the legal norms. In this vein, I submit that Romano's institutionalism allows us to understand the relationship between law and administrative power better than the paradigm of the liberal state that underpins the core of EU

---

[75] Romano, *L'Ordinamento Giuridico*, n 47 above 96.

[76] Itzcovich, n 46 above, 246–48. Romano is adamant that law is autonomous (even if not in absolute terms), and must be studied autonomously from sociology (see, further, Itzcovich, n 46 above, 241, 247; Romano, *L'Ordinamento Giuribidico*, n 47 above, 96–97; Romano, *Frammenti*, n 60 above, 79–80).

[77] Giannini, "Gli elementi degli ordinamenti giuridici", reprinted in S. Cassese (ed.) *Massimo Severo Giannini* (Laterza, 2010, 7-16, 9, 12. On Giannini's efforts to make sense of the work of his 'maestro', see Cassese, n 69, above.

[78] On the critique, see Itzcovich, n 46 above, 247, Bobbio, n 48 above, 28–29 and, in particular, Fioravanti, n 50 above, 422–24. Fioravanti argues that Romano's theory provides the 'basis of the autocratic power of the administration' (*idem* 449) on two main grounds: first, the constitutional role that Romano attributes to the administration, in relation to the judiciary and to the legislature (which denies the primacy of legislation as an expression of popular sovereignty) and, second, the autonomy that Romano gives to the administration in relation to legal norms of civil and penal codes, which, in his view, allows Romano to '[gradually uncouple] the administrative authority from those norms' (*idem* 441-444).

[79] In a similar sense, but also more open to give Romano's work other significance, Cassese, n 69, 436, 443. The historical reading also overlooks (or downplays) the legal-dogmatic interest of Romano's defense of the autonomy of the administration, as a means to assert the autonomy of public law in relation to private law (in this regard, see Bobbio, n 48 above, 37).

[80] In this sense, Tarantino 'La necessità come fondamento della dottrina romaniana' in Ruffia n 48 above, 239-243, at 242-3 (implausibly detaching the Romano of his time from the Romano as a theorist).

administrative law. This matters, because if the EU is to be characterised by resorting to state analogies, it is much closer to an administrative state than to a parliamentary democracy. Importantly, the link Romano makes between legal norms and the institution addresses the fear of executive or administrative autocracy: if the institution is 'the necessary and inescapable basis' of the legal norms, there is an 'organic connection' between the legal norms and the institution of which they are a composing element.[81] Institutionalism undoubtedly gives more prominence to executives and administrations in relation to legislatures and courts than accepted by normativism in the administrative law model of the liberal state that EU law has inherited. It admits the jurisgenerative capacity of the former and assigns a more limited role to legislative norms than assumed by normativism, with inevitable consequences for the relationships between administrations and courts. But it is arguably possible to resort to institutionalism without running the risk of generating or justifying autocratic executives and administrations.

In the current moment of climate crisis and health emergencies, we are witnessing what appear to be deep changes to the role of the state and public powers, where uncertainty prevails, and executives appear empowered beyond the limits of states of emergencies. The financial crisis that begun in 2008 also preconised a re-orientation of the role of law and regulation, premised on the need to weigh in the power of finance and secure financial stability (even if it is questionable whether the new legal regimes brought about an effective transformation in the relative position of state, society and market). In the EU, both in the aftermath of 2008 and now, there have been important shifts in the allocation of authority between the EU institutions and the Member States (and between Member States, depending on their respective 'potentia').

It is hard to deny that executives and administrations have today a prominence that the categories of public law shaped in the tenets of liberal constitutionalism struggled to contain. In the EU, that prominence relies on different combinations of EU and national bodies. While the spectre of autocracy must be taken seriously, the lack of the directing programmatic capacity of legal norms, and the ensuing difficulties of judicial control, has since long been a concern of public lawyers. The part of executive and administration action that finds only scant grounding in legal norms and fits uneasily with the categories that delimit the scope of reviewable acts and legal liability must also be subject to the law, while not necessarily subordinated to the legislature or prone to judicial control. Institutionalism can provide a complementary or alternative way of approaching their relationship to legal norms. Yet, the ambiguity and difficulties explained allow me to advance this proposal only as a research hypothesis, in the guise of Gianinni's observations.

[81] Romano, L'Ordinamento Giuribidico, n 47, 97, where he also states that his concept of law is 'is not intended to eliminate the concept of objective law as a set of norms'.

For want of the demonstration that he calls for, and given the ambiguity of the term institution, it remains for now a rather imperfect alternative to normativism.

5.3. Why institutionalism for the study of EU administrative law?

Stopping here, even in a piece intended to propose the broad lines of a research agenda, would be largely unsatisfactory. The purpose of this chapter is to point a direction of research that can usefully complement EU administrative law scholarship and overcome difficulties it faces when confronted with an ever fast changing reality. While a fully-fledged demonstration requires work not yet undertaken, the general direction proposed here requires some more argumentation, not least because the inexistence of English translation of much of Romano's work – his so called 'minor writings' and handbooks – may be an important obstacle for the reader interested in exploring these ideas further. But, importantly, the difficulty is not only one of literal translation. The lack of elaboration of Romano's institutional theory, combined with the ambiguity and difficulties pointed out above, mean that any construction of EU administrative law that takes institutionalism as a starting point will not be a mere transposition of Romano's ideas to the 21st century reality of EU integration. So, why may institutionalism be relevant to advance our understanding of EU administrative law?

The first reason is the importance that institutionalism gives to structure as the necessary basis of the legal norms. Institutionalism stresses the concrete and effective character of the legal order that intertwines norms and social reality (and makes the legal character of norms derive from the institution). As pointed out above, law is 'an organisation, a structure, and a position of the society in which it develops'.[82] As pointed out above, what Romano means by this is not fully clear, for lack of elaboration of the concept of institution.[83] Nevertheless, this perspective applied to the relationship between administrative power and law allows us to take the administration as a starting point to understand its legal character, and situate the relative position of the norms that govern it in the legal order. Following Romano's perspective, the connection between norm and institution is essential to law.[84] That connection is, then, essential to a suitable understanding of the law and its dogmatic construction.

When applied to EU administrative law, this approach has two main advantages. To begin with, the composite structures, procedures and relationships that make the EU administration can be taken in their singularity, without the pre-judgments of the parallelisms that one may find in the

[82] N 56 above.

[83] Bobbio, n 48 above, 28-29.

[84] Nn 57 to 59 above.

state public law and in its general categories of liberal constitutionalism. To the extent that these have become also a part of EU law (e.g. the right to be heard in adversarial procedures), they must be seen and analysed as a component of the institution of which they are part. Even if they may have a similar function to equivalent rules found in the Member States' laws, they most likely have in EU law a different dimension or legal significance. The intimate connection between norm and institution brings that to the fore. In other words, even if the general legal principles of law that, following decades of judicial developments, have become the general part of EU law, have correspondence in state law, it is not so much the similarities rather than the specific dimensions, meaning and implications that they have in EU law that the academic lawyer should search for, understand and characterise. Which type of legal relationships do they shape and between whom? What is law's role in shaping in legal terms the socio-economic relationships to which it applies? This requires understanding the interaction between the norms and the concrete social reality of which they are part. But if it is dogmatic construction one is striving for, the implications of such connection must be analysed from a legal perspective. As Romano proposes, one should attempt, to the extent possible, to stay within the boundaries of legal analysis.

Further advantages come, somewhat counter-intuitively, from the difficulties of bridging norm and institution, the normative and the factual. The liminal character of the concept of institution, in between worlds, may be more suited than normativism to understand the legal character of phenomena that are core to the functioning of the EU administration, while not fitting within the categories of normativism. Soft law, mentioned above, is a case in point. Depending on how it is used, soft law may be a 'pathological' development that the Courts must oversee (e.g., when used to circumvent legal strictures, such as competence) or an essential vessel for the shaping of the legal order – or both, which does not make it less relevant to understand the directions of development of EU law. Importantly, soft law acts entail a 'continuum of legal effects' the determination of which requires that they are not seen in isolation from 'the real life of the legal act and its addressees'.[85] Determining 'whether the act can reasonably be perceived as inducing (or even effectively imposing) compliance on the part of its addressee' – the criterion that AG Bobek suggested to define the reviewable character of soft law[86] – requires understanding the respective norms within the institution (in Romano's sense) of which they are part. Taking them in isolation, as they operate at the EU level and at the national level, obscures the specificity of those norms and acts; paraphrasing, what may be construed in a certain way (in that case, as soft law lacking legal effects) when looking only at the EU level 'becomes something very different one level down

[85] AG Bobek, *FBF*, para 53.

[86] *Belgium v Commission* above n 30 and *FBF* above n 39.

within the Member State'.[87] The need to analyse norms and acts in their whole 'life cycle' is particularly salient in the case of soft law (as compellingly argued by AG Bobek in the FBF case), but it arguably extends beyond soft law acts. The legal norms connect with the institution of which they are part, and both norm and institution are core dimensions of the law. Stating that the significance of legal acts can only be apprehended if one ditches the layered view of EU law and accounts for the composite character of the legal order is more than just arguing that law must be seen in its context. The legal, political, economic, social or cultural context of the norms are not just context: they are part of the law as institution, they are part of legal order that presupposes those dimensions and their imbrication with the norms.

Returning again to AG Bobek's opinion in the *FBF* judgment, there is nothing strange in the observation that the same act may have a very different legal significance when seen at the EU level and at the Member State level, as 'the entire system is designed to function in precisely that way'.[88] Institutionalism can provide a shift of perspective that brings to the fore the way that the legal norms and the tenets of normativism are embedded in the specific institutional setting of the EU. Assessing them as part of an institution – and necessarily shaped by its traits – allows for an analysis detached from the pre-conceptions on the legal norms' ability to constrain administrative power and on how the ensuing judicial and parliamentary controls may work. The connection between the normative and the factual – one of the aspects that Romano's institutionalism stresses, but which remains underdeveloped in his work – is, arguably, a fundamental element of analysis of the EU legal order because it is a legal order whose *raison d'être* lies in its transformative capacity of the state legal orders and, hence, of the social life that animates them, fashioning them in accordance with open-ended goals. The connection between the normative and the factual is essential to understand how that transformation comes about and to understand its multiple end-results, how it responds to societal needs, how it adjusts to shifting realities and renews itself, potentially entailing 'radical and profound transformations of its structure and of its functioning'.[89]

There are other related reasons, in addition to the concrete character of the law, why institutionalism may be relevant to advance our understanding of EU administrative law. A second lies in the empowerment of the administration that critics see as the 'dark side' of Romano's institutionalism.[90] If the relationship between institutionalism and the justification of the autonomy of the administration in Romano's theory has raised alarm bells, the descriptive dimension of

[87] AG Bobek, FBF para 54.

[88] AG Bobek, FBF para 54.

[89] N 62 above.

[90] Fioravanti , n 50, above.

institutionalism may be useful to understand how the allocation of administrative power within the EU determines one of the more fundamental aspects of EU law: the relationship between the EU and the Member States. The empowerment of the administration, while far from exclusive to the EU, has been central to the most significant developments that have occurred in the last decade in the EU: the banking union, the evolution of the ECB in relation to the coordination of the Member States' economic policies under the EU's fiscal rules, the operational powers of migration agencies, the turn to 'greening' and digitalisation that the EU induces through funding mechanisms under Next Generation Europe. These are all central aspects to the evolution of the EU that depend – not fully, but in essence – on different configurations of its administrative power. The constitutional and legal concerns associated to the empowerment of the administration are mostly approached from the perspective of transparency and accountability. A rich literature has developed drawn on both principles or values and its significance in the EU to address the democratic disquiets that executive dominance raises.[91] While undoubtedly relevant, related reforms are not the panacea for the EU's legitimacy troubles, or for that matter, for the democratic conundrum that the power of arms' length or independent administrations poses.[92] Transparency and accountability-enhancing reforms can *show* how law and policy are developed, they can constrain authority and may therefore induce change, but, per se, they have relatively little to say about the law's 'immobilising function', about how it 'determines, fixes, immobilises, crystallises, …, the manifestations of social life to which its efficacy extends'.[93] Institutionalism, on the contrary, places the emphasis precisely here.

Institutionalism allows, finally, to operate a further shift of perspective in the study of the EU administration and its law. Seen from this angle, the law governing the EU administration, in its EU-state imbrication, is no longer a concretisation of the constitutional law of the EU as derived from the Treaties and from the case law (a perspective that has been many times advanced by EU lawyers).[94] If taken as concrete law, it is, rather, the humus that shapes the evolution of the EU and of its law, and hence, its constitutional dimension or form.

For all reasons, taking the reverse side of some of Romano's critics, the fact that institutionalism zooms in on the autonomy of the administration in the EU legal order – and in its

[91] Among many, see D Curtin, "Challenging Executive Dominance in European Democracy" 77 *Modern Law Review* 1, 1-32 (2014).

[92] I Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' EUI working papers MWP, 2016/09.

[93] N 60 above.

[94] Schwarze and more recently, Curtin, Hoffman, Mendes, n 13 above.

significance for the development of the EU legal order – is not a reason to ditch it as a dangerous construction that may imperil the tents of liberal constitutionalism.

6. Conclusion

The proposal of alternative or complementary paths to develop EU administrative law is a daunting task. It requires conceiving solutions better attuned to its specificity as an instrument of integration, and hence, of change of the Member States legal orders. It must also bring to the fore the legal and political implications of its categories and principles and show how they shape socio-economic relationships in legal terms. If there are 'irritants' to the current liberal paradigm of administrative law, many more can likely be advanced against institutionalism. Notwithstanding this note of caution, I maintain that in the beginning of the 2020s, when EU law pervades to different degrees virtually all areas of social life, analyses of EU law that stay within the limits of normativism risk ignoring one of its fundamental aspects: how EU law norms are both anchored and shaped within law as institution, and how they fashion therein the socio-economic relationships to which law extends its efficacy. Sticking to a normative approach to EU law, focused on Treaty norms, on the norms and institutional practices that develop under them – to gauge their legality or correspondence to the tenets of liberal constitutionalism – fails to acknowledge the imbrication between legal norms and the exercise of administrative powers in areas where the relationships between public and private actors must be understood less as a matter of protecting the freedom of the private sphere faced with public authority than as an expression of the interests involved in relation to goods and assets.[95] These are areas where the full significance of the function of the administrative institutions that anchor EU integration comes across; they are 'curating and organising' interests and needs, where the public and private are deeply intertwined.[96]

Even if the path that I pointed to here finds a sympathetic reader, wiling to extrapolate the possible implications and to move outside the liberal paradigm of administrative law, many open questions remain. A crucial one is which actors can draw out the implications of an institutionalist perspective to the relationships between law and the exercise of administrative powers in the EU. We are unlikely to see it reflected in case law, since the courts will continue their tasks of developing norms and legal principles deduced from the Treaty or the common constitutional traditions of the Member States. Maybe we should turn our attention to how the administrations themselves

[95] See, in this regard, while analysing the link between Romano's institutionalism and the administrative state, Fioravanti, n 50 above, 411.

[96] Also Fioravanti, n 50 above, 412 and 418.

are developing the law and to how that law is perhaps also shaped by the controls that parliaments deploy when exercising primarily political accountability.