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## Foreword: The Administrative Law of the European Union

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# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

FRANCESCA BIGNAMI\*

### I

#### INTRODUCTION

In the European Union, the word “administration” is decidedly old-fashioned. “Networks,” “multi-level governance,” “administrative governance,” the “regulatory process” are the preferred vocabulary for how products are certified as safe, how subsidies are delivered to farmers, how interest rates are set, and how the other business of the European Union gets done. This linguistic transformation reflects an appreciation that public authority without the state is fundamentally different. Today, behind almost every analysis of the European administrative process is the claim that it is new. The organizational structure, the role of elected politicians, and the relationship to market actors and civil society would be unrecognizable to a Napoleon, a Bismarck, or a Beveridge.

The proliferation of terms reflects not only enthusiasm over novelty but also disagreement over how to characterize the organizational apparatus that is replacing autonomous national bureaucracies. Implicit or explicit in most of the language is the understanding of European public authority as diverse, plural, and non-hierarchical. Beyond this rudimentary core, however, the consensus disappears. Depending on the analysis, the European Commission, coalitions of national regulators, or interest groups play the dominant role in governance networks.<sup>1</sup> Some claim that the new ad-

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I would like to thank Sabino Cassese, Donald L. Horowitz, and Ralf Michaels for their comments. And mille grazie to Giacinto della Cananea and Giulio Vesperini for our many comparative conversations.

1. Many studies on rulemaking in Brussels focus on national regulators and the Commission. *See, e.g.*, SHAPING EUROPEAN LAW AND POLICY: THE ROLE OF COMMITTEES AND COMITOLGY IN THE POLITICAL

ministrative governance promotes beneficial exchange of regulatory ideas and experimentation,<sup>2</sup> others argue that it enables rational and expert consensus to emerge among national regulators,<sup>3</sup> yet others contend that it privileges the free market agenda at the expense of other policies.<sup>4</sup> And what about the law? In some accounts of the European administrative process the law barely exists, in others it permits secretive and unaccountable decisionmaking, and in yet others it facilitates a healthy administrative process.<sup>5</sup>

This issue contributes to the redefinition of administration in light of the European world of public authority without the state.<sup>6</sup> The question of what is, today, European administration and administrative law is fundamentally important because, without a good map of the changing topography of European public authority, we are powerless to think critically about integration. Needless to say, this is also an ambitious question. In part, the difficulty stems from the diversity of purposes and tasks that administration, whether it be local, national, or supranational, is called upon to address in contemporary society. As a result, many different forms of government come under the deceptively simple terms “administration” and “administrative law.” The complexity, however, is also distinctly European. The shape of administrative governance reflects the multiplicity of strong and distinguished national administrative traditions that have contributed to the common framework and that, in the disaggregated world of European governance, continue to thrive. Moreover, Europeans have been restless over the past twenty years. Constitutional settlement is alien to European politics. Since the renewed momentum for a common market in the Single European Act, one set of treaty amendments after another have led to the expansion of the policy agenda,

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PROCESS (Robin H. Pedler & Guenther F. Schaefer eds., 1996). Sabino Cassese has more recently emphasized the role of private interests. SABINO CASSESE, *LO SPAZIO GIURIDICO GLOBALE* (2003).

2. This claim is made with reference to the new form of European governance known as the Open Method of Coordination. See Charles F. Sabel & Joshua Cohen, *Sovereignty and Solidarity in the EU*, in *WORK AND WELFARE IN EUROPE AND THE U.S.* (Jonathan Zeitlin & David Trubek eds., 2003).

3. See, e.g., Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to the Deliberative Political Process: The Constitutionalisation of Comitology*, 3 *EUR. L.J.* 273 (1997).

4. See, e.g., FRITZ SCHARPF, *CRISIS AND CHOICE IN EUROPEAN SOCIAL DEMOCRACY* (1999).

5. For example, Renaud Dehousse argues that the administrative process known as comitology is opaque and lacking in legitimacy. See Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 143 (J.H.H. Weiler & Marlene Wind eds., 2003). See also Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 *HARV. INT'L L. REV.* 451, 455 (1999). By contrast, Andrew Moravcsik argues that the European regulatory process conforms largely with the requirements of democracy. Andrew Moravcsik, *Reassessing Legitimacy in the European Union*, in *INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS* 77 (J.H.H. Weiler et al. eds., 2003).

6. The following working definition of administration is used: any institution or set of institutions, outside of the courts and the legislature, which executes norms set down by the EC Treaty or European laws. Administrative law is the law that applies to those institutions when they engage in execution. This is not to deny that a functional definition is problematic. In essence, administration is everything that is not judicial or legislative, yet legislative is not clearly defined: the EC Treaty does not establish a hierarchy of norms and certain institutions, namely the Council of Ministers and the Commission, can act in both a legislative and an administrative capacity. Furthermore, the working definition is incomplete. Any notion of European administration is inescapably tied to the institution of the Commission even though, through its power of legislative proposal, the Commission makes basic policy choices and, as the following articles will demonstrate, many other institutions enjoy equal, or greater, executive powers. Nonetheless, the idea that if the Commission is involved it must be the province of administrative law, is powerful.

renewal of the institutional apparatus, and, now, with East European accession, a dramatic transformation of the membership. The topography to be charted has more the quality of a molten lava bed than of an ice age rock formation.

## II

### METHODOLOGY

#### A. The Public Law Perspective

The contributors to this issue approach the question of the new European administrative apparatus from the disciplinary perspective of public law. That is, the theoretical concerns that drive the inquiry go to the legitimacy of the new configuration of public authority, to the democratic accountability of European administrative networks, to the adherence to rule of law principles, and to the fairness of Commission and domestic proceedings. This is not an administrative science study of the organizational sociology of European governance networks and the means of improving the efficiency of public administration through, say, better service delivery.<sup>7</sup> Neither do the contributors to this issue seek to assess the degree of convergence or divergence among national administrative systems in order to make claims about the causal relationship between different national traditions of the state and the course of European integration.<sup>8</sup> Of course, the contributors are not myopic. Many draw upon the voluminous literature in sociology and political science on the Europeanization of administration. Nevertheless, it is important to keep in mind that the descriptive characterization of the emerging system of European networks, collaborative administrative proceedings, European agencies, Commission administration, and Court of Justice and Ombudsman review is done with an eye to answering the further question of whether this apparatus satisfies certain criteria of legitimate public authority.

#### B. The History of Legal Scholarship on European Administration

The interest of the legal community in European administration is fairly recent. As Mario Chiti explains in his contribution, in the first thirty years after the Treaty of Rome, the common wisdom was that European administrative law did not exist.<sup>9</sup> That is, it was widely believed that the European Economic Community did not have its own administration, subject to a unique set of legal rules and responsible for the execution of legislation. Implementation of directives, regulations, and other forms of Community legislation was the responsibility of national administrations subject to their unique traditions of constitutional and administrative law, in what is known as

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7. For a treatment of the subject from an administrative science viewpoint see Heinrich Siedentopf & Benedikt Speer, *The European Administrative Space from a German Administrative Science Perspective*, 69 INT'L REV. ADMIN. SCI. 9, 14 (2003).

8. For an analysis of Europe's impact on different national traditions of administration see CHRISTOPH KNILL, *THE EUROPEANISATION OF NATIONAL ADMINISTRATIONS: PATTERNS OF INSTITUTIONAL CHANGE AND PERSISTENCE* (2001).

9. For another account of the early days of European administrative law see SABINO CASSESE, *LA CRISI DELLO STATO* (2001).

“indirect administration.” Hence, in the 1960s, 1970s, and most of the 1980s, scholars spoke of French, German, or Italian administrative law, but not of European administrative law. The only law that qualified as distinctly European was the law regarding the internal organization of the Commission bureaucracy—the rights and duties of members of the civil service—and the liability rules that applied to dealings between the Commission and members of the public. The focus among academics was on the legislative and judicial institutions established under the Treaty of Rome, and on the so-called Community method, which rendered the European Community truly remarkable when compared with the other prominent international organizations of the time.

Attention to European administrative law only began after the passage of the Single European Act and the renewed impetus for the integration project. At this time, a number of changes occurred, each of which is covered by the different essays in this issue. First, with the proliferation of harmonization measures, it became impossible to ignore the existence of common, European, as opposed to purely national, mechanisms for executing them. Even in the earliest days of the European Community, implementation had never been left exclusively to national bureaucracies and their national legal traditions (“indirect administration”). The Commission was the engine of integration not only in that it possessed the exclusive power to propose legislative measures but also because, under the Treaty of Rome, it had the power to bring legal actions against Member States remiss in their implementation duties and was allocated enforcement powers in the competition and international trade areas (“direct administration”). Moreover, some policy areas like agriculture and regulation of fisheries required constant adjustments of quotas, price supports, and export and import licenses, which were handled through committees of national regulators meeting sporadically in Brussels. For decades, however, this was a largely invisible set of institutional practices without a legal framework and without a concerted attempt to develop one. The imperative of transforming the politics of necessity into the law of rights and duties came in the late 1980s with the burst of common market legislation and the increasing role for the Commission, committees of national regulators, and common Community standards in the implementation of European law.

The experience with comitology illustrates the gradual shift from political practice to law.<sup>10</sup> Early on, the common agricultural policy was administered by comitology committees. The Council was unable to meet with the frequency necessary to set prices for agricultural commodities, yet the distributional impact of agricultural subsidies was considered too politically sensitive for the Commission to handle alone, so

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10. Comitology refers to the process whereby the Commission, acting in tandem with committees of national regulators, implements European legislation. In order to select certain research and development projects for funding, revise lists of hazardous chemicals, and perform any number of other tasks, the Commission must generally obtain the consent of specialized national bureaucrats, representing each of the Member States and sitting on a committee. The influence of the committee of national regulators depends on the procedural sequence and voting rules governing the legal relationship between the Commission and the committee (as well as the Council). There are three basic types of committees, listed in order from least influential to most influential: advisory committees, management committees, and regulatory committees. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 150-53 (3d ed., 2003).

the Council created committees of national bureaucrats to supervise the Commission. Such committees were established and their precise features adjusted, regulation by regulation, agricultural commodity by agricultural commodity. Only in 1987 did the Community institutions take stock of regulation by committee and codify the different types of committees, which they distinguished by voting rules and procedures for transmitting proposals from Commission to committee to Council.<sup>11</sup> And only once this largely descriptive exercise was completed did a lively, and sometimes acrimonious, debate emerge on the legitimacy of comitology, resulting in a series of inter-institutional agreements between the Council and Parliament, which improved the transparency of the process and culminated, in 1999, in a formal legislative act.<sup>12</sup> A vigorous debate over the reform of comitology in the name of democracy, transparency, and fairness continues today.

A second reason for the recent scholarly interest in European administrative law is the shift in the case law of the Court of Justice on national procedural autonomy. In 1976, the Court had insisted that an essential element of the Community's constitutional order was the freedom of Member States to implement their Community obligations according to their individual traditions of public law and civil and criminal justice.<sup>13</sup> The only conditions set down by the Court of Justice were equal treatment and effectiveness. National courts and administrations were prohibited from making it more difficult for individuals to vindicate their Community rights as compared to their domestic rights ("principle of equivalence"). Furthermore, procedural requirements could not render it impossible, in practice, for individuals to exercise their Community rights in national courts ("principle of effectiveness").

In the 1980s, the Court's categorical position on national autonomy slowly eroded in the interest of improving uniform implementation and equal rights across the Community. Today, the Court requires that national courts adhere to certain uniform principles of access to justice and judicial review. Minimum standards for statutes of limitations, damages awards, and other procedural aspects of judicial relief enable individuals to vindicate their European rights more effectively at the national level. Individuals can do so directly, by invoking their European rights in litigation, or indirectly, through judicial challenges to their national administration's application (or non-application) of European law. The shift from national autonomy toward European uniformity is associated most notably with the *Francovich* decision, in which the Court required that national courts afford individuals a damages remedy against government for the failed, or poor, implementation of Community law, regardless of whether a damages remedy would have been available under national law.<sup>14</sup> Since *Francovich*, the Court has found that national governments may be held liable for laws, judicial decisions, and, most relevant for present purposes, administrative meas-

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11. Council Decision 87/373/EEC, 1987 O.J. (L 197) 33.

12. Council Decision 1999/468/EC, 1999 O.J. (L 184) 23.

13. Case 33/76, *Rewe-Zentralfinanz EG v. Landwirtschafts-Kammer für das Saarland*, 1976 E.C.R. 1989.

14. Cases C-6/90, 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357.

ures that infringe European law.<sup>15</sup> The Court has developed a law of administration which applies not only to the Commission, but also to national bureaucracies.

The third reason for the amplified scholarly interest in European administration, again associated with the proliferation of harmonization measures, is the greater attention of the Community's legislative branch to the application of European law. Starting in the late 1980s, the Community legislator, when adopting substantive rules for different policy areas, also began experimenting with a variety of institutional arrangements to guarantee better implementation. Under European law, national bureaucrats and courts must adhere to European rules of procedure when they implement European policies in areas such as the environment, telecommunications, privacy, and anti-discrimination law. National authorities and the Commission take part in a complex, multi-phase process to decide matters such as universal services obligations in telecommunications and licensing of genetically modified organisms. Firms that wish to market new drugs or protect their products with European trademarks can now apply to European agencies.

### C. Sources of Law

A few words on the public law approach adopted in this issue are in order. The authors in this issue consider a wide variety of legal sources in mapping out European administration and administrative law, from Council and Parliament regulations and directives, to Commission implementing rules, to Court of Justice jurisprudence, to national laws and jurisprudence. The methodological breadth should not be taken for granted. In most European countries, the focus has been traditionally on the review of administrative action by the courts.<sup>16</sup> That is, legal scholarship concentrates on the principles that inform when, on what grounds, and to what extent executive decision-making can be challenged before the courts. In both the civil and the common law worlds, court decisions have served as the source of principles of judicial review, not codes or statutes. This is one of the many reasons why public law sits uneasily in the traditional division of Western legal systems into common law and civil law jurisdictions: in both, courts rather than legislators have set down the principles that hold ad-

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15. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, 1996 E.C.R. I-5357 (establishing state liability for national legislation); Case C-283/93, *Regina v. HM Treasury, ex parte British Telecomms. Plc.*, 1996 E.C.R. I-1631 (establishing state liability for administrative regulations); Case C-224/01, *Gerhard Köbler & Republik Österreich*, 2003 O.J. (C 275) 13 (establishing state liability for judicial decisions).

16. For the sake of convenience, courts in the French model of administrative law are grouped together with courts in the English and German models, even though the French Council of State is not structurally independent of government administration to the same extent as the courts responsible for judicial review in the English and German traditions. Additionally, the focus of administrative law scholarship is slightly broader in Scandinavian countries, where individual complaints can also be brought to an ombudsman, see, e.g., Jacques Ziller, *European Models of Government: Towards a Patchwork with Missing Pieces*, 54 PARLIAMENTARY AFFAIRS 102 (2001), and in countries like France and Italy, where decisions involving financial matters are reviewed by an independent Court of Auditors. See JOHN BELL & NEVILLE BROWN, *FRENCH ADMINISTRATIVE LAW* 59 (5th ed., 1998).

ministrators in check and scholars have contributed to these principles through their analysis of judicial decisions.<sup>17</sup>

One of the most significant exceptions to the reliance on cases is Italy.<sup>18</sup> In the late 1800s, after a spell under French influence, Italian legal scholars turned to their German neighbors for intellectual inspiration.<sup>19</sup> The German Pandectist movement was highly influential, both among private law scholars working on the Italian Civil Code, and among public law scholars elaborating the legal principles for unified Italy's new administration. The task was to construct scientifically, based on low-level legal forms, an abstract, comprehensive system of the state which would then serve, through rigorous application, to structure the relationship between public administration and the citizen. The post-Pandectists, as they are known in Italy, strove for geometric harmony, with little attention to the political background and ramifications of their scientific principles. The distinct Italian contribution to the German Pandectist method was to rely exclusively on positive law—laws enacted by Parliament—in discerning and building the conceptual system of the state. According to the post-Pandectists, the legislator was the source of all authority; hence the legislator's pronouncements, in parliamentary enactments, constituted the source of the public law system. Judgments of the court specialized in administrative matters—the *Consiglio di Stato*—and the other courts that decided public law questions—mostly criminal courts—were relatively unimportant for legal science (*dottrina* or *autorevole dottrina*). Attention to parliamentary statutes and the ambition of constructing a theoretical system of higher-level concepts are enduring features of Italian public law scholarship.

Sabino Cassese, the moving force behind this issue, is both a critic and adherent of the Italian public law tradition.<sup>20</sup> As a critic, he rejects the post-Pandectist decontextualized, scientific approach and engages in a socio-politically informed and normatively incisive analysis of administrative law. As an adherent, he treats parliamentary laws as an important source of principles designed to structure and discipline public administration. The contributions to this issue bear Cassese's methodological imprint.

The importance of written, constitutional and legislative sources of administrative law in the articles is also consistent with current trends in legal scholarship. Even in classic, Western systems of administrative law, the bias toward judicial decisions is fading. Over the past twenty years or so, countries have codified elements of judicial review and administrative procedure and have undertaken significant legislative re-

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17. See J.F.W. ALLISON, *A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW* (1996).

18. Germany also qualifies as an exception but the Italian origins and contents of this issue lend themselves to a focus on Italy.

19. For the history and comparative analysis, see generally SABINO CASSESE, *CULTURA E POLITICA DEL DIRITTO AMMINISTRATIVO* (1971).

20. This issue began with a conference held at the University of Rome "La Sapienza" in April 2003. The contributions to this issue were originally published in Italian in Spring 2004. See *Il procedimento amministrativo nel diritto europeo*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO, QUADERNO n. 1 (Francesca Bignami & Sabino Cassese eds., 2004).



form of public administration.<sup>21</sup> Scholars in places like France and the UK now routinely analyze the statutory grounds for the lawfulness of administrative action.

#### D. Different Styles of Scholarship in the Civil Law and Common Law Traditions

To understand fully the contributions to this issue, it is important to develop the comparative law analysis a bit further. The contributions reflect different traditions of public law scholarship in the Member States, traditions that are indeed responsible for the continuing heterogeneity of European administrative law. The authors are Italian, German, Spanish, English, and American.<sup>22</sup> Because of their intellectual roots, German, Italian and Spanish scholars devote far more energy than their French, and certainly their common law, counterparts to the task of developing classification systems for administrative action. From the categories flow a host of interrelated ramifications for the workings of administration, the availability of court review, the degree of judicial scrutiny, and the nature of remedies. This style of legal reasoning is characterized by a certain intellectual elegance, which is at odds with the common law mode of defining legal rules through the accretion of distinguishing and confirming facts over a long line of cases. It also reflects an essentialist form of reasoning, in which the nature of state authority, the act, and the proceeding is critical. By contrast, the common law takes a more consequentialist approach to legal problems; the statement of the rule is driven more openly by the ramifications for the remedies available to citizens, parliamentary sovereignty, courts' institutional capabilities, and so on. A civil lawyer, reading a casebook from a common law system, might react with, "how messy"—that is, how full of potentially conflicting and contradictory results. A common law lawyer, faced with a civil law textbook, might answer, "so what?"—that is, yes, but how do I recognize when to apply each category, and how do the rules decide cases? In reading the contributions to this issue, the differences in intellectual style should be appreciated, yet should not obscure the fact that many of the same basic concerns are shared by the common law and continental traditions.

A comparison, drawn from the Italian civil law system and the American common law system, illustrates the points of difference and similarity. In Italian administrative law, the administrative act (*provvedimento*) is a fundamental organizing concept.<sup>23</sup>

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21. In France, Law No. 79-567 of 11 July 1979 sets down the types of administrative acts which are subject to the duty to give reasons (*motivations des actes administratifs*), Law No. 78-753 of 17 July 1978 establishes the right of access to administrative documents (*liberté d'accès aux documents administratifs*), and the Code of Administrative Justice (*Code de justice administrative*), which came into force on January 1, 2001, comprehensively regulates the administrative court system, including the structure and composition of the courts, judicial procedure, and remedies. In 1998, the UK adopted the Human Rights Act, which incorporates the European Convention on Human Rights into domestic law. The Convention's principles of good administration have already influenced English law. The UK also adopted a Freedom of Information Act in 2000, giving individuals a general right of access to government documents for the first time. Germany and Italy have enacted comprehensive administrative procedure acts: the German Law on Administrative Proceedings of 1976 (*Verwaltungsverfahrensgesetz*) and Italian Law No. 241 of 1990 on administrative procedure and the right of access to administrative documents.

22. For present purposes English and American law are treated as part of the same common law family.

23. See Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003); SABINO CASSESE ET AL., *MANUALE DI DIRITTO PUBBLICO* (2d

Once an administrative determination is classified as an act, as opposed to a measure taken in the course of an administrative proceeding, a number of consequences follow. The parties concerned must comply, judicial review is available, and, if challenged, the administration must demonstrate that it acted consistently with certain standards of administrative rationality, such as adherence to the enabling legislation. In American law, by contrast, each of these questions is addressed in a separate line of cases and statutory provisions. Compliance turns on a series of considerations: publication, notice to the parties, and the distinction between interpretive rules and other rules. The availability of judicial review depends on whether the administrative determination is final, and if so, whether the matter is “ripe” for review. And the grounds for review, together with the stringency of review and the degree of deference to agency action, have been developed in several different lines of cases. These legal doctrines are logically interrelated. For instance, it is more difficult to obtain review of a non-binding, interpretive rule than an ordinary rule prior to application precisely because such rules are non-binding; but once review is obtained, judicial scrutiny is more exacting to compensate for the lack of administrative procedure that would have enabled the agency to adopt an ordinary, binding rule.<sup>24</sup> One of the important tasks in teaching the cases is to draw out these connections, precisely because they are not neatly tied together through a single concept, as in the civil law tradition.

To push the example a bit further, Italian legal scholars have developed a number of categories of administrative acts: general acts (*atto generale*), declarations of important legal attributes (*atto dichiarativo*), authorizations (*autorizzazione*), concessions (*concessione*), subsidies and benefits (*sovvenzione*), expropriations (*atto ablativo*), and sanctions (*sanzione*).<sup>25</sup> The act’s classification will dictate the procedures required of the administrative authority, the ability of the administration to change course after issuing a decision, and the stringency of judicial review. Each category strikes a different balance between individual interests and the public need for government action, with ramifications for the amount of procedure afforded, the extent to which individuals can rely upon past administrative decisions, and the degree of judicial scrutiny of the act. For instance, when the state issues authorizations, it is conceived as regulating activities that individuals have the right to pursue naturally in the social and economic world; therefore the state is subject to extensive constraints. By contrast, when the state grants concessions, it is conceived as allowing individuals to undertake activities that typically lie within the prerogative of the state; hence the state is allowed considerable discretion.<sup>26</sup> A citizen applying for a gun license, classified as an authorization, enjoys more rights than one seeking to lease state property, classified as a concession.

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ed., 2002). The administrative act is also central to German administrative law (*Verwaltungsakt*) and French administrative law (*acte administratif*).

24. See generally *United States v. Mead Corp.*, 533 U.S. 218 (2001).

25. See Aldo Sandulli, *Il Procedimento*, in 2 TRATTATO DI DIRITTO AMMINISTRATIVO: DIRITTO AMMINISTRATIVO GENERALE 1035, 1186-1326 (Sabino Cassese ed., 2003).

26. *Id.*

In American law, similar value judgments regarding the balance between individual interests and swift and flexible state action inform most administrative law principles. For instance, the distinction between common law contract and property rights and statutory entitlements is extremely powerful. The law generally affords the former greater protection than the latter. To some extent, this distinction mirrors the Italian classification of administrative acts into authorizations, which impinge upon classic property and contract interests, and concessions, which involve the state's exercise of proprietary functions conferred by statute. Nonetheless, in American law, unlike Italian law, the differences are played out in separate lines of cases, one on administrative procedure,<sup>27</sup> another on access to judicial review,<sup>28</sup> and yet another on the grounds of judicial review.<sup>29</sup>

In both civil law and common law systems, considerable intellectual effort is devoted to crafting rules embodying certain value judgments about individual rights and public authority, but in the civil law it is done in theoretical constructs, in the common law, in judicial decisions. In one place the task is in the hands of legal scholars and is done in the abstract; in the other place the enterprise is for judges and is based upon the facts of cases. This statement, of course, sacrifices nuance for clarity. Legal scholars and judges, abstract formulae and facts, drive administrative law doctrines in both the civil law and common law traditions. Nonetheless, the intellectual style in the two traditions is noticeably different.

### III

#### A SURVEY OF THE ISSUE

The contributions to this issue are organized in three parts. The authors in the first part provide a theoretical and historical framework for analyzing European administration. The second part turns to European administration in which the balance of decisionmaking power rests with common European institutions, principally the European Commission. In Part III, the spotlight shifts from central administration managed by the Commission to decentralized administration. Here, national bureaucracies play the critical role, conditioned by European norms and their relationships with other national bureaucracies and the Commission. This phenomenon goes under many names: mixed proceedings, composite proceedings, and joint proceedings. The organization of the articles tracks the classic distinction between direct administration, policy areas in which the Commission implements and enforces European law, and indirect administration, policy areas in which the executive power is left to the Member States. As will become evident, the line between the two has never been clear and

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27. This refers to the line of cases decided under the Due Process Clause of the U.S. Constitution, of which *Goldberg v. Kelly* is probably the best-known. 397 U.S. 254 (1970).

28. In *Heckler v. Chaney*, the Supreme Court held that failure to act was presumptively unreviewable, based in part on the grounds that state interference with rights through administrative action was more serious than state failure to carry out statutory prescriptions, in other words, the failure to protect positive, statutory entitlements. 470 U.S. 821 (1985).

29. In cases where property rights are at issue, the petitioner can rely on the takings clause of the U.S. Constitution, in addition to traditional administrative law grounds of review. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (regulatory taking).

has become increasingly blurred with time, but the distinction remains useful heuristically.

#### A. Part One: General Aspects

The issue opens with Sabino Cassese's overview of administrative integration. He develops a typology of European administrative proceedings based on the Treaty's allocation of executive powers as well as the sequence of determinations by national and supranational authorities set down in various, sector-specific legislative instruments. In his typology, Cassese does away with the traditional distinction between direct and indirect administration: all proceedings represent "common systems." He argues that even in fields such as competition law, in which powers and responsibility lie primarily with the Commission, the Commission acts together with national authorities. Regardless of what the Treaty says about executive powers, because the Commission lacks a police force and the right to appear in national courts, it must call upon national competition agencies and national police for assistance with inspections and other enforcement activities.

Cassese then turns to the Court of Justice's treatment of mixed proceedings in areas such as agricultural subsidies and customs duties—that is, proceedings in which both the Commission and national authorities take part, but in which the balance of power rests with the national authorities. He finds that the Court recognizes each proceeding as constituting a unitary whole, a single exercise of public power, regardless of whether the proceeding starts with national officials and ends with the Commission or vice versa. The Court's doctrinal flexibility is directly connected to the vigorous protection of the right to be heard. Individuals can rest assured that they will receive notice of adverse facts and have an opportunity to respond to those facts, no matter how many different administrations handle the case. Cassese concludes that relationships among national executives and their counterparts in Brussels are less hierarchical and more variable than the equivalent relationships among national judiciaries and the Court of Justice or among national parliaments and the European legislator. The author predicts that Europe's *jus commune* of administration will become increasingly robust, dictated not from above, but formed of the interaction and reconciliation of the many *jura particularia*.

Mario Chiti provides an indispensable historical framework in which to situate current developments. He describes the ebb and flow of interest in European administrative law from the heyday of the European Coal and Steel Community—conceived as a special purpose, international organization, to which the Member States had delegated administrative tasks—to the inattention of the early years of the European Economic Community, to the resurgence following the Single European Act, and, finally, to the constitutionalization of European administration in the Constitutional Treaty. He then analyzes the types of functions performed by European administration: formulating market regulations, providing social and economic support, and running the Commission bureaucracy. Finally, Chiti turns to the national implementation of European law and traces the evolution from autonomy to integration. Integration, he argues, has been accomplished through the administrative proceeding, a complex se-

quence of procedural steps involving other national bureaucracies and European institutions, primarily the Commission.

Chiti is critical of the legal response to today's multi-level system of administrative governance. He argues that because the real choices are often made by public bodies two steps removed from the formal decision, traditional insistence on final agency action as a pre-condition of judicial review is misplaced. In a number of cases, individual rights have suffered because national courts have denied review of administrative action mistakenly believed to be preliminary to the Commission's final decision. Chiti therefore calls for more innovative administrative law, capable of addressing the needs of the new reality of multi-level governance.

## B. Part Two: The European Commission

In Part Two, the focus is decisionmaking by the principal European executive body, the Commission. Francesca Bignami examines procedural rights before the Commission in all its administrative activities, both individualized determinations and rulemaking. She argues that procedural rights can be divided into three categories, each of which is associated with a distinct phase in European history and a particular set of institutional actors. The first set of rights, explored in greater depth in Jürgen Schwarze's contribution, was established in the 1970s and is anchored in the right to a hearing when the Commission inflicts sanctions or other forms of hardship on individuals. The rise of transparency in the 1990s—the requirement of openness in all European institutions, including administration—marks the second phase. The most recent phase is the debate on whether and under what conditions individuals, firms, and their associations, billed “civil society,” should take part in European legislative and rulemaking proceedings.

Civil society participation may take one of any number of forms. According to Bignami, a legal right to participation would entrench a pluralist form of interest group representation. But in Europe, republican and corporatist traditions continue to flourish; there is no consensus on how the people should be represented outside of elections and political parties. She argues that Article I-47 of the Constitutional Treaty, recognizing the “principle of participatory democracy” and civil society participation, should be interpreted cautiously. The view that Article I-47 gives rise to judicially enforceable rights and duties would be at odds with European ideas of democracy. Indeed, without countervailing, vigorous electoral politics, such an interpretation might produce an entirely novel form of interest group pluralism.

The article by Jürgen Schwarze that follows examines the procedural requirements that apply when the Commission implements European law directly against individuals and firms. The different elements of administrative procedure as well as their enforcement through judicial review in the Court of First Instance and the Court of Justice (“European Courts”) are systematically explored. Schwarze argues that the right administrative procedure is critical to the legitimacy of administrative action. Administrative procedure protects fundamental rights. Furthermore, the right process can substitute, at least in some respects, for the right decision: given the difficulties inherent in ascertaining whether the economics or science of administrative decisionmaking

are sound, the European Courts have come to insist on extensive procedural safeguards. Schwarze concludes by pointing to a new area of Commission administrative practice in need of administrative law: competition fines. He argues that, in light of the amounts at stake, certain fines should be treated as criminal sanctions, not administrative sanctions as is currently the case, which would require more extensive legal safeguards.

The issue turns then to Paul Craig's analysis of an area critical to any government administration: the budget. The budget finances the operation of the Commission, European Parliament, Council, and other European institutions, as well as European subsidies programs such as the common agricultural policy and structural funds. In 2002, the Council and European Parliament enacted the Financial Regulation to bring fiscal discipline in the wake of the Santer Commission scandals. Craig argues that the Regulation has constitutional significance in that it sets down a far-reaching, comprehensive framework for European administration.

The Financial Regulation identifies two principal methods through which the budget is disbursed: centralized management—controlled by the Commission or agents of the Commission—and shared management—handled by Member State bureaucracies in accordance with the requirements set out in the Financial Regulation and common agriculture policy (CAP) and structural funds regulations. In the centralized management camp, disbursement of funds can be handled by one of a number of actors: the Commission, a new breed of special-purpose executive agency created to manage specific programmes, national public bodies, or, under narrow circumstances, private sector firms. Craig discerns a number of reform strategies in the Financial Regulation designed to guard against waste and fraud. Craig is optimistic about the prospects of fiscal rigor under the new scheme: the principles are sound and the comprehensive, multi-layered legal framework will legitimate and discipline centralized administration more effectively.

The future of fiscal responsibility in shared administration is less bright. Fore-shadowing Part III of the issue, Craig examines management of the CAP budget, in sheer Euros the most significant area of shared management. Here, the problem of fiscal accountability is intrinsically difficult because the monies incorrectly paid by national agencies come out of the common, Community budget, not national budgets. The incentive, therefore, to guarantee fiscal rigor at the national level is low. According to Craig, the law on fiscal responsibility still has some way to go in curbing national fraud and mismanagement.

From this classic form of domestic administration, the issue moves to a classic form of international administration, the enforcement of legal obligations against state parties to an international treaty. Alberto Gil Ibáñez provides an in-depth analysis of Commission infringement proceedings against Member States under Articles 226 and 228 of the Treaty. The dramatic scope of European administration—enforcement of the law against both individual citizens and Member States—is yet another reminder that the European Union resists classification in the old paradigms of nation-state and international regime. Inadequate implementation of European law has long been a cause for concern, and the Commission's power to bring infringement actions against

recalcitrant Member States is one of the principal institutional responses. Gil Ibáñez carefully examines the process through which the Commission brings such complaints, including the Commission's policy on selective enforcement announced in 2002. The author suggests a number of improvements and highlights the most promising ideas put forward during the Constitutional Convention. Some of the reforms would curb the Commission's discretion, subjecting the current politics of when to pursue Member States to the discipline of legal rules. According to Gil Ibáñez, such reforms would improve both the rights of Member States—which face tough money sanctions—and individual citizens—who benefit from Commission prosecutions. Other reforms would simplify and accelerate infringement proceedings. A number of points that bear careful study arise out of Gil Ibáñez's analysis.

Up to now, the government bodies responsible for making European administrative law will have been familiar to all lawyers: a legislature (the Council and European Parliament), an executive (the Commission), and courts (the Court of Justice and Court of First Instance). The article by Simone Cadeddu covers the European Ombudsman, a recent player in the European constellation drawn from the Scandinavian system of public law. Cadeddu's analysis is essential reading, especially for those outside of the Scandinavian tradition. He carefully and succinctly describes the institution of the Ombudsman. Most significantly, he situates the Ombudsman in the broader context of courts and administration, highlighting its unique role in promoting fair and legitimate public administration. In hearing complaints of bad administration against European institutions, the Ombudsman acts as a quasi-judicial body. Nonetheless, the Ombudsman is quite different from courts-of-law: it applies not only the law but also principles of courtesy, efficiency, and timeliness. Additionally, the Ombudsman does not have the power to issue binding decisions against the Commission and other parts of European administration; it must rely instead on persuasion and political pressure.

### C. Part Three: Mixed Administration

The contributions in Part III focus on European administration in which powers and discretion are shared between national administrators and European institutions, but the balance of power lies with national administrators. The authors agree that mixed administration is best conceived as multiple sets of administrative proceedings involving domestic authorities, their counterparts in other Member States, and the Commission and other supranational institutions. The challenge, which the articles address in different ways, is to identify the common legal principles that should discipline this still amorphous form of European administration, rapidly becoming the predominant one.

Claudio Franchini examines the principles of administrative justice that govern mixed administration. His starting point is the classic separation between implementation by the Commission, subject to the rigor of European administrative law principles (direct administration), and implementation by national authorities, subject to their distinct public law traditions (indirect administration). Franchini conducts a sweeping overview of European principles of administrative justice. He argues that

legality, impartiality, the duty to motivate decisions, legal certainty, legitimate expectations, fundamental rights, good administration, sound financial management, and access to administrative documents all bear fundamental similarities to the national legal requirements at play in indirect administration. The emergence of the new reality of mixed administration, however, is testing the limits of these old modes of administrative justice. Franchini perceives a need for common principles to bring order and legitimacy to the fragmented world of mixed administrative proceedings. Order, he argues, is most likely to come from the European Courts.

In the following article, Giacinto della Cananea constructs a phenomenology of mixed proceedings. This contribution gives a detailed, concrete sense of the complex and variegated world of mixed administration. Della Cananea divides mixed processes into those which are initiated by the Commission, such as the award of eco-labels to environmentally friendly products, sugar subsidies, and the distribution of the European Social Fund; those which are initiated by the Member States, such as geographical indications and olive oil subsidies, and those in which the Commission and national authorities participate on an equal footing, such as new drug approvals. This overview enables della Cananea to reach a number of general conclusions about mixed proceedings. Notwithstanding their diversity, della Cananea discerns two common features: all mixed proceedings provide significant opportunities for the participation of interested parties, and all include several phases in which decisionmaking is passed back and forth between national and common European institutions.

Like Mario Chiti, Giacinto della Cananea points to flaws in the existing legal regime. Significant lacunae undermine the European system of judicial review. National courts may not regard national decisions generated in mixed proceedings as final and hence may deny review, while the European Courts may not consider the Commission's final determination as the decision that injured the complainant, and hence may send the matter back down to the national courts. Moreover, individual rights in mixed proceedings turn on national administrative law, such as whether a given Member State has a generous or stingy access-to-documents regime. Della Cananea argues that the contingent nature of rights undermines the ideal of equality among all citizens of the European Union.

The issue ends with Edoardo Chiti's contribution on European agencies. Nowhere in this issue is the confusion generated by the old language of the state in the new world of Europe more vividly illustrated than with European agencies. Agency calls to mind a single bureaucracy, fully equipped to carry out the commands of the legislator in a specific policy area. As Chiti demonstrates here and elsewhere, European agencies are something different altogether. Agency is code for the segmentation of single administrative determinations into multiple, inter-related phases, some of which are handled by the agency, others by national authorities, and yet others by committees of national experts acting in concert. The personnel, resources, and legal authority of the European agency are just one part of the plural structure necessary to approve a new drug or grant a trademark. The defining element of this branch of European administration is procedure. Procedure, by laying down the different phases of the decisionmaking process, allows for the integration and coordination of multiple public authorities. Sometimes, procedure also allows for the participation of private



interests.

Chiti concludes with a call for more procedure. He advocates more room for interest group participation in new drug approvals and environmental information-gathering. Furthermore, European agencies with powers limited to information-gathering have been allowed, wrongly in Chiti's view, to operate through informal networks. This approach is mistaken because information-gathering is a significant regulatory tool, with a direct impact on Member States and private parties, and formal procedure is necessary to guarantee transparency and individual rights.

#### IV

#### CONCLUSION

What do the contributions, taken together, reveal about the nature of European administration? First, the Commission and European agencies are emphatically not self-sufficient bureaucratic entities. They must cooperate with a web of national authorities in accomplishing the tasks set down in European legislation, and because of these relationships it is virtually impossible to allocate responsibility for policy decisions to one set of civil servants or another. Decisionmaking is national, transnational, and supranational, all at the same time.

Second, the law is forever catching up with the changing administrative reality. For those familiar with the history of domestic systems of administrative law, this should come as no surprise. The administrative procedure codes of Germany and Italy were the fruit of years of administrative experience and scholarly analysis. The UK Tribunal and Inquiries Act of 1958, which reformed the adjudication system for social welfare benefits, was passed only after a decade of experience with Labourite welfare laws and the fact-intensive report of the Franks Committee.<sup>30</sup> The American Administrative Procedure Act of 1946 grew out of complaints of bureaucratic New Deal lawlessness and drew upon the work of committees set up by the Roosevelt administration and the American Bar Association. This area of the law, more than others, seems to be propelled by social and political practices, practices which are periodically exposed, examined, acknowledged, and reordered.

A third lesson is that European administrative law is distinct from its national counterparts. It contains a number of unique features designed to structure and legitimate administrative action, all centered on the concept of process. Single decisions are divided into multiple phases, each of which requires the participation of a different authority: national administrators, officials from other Member States, and supranational officials. Interested parties have the right to be heard at various points in the decisionmaking process. Firms that wish to obtain eco-labels, agricultural subsidies, economic development grants, new drug approvals, and exemptions from customs duties are all guaranteed the right to come before government administrators and make their case. Whether, in reality, the procedure is used—meaning whether different ad-

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30. See H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 16 (8th ed., 2000).

ministrative authorities and private parties can and do exercise their formal prerogative to intervene—is a matter for further research.

Lastly, the different contributions make it clear that the legitimacy of administrative action is still rooted in the Weberian ideal type of legal authority.<sup>31</sup> Farmers, telecommunications operators, and drug companies accept the decisions of national and supranational bureaucrats because the bureaucrats, in turn, abide by the impersonal norms set down in judicial proceedings, treaty negotiations, and votes of the Council and European Parliament. Yet the legal rules that direct and constrain bureaucrats are generated by institutional and social processes that encompass multiple, deep-rooted national traditions of law and government and place a high premium on consensus. Therefore, in their making and re-making, in their formulation, application and reconsideration, the legal rules rarely become commands that define clearly bureaucratic duties and prerogatives; the rules remain inherently diverse and plural. The legal norms that legitimate administration are themselves legitimate only because they are so loosely woven that they can accommodate difference. We are closer to understanding how the iron cage of the present is different from that of our predecessors.<sup>32</sup> Whether that difference is better or worse we leave to future scholarly and political endeavors.

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31. MAX WEBER, 1 *ECONOMY AND SOCIETY* 217 (Guenther Roth & Claus Wittich eds., 1978).

32. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 123 (Talcott Parsons trans., Routledge 2d ed. 2001) (1920).