2 Administrative law*

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1 INTRODUCTION

Comparative administrative law constitutes a relatively young discipline in comparison with other fields of law in which comparative analysis is deeply rooted, such as, in particular, private law. The main reason for this has been the widely shared assumption that in the area of public law there would be neither a practical nor a theoretical need to search for solutions that comparative analysis might have been able to bring about. In fact, since the 19th century the domestic administrative systems have long been perceived as reflecting a unique organizational choice by the nation state tailored to the national political, societal, economic and cultural particularities of its polity rather than being the result of transnationally shared fundamental values or concerns. Thus traditional concepts of administrative law used to emphasize the uniqueness of the state’s administrative system that would not easily allow comparisons with, let alone ‘transplants’ from, other systems. Contrary to this, private law, at least in its commercial aspects, has traditionally been more open to comparative analysis and transnational convergence. This essentially flows from the ‘universality’ of the private economic interests at stake and the need to facilitate ever growing private cross-border transactions. Moreover, private law does not bear the same intimate link with the identity of the nation state, its fundamental values and the functioning of its public institutions as has been the case for domestic administrative law (Bermann, 1996, pp. 30–31; della Cananea, 2003, pp. 563–8).

Another reason for the longstanding lack of comparative work on administrative law stems from the fact that notably the common law systems, with the exception of the United States, have long resisted – under the Diceyan influence (Dicey, 1885) – the recognition of administrative law as constituting a body of law in its own right (Chiti, 1992, pp. 15–17). Furthermore, the relatively late development of fully fledged national administrative systems governed by judge-made law or statutes with clearly delineated subcategories of administrative powers, such as for

* See also: The aims of comparative law; Constitutional law; Public law.
instance in environmental matters, has rendered administrative law less
amenable to useful comparative analysis than private law, a domain which
was early subdivided into various subfields with clear-cut boundaries
(Schwarze, 1992, p. 77; Bermann, 1996, p. 31).

This is not to say that comparative administrative law has played no
role in the early development of modern democratic polities. Indeed,
albeit pursuing different purposes, a number of important analyses in
comparative administrative law were delivered as early as the end of the
19th century (Gneist, 1884; Dicey, 1885; Mayer, 1886; Goodnow, 1893).
Moreover, comparisons with leading continental administrative systems,
such as those of France and Germany, have helped shape and consoli-
date under the ‘rule of law’ the administrative structures of a number of
emerging nation states, putting the latter under continuous influence of
However, it was only in the post-World War II period that the first serious
attempts at establishing comparative administrative law as a discipline of
its own were undertaken (Rivero, 1954–8; Schwartz, 1954; Scheuner, 1963;

Today, for a variety of reasons, comparative administrative law has
become an essential part of both legal practitioners’ and academics’ work
with a great potential for further evolution. Growing internationaliza-
tion and integration of economic relations among states and individuals
(‘globalization’), enhanced international diffusion of information, knowl-
edge and technological innovation, cross-border environmental issues,
etc. increasingly require common administrative responses to common
problems that appear more or less contemporaneously on a worldwide
scale. It is obvious that traditional domestic administrative law is inher-
ently inappropriate to meet problems transcending national boundaries.
It therefore requires adaptation and an opening for efficient problem-
solving mechanisms that may be found by means of comparative analysis
and/or transnational convergence. A factor contributing to this evolution
has been the continuous blurring in the second half of the 20th century
of the traditional dichotomy between the so-called civil and common law
systems that was concomitant with the overall recognition of administra-
tive law as a discipline of its own. Moreover, European integration has
created marked convergence tendencies in administrative law during the
same period. This convergence phenomenon can be described as a circular
process of mutual adaptation and cross-fertilization of administrative laws
with a view to constraining the exercise of public power by the new supra-
national polity, which is characterized by the pooling of various adminis-
trative competencies, the emergence of new functions and responsibilities
for public administrators at both national and supranational level as well
as novel and complex ways of horizontal and vertical interaction between them (‘multi-level governance’) (Scharpf, 1985; Chiti, 1992, pp. 12, 24–7; Schwarze, 1996d). Comparative administrative law thus gains a crucial role in shaping the administrative constraints and judicial control mechanisms required to ensure the obedience of the supranational public power to the ‘rule of law’. The latest rise, more recently at international level (Stewart, 2005; Kingsbury et al., 2004), in doctrinal debate and the emergence of a number of specific journals, notably European, dedicated to comparative analysis in administrative law, such as for instance European Public Law and the European Review of Public Law is evidence of the fact that this evolution is being taken seriously in legal doctrine and practice.

2 METHODOLOGICAL FOUNDATIONS

2.1 Determining the Objective of Comparative Analysis

Comparative analysis applied to administrative law should be understood as a specific tool aiming at reaching predetermined objectives and not as an end in itself. The giving of a comprehensive descriptive and/or analytical account of different administrative law systems or specific parts of it certainly constitutes a valuable knowledge-gaining exercise about the functioning and the values of these systems, but will not immediately offer solutions to perceived problems. While such comprehensive analyses may well serve as a reference or a starting point for more detailed research into a given problem, the core of comparative work consists of singling out the responses that foreign systems or branches of administrative law offer to the same or to a similar problem in order to enable the comparative analyst to make well-argued suggestions for a better solution.

2.2 Applying the Principle of Functionality

From a purely methodological point of view, comparative analysis in administrative law, as in other fields of law, follows the principle of functionality. The application of this principle entails in a first step the accurate definition of a given problem in its most generic terms freed from the specific doctrinal underpinnings of the legal order in which it occurs. This should enable the comparative analyst to find in a second step ‘a functionally equal solution’ in a foreign legal order irrespective of the source of law delivering that solution (Schwarze, 1992, pp. 82–3; Bermann, 1996, pp. 32–3). Schwarze explains this process of comparison as comprising a negative and a positive effect: as regards the negative effect, the principle
of functionality demands that the solutions taken from the foreign legal system are ‘to be divested as far as possible from all specific conceptual content in order to facilitate their separation from specifically national doctrine and their proper evaluation’ regarding their generic function and substance. The positive effect consists of examining each solution ‘as a single unit with respect to its function’ and its substance and taking it into consideration for comparative purposes (Schwarze, 1992, p. 83). In a third step, subsequent to this comparative analysis, a critical evaluation of the results gained needs to be undertaken so as to determine the most appropriate, preferable, efficient or ‘best’ solution adapted to the requirements of the legal order to which it should be applied (ibid., pp. 84–5; Bermann, 1996, pp. 32–3). This last step is particularly important in order also to guarantee the legitimacy and the acceptance of a new solution that comparative work brings about.

However, the comparative methodology underlying the principle of functionality necessarily bears its limits in administrative law with a view to the inherent uncertainties as to the actual substance and meaning of administrative rules and guarantees in the context of any administrative system. Accordingly, administrative rules of a ‘technical’ or ‘incidental’ nature, such as those on the classification of goods, are much more amenable to solutions singled out by comparative work than ‘essential’ rules with a particularly firm grounding in the polity’s administrative and political system, such as rules on the protection of public security and order, social security or immigration. In other words, the more a given administrative legal concept reflects the identity and the fundamental political and societal choices of the state, the less likely it is that it is open to comparative analysis and/or adaptation by borrowing legal solutions from abroad (Schwarze, 1992, pp. 85–7; Bermann, 1996, pp. 32–3).

### 2.3 Objectives of Comparative Research in Administrative Law

Among the objectives to be reached through comparative research in administrative law a number can be distinguished. Firstly, comparative analysis may help better understand the underpinnings and intrinsic values of a given legal concept, which may long be rooted in domestic administrative law or even originally be ‘borrowed’ from a foreign system, to enable it to deliver better results through modified interpretation or adaptation.

Secondly, comparative research may contribute to developing domestic administrative law beyond its traditional paradigm by adapting it to foreign concepts or even accepting ‘transplants’ from other administrative systems that contribute to more efficient problem solving or better results.

Thirdly, comparative methodology has proved to be an indispensable
tool for fostering legal and administrative/institutional solutions regarding the exercise of a ‘federal type’ of public power, such as the one at the European level. In this context, comparative analysis can provide the basis for coordination, harmonization or even unification of national administrative laws in order to facilitate cooperation between the public institutions involved, the final objective being to create a coherent environment for dealing more efficiently with transnational issues in the interest of both public utility and individual protection. Comparative analysis may also prepare the ground for establishing new higher-ranking administrative principles that specifically constrain the exercise of public power by the new supranational polity (see below, section 3). This may be reached in different ways, namely through the creation of laws by the competent domestic legislature, the coordination, harmonization or unification of laws by transnational or supranational institutions, the interpretation or shaping of administrative law concepts by the judiciary, or a combination of these instruments (Schwarze, 1992, pp. 78–82). It has also been argued that comparative analysis is particularly important in providing guidance in the discussion on the usefulness of regulatory cooperation and harmonization among states on the one hand and maintaining competition of legal cultures and concepts on the other. Indeed, both models – regulatory cooperation and regulatory competition – require careful comparative analysis in order to be able to decide upon the most efficient solution for improving both public and private utility (Bermann, 1996, pp. 34–5).

3 GENERAL PRINCIPLES OF ADMINISTRATIVE LAW

One of the most important objects of comparative administrative research since the 1950s has been the quest for universally applicable or general principles of administrative law (Chiti, 1995a). The frontrunners in the evolution of shaping such general principles at the European level clearly are the European Court of Human Rights in Strasbourg (Boyle, 1984; Bradley, 1995) and the Court of Justice of the European Communities in Luxembourg (Rengeling, 1977, 1984; Schwarze, 1992; Usher, 1998; Tridimas, 1999). In the context of Community law, the European Court of Justice’s elaboration of general principles of administrative law, alongside the creation of autonomous Community fundamental rights, has been one of the most important contributions a judiciary has ever made to the functioning of a supranational organization entrusted with its own regulatory and executive powers (Chiti, 1995b). While the Strasbourg European court was asked to shape a range of guarantees of administrative justice
based on Article 6 of the European Convention on Human Rights (Schwarze, 1993b; Jacot-Guillarmod, 1993; Bradley, 1995), the European Court of Justice was faced with the need to create such principles in the complete absence of codified rules – the exception being the duty to state reasons under Article 253 of the EC Treaty – by drawing in particular on the legal traditions of the Community’s member states. To that effect, thorough comparative analysis of the member states’ administrative laws was an indispensable prerequisite.

It is submitted that the European Court of Justice’s activity in filling gaps in the European Community’s administrative system by judge-made general principles constitutes, not least because of its enormous practical importance, the most striking example of applied comparative analysis in the field of administrative law so far. Bearing in mind the legal effects that Community law is capable of producing within the national legal orders (direct effect and supremacy), there has unsurprisingly been a long-lasting debate in legal doctrine on the correct methodology to be followed, stretching from a ‘minimalist’ to a ‘maximalist’ approach, which was essentially inspired by the concern to ensure that the member states and their citizens could accept the newly shaped principles as legitimate. Whilst the minimalist comparative approach would require finding a solution on the smallest common denominator that matches or is close to the choice of all of the member states, the maximalist theory in its extreme form would allow for opting for the solution that offers the most extensive protection to the individual (Schwarze, 1992, pp. 71–2). It has been convincingly argued with respect to the judicial development of Community fundamental rights that none of these approaches offers workable solutions having regard to the heterogeneity of the national balances struck between individual and public interests (Weiler, 1995). Instead, the European Court of Justice needs to define its own balance between the individual and the (Community) public interest in instances where the former is subject to the exercise of Community public power. Thus comparative work in this context implies a considerable autonomy on the part of the Community judge in finding the adequate or ‘best’ solution among the several sources available which is compatible with the structure and the objectives of the Community (Schwarze, 1992, p. 73). In German doctrine, this comparative approach has been labelled ‘evaluative comparison of laws’ because it involves a weighted comparison and a value judgment on the adequacy of the solution found for the functioning of the Community administrative system and its compatibility with its own fundamental goals and values (Bleckmann, 1992, 1993; Schwarze, 1992, pp. 72–3). But it also seems obvious that the European Court of Justice’s comparative approach is equally inspired by
the three-step methodology underlying the principle of functionality (see above, section 2).

Mainly as a result of judicial activism, the Community system now disposes of an array of higher-ranking general principles of administrative law – whether procedural or substantive in nature – putting constraints on the exercise of Community public power vis-à-vis the citizen and providing adequate protection to the latter (Usher, 1998; Tridimas, 1999; Nehl, 1999, 2002a). The recent codification of a number of these principles in Article 41 of the European Charter of Fundamental Rights is further evidence of their recognition as fundamental parameters of legality of Community administrative action under the ‘rule of law’ (Kan’ska, 2004). However, once these principles are established at Community level, they also reflect back on the member states’ legal orders owing to the intimate linkage between the Community and the national administrative systems regarding the joint implementation of Community law, a phenomenon which has been described (above, section 1) as a continuous process of mutual influence and convergence (Schwarze, 1996d; Nehl, 2002a, pp. 24–6). It seems that similar developments may take place at international level, notably in the context of the World Trade Organization, which is now equipped with its own ‘judiciary’ in the form of ‘panels’ and an ‘appeellate body’ who have started shaping comparable general principles of administrative law disconnected from the national paradigm (della Cananea, 2003; Stewart, 2005).

4 ADMINISTRATIVE JUSTICE: PROCEDURAL VERSUS SUBSTANTIVE JUSTICE

The notion of administrative justice, although being widely used in particular by Anglo-Saxon lawyers (JUSTICE, 1988; Bradley, 1995; Longley and James, 1999), is not easily amenable to comparative analysis as it is too broad a concept, implying a wide range of principles and values governing not only executive activity as such but also its control by the judiciary. However, the dichotomy between procedural and substantive administrative justice has proved to be a subject of particular interest for comparative research as it grants useful insights into the functioning and the fundamental values of a given administrative system from which further conclusions may be drawn when comparing different branches or types of rules of administrative law (Ladeur, 2002a). In various legal systems procedural administrative justice forms a concept of its own, such as ‘natural justice’ or ‘procedural fairness’ in English law (Craig, 1993; Galligan, 1996; Harlow, 2002) or ‘due process’ in US law (Pennock and
Chapman, 1977; Mashaw, 1985). Its primary objective is that administrative procedures should be conducted fairly, inter alia by granting individuals whose rights and interests can be affected by the outcome of the administrative decision-making process the opportunity to make known their views effectively. While the concept of procedural justice thus relates to the formal and procedural requirements governing administrative decision making independently of its final outcome, the concept of substantive administrative justice is concerned with the rationality of its results and in particular with distributive justice (Tschentscher, 1997).

From a comparative viewpoint, it is certainly worthwhile conducting comparative analysis regarding the various substantive rules that ensure distributive justice. The results of such analysis are, however, likely to be disparate as they necessarily reflect the diversity of substantive policy choices made by the respective legal systems which the relevant substantive rules are designed to attain. Moreover, in the face of the undeniable loss in all modern legal systems of the legislatures’ capacity of sufficiently directing the achievement of distributive justice (Grimm, 1990; Ladeur, 2002a), it may nowadays appear more promising to have a comparative look at rules enhancing procedural justice. This is particularly true of those fields of administrative activity that are no longer open to ‘pre-regulated’ substantive distribution decisions by the legislator but rather have to rely heavily on the exercise of wide administrative discretionary powers – be it in the form of executive regulation or individual administrative acts – that enable the administration to react efficiently to rapidly changing market, technological and living conditions, as for instance in the area of technocratic rule making or risk management in environmental matters (Ladeur and Prelle, 2002). Legal sociology teaches us that, in such conditions of uncertainty regarding the attainment of distributive justice and the rationality of the policy choice, procedural administrative justice has an increasingly important role to play in compensating the loss of substantive control and, accordingly, in enhancing the legitimacy of the substantive distribution decision finally reached (Luhmann, 1969; Rawls, 1971; Röhl, 1993). Comparative research may thus take a particular interest in unveiling the various procedural solutions followed by different administrative systems in order to outweigh the loss of control and legitimacy entailed.

The above emphasis on procedural rather than substantive administrative justice bears important implications for the observance of the ‘rule of law’ by the administration equipped with wide discretionary powers as well as for the judicial control of the latter (see below, section 5). Under these circumstances, the administration no longer simply constitutes the executive arm of the legislator being charged with a purely ‘technical’ implementation of legislative directives transmitted to it by the polity.
('transmission belt model') (Stewart, 1975, pp. 1669–88). It has therefore been argued, in particular at the European level, that new models of administrative justice and legitimacy should be introduced which are rooted in procedural rationality and thus depart from the traditional ‘rule of law’ concept. These models notably include pluralist approaches based on heterarchical postmodern legal theory (Ladeur, 1997), deliberative schools of thought (Joerges and Neyer, 1997; Everson, 1998) or non-majoritarian theory inspired by US doctrine that favours administration by independent agencies (Majone, 1996; Fischer-Appelt, 1999). All of these theories are firmly grounded on procedural justice considerations and draw on the various facets of legitimacy that the observance of procedural rules may bring about in this context (Nehl, 2002b, pp. 135–43). It is submitted that comparative analysis is particularly helpful in providing valuable insights into the opportunities opened by those new concepts of procedural justice, be it at national or transnational level.

5 ACCESS TO JUSTICE, JUDICIAL REVIEW AND REMEDIES IN ADMINISTRATIVE LAW

5.1 Access to Justice or Locus Standi

In particular, Anglo-Saxon lawyers tend to understand the issue of citizens’ access to justice or judicial review of administrative action as forming an integral part of a (fundamental) right to administrative justice (Bradley, 1995; Harlow, 1999b; Longley and James, 1999). On the other hand, the French administrative system considers access to justice by the individual primarily as a means to enable the courts to control the legality of the administration’s behaviour ‘objectively’ and in the public interest. The protection of individual rights is thus merely a necessary reflex of such judicial control, a phenomenon which seems to explain the paucity of French doctrinal debate on the concept of ‘intérêt à agir’ (Woehrling, 1998). However, rules on locus standi or standing have given rise to considerable doctrinal and comparative debate particularly with regard to those legal systems (among them the United Kingdom and the European Community) in which there exists no clear-cut theory of access to justice and where there is the need to decide on the applicant’s right to challenge the administrative act on the basis of case-specific ad hoc criteria (Arnull, 1996, 2001; Harlow, 1992, 1999b). Comparative analysis with administrative systems which know a specific theory of access, such as the German ‘Schutznormdoktrin’ with its focus on the protection of subjective rights, may help overcome such difficulties (Blankenagel, 1992). It should also be
noted that these access theories are themselves subject to intense adap-
tion as a consequence of European legal integration and the direct effect of
Community rules (Ruffert, 1997; Calliess, 2002).

5.2 Judicial Review: Types and Degree

The powers of judicial review regarding administrative conduct and in par-
ticular the degree of scrutiny of administrative acts grant valuable insights
into the functioning and the basic values of a given administrative system
(Nehl, 2002b). The issue of intensity of judicial control is closely con-

ected to the substance–procedure dichotomy mentioned above (section
4). In fact, legal systems showing a relatively high degree of judicial defer-
ence vis-à-vis the substantive policy choices made by the administration
normally focus on reviewing more intensely the legality of the adminis-
trative decision-making process, thereby putting much emphasis on the
observance of procedural guarantees. The United Kingdom’s concept of
judicial review constitutes one of the most striking examples in this respect
(Harlow, 2002) which seems also to have influenced the Community
courts’ case law (Nehl, 1999, 2002a). On the other hand, administrative
law systems – most prominently the German system – with a long tradi-
tion of particularly intense powers of judicial scrutiny over administrative
discretion, tend to undervalue the relevance of procedural legality, as they
accord procedural rules merely a serving function (‘dienende Funktion’) in
the interest of the rationality of the outcome of the decision-making
process rather than a protective rationale on their own (Schoch, 1999;
Schmidt-Aßmann, 2003). It is submitted that, in the face of the continu-
ous rise of administrative discretion powers in modern administrative
systems, combined with an increasing lack of substantive guidance eman-
ating from legislative statutes (see above, section 4), judicial review will
have to undergo a fundamental change in respect of both its object and
its degree of scrutiny. In this context, comparative analysis has already
proved to be a very valuable instrument. Thus European administrative
law starts benefiting from rich US experience in a comparable ‘federalized’
setting (Stewart, 1975; Shapiro, 1988, 2002) and German administra-
tive law is reconsidering its dogma of intense control of administrative
substantive discretion by discussing a possible revaluation of judicial
procedural review (Schmidt-Aßmann, 1997; Ladeur and Prelle, 2002).

5.3 Judicial Remedies

European legal integration has furthermore triggered an intense debate on
the convergence of judicial remedies, stretching from interim relief to state
liability, as a result of case law of the European Court of Justice (Curtin and Mortelmans, 1994; Caranta, 1995; Schwarze, 1996a). Although a number of these remedies, in particular state liability for the infringement of Community rules, do not belong to the core of administrative law but rather to the realm of private or tort law, the methodological underpinnings of comparative analysis in this context do not differ substantially from those mentioned in sections 2 and 3.

6 OUTLOOK

Comparative administrative law has grown into a discipline of comparative analysis of its own in recent years. As the example of European integration impressively shows, the importance of comparative research in administrative law cannot be underestimated with a view to the ever closer ties that are continuously being established between the various administrative systems at national and international level. Regional integration in other parts of the world will further stimulate this development and intensify the move towards a ius commune transcending the boundaries of the traditional nation state. As the case law of the Word Trade Organization’s panels and appellate body demonstrates, there even is a prospect of convergence of administrative principles on a worldwide scale, an issue that academic debate has recently taken up under the topic of the ‘emergence of global administrative law’ (Kingsbury et al., 2004).

Apart from convergence among administrative systems being more or less induced by legal integration, comparative administrative law also continues playing its role in the reformation of the domestic administrative system that needs to react to the new challenges posed by modern and open societies and the continuous loss of the nation states’ capacity and autonomy in finding responses to problems in an ever more globalized world. The continuous need for reform thus renders domestic administrative law particularly amenable to comparative analysis and increases the readiness to ‘borrow’ legal concepts from abroad even if this is not required by legal integration.

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