

A RESTATEMENT OF EUROPEAN ADMINISTRATIVE LAW: PROBLEMS AND PROSPECTS

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Introduction

The European Union has been characterized, among other things, as a vast regulatory state (Lindseth 2006). Thanks to a mass of both primary legislation (predicated directly on the Treaty Establishing the European Community¹ and the Treaty on European Union²) and secondary legislation (adopted by one or more of the EU institutions via delegation through pieces of primary legislation), the EU institutions exercise an abundance of rulemaking authority. They also enjoy, on the basis of these same normative instruments, the authority to render large numbers of individualized decisions. This combination of rulemaking and adjudicatory power has enabled the European Union to become an arena of administrative law activity as intensive as any to be found on the globe (Bermann et al. 2009).

One of the virtues of the European Union, particularly in evidence in recent years, has unquestionably been its taste for procedural innovation and experimentation (de Búrca & Scott 2007; de Búrca & Walker 2007). However, these have come at a price, insofar as something of a disconnect has arisen between the proliferation of procedural regimes, on the one hand, and the relative absence of general standards of administrative procedure and its review, on the other. As the EU law literature never fails to emphasize (Joerges et al. 2004; Larsson & Schaefer 2006, p. 541), at stake are the transparency and legitimacy of EU law and the European Union itself.

Reflections such as these have generated a strong impulse to make sense of the administrative procedure landscape of the European Union. One manifestation is the recent surge in academic literature seeking in itself to provide a comprehensive and systematic understanding of EU administrative law – or as comprehensive and systematic an understanding as can be had (Auby & de la Rochere 2007; American Bar Association 2008; Craig 2006; Hofmann & Türk 2006; Hofmann & Türk 2009; Serden & Stroink 2002). Another set of manifestations are the discussions afoot about the possibility of producing, if not legislation in the form of a general European Union administrative procedure act, then at least something along the lines of a “restatement” or set of “best practices” of European Union administrative law. One such forum is the recently launched Research Network on EU Administrative Law (or “ReNEUAL”) – a project designed by a group of leading European administrative law scholars to pursue precisely these objectives. According to its prospectus, “EU administrative law is regulated in a rather unsystematic manner, mainly on a policy-by-policy basis. To date, only few areas of EU administrative law [have been] subject to a systematic approach with rules and principles applicable beyond a single policy area.”³

A Restatement?

The term “Restatement,” of course, has a decidedly American law ring to it – so much so that it is difficult, though not impossible, to imagine any instrument bearing a title of that sort emerging from an initiative such as the ReNEUAL Project. But the term has nonetheless come to be treated as a useful shorthand for any enterprise whose aim is to rationalize, clarify and, on the margins, improve European Union administrative law.

Not that the term “Restatement,” as understood in US law, would be entirely inapt for an enterprise of this sort. In the United States, the notion of a Restatement of the Law has traditionally signified a consolidation of the principles of law governing a given field with a view to bringing a measurably greater degree of clarity, consistency and simplicity to the law than would otherwise exist – without, however, any pretense that such a consolidation amounts in itself to positive law (Hull 1998). Instead, a Restatement’s value lies principally, though by no means only, in guiding courts in their development of the law and adjudication of individual disputes. A successful Restatement helps courts to align their case law not only with other decisional law within the jurisdiction, but also with the decisional law of sister-state jurisdictions, to the extent of course that the enacted law within any given jurisdiction permits such alignment. Viewed at this very general purposive level, the notion of a Restatement looks like quite a good fit with the movements in which European administrative law academics are finding themselves increasingly engaged.

The fit, however, is by no means exact. Restatements initially flourished in the United States in fields where existing law was largely judge-made rather than statutory, and where it fell within the jurisdiction of the states rather than the federal government (Bermann forthcoming). These features – state as opposed to federal law, common law as opposed to statute – combined to produce a risk of needless legal divergences within and across jurisdictions. This would not, however, be an entirely accurate description of the EU law landscape. Much of the administrative law that would be “restated” in the European Union is law established at the EU level, whether by treaty, legislation or case law of the European courts, or taking “soft law” form (Jans et al. 2007, p. 12). It would

not entail the “state law purity” of the bodies of law that were the subject of the early Restatements in the United States (Bermann forthcoming). Moreover, European administrative law is not judge-made to the extent that the bodies of law subjected to Restatement in the United States have traditionally been. The procedures by which primary and secondary EU legislation are adopted and applied in individual cases are largely laid down in written law (notably the treaties and the primary and secondary legislation itself), though subject to a substantial measure of judicial supervision. European Union administrative law is thus neither as pervasively “state” nor as pervasively “judge-made” as the law that has been the object of the American Restatements.

Of course, even Restatements in the United States are no longer quite what they used to be. Consider the titles and subjects of some of the ALI’s most recent Restatement and other projects. They would include the foreign relations law of the United States,⁴ draft federal legislation on the recognition and enforcement of foreign judgments,⁵ principles of world trade law,⁶ principles and rules of transnational civil procedure,⁷ private international law aspects of world intellectual property law,⁸ the law of cross-border insolvency,⁹ and principles of aggregate litigation.¹⁰ The current Restatement project on the U.S. Law of International Commercial Arbitration¹¹ addresses a field of predominantly federal rather than state law, albeit one that is not subject to federal preemption. Rather, it is dominated by a federal statute¹² and international treaties to which the US is a party.¹³ Nor has the field been by any means been wholly relegated to the courts, notwithstanding the voluminous case law interpreting the relevant statute and treaties. If a field as federal and as statutory as international commercial arbitration in the

U.S. is the proper subject of an ALI Restatement, it would not seem wide of the mark to consider EU administrative law equally susceptible to “restatement.”

Among the features of the ALI Restatements in particular that have helped make them an attractive model in the EU administrative law arena has nothing to do with the state versus federal law or the case law versus statutory character of the field being treated, but the architecture of Restatements themselves. Not unlike many uniform and model laws, Restatements have regularly followed the tripartite structure of “blackletter,” “comments,” and “reporters’ notes.” Within this architecture, “blackletter” signifies the setting forth of legal principles that courts are invited to apply in cases falling within a Restatement’s scope, as if it were law, though it is not. The “comments” in turn lay out in explanatory fashion the basic rationales and underlying policy choices that animated the drafters to produce the blackletter they did. Finally, the extensive “reporters’ notes” reveal the sometimes vast reservoir of sources and authorities that the drafters consulted and against the background of which the positions adopted by the blackletter and explained in the comments can best be appreciated. In truth, the ReNEUAL Project contemplates performing essentially the same three exercises, though in reverse order: namely, a presentation of the administrative law *status quo*, followed by its assessment in light of alternatives, followed in turn by what the ReNEUAL Project is, for now, calling “best practices.” (The term “best practices” is meant to make it clearer than the term “restatement” would that the instrument is by no means to be considered as a set of binding norms.)

For these reasons, I use the term “restatement” (and I favor using the lower case) to mean nothing more than any exercise by which the legal principles governing a given

field are set forth in a clear and systematic fashion with a view to promoting a consistent understanding and application of the law.

Why a “restatement”?

Would a restatement of European Union administrative law be a useful project and product? My answer is yes. Even looking only at the EU level, we find little by way of comprehensive horizontally applicable procedural legislation, whether in the form of an EU administrative procedure act or otherwise. The question whether a legal basis for such a codification can be found in the EC Treaty is still debated (Jans et al. 2007, p. 59; Craig 2006, p. 280). Mention of course needs to be made of certain horizontal instruments that have distinctly cross-sectoral application. These instruments would include the Comitology decisions of 1987, 1999 and 2006,¹⁴ the EU’s Financial Regulation,¹⁵ and the regulation governing the EU’s “executive agencies” (Craig 2006, p. 37).¹⁶ But these instruments govern only the institutions and mechanisms that they themselves specifically create. Noteworthy also is the European Ombudsman’s Code of Good Administration,¹⁷ which is wide-ranging but also not legally binding. Instruments such as these aside, useful generalities of EU administrative law tend to take the form of a small number of vague propositions known as “general principles of law” (Jans et al. 2007, p. 115; Schwarze 2005; Tridimas 2006)¹⁸ that find only a tenuous basis in the EC Treaty.¹⁹

The “best practices” envisaged by the ReNEUAL Project would not even purport to be as authoritative as the Restatements in the US. While Restatements furnish courts rules of decision for cases that come before them, best practices pursue a more varied set of goals. They inform the legislative process, and may even permit a streamlining of

legislative proposals by sparing their having to be burdened with detailed and potentially inconsistent provisions on administrative procedure. They provide officials at all levels with indications as to how EU law and policy can best be formulated and implemented. They can promote cooperation in the growing number of areas of law governed by joint EU-Member State (or “integrated”) administration. They can provide a more clear and consistent terminology for both those who make and those who apply the law. And while they may not be immediately applicable in political and judicial supervision of administrative actors, it is difficult to imagine that they would not inform the standards that supervising bodies, including courts, employ in exercising their review functions.

The Challenges

Like any ambitious project, a restatement or set of best practices of European Union administrative law faces serious challenges – challenges pertinent, at the very least, to (a) its scope, (b) its extension to Member State administrative law, (c) its relationship to positive law, and (d) the sheer complexity of the administrative processes to be restated.

Scope of inquiry.

What kinds of administrative processes should a restatement or compendium of best practices address? The ReNEUAL Project, like any similar undertaking, needs to define administrative procedure, which in turn requires defining what it means to “administer” the law. Within the EU context, shall we include the adoption of primary legislation by the Council and Parliament, a function that by its very name suggests that it represents the making rather than the administration of the law? Yet a good case can be made that such legislation bears much the same relationship to the European Treaties as

regulations bear to enabling statutes within the United States and should accordingly be viewed as administrative instruments, albeit in legislative form (Strauss et al. 2009, p. 4).

Shall we consider the EU judiciary as an administrative institution? Instinctively we would not and do not. And yet, taken in its broadest sense, administration of EU law is performed not only by political but also by judicial institutions at all levels. Consider that the courts of the EU and the Member States regularly exercise judicial review over administrative action, an exercise of power that has long been considered an essential aspect of administrative law at the national level, and is no less so merely because the law and policy being administered have their genesis in EU law. Not only does administrative law at the national level properly concern itself with such issues as the availability, scope and standard of judicial review of administrative action, and the liability of administrative actors for their illegal or otherwise wrongful acts (Craig 1999), but those issues figure regularly in the administrative procedure legislation and administrative law case law that may be found at the national level.²⁰ Given the absence of any such general administrative procedure legislation at the European Union level,²¹ would judicial review of administrative action not be an appropriate chapter of a restatement of administrative law?²²

In fact, courts do more by way of administrative law than conduct judicial review of administrative action. As European Union law ventures further and further into private law terrain – as it has done with products liability,²³ consumer contracts,²⁴ and, more recently, with choice of law in both torts²⁵ and contracts,²⁶ courts at the Member State level *are* the administrators of EU law. It is true that we in the United States seldom look upon civil litigation in such areas of the law as administration of the law, but that is what

it is. When the Council and Parliament enact a piece of consumer protection legislation giving consumers one or another legal remedy directly assertable in litigation, the courts become in every sense of the term administrators of EU law. While a restatement or statement of best practices of EU administrative law would not presume to restate the substantive law of product liability or consumer protection, it could well restate or set forth certain general principles designed to guide courts in their exercise of authority within these fields.

Once defined (with or without including the Council and Parliament acting in co-decision, and with or without including the courts), the universe of administrative law still needs to be organized. Indeed, notwithstanding the variety and complexity of administrative processes in the EU, they cannot manageably be addressed without a classification. Although any number of classifications can be imagined,²⁷ a likely typology – and one that has been provisionally adopted by the ReNEUAL Project – consists of (a) “administrative rule-making,” (b) “unilateral single-case decision-making,” (c) “administrative contracts,” and (d) “information management.” These represent the species of administrative action that the ReNEUAL Project regards as most central to European Union administrative procedure.

Extension to Member State administrative processes.

It is a commonplace of EU law that a great deal of the rule-making activity – and indeed the vast majority of the adjudicatory activity (Jans et al. 2007, p. 199)²⁸ – that is predicated on the European treaties and on EU legislation is conducted not at the European Union level, but rather at the level of the Member States and their political subdivisions. Although the implementation of EU law is, to this extent, entrusted to

Member State officials, the EU nevertheless retains an obvious interest in ensuring the effectiveness and fairness of the administrative procedures by which EU law and policy are effectuated at the Member State level and below. It also has an added interest in ensuring that these procedures are expressed both with clarity and with a reasonable degree of uniformity and predictability across the EU.

Consequently, a consensus has emerged that the administrative process to be addressed in any attempt at restatement or compilation of best practices should include not only rulemaking and enforcement activity of various kinds at the EU level, but also implementation of EU law norms at the Member State level as well. However, prescribing administrative process at the Member State level entails some delicate line-drawing. It is not contemplated that a restatement or even a set of best practices would prescribe how Member State officials should go about administering purely national law; the principles governing the administration of national law rightly remain the province of national law. Yet, it is also not realistic to expect Member State officials to observe one set of administrative processes for the making and implementing of EU law and another for the making and implementing of domestic law.

Up to now, the EU legislator has largely refrained from dictating the particular ways in which decision-making on matters of EU law is to be carried out by officials at the Member State level and below. Indeed the very notion of a directive is that Member States should enjoy a healthy measure of discretion in determining the modalities by which the EU law objectives laid out in those directives are to be achieved.²⁹ Bringing consistency to the application of EU law once it reaches the stage of Member State administration requires careful thought. The challenge will consist of reforming EU law

so as to minimize both the discontinuities in the administration of EU law across Member States, while at the same time minimizing within any given Member State the discontinuities between the modes by which EU and Member State law are implemented.³⁰ The solution may lay in (a) establishing at the EU level general principles to guide the implementation of EU law at the level of the Member States, while (b) encouraging the EU legislator to prescribe implementing methods that comport most readily with existing administrative methods at the Member State level, provided the efficacy of EU law and policy is not threatened, and (c) fostering the evolution of domestic administrative law at the Member State level in the direction of bridging gaps between EU and Member State administrative law methods (Craig 2006, p. 50; Jans et al. 2007, pp. 5, 8, 35ff).³¹

The relationship to positive law.

A challenge intrinsic to any restatement, in the US sense of the term, consists of the reconciliation of the restatement with positive law. While instruments like restatements or best practices legitimately aim to rationalize and, within limits, improve the law, they inevitably operate within the confines of certain legal givens. Though driven to bring improvement to the law, the drafters of the American Restatements know that their prescriptions must be consistent with certain norms – at a minimum, established constitutional case law and clear statutory and regulatory mandates. It is only within those confines that innovation can legitimately occur (Bermann forthcoming).

But a reality of the European Union is that its administrative law – indeed all of its law – is based on a complex web of highly detailed treaty provisions and a massive body of secondary legislation. To one degree or another, each of these operates as a

constraint on the innovations and improvements that restatements can hope to introduce. Reconciliation of this kind is not a mechanical exercise. Only with resourcefulness and good judgment can restaters determine the latitude that different elements of existing law allow them in effecting change. Both the utility and legitimacy of restatements and best practices depend on the skill with which this operation is managed.

The complexity of EU administrative process.

Any attempt at restating EU administrative law or fashioning best practices, even strictly at the EU level, must cope with that body of law's extraordinary procedural complexity. This can be traced to several causes. In the first place, administrative procedure within the EU has developed as a highly sectoral affair, particularly when it comes to individual decision-making (or, in US parlance, administrative adjudication) (Asimow & Dunlop 2009). Relatively few are the sectors in which something resembling a comprehensive procedural code has been adopted.³² The absence of standardization across sectors and the general eclecticism of EU administrative procedure law (Craig 2006, p. 279)³³ have allowed the EU administrative process to become, and to remain, deeply variegated.

Second, even where significant horizontal unification has occurred, complexity reigns, as evidenced by comitology (Craig 2006, pp. 99-142; Hofmann & Türk 2006, pp. 77-84).³⁴ Even after the 2006 comitology reform³⁵ and under the comitology provisions of the prospective Treaty of Lisbon,³⁶ the rules according to which comitology is conducted and supervised remain extremely complex. As sub-delegation of delegated powers occurs under the new comitology regime, the need for guiding principles will only increase (Hofmann & Türk 2009, pp. 361-62).³⁷ Much the same may be said of the

development of agencies on the EU institutional landscape, another feature of EU administrative law in which a certain degree of harmonization has been achieved. Despite the proliferation of agencies and their superficial commonality, there still do not exist even rudimentary understandings about the principles that should govern the agencies or the principles of accountability that should govern their relationship to existing institutions at the EU level, much less about the mechanisms through which those principles are assured (Everson 2009, p. 116).³⁸ Each is essentially fashioned by the enabling regulation that created it.

While the need for a restatement of principles or a set of best practices regarding comitology and the functioning of agencies is evident and widely acknowledged, they represent, as pointed out by Herwig Hofmann, only a portion of the problem, and a small portion at that. Daily administration of EU law increasingly entails the use of “composite procedures,” defined by Hofmann as “multi-stage procedures with input from administrative actors from different jurisdictions” (Hofmann & Türk 2009, p. 365). By their very nature (notably their tendency to escape application of traditional hierarchical principles of control and coordination), such arrangements defy procedural generalization. They also pose a challenge to the supervision of administrative activity and even to the operation of judicial review, and thus indirectly maintenance of the rule of law. Although what scholars have recently come to call “integrated” models of administration have been around for a long while, (Craig 2006, p. 94)³⁹ they are becoming ever more prevalent (Hofmann & Türk 2009, p. 365; Jans et al. 2007, pp. 31-32).⁴⁰ Thus, the EU administrative process has not only a “multi-level governance” character, but also a distinctly *ad hoc* one (Chiti 2009, p. 9; Craig 2009, p. 34; Hofmann

& Türk 2009, p. 357). A telling sign of this is the uneven manner in which Member States are called upon specifically to monitor the application of EU law on their territory (Jans et al. 2007, pp. 221-25) and in which new forms of governance bring private actors and representatives of civil society into the administrative process (Neuhold & Radulova 2006, pp. 44, 58-65).⁴¹ The “open method of coordination” (“OMC”), which has emerged as an alternative to traditional hierarchical lawmaking within the EU, deliberately encourages highly variable patterns of decision-making (Craig 2006, pp. 205, 191-233).⁴²

Third, the European Union is a conspicuous administrative law actor on the world stage, perhaps more so than any other polity, including the United States. It participates in a wide variety of international regulatory and enforcement regimes, both bilateral and multilateral. Some of this international activity mimics conventional rule-making and administrative adjudication. But much of it, too, is *ad hoc*, and much of it is generative of soft law, at best. Questions are already being raised in Europe (Hofmann & Türk 2009, p. 372), as they have been in the US, (Bermann 2001, p. 373) as to whether international regulatory and enforcement cooperation opens up avenues for circumventing or, in any event, weakening, “constitutional” understandings in domestic law as regards allocations of authority, transparency, participation and accountability (Bermann 1993).⁴³ While it may be difficult to imagine the Council or Parliament enacting hard law instruments to regularize the EU’s administrative activity on the international plane, it is not at all difficult to imagine the development of ground rules for the participation of EU actors in international regulatory and enforcement regimes.⁴⁴ The growing international dimension of regulation surely complicates any attempt at restating

EU administrative law or establishing best practices, but the challenge is at least one that a restatement or set of best practices, by its very nature, has a possibility of meeting.

Conclusion

The fact that EU administrative law has evolved in the direction of ever greater differentiation is incontestable. If that is one of its strengths, it is also one of its weaknesses, for while such differentiation improves the capacity of the EU administrative process to respond to the need for effective regulation and enforcement across sectors, it has also lessened the intelligibility of the administrative process. Of course, the difficulty associated with restating the law or setting forth best practices is only heightened in an environment of that sort, but so too is the need for the clarification that such instruments have the unique capacity to address.

¹ Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79.

² Treaty on European Union, O.J. C 340/2 (1997), 37 I.L.M. 67.

³ Research Network on European Administrative Law (ReNEUAL), “Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law,” p. 1 (on file with the author).

⁴ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

⁵ RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

⁶ PRINCIPLES OF TRADE LAW: THE WORLD TRADE ORGANIZATION (2003).

⁷ PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (1998).

⁸ INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008).

⁹ TRANSNATIONAL INSOLVENCY: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (2003).

¹⁰ For information on the ALI Principles of the Law of Aggregate Litigation project, see http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7.

¹¹ RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 5: Recognition and Enforcement of Awards (Proposed Official Draft 2009).

¹² Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

¹³ United Nations and the Panama Conventions on the Recognition and Enforcement of Foreign Arbitral Awards. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. Organization of American States [OAS], Inter-American Convention on International Commercial Arbitration, pmbl., Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter Panama Convention].

¹⁴ See Council Decisions 87/373/EEC, available at http://www.dst.dk/pukora/epub/upload/2285/6_5_en.pdf, and 1999/468/EC, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/l_184/l_18419990717en00230026.pdf, as further modified by Council Regulations 806(2003) (qualified majority) and 807(2003) (unanimity), and by Council Decision 2006/512/EC, available at http://www.stat.fi/eu2006/councildecision_7-2006.pdf.

¹⁵ Council Regulation 1605/2002 of June 25, 2002, on the Financial Regulation Applicable to the General Budget of the European Communities, OJ 2002 L 248/1. Mention could also be made of EU access to data and data protection regimes, as well as requirements for the conduct of regulatory impact assessments.

¹⁶ Council Regulation 58/2003 of Dec. 19, 2002, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1. Executive agencies denote those entities specifically created by sectoral regulations to administer and manage programs on a centralized basis. Because the Commission's right to take policy decisions remains undisturbed, the executive agencies – located within the Commission, but outside the Commission hierarchy – allow administration of EU law to be centralized without that burden being lodged in the Commission staff itself.

¹⁷ European Code of Good Administrative Behavior (2005), available at <http://www.ombudsman.europa.eu/code/en/default.htm>.

¹⁸ These principles include, in addition to fundamental rights, principles of equality, proportionality, legitimate expectations and the right to be heard.

¹⁹ Article 220 states: “The Court of Justice and Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty, the law is observed.”

²⁰ For example, Germany's Administrative Procedure Act [Verwaltungsverfahrensgesetz (VwVfG)] of 25 May 1976 (as amended May 2004) [Germany], 25 May 1976, available at: <http://www.unhcr.org/refworld/docid/48e5def72.html>. U.S. Administrative Procedure Act, 5. U.S. C. 706 (1994). See generally, ADMINISTRATIVE LAW OF THE EUROPEAN UNION AND ITS MEMBER STATES AND THE UNITED STATES (René Seerden & Fritz Stroink eds., Antwerpen 2002); VERWALTUNGSRECHT IN EUROPA, vol. 1 and 2 (Jens-Peter Schneider ed., Göttingen 2007 and 2008), vol. 3 forthcoming; JACQUES ZILLER,

ADMINISTRATIONS COMPARÉES (Paris 1993). For judicial review under the applicable APA sections, see Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUMBIA LAW REVIEW 2071 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE LAW JOURNAL 511.

²¹ See note 3 *supra*, and accompanying text.

²² According to settled case law of the European Court of Justice, every person enjoys a right to be heard to the extent that an EU act has a serious adverse effect on its interests. See *Al-Jubail Fertilizer Co. v. Council*, Case C-49/88, [1991] ECR I-3187. That right is to be read into every EU law enactment and, as a general principle of law, cannot be legislatively excluded.

²³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 210/29 (1985), amended by European Parliament and Council Directive 1999/34/EC, O.J. L 141 (1999).

²⁴ Council Directive 93/13/EEC on unfair terms in consumer contracts, O.J. L 95/29 (1993).

²⁵ Regulation EC 864/2007 of July 11, 2007, on the law applicable to non-contractual obligations (Rome II), O.J. 2007 L 199/40.

²⁶ Regulation EC 593/2008 of June 17, 2008, on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6.

²⁷ The American Bar Association project on The Administrative Law of the European Union was divided into five chapters, based on commonly used US law notions: rulemaking, adjudication, judicial review, transparency and data protection, and oversight.

²⁸ Reference is sometimes made to the European Union's "enforcement deficit."

²⁹ Treaty of Rome Establishing the European Community, art. 249.

³⁰ The "ReNEUAL Project" proposes as follows: "[T]his project is not about general harmonising of national administrative law. The best practice guidelines will be used to reduce the complexity of EU law itself." ReNEUAL, *supra* note 3, n. 5.

³¹ One way in which gaps between Member State and EU administrative procedure, and gaps among Member State administrative procedures, can be bridged is through the EU's establishment of a network of national agencies whose implementation of EU law the Commission itself coordinates and supervises. See Craig 2006, p. 50.

Some European administrative law scholars discern a more general "Europeanization" of national administrative law that extends, through "voluntary adoption," even to the administration of purely domestic law at the member State level. See Jans et al. 2007, pp. 5, 8, 35ff. An important ingredient has been the case law of the European Court of Justice requiring that, when implementing EU law, Member State administrations and courts provide procedures and remedies that are equivalent to those they provide for the vindication of domestic law claims and that are in any event effective. See *Edis*, Case C-231/96, [1998] ECR I-4951 (principle of equivalence); *Santex*, Case C-327/00, [2003] ECR I-1877 (principle of effectiveness).

³² See, for example Council Regulation 1/2003/EC, Dec. 16, 2002, on the implementation of competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003 L 1/1 (competition law); Council Regulation EC 659/1999, March 22, 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999 L 83/1 (state aids).

³³ Craig identifies the sources of EU administrative law as treaty articles, Community legislation, judicial pronouncements and norms embraced by the Commission and the Ombudsman.

³⁴ On comitology generally, see Craig 2006, pp. 99-142; Herwig C.H. Hofmann & Alexander H. Türk, Policy Implementation, *in* EU ADMINISTRATIVE GOVERNANCE (2006), pp. 77-84.

³⁵ Council Decision 1999/468/EC of June 28, 1999, laying down the procedure for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of July 17, 2006, OJ 2006 L 200/11.

³⁶ Treaty on the Functioning of the European Union, arts. 289-91.

³⁷ These authors contemplate “delegation cascades.”

³⁸ *But see*, Communication from the Commission to the European Parliament and the Council, European Agencies: The Way Forward,” COM (2008) 135 final (Mar. 11, 2008).

³⁹ The EU’s Common Agricultural Policy and its Structural Funds have been operated on this basis from nearly their beginning.

⁴⁰ For an example of a recent enactment, see Council regulation 1083/2006 on general provisions on the European Regional Development fund, the European Social Fund and the Cohesion Fund, O.J. 2006 L 210/25.

⁴¹ See also Jans et al. 2007, p. 12.

⁴² OMC has been defined as “a soft law approach fostered through deliberation, learning, and discourse.” (Craig 2006, p. 205). OMC was itself a response to sectoral peculiarities (becoming entrenched notably in the economic and monetary, employment and social inclusion sectors) and has in turn generated diversified patterns of implementation (Craig 2006, p. 191-233).

⁴³ See also, Administrative Conference of the United States, Recommendations and Reports 63-172 (1991).

⁴⁴ *Id.*