Herwig C.H. Hofmann and Russell L. Weaver (eds), *Transatlantic Perspectives on Administrative Law (*Brussels: Bruylant 2011), ISBN 9782802730521, 282 p.

'Transatlantic Perspectives on Administrative Law' is a partly descriptive, partly comparative work that focuses on contemporary developments within European and North-American traditions of administrative law. The book contains eleven contributions, previously published in a special issue of the Administrative Law Review (2009). A first version of most of the contributions was initially written for the Administrative Law Discussion Forum held at the University of Montpellier in May 2008. In the introductory chapter by *Weaver and Hofmann*, two trends in (global) administrative law are distinguished, around which all the contributions in the book revolve. *On the one hand*, there is the question of the relevance of administrative law for developing legitimacy and accountability of multi-level regulatory systems. *On the other hand*, the authors discern a 'renaissance of comparative administrative law', going hand in hand with an increased awareness of the use of this discipline for the field.

The first trend refers to the increasingly popular idea[1], promoted by (amongst others) Rose-Ackerman, that administrative law can and should contribute to government's accountability and legitimacy.[2] This paradigm at least partly removes the focus of administrative law from the reinforcement of the legal position of the individual *vis-à-vis* the administration to the reflection on broader mechanisms of accountability *vis-à-vis* the public as a whole (a viewpoint that is closer to the approach adopted in the field of political science).

The second trend refers to the particular position of comparative administrative law within the whole of comparative legal scholarship and the fact that its necessity has often been questioned. The number of recent contributions on comparative administrative law[3] could make one inclined to think that there is little controversy in addressing questions of administrative law from a comparative perspective. It is indeed clear that administrative legal scholarship increasingly welcomes comparative analysis and – even more – sometimes even regards

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1 See e.g. R. Rawlings & C. Harlow, 'Promoting Accountability in Multilevel Governance: A Network Approach' [2007/4] *European Law Journal* 542-562, an article that can also be situated in this tradition.

2 See e.g. S. Rose-Ackerman & P.L. Lindseth, 'Comparative administrative law: an introduction' in S. Rose-Ackerman & P.L. Lindseth (eds), *Comparative Administrative Law* (Cheltenham 2010), 18; S. Rose-Ackerman, 'The Regulatory State' in M. Rosenfeld & A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford 2012), 671-685.

3 E.g. S. Rose-Ackerman & P.L. Lindseth (eds), *Comparative Administrative Law* (Cheltenham 2010); J. Bell, 'Administrative Law in a Comparative Perspective' in E. Örücü & D. Nelken (eds), *Comparative Law. A handbook* (Oxford 2007) 287-311; J. Bell, 'Comparative Administrative Law' in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford 2006), 1259-1286; R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Cambridge 2012), 392 p.

it as a requirement for quality legal research. This has not always been the case however.

Two centuries ago, Dicey famously denied the existence of such a thing as 'administrative law' in the common law system, as opposed to continental traditions.[4] Nevertheless, it would be wrong to suggest that only the Anglo-American tradition has long struggled with the recognition of administrative law as an autonomous field and with its delineation in relation to constitutional law. For many continental systems as well, administrative law is a relatively young branch. Half a century ago, studying administrative law, even in systems strongly influenced by the French tradition such as Belgium, was still considered rather 'exotic'. This probably had something to do with the lack of statutory law governing the privileges, rights and duties of the administration. Administrative law in Europe is – if anything – principled law. General principles of law and more specifically principles of proper administration play a primordial role in limiting the powers of the administration. However, it took these principles quite a while to develop in the (specialised) case law. Nowadays, most continental systems use separate administrative courts or specialised chambers within the general courts, but these were often only established or properly developed over the course of the 20th century.

Anno 2013, the emancipation of administrative law is a fact. Its 'youth' however, places it in a somewhat peculiar position when it comes to attempts to compare the flaws and benefits of different legal systems. In an inspiring article on the use and value of comparative administrative law and legal history, Della Cananeain 2010 pointed out that the relatively late development of a body of administrative law in many European states (together with the alleged political-cultural embedding of administrative law[5]) explains why less comparative research has been performed in the field of administrative law than in the field of private law.[6] However, the author seems to regard the ongoing development of administrative law as a systematic branch of law as a stimulus for comparative research, rather than an impediment.[7] The construction of a body of administrative law is indeed a gradual process, which can benefit from foreign inspira-

4 Dicey in *Law of the Constitution*, published in 1885.

5 The author speaks of the paradigm of 'administrative law as a national *enclave*'. See also H.P. Nell, 'Administrative law' in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham 2006) 18, where a similar argument is being made.

6 G. della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' [2010/2] *Online Italian Journal of Public Law*, 165.

7 *Ibid.*, 170: 'The evidence is that national authorities face similar problems and adopt similar solutions, learning from the experience of others in the process. This explains, together with EU rules, the shift from the study of "foreign" law to the increasing use of comparative legal analysis.'

tion and cross-fertilisation. This requires comparison with solutions adopted in other systems.

Thanks to the common project that EU Member States face, much comparative legal work in Europe today focusses exclusively on the European legal sphere.[8] The editors of this volume rightly thought it wise to look over the Atlantic once in a while in addition to their principle research. It is hard to say what is the most compelling conclusion this book brings the reader to: the similarity of the problems faced or the differences that still exist between the solutions adopted to address these problems. The former should reassure us that comparative analysis of European and American legal traditions can be useful, since both formulate answers to the same questions. The latter should challenge us to address the question, for each single topic, why a different answer is offered by both traditions. In some cases, our legal traditions and the assumptions underlying them explain why we persist in adopting a different solution and transposing an American solution to the European case and *vice versa* will probably be unadvisable. In other cases, however, comparing is a useful learning experience and inspiration can be drawn from each other's solutions to legal problems. This is especially so where problems originate from the multi-level structure (federal or supranational) of government. *Hofmann's* chapter on challenges that European Union public law is confronted with in the 21st century immediately sets the tone, demonstrating how EU administrative law is mostly characterised by its lack of centrality. His formulation of the most pressing problems that the system faces today makes this abstract observation quite tangible. Although a minority of the contributions in Hofmann and Weaver's volume are genuinely comparative in nature, they all address questions arising in the North-American as well as the European legal sphere. The contributions focusing on North-American law invite the European reader to reflect on the usefulness of the solutions adopted in the European legal sphere and *vice versa*.

One of the most obvious differences between both traditions seems to be the importance attached to the anchoring of administrative rules and principles in statutory law. While continental lawyers are perhaps inclined to assume that the American tradition, stemming from common law, to a much greater extent than European law, relies on judge made law, this does not seem to be the case for the field of administrative law. An eye-opening contribution by Catherine Donnelly[9] written in roughly the same period and assessing the impact of federal US administrative law and supranational EU administrative law on US

8 So does Della Cananea's article, which promotes the use of comparative law to identify common European principles of administrative law, which can serve as a common substratum.

9 C. Donnelly, 'Administrative Law and Multi-Level Administration: An EU and US Comparison' [2008-09] *The Cambridge Yearbook of European Legal Studies*, 211-246.

States and EU Member States respectively, has already revealed this paradox. Donnelly explains how 'administrative law' in a US context is often simply assumed to just be the Administrative Procedure Act (APA) as such. In principle, federal courts have no mandate to create or complement the body of rules and principles governing the functioning of the administration. Their role in contributing to the development of federal administrative law is therefore far more limited than that of the European Court of Justice in relation to EU administrative law. This difference in judicial intrusion is reflected in the differing impact that federal US law and EU law have on the systems of administrative law in the US States and the Member States of the EU respectively. In the US, the APA is dominant but does not apply to agents at the State level. If one adds to this the relatively low level of judicial activism in the field, it is easy to understand why the administrative law systems of the US States have hardly been influenced by federal administrative law. At the EU level, primary and secondary legislation – although important – are less dominant sources of general administrative law and general legislation on administrative procedure is lacking. Consequently, the ECJ itself has been playing an important role in the creation of a body of general principles of administrative law, the scope of which does not only extend to administrative action by the EU institutions themselves but also to Member States whenever they act within the scope of EU law. Both the chapter by Asimow and Dunlop and Funk's chapter contribute to a more thorough understanding of this different approach to the development of administrative law in the multilevel legal orders of the US and the EU.

Asimow and Dunlop, both American, one writing from an academic's perspective and the other a practitioner's, discuss the law on administrative adjudication in the European Union. The authors write from a background where the rules to be followed in procedures of adjudication – meaning, in an American sense at least, individual application of rules on those subject to them – are evident and clear-cut. Statutory law itself offers considerable legal certainty as to the duties of the administration when preparing and issuing individual decisions. The writers conclude, with surprise, that identifying the rules and principles applicable to adjudication in European Union administrative law is on the other hand a rather difficult task. The authors uncover lacunas and, perhaps more importantly, make us aware that there remains insufficient legal certainty when it comes to adjudication in EU law. Over the past few years, the EU has been taking many initiatives to improve the legislative process and to build a framework for regulatory decision making. Adjudication however, is often disregarded, although it probably has the most direct impact on citizens. Although the solution does not necessarily lie in the American example, *i.e.* the adoption of anchoring legislation, the conclusion that the lack of clarity, uniformity and coherence that currently exists is unacceptable in any *Rechtsstaat*, seems unavoidable. *Funk's* chapter offers a more thorough insight in three US legislative acts in the field of administrative law other than the more often discussed Ad-

ministrative Procedure Act: the Federal Advisory Committee Act, the Sunshine Act and the Negotiated Rulemaking Act.[10] His analysis holds a warning for European lawyers not to make transparency and participation into principles that outweigh all other interests, since this may have perverse effects.

In the chapter 'Eight Things Americans Can't Figure out About Controlling Administrative Power', *Shapiro and Murphy* reveal some unresolved problems in American law regarding control of the executive. They conclude their chapter by modestly asking European scholarship for help or inspiration. While some questions seem to be rooted in American constitutional traditions (especially with regard to the specific American approach towards separation of powers in a presidential system), others are transferable to a European context. The question of the scope of judicial review on administrative action and particularly the extent to which courts can judge the merits of the case is probably the most familiar one to European scholars. A recent book edited by Craigand Tomkins demonstrates how the subject of controlling the executive still raises questions in many jurisdictions, including European ones.[11]

Another problem that North-American and European law have in common is that of dealing with the shift from a government to a governance approach in public law. One feature of governance is contractualisation of the administration, *i.e.* the increased use of contractual instruments in daily administrative practice instead of unilateral action. Denis *Lemieux* addresses the unavoidable question of to what extent the use of contracts in Canadian public administration excludes the applicability of general rules and principles of public law, which often take the form of procedural guarantees for citizens, such as the duty to give reasons. This question has been and is still keeping courts and legal scholars busy in for instance Belgium.[12] Since this question is particularly relevant for legal practice, there is a pressing need for more systematic and in-depth research. Perhaps inspiration can be sought in the pragmatic approach which the Canadian courts have adopted regarding this matter.

Another set of challenges that are faced on both sides of the Atlantic relate to administrative organisation. This is perhaps the most understudied domain in comparative administrative law. *Schneider's* contribution on a common framework for decentralised EU agencies and the Meroni doctrine does not engage

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10 Donnelly also mentions these acts, but does not discuss them in much detail.

11 P. Craig & A. Tomkins (eds), *The Executive and Public Law. Power and Accountability in Comparative Perspective* (Oxford 2006), 1-15.

12 Where the question has, for instance, arisen whether the dismissal of government personnel in contractual service is subject to the duty to state reasons: e.g. I. Vanden Poel, 'Motivering van het ontslag van een contractant in overheidsdienst: een bres in het Belgische ontslagrecht?' [2011/3] *Tijdschrift voor Sociaal Recht*, 115-153.

in a comparison as such, but addresses the question of the lawfulness and accountability of administrative agencies at the EU level, issues which the Americans have considerable experience with. Comparative work on agencification is still relatively scarce.[13] *Weiß's* chapter offers an analysis of the recent phenomenon of networks of national administrative bodies at the EU level and the similarities and differences with EU level agencies. A recent contribution by Chamon in Review of European Administrative Law addresses similar questions, including more recent examples of this trend.[14] *Strauss's* demonstrates how American judges' lack of information on the institutional design of public authorities sometimes leads to undesirable outcomes in judicial decision making. His contribution raises the question of whether there is a similar disregard for institutional features in the rulings of administrative judges in Europe. Research on this question would undoubtedly be useful.

One of the merits of the comparative work under review is undoubtedly that many of the contributions focus on *traditional* and *general* problems of administrative law. At the same time however, each and every one of the chapters has a clear focus and delineation. Furthermore, the editors did not shy away from more specific and even technical subjects, such as issues of electricity regulation. *Koch's* contribution on this topic may be harder to fully comprehend for generalists in public law, but nevertheless succeeds in convincing the reader that it would not be unwise for the European Union legislator to seek inspiration in US law when it comes to setting up an efficient system of governance in electricity regulation. EU law can benefit from lessons drawn from American trial and error processes and should not be too proud to do so. The chapter by *Weaver, Finkand Lichere* addresses what is possibly even less typical an administrative law subject. Their call for an improvement of regulatory structures for the protection of consumers in a system of world trade nevertheless makes us aware how the omnipresence of government interference today also implies that the scope of administrative law enlarges, even to that extent that the separation between economic law and administrative law becomes quite vague.

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13 See e.g. in the field of political science: G. Bouckaert, K. Verhoest & S. Van Thiel, *Government agencies: practices and lessons from 30 countries* (New York 2012). For an older, *legal* comparative work, see L. Verhey & T. Zwart (eds), *Agencies in European and Comparative Law* (Antwerpen 2003).

14 M. Chamon, 'The Influence of "Regulatory Agencies" on Pluralism in European Administrative Law' [2012/2] *Review of European Administrative Law*, 61-91.

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