

FORMS OF EUROPEAN ADMINISTRATIVE ACTION

MARIO P. CHITI*

I

INTRODUCTION

This Article examines the various forms of European administration and their associated administrative law systems. From the outset, it should be understood that the expression “European administration” is not used here (as it usually is) to refer to the complex of government bodies exercising administrative powers in the European Community (EC, or “Community”) (such as the European Commission, European agencies, and all other official bodies). Rather, the expression here is used to refer to the combination of Community public powers and national administrations responsible for implementing Community measures and operating as decentralized, Community government bodies. Together, the two constitute “the common administration of the European order,”¹ marked by common, Community-made interests and shared substantive and procedural legal principles.

So far, the notion of “common administration” has been used by certain scholars to explain the special relationship in European governance among all of the different public administrations, both vertically (that is, the relationships between the Member States and Community bodies, such as the Commission), and horizontally (that is, the relationships among the Member States), and to understand the phenomenon of European administrative networks. The notion is now spreading from “legal science” (that is, legal scholarship) to statutory law, as evidenced by various regulations and directives, and now also by the Treaty Establishing a Constitution for Europe (hereinafter “Constitutional Treaty”). In fact, in the Constitutional Treaty, the structure and functions of both European and national public administration are addressed, and the goal of effective implementation and administration of Community law is identified as a “matter of common interest.”²

This clarification of the meaning of European administration lays the groundwork for the central thesis of this Article: in the Community, we face the rise of a *multi-level* public administration in which the original Community scheme of the indirect, autonomous execution of Community policies by national administrations is being replaced by an administrative model of integration based on the criteria of flexibility

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* Professor of Administrative Law, University of Florence; President of the Italian Institute of Administrative Sciences.

1. MARIO P. CHITI, DIRITTO AMMINISTRATIVO EUROPEO 251 (2d ed., 2004).

2. See TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, art. III-285, 2004 O.J. (C 310) 3.

and differentiation. By now, the model of polycentric public administration is standard in national systems, and it is gradually becoming so in Europe's supranational system of governance.³ Europe's legal order contains a variety of principles capable of disciplining the new multi-level public administration that may be said to substitute an "administrative law of integration." This thesis seems contrary, however, to the prevailing academic view:

[W]hat is lacking—and unlikely to emerge in the foreseeable future—is a coherent body of law structuring the practices of multi-level co-operation between European, national and hybrid authorities, as well as complex networks of governance; that is a body of law structuring exactly the type of activities that characterize so much of the European multi-level system of governance.⁴

The Constitutional Treaty affirms the existence of a developed law adapted to the politics of Community administration. Even though the Constitutional Treaty has yet to be signed and ratified, the origins of the Convention, the inclusive nature of the drafting process, and the prestige of the members of the Convention all suggest that the provisions regarding public administration, even without signature and ratification, have already become part of the *acquis communautaire* (the complete body of Community laws that Member States must respect).

This Article proceeds in three parts: Part II recounts the history of administration and of administrative law in the European Community; Part III examines the main types of administrative action in the Community; and Part IV highlights the novel elements and the shortcomings of European administrative law today. Part V concludes with a look at the current limits of European administrative law.

II

THE HISTORY OF ADMINISTRATION AND ADMINISTRATIVE LAW IN THE EUROPEAN COMMUNITIES

A. The "Administrative Atmosphere" of the European Coal and Steel Community

European integration began in 1951 with the European Coal and Steel Community (ECSC). The ECSC was an essentially administrative organization—a variant, albeit with additional supranational features, of the different international administrative organizations dating to the second half of the 1800s.⁵ In Carl Friedrich Ophuls' understanding in *Les Réglements et les directives dans les Traités de Rome*, the substantive goals and the organization of the ECSC operated in an "administrative

3. For a partly different opinion on the multi-level character as a distinctive feature of European administrative law, see Sabino Cassese, *Il diritto amministrativo presenta caratteri originali?*, in RIV. TRIM. DIR. PUBBL. 35, 51 (2003).

4. Christian Joerges, *The Law's Problems with the Governance of the European Market*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 10 (Christian Joerges and Renaud Dehousse eds., 2002) (summarizing another paper in the same volume, which Joerges believes is excessively pessimistic).

5. Cf. STEFANO BATTINI, AMMINISTRAZIONI SENZA STATO PROFILI DI DIRITTO AMMINISTRATIVO INTERNAZIONALE (2003).

atmosphere.”⁶ The policy aims, derived from national imperatives of restructuring the coal and steel industries; the organization in which the supranational, technocratic and expert High Authority was given a pivotal role; and the types of legal acts anticipated in the ECSC Treaty, all contributed to the “administrative atmosphere” of the early days of European integration. In addition, the administrative legal systems of the six founding Member States were quite similar, also facilitating the exercise of administrative power in the new Community.⁷

Judicial and scholarly attention to administrative action and law, including the influence of national legal principles on Community law, came naturally in this historical context. Evidence of this interest can be found in the jurisprudence of the European Court of Justice of the 1950s and in the numerous studies of European legal scholars dedicated to the ECSC.

Regarding the jurisprudence, in the early period the Court of Justice handed down a number of fundamental judgements on the character of the Community administration and administrative decisionmaking. The most famous and commonly cited of these judgments were *Fédération Charbonnière de Belgique*, on misuse of powers;⁸ *Algera*,⁹ concerning revocation of administrative acts; *Lachmueller*,¹⁰ on the application of the general rules of administrative law to the activity of the linguistic service of the Commission; and *Giuffrida*,¹¹ concerning abuse of procedure.

In these decisions, the Court of Justice declared the contested Community measures to be administrative acts governed by legal principles—in the absence of a complete and comprehensive Community legal framework—derived from national administrative law, and in particular French administrative law, which had a special influence over that stage of European integration. Thus the frequent recourse in the Court of Justice’s case law to the terminology and concepts of legal orders “with an administrative regime”—in other words, legal systems in the French administrative law tradition (*droit administratif*). These concepts include the presumption of validity of administrative acts, the enumeration and typology of grounds on which administrative acts can be held to be illegal, the difference between the non-existence and the nullity of administrative acts (if the legal defect is so grave as to render the act “nonexistent,” the usual statutes of limitation on bringing a challenge do not apply and the court’s decision striking the act has retroactive effect), the conditions for and consequences of the revocation of administrative acts, and so on.¹²

6. Carl Friedrich Ophuls, *Les Réglements et les directives dans les Traités de Rome*, in C.D.E. 3, 10 (1966).

7. See Jean Rivero, *Le problème de l’influence des droits internes sur la Cour de Justice de la CECA*, in A.F.D.I. 295 (1958).

8. Case 8/55, *Federation Charbonniere de Belgique v. High Authority*, 1954-56 E.C.R. 245.

9. Joined cases 7/56 & 3-7/57, *Algera v. Common Assembly*, 1957 E.C.R. 39.

10. Joined cases 43/59, 45/59, & 48/59, *Von Lachmueller v. Commission*, 1960 E.C.R. 983.

11. Case 105/75, *Giuffrida v. Council of the European Communities*, 1976 E.C.R. 1395.

12. See Giandomenico Falcon, *Dal diritto amministrativo nazionale al diritto amministrativo europeo*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 351 (1991) (underlining the importance of the use made of these notions).

Connected to the sophisticated and extensive jurisprudence of the Court of Justice was the attention of European administrative legal science to the ECSC. Well known are the French and German contributions (besides the work of Rivero,¹³ the studies by De Laubadère,¹⁴ Lorenz,¹⁵ and Ipsen¹⁶ merit mention). Less renowned are the Italian studies—unfairly so, since some of them made seminal contributions to the legal conceptualization of the administrative acts of the ECSC (and then of the European Economic Community (EEC)) and discerned, ahead of their time and well before the Court of Justice reached the same conclusion, that a number of elements of the Community legal experience were entirely novel and that the Community legal order was *sui generis*.¹⁷

The lively scientific interest in the administrative aspects of the Communities in the first stage of the European integration was followed by a long period of near oblivion in Italy and Europe generally. Only in the late 1980s was interest in European administrative law revived. This renaissance of academic interest, however, was spurred by transformations in the EC, especially after the expansion of policy areas in the Single European Act of 1986 (ESA), and was almost completely uninfluenced by the virtually forgotten ECSC experience.

B. The Passage to the “Constitutional Atmosphere” of the EEC and the Establishment of the “Vulgate” on the Character of the Community

The vanishing of the initial Community “administrative atmosphere” was connected partly to the difference in the institutional model of the EEC as compared to the earlier ECSC, and partly to the emergence of an interpretive “vulgate”¹⁸ on the constitutional roots of the Community, which tended to marginalize the administrative aspects.

As for the former—the differences between the EEC and ECSC institutional models—the passage to the “constitutional atmosphere” of the 1960s is due to a number of factors. Going back to the original 1957 text, the EEC Treaty—in contrast with the treaties establishing the international, administrative organizations of the time—is marked by a set of wide-ranging aims and the conferral of significant freedom and powers to Community bodies in achieving those aims. Certain Community institutions, such as the Commission and the Court of Justice, exhibit

13. See Rivero, *supra* note 7.

14. Hans Köln, *Les actes administratifs*, in DIX ANS DE JURISPRUDENCE DE LA COUR DE JUSTICE DES COMMUNAUTES EUROPEENNES 472 (1965).

15. *General Principles of Law: Their Elaboration in the Court of Justice of the EC*, in A.J.C.L. 1 (1964).

16. Tubingen, EUROPAISCHES GEMEINSCHAFTSRECHT (1972).

17. The “Community period” of the Italian science of administrative law is, marked by the studies of Gasparri on review of the excess of power in the ECSC (1957); of Vitta on the executive bodies of the ECSC (1960); of Monaco on the administrative organization of the European Communities (1961); of Benvenuti on the ECSC as an administrative organization (1961); of De Vergottini on the different types of general, legal acts and administrative measures in the European Communities (1963); of Sacchi Morsiani on the administrative power of the European Communities (1965-70); and of Jaccarino on the acts of the European Communities (1970).

18. The expression is taken from Renaud Dehousse, *Misfits: EU Law and the Transformation of European Governance*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET, *supra* note 4, at 207.

unprecedented supranational features. The system of government operates according to an institutional balance and a complex architecture in which lawmaking and administrative functions are intentionally blurred. The Court of Justice, in its case law, characterized the Community legal system as distinct from the existing archetypes of both national and international law, since individuals as well as States were governed by and subject to the system of rights and duties. The Court, as one observer astutely put it, turns out to be the “federal virus” that has since grown into a full-fledged European constitutional order.¹⁹

These characteristics of the EEC gave rise to the EEC’s *interpretation*—soon accepted as the “vulgate”—as an essentially constitutional organization whose principal mission was to craft and promulgate norms and regulations. According to the vulgate, the execution of the rules was peripheral to the mission of the Community institutions, which preferred to entrust such tasks to the Member States’ administrations, according to the model of indirect execution.

Both the case law and the legal science thus focused on identifying and understanding the novelties of the Community legal system, usually defined as the “constitutional” elements of the EEC. Few bothered to study Community administration and the relations among Community and national administrative bodies. Indeed, given the reliance on indirect implementation by the Member States, many denied that a distinct *Community* administration, with a distinct *European* administrative law existed.

The scholarly fascination with the constitutional characteristics of the Community legal order—extraordinary compared to previous international experiences—was justified, but this vulgate concealed the equally important administrative reality of the Community. This reality, however, has gradually resurfaced as a consequence of three factors: first, the decline of indirect execution—vested in each of the Member States acting alone—and the rise of coordinated administrative action, involving both Community institutions and the Member States; second, the rapid expansion in Community policies and powers, with the associated need to develop an administrative apparatus capable of implementing such policies; and third, the growing resort to direct enforcement of Community law, against both individuals and firms.²⁰

Some of these developments were inherent in the “constitutional” jurisprudence of the Court of Justice, namely the revolutionary holding that individuals were directly vested with rights and duties under the Treaty, rather than through the intermediary of the state (as under classical international law).²¹ These Treaty-based rights and obligations applied regardless of whether they were constitutional or administrative. Other developments were connected to case law both concerning the direct effect of the Treaties (and the measures passed pursuant to the Treaties) and concerning state

19. Giuliano Amato, *Verso la Costituzione europea*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO, *supra* note 12, at 291.

20. For a systematic exam of the various interactions, see EDOARDO CHITI & CLAUDIO FRANCHINI, L’INTEGRAZIONE AMMINISTRATIVA EUROPEA (2003).

21. Case 26/62, Van Gend & Loos, 1963 E.C.R. 1.

liability for infringement of Community obligations. Both were legal techniques originally conceived for the purpose of ensuring the effectiveness of Community law, but also entailing a number of consequences for the individual's relationship with the Community authorities and national administrative bodies responsible for the enforcement of Community law. The revival of attention to Community administrative law is also associated with new areas of Community policy that entail the provision of services and the distribution of benefits (for instance, the policies under the Community "Social Agenda"), entrusted under the most recent law to Community institutions, and closely resembling classic forms of social welfare administration in the Member States.

C. The Institutional Balance of the Community and the Lack of a Constitutional Basis for Administration

The recognition of the empirical phenomenon of Community administrative action—and hence the limits of the "vulgate" on the nature of the European legal order—has highlighted the numerous gaps in both primary and secondary Community law as well as the absence of a theoretical framework capable of providing a sound legal basis for European administrative action. While the lacunae left by written Community law can be filled relatively easily (demonstrated by the most recent Community legislation to be considered later), working out a conceptual reconstruction of Community administrative action, new in many respects compared to classic administration, is more complete. In fact, it is extremely difficult to identify a set of common legal principles that underlie the different administrative law traditions of the Member States, even more so than for constitutional law. Indeed, talking about "common administrative values" shared by all Member States is historically artificial. As we all know, national administrative experiences, even in continental Europe, are quite different. The legal doctrine of and scholarship on Community administrative law within the last decades has drawn more on the comparative law techniques of imitating particular national systems and developing hybrids of different systems than on expressing a new common administrative law that can be found, through rational scientific inquiry, in the laws of all the Member States.

Some of the most troubling shortcomings of Community administrative law are related to the absence of a clear constitutional basis for public administration and the lack of a distinction between the primary, lawmaking activity of the Community, and the secondary, *administrative* lawmaking and enforcement activity of the Community. Moreover, certain features of Community administration make the construction of a principled, legal framework especially difficult: the prevalence of regulation over the provision of services and benefits and other classic forms of administrative action—a balance quite foreign to the experience of the Member States—and the establishment of an original, unprecedented form of administrative organization, namely, mixed administration.

These problems, however, are gradually being addressed, even setting aside for the moment the Constitutional Treaty. The Treaties of Amsterdam and Nice clarified certain important points, such as the question of subsidiarity and proportionality, thus

requiring the Community to balance the need for uniform implementation against the national interest in autonomy and discretion, and on the forms of protection. The Charter of Fundamental Rights of the European Union, albeit still lacking formal legal force, provides for the principle of good administration,²² and the right of access to the documents of the institutions.

Community law of the past decade has also paid greater attention to the legal principles that should govern the implementation of Community laws, as demonstrated by numerous regulations and directives, both sectoral and general. The European Court of Justice and Court of First Instance are also, through an extensive jurisprudence, identifying different types of Community administrative acts, their relationship to other forms of Community acts, and the grounds and circumstances under which the Court will hold them to be unlawful.

D. The Proposal for a Constitutional Treaty and the New Constitutional Basis of European Administration

The Constitutional Treaty, approved in July 2003 by the European Convention, dedicates significant space to the issues of public administration and sets down a series of new general principles directly relevant to public administration, especially on the issues of allocation of powers between Europe and the Member States, and on different types of European legal acts. If the Constitutional Treaty is ratified in its current form, European administration will have a solid constitutional basis.

The new framework for legal acts under article I-33 provides for “legislative” and “administrative” acts. Within the administrative category, it identifies four types: European regulations, European decisions, recommendations and opinions. When and if this text is ratified, the challenge will be to identify existing and future types of administrative acts, and to find the criteria to determine what should be considered a regulation, decision, recommendation, or opinion. Article I-37 reaffirms the distinction between legislative and administrative measures. It sets down the principles that should govern the “implementing acts” of both the Union and the Member States when giving effect to European laws and other measures. For the first time, implementation is clearly set off from the other public activities of the Union. This represents a significant transformation of constitutional order, from the current “confusion” of powers, to a clear division of legislative and administrative functions.

The new text on competences also constitutes a turning point in the Community legal tradition. The original EC Treaty and all the subsequent Treaties were based on a dynamic and flexible model centred on the “policies” and “objectives” to be pursued; principles that should protect the powers of the Member States as well as those of the Community, such as competence, were taboos. In contrast, the Constitutional Treaty allocates five types of competence to the Union, including one

22. Under Article 41, paragraph 2, of the Charter—now inserted in the Treaty Establishing a Constitution for Europe—the right to a good administration includes: the right of every person to be heard before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and the obligation of the administration to give reasons for its decisions.

that is directly relevant to administration—the competence allowing the Union to support, co-ordinate and complement policies of the Member States (article I-17). But a word of caution before concluding that Europe’s first Constitution is typical of national federal orders: the new European system of competences still allows for greater flexibility than national constitutions and is conceived, above all, as a mode of integrating and combining the different levels of government rather than of separating and checking public power.

A number of constitutional provisions would expand European competences in the administrative arena. Among these figure article III-285 concerning “administrative co-operation” and part of the chapter dedicated to the sectors in which the Union may take co-ordinating, complementary or supporting action. Under article III-285, the “effective national implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.” Consequently, the Union would acquire the power to promote various initiatives with the aim of supporting and co-ordinating implementation—without prejudice, however, to the existing duties of the Member States to implement Union law.

Article I-37 requires Member States to adopt all national measures necessary to implement European acts. It also improves the powers of Member States: Article I-37 requires that European laws lay down mechanisms in advance, through which Member States can monitor and control implementing acts. While the first part is already implicitly guaranteed under the duty of sincere co-operation in Article 10 of the EC Treaty, the second is completely new. In sum, problems of administrative integration, both vertical and horizontal, are clearly a matter of concern in the Constitutional Treaty.

III

THE VARIOUS FORMS OF COMMUNITY ADMINISTRATIVE ACTION

A. Regulation

The best-known type of Community administrative action, long considered the only type, is regulation.²³ In national administrative law, the notion of regulation covers the different public measures used to regulate economic activities and the market. It is not easy to translate directly the notion into Community law, because until now the Community has not made a clear-cut distinction between law and administration. For this very reason, one commentator has called Community governance a form of “political administration,”²⁴ that is, an unprecedented form of

23. I here refer to the allocation of functions proposed by DOMENICO SORACE, *DIRITTO DELLE PUBBLICHE AMMINISTRAZIONI* 71 (2003), which, with the limits explained in the text, can be applied also to the Community system.

24. Christian Joerges, *Good Governance through Comitology?*, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* 309, 322 (Christian Joerges and Ellen Vos eds., 1999).

public power concerned with settling fundamental questions of risk administration and market order, rather than the mere regulation of market dynamics.

However, Community law has progressively defined the regulatory power with regard to administration and has as well “transplanted” typically national administrative powers, such as *imperatività* (executory capacity of administrative measures). More generally, an examination of Community regulatory power shows that in the Community system, public administration is also in a position of legal supremacy analogous to that of public administration in the national systems with administrative regimes.

A number of significant differences separate regulation at the Community level from national regulation, albeit less marked than in the early days of European integration. At the Community level, regulatory schemes make less use of command and control techniques (such as permits and licenses), and greater use of incentives (such as grants and awards). Community regulation also relies more heavily than national regulation on plans and programs, the details of which are to be filled in by local authorities.

Yet change is afoot. The old regulatory technique of Community plans and programs and national implementation—or in other words, of indirect execution—is gradually being replaced with the technique of joint implementation (sometimes defined also as mixed or composite) involving both the Community and the Member States. The new principle of “acting together” entails a complex sequence of Community and national determinations in a single administrative proceeding—which sometimes is initiated at the national level, other times at the Community level—and can involve consideration and reconsideration of the very same matter in the two spheres.

The legal consequences of joint implementation are manifold. National administrative law has come under much greater pressure to conform with general principles of Community law because of the need to guarantee efficiency and uniformity in such proceedings. Furthermore, the procedure and organization of national administrative bodies involved in joint proceedings must be modified to comply with requirements set down in Community law. The co-optation of national administrative agencies obviates the need to expand the core civil service at the European level. We are witnessing a rise in the number of European agencies, an atypical body well-suited to the needs of joint administration, and heavier reliance on advisory committees composed of interest group representatives and national technical experts. Last, this form of administration has contributed to a thicker set of both vertical relations between Community and national administrations, and horizontal relations among the different national administrations responsible for the enforcement of Community law in their territories.

B. The Provision of Services

Recently, the Community has also gotten into the administrative business of providing services, a form of administrative activity well known in national administrative law. This development is a consequence of the evolution of the EC

from an organization aimed at the establishment of a common market into a full-fledged political community that includes among its citizens individuals in need of public services. The impetus to expand Europe's administrative mission began with the "constitutional" jurisprudence of the Court of Justice in the 1960s—in which the Court declared that individuals enjoyed rights and duties in the European legal order—and continued with the addition of "economic and social cohesion"²⁵ to the objectives of the Community in the Single European Act (1986). In 1997, the Amsterdam Treaty went on to recognize "the place occupied by services of general economic interest in the shared values of the Union, as well as their role in promoting social and territorial cohesion."²⁶ The Constitutional Treaty repeats and strengthens the commitment to providing public services and promoting social and economic development.

The path toward "social Europe," however, has not always been direct or without obstacles. One area of Community law that runs counter to the political ambition of providing essential services to all citizens is competition. For instance, vocational training in many Member States is provided directly by public, state institutions. Now, under Community law, it appears that vocational training is a service like any other and must abide by the fair competition principles of public procurement law.²⁷

C. Internal regulation of and external checks on the Commission and other Community administrative bodies

The third type of administrative functions are those that enable the Community to accomplish the ultimate ends of regulating the European economy and providing services and benefits to European citizens. Distributions of the budget within the administration, management of the civil service system, and procurement of goods and services for the administration are essential to any government. Contrary to national governments, the Community is not required to abide by the rules of public bidding and fair competition set down in European public procurement laws.²⁸ However, this (unfortunate) double-standard is gradually disappearing.

Finally, the advising, checking, and controlling of administrative agencies is absolutely crucial in Community administrative law. Advice is sought from the advisory committees established under the Treaties, bodies such as the Economic and Social Committee, as well as from expert committees established by law for particular regulatory areas made up of Community officials, officials of national administrations, independent experts, and representatives of interest groups. While advisory activities have always been prominent in European administrative law, activities designed to check and control have acquired importance more recently. Oversight has become increasingly necessary with the expansion of Community policymaking, the growth of

25. EC Treaty, art. 158.

26. EC Treaty, art. 16.

27. MARIO P. CHITI, *supra* note 1, at 272.

28. N. Bassi, *I contratti e le convenzioni tripartiti di obiettivi tra Comunità, Stati membri e autorità regionali e locali: un tentativo di inquadramento sistematico*, in *RIV. IT. DIR. PUBBL. COM.*, *supra* note 12, AT 496.

the Community budget and public expenditures, and the emerging principle of “good administration.” For instance, the Court of Auditors, which is responsible for reviewing Community expenditures at the end of every fiscal year, was officially recognized as a Community institution in 1992 by the Maastricht Treaty. The recent attention to administrative controls and checks is also in evidence in the new law setting down in minute detail the procedure for public spending.²⁹

IV

NOVEL ELEMENTS AND THE SHORTCOMINGS OF EUROPEAN ADMINISTRATIVE LAW TODAY

A. The “Discovery” of Administrative Proceedings in Community Law

The emergence of various kinds of Community administrative action has run parallel to the “discovery” of the administrative proceeding as the ordinary mode of administrative action. Administrative action in the Community system is undertaken through procedural sequences in which national and supranational regulations alternately examine the same matter and administer a single administrative decision.³⁰

Originally, neither the Treaties nor Community laws (regulations and directives) had anything to say about procedure. As a practical matter, most administration was in the hands of the Member States (that is, indirect administration). Moreover, national differences in law and legal cultures created an imposing obstacle to Community action in the area.

The Court of Justice began elaborating a set of more procedural and substantive principles, applicable to the Commission in all its dealing with individuals and Member States, in fruitful dialogue with national courts and national legal science. By now, this historical process has been widely studied.³¹ It deserves to be mentioned here for two reasons: the importance of judge-made law as a source of principles for Community public action; and the early forms of administrative procedure in the case law of the Court of Justice, at one and the same time the consequence and the cause of the emergence of European administration. This experience demonstrates that in novel, supranational, legal systems like the European one, case law seems to be the natural source of general administrative and constitutional law principles, which then are partly transposed into written law—that is to say, in the case of Community law, into treaty amendments, directives, and regulations.

The conversion of judge-made principles into “written” law has accelerated recently. The Charter of Fundamental Rights of the European Union, “proclaimed” on

29. Council Regulation 1605/2002 on the Financial Regulation Applicable to the General Budget of the European Communities, 2002 O.J. (L 248) 1; Council Regulation 58/2003 of 19 December 2002 Laying Down the Statute for Executive Agencies to be Entrusted with Certain Tasks in the Management of Community Programmes, 2003 O.J. (L 11) 1.

30. SABINO CASSESE, *LE BASI DEL DIRITTO AMMINISTRATIVO* 307 (4th ed., 2000).

31. In particular by HANS-PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* (1999); TRIDIMAS, *supra* note 12; Claudio Franchini, *I principi applicabili ai procedimenti amministrativi europei*, in *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 1037 (2003); *see also* MARIO P. CHITI, *supra* note 1.

the occasion of the European Council of December 2000 in Nice, and now part of the Treaty establishing a Constitution for Europe, contains a number of articles dedicated to administrative procedure. Secondary Community law—that is, directives and regulations—have also begun to set down general rules of administrative action, in some cases by individual policy sectors,³² and in other cases more broadly, as in the Financial Regulation on the Community's general budget.³³

The attention that scholars now pay to the administrative dimension of the Community has led to the rediscovery of similar forms of Community action dating back to the beginning of the 1960s, at the time unnoticed by scholars, but bearing significant resemblance to Community administration today.³⁴

The demands of the internal market and the need to overcome the resistance to compliance in many Member States has driven to some extent the move to include procedural principles in written law. The most notable example of procedure as a tool for inducing national compliance with Community law is public procurements: the national administrative procedure followed in awarding public controls has been specified in such detail that Member States' freedom of execution has been virtually eliminated. Such specification involves precise, self-executing directives, which have then been consistently interpreted in even its broadest aspects by the Court of Justice through judgments following preliminary ruling procedures.

Aside from the historical, legal process through which general principles have been established, European administrative law is very similar to national law and does not display any unique elements, with the sole exception of the principle of subsidiarity. That is not to say all principles are common to all national orders. The principles identified as "general" by the Court of Justice (and, more recently, also the Court of First Instance) in many cases belonged only to a few national orders. For instance, the principle of legitimate expectations is a long-standing element of German law but was almost unknown in many other places until it was adopted in Community law. The same can be said for the principle of proportionality, which again was

32. See, e.g., Council Regulation 3975/87 EEC of 14 December 1987 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, 1987 O.J. (L 374) 1 (air transportation); Council Regulation 4056/86 EEC of 22 December 1986 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport, 1986 O.J. (L 378) 4 (maritime transportation); Council Directive 2001/18/EC of the European Parliament and the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EC, 2001 O.J. (L 106) 1.

33. Council Regulation 1605/2002 of 25 June 2002 on the Financial Regulation Applicable to the General Budget of the European Communities, 2002 O.J. (L 248) 1; Council Regulation 58/2003 Laying Down the Statute for Executive Agencies to be Entrusted with Certain Tasks in the Management of Community Programmes, art. 2, 2003 O.J. (L 11) 1. See Paul Craig, *A New Framework for EU Administration: The Financial Regulation 2002*, 68 LAW & CONTEMP. PROBS. 107 (Winter 2004).

34. Gil Carlos Rodriguez Iglesias, *Sui limiti dell'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 5 (2001), which also refers to Council Directive 64/221/EEC of 25 February 1964 on the Co-ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security or Public Health, 1964 O.J. (L56) 850. Cf. Albrecht Weber, *Il Diritto Amministrativo Procedimentale Nell'Ordinamento della Comunità Europea*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 393 (2002) (providing many other examples).

borrowed from German law, even though slightly different incarnations did exist in other legal systems, including the Italian one.³⁵

B. Features of European Procedural Law

Until recently, Community administrative law borrowed largely from national law and did not contain any novel elements. Recently, however, principles without national roots have begun to appear. Such is the case of the precautionary principle. This principle appeared in Community law for the first time in the Single European Act, with specific reference to environment protection. Article 174 of the EC Treaty provides in paragraph 2 that Community action on environmental matters shall be founded on the principle of preventive action and has since been amplified in the Maastricht Treaty through express reference to the “precautionary and preventive action principles.” Even though the text speaks of precaution only in the environmental area, the precautionary principle was immediately elevated to the rank of a general principle of Community law, with special relevance for health protection and consumers’ security. This principle requires that the competent authorities adopt measures designed to prevent potential risks to public health, security, and environment, measures under which “the demands connected to the protection of such interests prevail over the economic interests.”³⁶

The implications of the precautionary principle are manifold. Since it refers not only to risk but also to uncertainty, it provides the legal basis for *sui generis* Community acts in particular situations of necessity and urgency, similar to Italian “extraordinary administrative orders” (*ordinanzemministrative straordinarie*), with no need to wait for the reality and gravity of risk to be fully demonstrated. Further, the principle limits judicial review, since the European Courts cannot substitute the technical conclusions of the competent authorities with their own, nonexpert opinion.

A second difference that separates Community law from most national administrative laws is the treatment of administrative inaction. In several national legal orders, including the Italian and the Spanish ones, the inertia of public administration is no longer considered pathological and is now one of the ways in which an administrative proceeding may conclude. One of the rationales for permitting administrative agencies not to issue a formal decision is the need for simplification and economy of administrative action. Nevertheless, judicial review of such inaction is generally guaranteed through the doctrinal device of “presumed inaction”: after the expiration of a certain period of time, the agency is presumed not to have acted and the concerned individual has a statutory right to challenge the inaction before a court.³⁷ In contrast, Community law is very suspicious of

35. ALDO SANDULLI, LA PROPORZIONALITÀ DELL’AZIONE AMMINISTRATIVO, (1998); DIANA-URANIA GALETTA, PRINCIPIO DI PROPORZIONALITÀ E SINDACATO GIURISDIZIONALE NEL DIRITTO AMMINISTRATIVO, (1998).

36. So, in a very frank way on the nature of the precautionary principle as a principle superior to others belonging to same constitutional rank. Joined Cases T-74, T-76, T-83, T-85, T-132, T-137, & T-141/00, *Artegodan GmbH v. Commission*, 2002 E.C.R. II-4945.

37. See Alberto J. Gil Ibáñez, *The “Standard” Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228*, 68 LAW & CONTEMP. PROBS. 135 (Winter 2004).

administrative inaction, as demonstrated in three examples from the case law at the Court of Justice.

In *Commission v. Italy*,³⁸ Italian legislation implementing the European groundwater directive was at issue. The Italian legislation allowed the administration to deny industry applications through “tacit” administrative authorizations, or, in other words, administrative silence. The Court of Justice interpreted the Community Directive as prohibiting this administrative technique. According to the Court of Justice, the Italian arrangement did not allow the parties, the Commission, or the courts to verify whether the administrative checks required under the groundwater Directive had been actually carried out; nor did it allow the parties to follow and monitor the decisionmaking process of the administrative authority, with prejudice to the interest in legal certainty. On these grounds, the Court interpreted the Directive as requiring that the refusal, grant, or withdrawal of authorizations take place by way of an express measure in accordance with precise rules of procedure.

The same conclusion was reached by the Court in two later cases, *Commission v. Germany* and *Daesang Corp. v. Commission*.³⁹ These judgments repeat the finding that lack of an express measure prevents the parties and the Court from overseeing the decisionmaking procedure and also state, unconvincingly, that when the public authority takes no action, individual examination of the application is not guaranteed, with negative consequences for the public interests involved in the case.

The decisions of the Court of Justice reveal a prejudice toward administrative silence or inaction, rather than a reasoned, justified disagreement over this legal doctrine. The European rule against administrative silence frustrates the attempts of the last decade in Spain, Italy, and elsewhere to simplify and expedite the work of the bureaucracy.

C. Integration between Community and National Legal Orders

The absence, for the most part, of novel principles of European administrative law is beneficial because it facilitates the integration of European and national administrative law. But it also highlights a stage of immaturity of European administrative law, which as of yet has not produced new principles specifically designed to address the unique features of Community administrative action.

The familiarity of European administrative law to national scholars, judges, and administrators is important because of the rise in the implementation of European law through joint or mixed administration. Because the very same matter is tossed back and forth between national and Community regulators, it is critical that they work with the same administrative law concepts and principles. In part, the general principles of mixed proceedings already exist in the Member State because of the prevalence, in European law, of borrowing from national law; in part they are gradually and

38. Case C-360/87, *Commission v. Italy*, 1991. E.C.R. I-791.

39. Case 131/88, *Commission v. Germany*, 1991 E.C.R. I-825; Case T-230/00, *Daesang Corp. v. Commission*, 2003 E.C.R. II-2733.

incrementally established by the European Court of Justice. This, as it turns out, is quite healthy for achieving the various ends of Community administration.

At the same time, the lack of innovation has left two new, and problematic, features of the European system of mixed administration untouched: the involvement of both national and European authorities in different procedural sequences depending on the policy area,⁴⁰ and the insignificance of the final act compared to the decisions leading up to the final act as the matter is passed back and forth between national and European regulators. The two problems are tightly connected, since the participation in the same proceeding of different administrative authorities—Community, national, “infranational”⁴¹—compromises procedural unity as well as any relevant legal differences between the final determination and the interim decisions leading up to the determination.

D. Composite Proceedings and the Crisis of the Principle of Procedural Autonomy

The rise of mixed proceedings chronicled in this Article is one of the principal causes of the crisis in national procedural autonomy—until recently one of the core legal principles governing the relations between the Community and the Member States and rooted in the old, disappearing system of indirect administration.⁴²

Legal science has questioned the existence and the effective reach of the principle of procedural autonomy for a long time.⁴³ Not only has procedural autonomy been eroded by the growth of mixed administration, but even in those areas still left to national discretion and indirect implementation, the public interest of uniform law throughout the Community and the citizen’s interest in equality have limited the scope of the principle.

The Court has long adopted a flexible approach to national administrative procedure.⁴⁴ It has established two important principles for evaluating whether national procedure effectively allows citizens to vindicate their Community rights: the principles of equivalence (or non-discrimination) and of effectiveness. Equivalence means that the procedural opportunities for individuals to invoke their Community rights should be no less favourable than those through which they may invoke their rights arising under national law. As for effectiveness, national procedural

40. See Giacinto della Cananea, *The European Union’s Mixed Administrative Proceedings*, 68 LAW & CONTEMP PROBS. 197 (Winter 2004).

41. This refers to various committees in which national regulators hammer out their differences. See *id.* at 215; Edoardo Chiti, *Administrative Proceedings Involving European Agencies*, 68 LAW & CONTEMP. PROBS. 219 (Winter 2004).

42. See Rodriguez Iglesias, *supra* note 34, at 6.

43. For a synthesis see A. GARCIA URETA, *PROCEDIMENTO ADMINISTRATIVO Y DERECHO COMUNITARIO* (2002).

44. See Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989. Analogously, for procedural law, see Case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, 1983 E.C.R. 3595. The same position can be found also in the Community secondary law, such as Council Regulation 2988/95 of 18 December 1995 on the Protection of the European Communities Financial Interests, 1995 O.J. (L 312) 1. In particular, article 2.2 provides that, subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States. In the legal science, C. Kakuris, *Do the Member States still possess Judicial Procedural Autonomy?*, in C.M.L.R. 1398 (1997).

requirements may not make it excessively difficult or impossible in practice to exercise the rights granted under Community law.

Not only is national administrative procedure subject to the Community requirements of equivalence and effectiveness, but it has increasingly come under the spell of specific conditions set down by Community legislation. This proliferation of written, statutory procedural law has three consequences: the “Europeanization” of national administrations, which come to operate as a single administration or executive power of the European order; the strong vertical integration between national administrations and Community bodies, and horizontal integration among the administrations of the Member States; the creation of new general principles of European procedural law.

One prominent example of this recent trend is EC Council Regulation n. 1334/2000, of 22 June 2000, setting up a Community regime for the control of exports of dual-use items and technology. Dual-use items are products that can be used for both civil and military purposes and that are subject to regulatory control upon export from the Community, in order to ensure that the Community complies with its international commitments in the field of non-proliferation.

To establish effective export controls, the Community has established a common administrative system for enforcement and monitoring in all Member States. From the standpoint of the internal market objectives of free trade among the Member States also guarantees the free movement of dual-use items inside the Community. Under Regulation n. 1334/2000 an exporter of dual-use items must obtain an administrative authorization, granted either by the Commission or by the responsible authority in the Member State of the exporter’s place of establishment, depending on the circumstances. The Regulation sets down the authorization procedure, including an authorization application form, to be used by all the Member State authorities. Article 8 provides that, in deciding on export authorization, the Member States shall take into account all relevant considerations, including their commitments under international law. At the conclusion of the proceedings, the competent authorities “may refuse to grant an export authorization and may annul, suspend, modify or revoke an export authorization which they have already granted,” and they are required to inform the competent authorities of the other Member States and the Commission.

The Regulation not only imposes vertical coordination by setting down a single authorization procedure to be used in all Member States, but also fosters horizontal coordination. For instance, before any Member State authorizes export of a technology that had previously been denied authorization by another Member State within the previous three years, it must first consult the Member State that denied authorization.⁴⁵ If, following consultations, the Member State nevertheless decides to go ahead and authorize the technology, it must inform the other Member States and the Commission, providing all relevant information supporting its decision.

The Regulation on dual-use technology highlights once again the Community legislator’s skepticism of administrative silence or inaction. The Regulation does not

45. See TREATY, *supra* note 2, at art. 9, para. 3.

anticipate administrative silence, and indeed the whole procedure is geared toward producing an express authorization or denial of authorization based on the facts of the case. For example, article 6, paragraph 2 allows authorities to condition authorization on certain guarantees to be provided by the exporter, such as an end-use statement.⁴⁶

Another very recent example of the minute Community regulation of national procedure is the Council Regulation on the Financial Regulation applicable to the general budget of the European Communities.⁴⁷ Of the numerous provisions relevant to this discussion, those concerning the methods of implementing the budget provide the best evidence of the various forms of administrative integration between the Commission and other government bodies, within or outside the Community.⁴⁸ The Commission can execute the budget through one of three procedures: “centralized” management; “shared” or “decentralized” management; or joint management with international organizations. The “centralized” system, concentrated in the Commission, is quite peculiar. It can occur in one of four ways: (1) directly by the Commission; (2) indirectly by a new form of “executive agency” (which should not be confused with standard European agencies such as the Medicinal and Trademark agencies), created by a separate Council Regulation;⁴⁹ (3) indirectly through the “bodies set up by the Community;”⁵⁰ or (4) indirectly through “national public-sector bodies or bodies governed by private law with a public service mission providing adequate financial guarantees.”⁵¹ In the case of “shared management,” implementation is delegated to the Member States. In the case of “decentralised management,” implementation is delegated to third countries. In these two forms of administration, however, the Commission retains significant decisionmaking responsibility.⁵² The fourth and last model entrusts the Commission with final responsibility for implementation of the budget in all cases. It states, “the Commission shall implement the budget . . . on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management,” under “joint management with international organizations,” subject to particular conditions.

Notwithstanding the variety of the models of budget administration, the Regulation provides a single body of rules and procedures to ensure overall coherency, and entrusts final responsibility for most budget decisions to the Commission. In particular, it prohibits the Commission from delegating powers to third parties when these powers involve a large measure of discretion and entail

46. *Id.* at art. 6, para. 2.

47. Council Regulation 1605/2002, *supra* note 33.

48. *See* Craig, *supra* note 33, at 110-133.

49. Council Regulation 58/2003, *supra* note 33.

50. These bodies are referred to in Council Regulation 1605/2002, *supra* note 33, at art. 185, as have legal personality and actually receiving grants charged to the budget.

51. *See* Craig, *supra* note 34, at 119-120.

52. For example, it has the power to take final responsibility in budget execution, in pursuance of Article 274 of the EC Treaty.

political choices. The Commission must clearly define the tasks being delegated and fully supervise their execution.⁵³

E. New Features of Judicial Review

Administrative acts that result from Community administrative proceedings—that is, proceedings designed to implement Community law—are subject to general requirements of Community law that are becoming progressively differentiated from those of national legal systems.⁵⁴ This widening gap between Community and national law is particularly apparent in the domain of the grounds upon which administrative acts can be declared void: the grounds of judicial review. Article 230 of the EC Treaty lists lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of powers as the grounds of review of Community legal acts. It appears that the drafters did not anticipate that the French-inspired ground of misuse of powers (*detournement de pouvoir* or *sviamento di potere*) would be invoked frequently by litigants; and yet, today, this ground has spawned a prodigious jurisprudence on misuse of powers.⁵⁵ Under Community law, the Commission or other deciding institution is deemed to have misused its powers when it does so to achieve goals other than those provided by the law and officially declared by the deciding institution; or to evade procedures specifically prescribed by the Treaty. To establish misuse of powers, the litigant must put forward significant and consistent evidence that the Community institution acted for reasons other than the stated ones.⁵⁶ In the Italian case, by contrast, the understanding of “misuse of power” is broader and applied to a far wider array of situations.⁵⁷

Italian and Community law also diverge on the judicial techniques for holding administrative acts in violation of Community law, an issue that has implications for the timing of review, the application of statutes of limitation on bringing challenges, and the retroactive application of judgments striking administrative decisions.⁵⁸

Italian courts have established two types of invalidity: one, when the national administrative act comes into conflict with Italian law or administrative rules implementing Community law or with Community law itself; and one when the national administrative act implements a national provision that itself conflicts with Community law. According to the Italian *Consiglio di Stato* (the highest court with jurisdiction over administrative law cases), the first comes under the ordinary regime

53. Council Regulation 1605/2002, *supra* note 33, at art. 54.

54. The theme is widely dealt with in ARZOZ SANTISTEBAN, *CONCEPTO Y REGIMEN JURIDICO DEL ACTO ADMINISTRATIVO COMUNITARIO* (1998).

55. A. Garcia Ureta, *Misuse of Powers as a Ground for the Annulment of Community Acts: A Case Approach*, in *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 775 (2003).

56. Among the various judgments, Case C-248/89, *Cargill Bvv.* Commission, 1991 E.C.R. I-2987; and Case T-247/01, *eCopy, Inc. v. Office for Harmonisation in the Internal Market (Trade Mark and Design)*, 2002 E.C.R. II-5301.

57. Roberto Caranta, *La giustizia amministrativa comunitaria*, in 5 *TRATTATO DI DIRITTO AMMINISTRATIVO, DIRITTO AMMINISTRATIVO SPECIALE* 4954 (Sabino Cassese ed., 2d ed. 2003).

58. Mario P. Chiti, *L'invalidità degli atti amministrativi per violazione di disposizioni comunitarie e il relativo regime processuale*, in *DIRITTO AMM.* 645 (2003).

for finding administrative acts in violation of higher law, the only difference being that the law is Community rather than national; or, in other words, as a technical matter, the judge will find the act illegitimate (*illegittimità* or *annullabilità*). This means that litigants must challenge such administrative acts within certain statutory time limits or else find the action to be time-barred. Furthermore, a judicial decision of illegitimacy does not have retroactive effect, meaning that individuals not party to the suit who have already complied are not entitled to seek compensation or other forms of remedy. In the second case, the judge will instead find the act to be void or non-existent (*nullo* or *inesistente*), since it was based on a national provision that itself was found unlawful because it was incompatible with Community law, and hence incapable of conferring any administrative power. An administrative act can always be challenged on such grounds, and because the consequence is to find the act void or nonexistent, even individuals who were not party to the case and who were somehow adversely affected before the case came down benefit from the decision.

Whether this regime is lawful under Community law and complies with the principles of equivalence and effectiveness is an open question. Italian courts maintain that the current scheme is not discriminatory and does not make it impossible or excessively difficult to vindicate Community rights against Italian administrative decisions. When the litigants find themselves time-barred in the case of possibly illegitimate acts, they are advised to resort to the traditional tools of national law, such as the doctrine of excusable mistake.

The Court of Justice set down the standard for national remedies against unlawful administrative acts in *Santex Spa*,⁵⁹ revising somewhat a position announced in an earlier line of cases. National rules establishing statutes of limitation for bringing challenges to administrative decision are lawful as long as they satisfy the requirement of effectiveness, or, in other words, so long as such statutes of limitation do not make the exercise of rights recognized by Community law virtually impossible or excessively difficult and do not breach the requirement of non-discrimination. In *Santex Spa*, the Court held that the Italian sixty-day statute of limitations period for bringing challenges to a notice of an invitation to tender satisfied both conditions. The decision of the Court, however, rested on the specific experience with the particular procedural requirement and left open the possibility that, in another set of circumstances, the application of the statute of limitations might breach the principles of effectiveness or non-discrimination, in which case the Italian court would be under a duty to disregard (disapply or *disapplicazione*) the Italian statute of limitations to apply Community law and protect the rights conferred thereunder on individuals.

The holding of the Court of Justice might appear minimalist, but the contrast with the jurisprudence of the Italian *Consiglio di Stato* is clear. The duty to disregard, under certain circumstances, statutes of limitation to bring challenges to administrative decisions goes further than the excuses available at the national level to litigants who otherwise would be time-barred from going to court.⁶⁰

59. Case C-327/00, *Santex Spa v. Unità Socio Sanitaria Locale n. 42 di Pavia*, 2003 E.C.R. I-1877.

60. Not all of the rule changes imposed by the Court of Justice, however, appear justified. For instance, the Court requires that ante causam interim protection, or preliminary injunctive relief, always be available in

F. Consequences for the Rights of the Parties

The influence of Community law on administrative procedure inevitably affects the rights of the parties who come before administrative agencies and the courts. When implementation was fully in the hands of the Member States, individual rights were left entirely to national law. National autonomy over rights paralleled national autonomy over the organization of administrative and judicial systems. Early on, however, the freedom of the Member States to set rules of procedure for their judicial systems began to disappear because of the prejudice to Community rights that was resulting from national differences in civil procedure. Today, procedural autonomy over the administrative arena is also beginning to fade.

The consequences of the Europeanization of administrative proceedings for individual rights are potentially grave. In Community proceedings, the decisions that are made by various administrative authorities as they pass the same matter back and forth and that precede the final, legally binding decision are more important than the equivalent decisions in purely national proceedings. This is because different government bodies, with different civil servants and administrative ties, participate at various phases and because a conclusive assessment of the particular facts and policy issues may very well be made at a preliminary phase by the administrative body best situated to make such determinations rather than by the administrative agency that issues the final, formal decision. Thus the traditional distinction in Italian law between procedural acts—those considered ancillary to final agency acts⁶¹ and that give rise to no right or duties inhering in the parties—and final acts,⁶² with which the parties have a duty to comply⁶³ and against which the parties may vindicate their rights in court, is problematic. Often the rights of the parties are compromised by a determination made during the Italian phase of a proceeding, even though the final decision rests with the Community institution (generally the Commission); yet the parties are barred from going to Italian court and challenging what is considered an ancillary, non-final administrative determination. When the parties then attempt to challenge the final decision (formally issued by the Commission) in the European courts, they are denied standing because the Commission's decision is believed not to "directly" affect the parties; the decision that did "directly" affect the parties was supposedly the Italian one.⁶⁴

national court proceedings challenging a national administrative act as violating Community law. Yet the Italian judicial system guarantees interim protection against administrative decisions in other equally effective ways. See Case C-214/00, *Commission v. Spain*, 2003 E.C.R. I-4667 considering such a remedy as inherent, imposing it to the laws of the Member States).

61. In Italian, this is called "*atto privo di rilievo esterno*" or "act without external effect."

62. The Italian term is "*provvedimento*."

63. The Italian term is "*atto a rilievo esterno, con contenuto imperativo*," or "act with external relevance and imperative content."

64. See for instance the case of genetically modified products, decided by the Court of Justice in judgement 21.3.2000, case C-6/99, effectively commented by Roberto Caranta, *Coordinamento e divisione dei compiti tra Corte di giustizia delle Comunità europee e giudici nazionali nelle ipotesi di coamministrazione: il caso dei prodotti geneticamente modificati*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1133 (2000).

To have standing before the European courts, the individual must be "directly and individually affects" by the Community measure. See EC TREATY, art. 230.

In this respect, a genuine “jurisdiction issue” is emerging in the European Union, which is reminiscent of problems faced by the Italian government immediately after Italian unification in the nineteenth century and which was solved by legislation.⁶⁵ The Court of Justice does not yet decide jurisdictional conflicts, except indirectly through preliminary references. Instead, national courts decide the issue, even when Community rights are involved, and, paradoxically, without the same guarantees offered by the national system for purely internal administrative decisions.

Because the European Courts can take up to two years to decide the standing question, when the parties return to national court to challenge the (now final) administrative decision, they can find themselves time-barred under national statutes of limitations.⁶⁶ Or, if the proceeding concludes with a final decision by an Italian administrative agency (so that the doctrine of final agency action poses no bar to access to the courts), the national court may not adequately scrutinize the decision because it appears to be so influenced by Community law—and by the ancillary, non-final determinations of the Commission—that review would be better left to the European Courts.

V

CONCLUSION: THE CURRENT LIMITS OF EUROPEAN ADMINISTRATIVE LAW

Genuine innovation in European administrative law is rare. Most of the principles worked out by the European Courts find their origins in one or more national systems of administrative law. Yet the multi-level structure of administrative governance is new, unlike anything to be found in federal systems like Germany, or in systems with strong regional and local autonomy, like Italy.

What is lacking in Community administrative law, therefore, is a complex of original principles similar to those worked out for the “constitutional” dimension of the Community legal order, principles such as supremacy of Community law, direct effect, and Member State liability for breaches of Community law. Thus, the task awaiting scholars is the creation of new principles appropriate to the administrative law of European integration.

65. Law n. 2832 of 1877.

66. *See, e.g.*, Case C-97/91, *Oleificio Borelli Spa v. Commission*, 1992 E.C.R. I-215. For a comprehensive discussion of *Oleificio Borelli see della Cananea, supra* note 40.