EUI EUROPEAN UNIVERSITY INSTITUTE

Jacques Ziller
a European scholar

Edited by Diane Fromage

Published by
European University Institute (EUI)
Via dei Roccettini 9, I-50014
San Domenico di Fiesole (FI)
Italy

EN PDF	QM-03-22-104-EN-N	ISBN: 978-92-9466-346-7	doi:10.2870/098663
ES PDF	QM-03-22-104-ES-N	ISBN: 978-92-9466-347-4	doi: 10.2870/035530
FR PDF	QM-03-22-104-FR-N	ISBN: 978-92-9466-349-8	doi: 10.2870/705940
IT PDF	QM-03-22-104-IT-N	ISBN: 978-92-9466-348-1	doi: 10.2870/44968


With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the EU budget. This publication reflects the views only of the author(s) and the Commission cannot be held responsible for any use which may be made of the information contained therein.

EUI EUROPEAN UNIVERSITY INSTITUTE

Jacques Ziller, a European scholar

Edited by Diane Fromage

The book was jointly produced by the Depart of Law and the Robert Schuman Centre

European University Institute, Florence, Italy

Table of contents

Foreword vi
Diane Fromage

Section 1. Recent evolutions in EU Law 1

1. General principles of law in monetary policy: in the hands of courts? 2
Joana Mendes

2. The legal bases for the energy independence of the European Union 15
Ernesto Bonafé

3. The *Polisario* saga: the principle of good administration and the interface between EU law and international law 28
Alessandro Petti

4. New developments in AI regulation – remarks on the EU AI regulatory sandbox 49
Katarzyna Ziółkowska, Marek Wierzbowski

5. The Challenges of AI: a rule of law perspective 56
Karine Caunes

6. Digital Administration . The ReNEUAL Model Rules on EU Administrative Procedure Revisited 77
Herwig C. H. Hofmann, Oriol Mir, Jens-Peter Schneider

7. EU Administrative Law, General Principles of Law and National Autonomy 107
Paul Craig

8. Il 'terzo' nei procedimenti amministrativi europei 120
Alessia Monica

9. A new common constitutional tradition in Europe? Nemo tenetur se detegere 136
Giacinto della Cananea

10. Multilevel (administrative) cooperation in the EU: the unique case of the Banking Union 150
Diane Fromage

9. A new common constitutional tradition in Europe? Nemo tenetur se detegere*

Giacinto della Cananea, Professor of Administrative Law,
Bocconi University

1. Introduction

The concept of "common constitutional traditions" in Europe has been the subject of much comment in recent years. My intent here is not to provide a general overview of the topic. My own views on this matter have been set out on an earlier occasion. The aim of this paper is to focus more closely on a tradition that has just been included by the Court of Justice of the EU among common constitutional traditions; that is, which is designated by the maxim *nemo tenetur se detegere*. It raises, however, some doubts about the conclusion reached by the Court. The paper is divided into four parts. The first section will briefly illustrate the emergence of the concept of common constitutional traditions. The following two sections will analyse the legal relevance and sig-

* Paper for the workshop in honour of Jacques Ziller (2022). This is the fruit of research undertaken on the "common core of administrative laws in Europe" (ERC advanced grant no. 694967). I wish to thank Sabino Cassese and Mario Comba for inviting me to join the ELI research on common constitutional traditions, as well as Marta Cartabia and Daria De Pretis for their comments on an earlier draft presented at the ELI workshop in Vienna. I remain, of course, solely responsible for any errors or omissions.

nificance of the maxim *nemo tenetur se detegere* in criminal proceedings and administrative procedure, respectively. This will be followed by an evaluation of the recent ruling of the European Court of Justice (ECJ) in *DB v Consob*. It will be argued that this jurisprudence can help us to understand both why a recognition of this maxim is acceptable in principle and why, nevertheless, such claim should be verified from a scientific perspective.

2. "Common constitutional traditions" in the European Union

It may be helpful for the sake of clarity to make clear how the phrase common constitutional traditions has been used to denote the existence of some fundamental norms of public law which are shared by the legal orders of EU Member States, as well as the consequences that follow from ascribing a certain norm within such traditions.

Although the Treaty of Rome (1957) entrusted the ECJ with the broad mission of ensuring the respect of the law in the interpretation and application of its provisions,[436] it referred to common constitutional traditions for the first time in 1970, when it was asked to assess the legality of European Community (EC) law on a preliminary ruling by a German administrative court. The referring court had hypothesised the violation of the guarantees provided for by German constitutional law, including control over the proportionality of restrictive measures on rights.[437] Advocate General Dutheillet de Lamothe reiterated the constant concern to avoid a misalignment of interpretations concerning EC law. However, he outlined a new perspective, emphasising that the Community order was not limited to the provisions of the founding treaties and those of the secondary sources, but rather included a common substratum of values and legal principles, ultimately attributable to a vision of the person and of society ("*le patrimoine commun des Etats membres*"). Consistent with this perspective, the Court of Justice excluded that the control over the legality of the acts of the Community institutions could be based on this or that national law. However, it stated that such common traditions form part

436 Treaty establishing the European Economic Community (EEC Treaty), Article 164 (1).

437 Case 11/70, *Internationale Handelsgesellschaft*, Judgment of the Court of 17 December 1970

of the principles of which it is required to ensure the observance.[438] It adhered constantly to this orientation in subsequent pronouncements.[439]

A further impulse came from the Maastricht Treaty, which in Article F made reference to both common "constitutional traditions" and the European Convention on Human Rights. That reference was initially mainly in relation to the European Convention on Human Rights. In this, the means to overcome what was perceived as an intolerable deficiency of the European constitution was identified: the absence of a declaration of rights. This reconstruction, however, did not fully grasp what was new and original in the recognition – resulting from case law and codified by the treaty – of the existence of a body of common constitutional traditions. This recognition is of a precise importance for more than one reason. It confirms the double opening of the national legal systems, that is, horizontally and vertically, towards the European order. It reaffirms the existence, alongside the written principles, of the unwritten ones, including those that have been elaborated and refined by the courts. Moreover, Article 6 attributes to the common constitutional traditions the rank of general principles of Union law, which prevail on EU legislation.[440]

438 *Ibid*, paragraph 4. For a retrospective, see Graziadei, M. and De Caria, R. (2017), *The "Constitutional Traditions Common to the Member States of the European Union" in the Case law of the European Court of Justice: Judicial Dialogues at its Finest,* Rivista trimestrale di diritto pubblico, Vol. 56, No.. 4, 2017.

439 Advocate-General Warner referred to "shared patrimony" in Case 63/79, *Boizard v. The Commission*, regarding the protection of legitimate confidence and, in English culture, to estoppel. See also Stirn, B. (2015), *Vers un droit public européen*, LGDJ, 2015, 2nd ed., at 84 (using the expression "*socle commun*", that is, common ground). On the concept of 'constitutional convention', see Marshall, G. (1984), *Constitutional Conventions: the Rules and Forms of Political Accountability*, Clarendon Press, 1984 (for the thesis that conventions are the 'critical morality' of the constitution and they 'will be the end whatever politicians think it").

440 See Cassese, S. (2017), "*The Constitutional Traditions Common to the Member States of the European Union",* Rivista trimestrale di diritto pubblico, Vol. 56, No. 4 2017(observing that traditions are based on history but are not immutable). But see also Fedke, J. (2018), *Common Constitutional Traditions*, paper presented at the workshop organized by the ELI in Turin, on November 2018 (observing that the German version of Article 6 TEU - *gemeinsame Verfassungsüberlieferungen der Mitgliedsstaaten* – is backward-looking). The ELI comparative research has given rise to a document concerning free speech: European Law Institute (2022), *Freedom of Expression as a Common Constitutional Tradition in Europe*, 2022, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf.

3. *Nemo tenetur se detegere* in criminal proceedings

Like the maxim *audi alteram partem,* so too does the maxim *nemo tenetur se detegere* originate from criminal law. Both serve to reinforce the individual's freedom against the power of public authority. However, while *audi alteram partem* can certainly be counted among those that are part of the *acquis communautaire,* the other is of more recent recognition.

The nature and effects of the precept designated by the maxim *nemo tenetur se detegere* is a matter on which opinion can differ. Certain predominant lines of thought can, however, be delineated. There is diversity of view as to whether it constitutes either as a manifestation of the right to a due process of law or as an institutional guarantees in the sense indicated by Carl Schmitt in his *Verfassungslehre*; that is, as an institution which receives constitutional protection in order to prevent its "elimination ... by way of simple legislation", due to its connection with the preservation of the *Rechtsstaat*, without being intrinsically related to the idea of liberty, such as the prohibition of criminal statutes with retroactive force and *ex post* facto laws.[441]

With these different views in mind, we can now examine the normative and factual data. The Fifth amendment to the US Constitution has an emblematic value, by virtue of which no one "can be obliged in any criminal case to testify against himself". In the jurisprudence of the Supreme Court, this prohibition – often called privilege against self-incrimination - has acquired a central importance. It has been affirmed by the Warren Court in its famous *Miranda* ruling, in relation to a phase prior to the criminal trial, i.e., investigations carried out

441 Schmitt, C. (1925), *Verfassungslehre*, Eng. transl. by Seitzer, J. (2008), *Constitutional Theory*, Duke University Press, 2008, at 208-219 (including between such institutional guarantees, distinguishable from basic rights, also the independent administration of local affairs, the prohibition of exceptional courts, the protection of civil servants' rights and the 'right of access to ordinary courts'). For a different view of Schmitt's beliefs and ideas about public law, which emphasises his account of the relationship between legality and emergencies, see Vermeule, A. (2009), *Our Schmittian Administrative Law*, Harvard Law Review, Vol. 122, 2009.

by the police.[442] This has been a strongly contested issue in subsequent years, for some argued that such safeguard was essential for a liberal democracy, while others criticized it for its negative impact on the action of police forces aiming at preventing and repressing crimes. It is therefore extremely significant that, in a very different cultural and political climate, a third of a century later, the chief justice Rehnquist stated that the Miranda warnings "have become part of our national culture".[443] This assessment is important in itself, concerning the persisting validify of the *Miranda* doctrine. It is important, moreover, because it confirms that constitutional traditions arise from a complex of elements, also not of a strictly legal nature, extended to culture in a broad sense.

There is a similarity between the interpretation elaborated by the US Supreme Court and an important norm adopted by the international community more or less in the same years in the context of the International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty (1966) that commits the contracting parties to respect the civil and political rights of citizens and other persons, "recognizing that these rights derive from the inherent dignity of the human person", as the preamble affirms. This norm is laid down by Article 14 (3), according to which "everyone charged with a criminal offence shall be entitled to the following minimum guarantees, in full equality: g) not to be compelled to testify against himself or to confess guilt". The meaning of the norm is clear, in the sense that none can be obliged to admit anything that may give rise to criminal sanctions against him or her, and so is its ambit or scope of application, that is, criminal trials.

For all its moral and political significance, the ICCPR is binding only on the States that have ratified it, including those that form part of the EU (but not the UK). The case of Italy can be instructive, as it is in its legal system that the dispute concerning the existence of a constitutional convention has arisen. Article 24 of the Constitution, which recognises and guarantees the right of defence, is inter-

442 US Supreme Court, *Miranda v. Arizona* (1965). For further analysis, see Schauer, F (2013), *The Miranda Warning*, Washington Law Review., Vol. 88; Alschuler, A.W. (1996), *A Peculiar Privilege in Historical Perspective: the Right to Remain Silent*, Michigan Law Reviw, Vol. 94, No. 8, 1996, (arguing that the privilege included in the Bill of Rights in 1791 differed from that enforced by the courts in English law); Thomas, G.C. (1993), *A Philosophical Account of Coerced Self-Incrimination*, Yale Journal of Law & the Humanities philosophy, Vol. 5, 1993(discussing the concept of coercion in the light of various strands in philosophy).

443 US Supreme Court, *Dickerson v. US* (2000), with the dissenting opinion of Justice Antonin Scalia.

preted coherently with the international norm just mentioned. This interpretation appears to be confirmed by the "living law", in particular by Articles 63 and 64 of the Code of Criminal Procedure. Italian courts have had little difficulty in recognizing the existence of a prohibition of any kind of norm imposing self-incrimination. They have, however, shown considerably more reluctance to accept that such prohibition is part of the law outside the field of criminal law. For example, in a proceeding concerning a municipality the Court of Auditors has asserted that the obligation to report financial losses, concerning both public expenditure and revenue, includes that to make all information available to the prosecutors' office.[444] One of the objectives of this paper is to examine whether this reluctance is justified or not, from a European perspective and this requires a brief analysis of the case law of EU courts.

4. *Nemo tenetur se detegere* in administrative procedures: the opinion of European courts

The first case brought before an EU court was *Mannesmanrohren*.[445] The facts were as follows. The Commission initiated an investigation procedure aiming at ensuring the respect of competition rules. It carried out inspections at the premises of some firms. It then sent to one of those firms a request for information in which it asked questions regarding presumed infringements of the competition rules. The firm replied to certain of the questions, but declined to reply to others. The Commission argued that this infringed the duty of cooperation established by EU law. The firm replied that Article 6 ECHR not only enables persons who are the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information, but also establishes a right not to incriminate oneself. The Court of First Instance was reluctant to endorse this argument. It observed that it is essential that the authorities that exercise administrative powers can effective-

444 Court of Auditors, plenary panel, judgment of 30 January 2017, no. 2, on a question of principle referred by the first central appeal section relating to the Municipality of Naples.

445 Case T-112/98, *Mannesmanrohren Werke v. Commission*, Judgment of the Court of First Instance (First Chamber, extended composition) of 20 February 2001.

ly remedy unlawful conduct. Accordingly, those who – in various capacities –are active in the market must cooperate with the Commission. By taking this line of reasoning to its logical conclusion, operators cannot avail themselves of the right to remain silent. In order to reach this conclusion, the CFI had to exclude the existence of an "absolute right to silent".[446] Moreover, being aware of the possibility that the information could be used in criminal proceedings, the Court decided to resolve the problem by stating that the operators have plenty of opportunity to defend themselves there, attaching a different meaning to the attested facts. This was perhaps the least convincing part of an argument for which it is axiomatic that the collective interest has absolute priority over the right of defence and, therefore, prevents the administrative procedure being compared to the criminal trial.

The difficulties and dysfunctional consequences that derive from this argument can be better understood from the perspective of the ECHR. The European Court of Human Rights has followed an interpretative approach very similar to that followed by the Supreme Court. It did so in a dispute concerning the Swiss tax administration, which had ordered a taxpayer to make available the documentation relating to his assets and the relationships with the banks that looked after them.[447] The imposition of a pecuniary sanction was linked to the taxpayer's refusal. The Swiss administrative judge and the federal court had rejected the appeals of the person concerned. The Strasburg Court affirmed the applicability of Article 6 to administrative tax proceedings.[448] It also reiterated that, although Article 6 does not explicitly mention it, the right to remain silent is part of the generally recognised rules of international law that are at the heart of the notion of "due process". It stressed that the recognition of this right prevents the administrative authorities from trying to obtain documents

446 *Ibid*, paragraph 66.

447 , *Chambaz v. Switzerland*, Judgment of the European Court of Human Rights of 5 April 2012

448 *Ibid*, paragraph 39.

through coercion or undue pressure.[449] It distinguished the case under consideration from a previous case, marked by the unlawful conduct of the applicant. It thus came to the conclusion that the respondent state had violated the person's right not to incriminate himself.[450] This conclusion must, however, be qualified. What is incompatible with the ECHR is the use of coercion or oppression that undermines the very essence of the right to remain silent and thus infringes Article 6. But the States retain their margin of appreciation and can thus authorize their public authorities to use evidence obtained without coercion.

The soundness of the interpretation elaborated by the lower EU court was put into doubt by the Italian Court of Cassation, which raised the question whether such domestic legislation, interpreted in that manner, was constitutionally admissible and asked the Constitutional Court (ICC) to judge on its constitutionality. The ICC had two options: it could either decide directly or do so after involving the ECJ, through the preliminary reference. It chose the latter option. Its reasoning was based on both Article 13 of the ICCPR and Article 6 of the ECHR, and raised the issue whether EU norms, as interpreted by the CFI, infringed the right of defence.[451] Before examining the ruling adopted by the ECJ, three quick remarks are appropriate. First, for the ICC as well as for legal scholarship, there is no doubt that the financial regulator is an administrative authority, though characterized by a high level of autonomy, and that its procedure is administrative in nature. The question that thus arises is whether the maxim *nemo tenetur se detegere*, though initially elaborated and applied in the field of criminal law, applies to such procedure. Second, the argument elaborated by the ICC refers to such maxim from the angle of common constitutional traditions, [452] though it is also grounded on the ICCPR. Last but not least, the ICC has chosen to pursue the dialogue with the ECJ, similarly to what it has pre-

449 *Ibid*, paragraph 52, with references to various precedents: *John Murray v. United Kingdom,* 8 February 1996, paragraph 45; *Saunders v. United Kingdom,* Judgment of the European Court of Human Rights of 17 December 1996, paragraphs 68-69; *Serves c. France,* Judgment of the European Court of Human Rights of 20 October 1997, paragraph 46. Later judgments are illustrated in the ruling issued by the Privy Council of the UK, on 17 June 2019, *Volaw Trust Ltd. v. the Comptroller of Taxes (Jersey).*

450 *Ibid*, paragraph 58.

451 Constitutional Court, order no. 117 of 2019.

452 *Ibid*, paragraph 2 and 10.2.

viously done in the *Taricco II* case, with the result of neutralizing an issue potentially disruptive.[453]

The opinion elaborated by Advocate General Pikamae was critical of some of the ways in which the preliminary question was presented, but showed a clear awareness of the relevance of the problems and of the existence of appropriate solutions to remedy them, as well as of the importance of the homogeneity clause in Article 52(3) of the Charter of Fundamental Right.[454] The AG thus suggested that the distinction between natural and legal persons could be helpful to clarify why the privilege against self-incrimination may be invoked by the former, unlike the latter. Following this distinction, in his view, Member States are not required to punish persons who refuse to answer questions put by the supervisory authority which could establish their responsibility for an offence liable to incur administrative sanctions of a criminal nature.

The ECJ endorsed the view of its AG.[455] It then reiterated its holding that, though the ECHR has not been formally incorporated into the EU legal order, the rights it recognizes constitute general principles of EU law and must be interpreted coherently with the meaning and scope they have under the Convention.[456] It was, however, more cautious than the Strasbourg Court, as it pointed out that the right to silence "cannot justify every failure to cooperate with the competent authorities", for example by failing to appear at a hearing planned by those authorities.[457] That said, even though the sanctions imposed by the Italian financial regulator (CONSOB) on DB were administrative in nature, a financial penalty and the ancillary sanction of temporary loss of fit and proper person status, such sanctions appeared to have punitive purposes and showed a "high degree of severity". Moreover, and more importantly, the evidence obtained in those administrative procedures could be used in criminal proceedings.[458] For

453 Case C-42/17, *MAS,* Judgment of the Court (Grand Chamber) of 5 December 2017 in disagreement with the opinion of Advocate General Bot. The case ended with the judgment no. 115/2018 of the ICC.

454 Case C-481/19, *DB v. Consob*, Opinion of the Advocate General Pikamae, delivered on 27 October 2020,

455 Case C-481/19, *DB v Consob*, Judgment of the Court (Grand Chamber) of 2 February 2021.

456 *Ibid*, paragraph 36.

457 *Ibid*, paragraph 41.

458 *Ibid*, paragraph 44.

the Court, this justified an interpretation of EU legislation that does "not not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature".[459]

After this ruling, the ICC found that the Italian legislation was unconstitutional, on grounds that it did not recognize any opportunity for affected individuals to remain silent within the administrative procedure. However, it excluded any contrast with EU law.[460] The case has thus been settled without a conflict between national law and EU law. Both courts have discharged the function which, in a liberal democracy, is proper to them: to actively seek and try to translate into reality all the potential inherent in the constitutional and legislative provisions of which they must ensure the respect. More specifically, the principle which is expressed by the maxim *nemo tenetur se detegere* does not not protect against the making of an incriminating statement per se, but against the obtaining of evidence by coercion or oppression. It is a shield against an invasive power. At a theoretical level, however, the question that arises is whether a common constitutional tradition does exist in the field of administrative law. While the preliminary question sent by the ICC adopted the concept of common constitutional traditions, the ECJ preferred to resolve it on the terrain of EU law and the ECHR. But even if the ECJ had affirmed that the maxim *nemo tenetur se detegere* can be regarded as a common tradition, it would still remain to be seen whether this characterization is convincing.

5. A 'factual' analysis

The question with which we are thus confronted can be summarized as follows: is the maxim *nemo tenetur se detegere*, in one way or another, shared by the administrative laws of EU Member States. The question will be discussed on the basis of the results of a recent comparative inquiry concerning European administrative laws.

One word or two might at the outset be helpful in order to clarify the assumption on which such comparative research is based, the methodology it has

459 *Ibid*, paragraph 55. See also paragraph 58.

460 ICC, judgment of 13 April 2021, n. 84/2021.

employed and its appropriateness in the field of public law. The assumption is that, although in the history of European law several scholars have used either the contrastive and the integrative approach, which emphasize diversity and similarity, respectively,[461] both approaches are incomplete descriptively and prescriptively. The descriptive validity of both traditional approaches is undermined by the fact that it chooses only a part of the real and neglects the other. Prescriptively, the force of the point adumbrated above is even stronger in view of the realization that the supranational legal systems that exist in Europe acknowledge the relevance and significance of both national and common constitutional traditions. Methodologically, the main difference between the traditional approach and the current comparative inquiry is that the latter follows the approach delineated by the American comparatist Rudolf Schlesinger; that is, it is a factual analysis. The distinctive trait of the method elaborated by Schlesinger in the 1960's, with the intent to identify the common and distinctive elements of the legal institutions of a group of States, is precisely this: instead of seeking to describe such legal institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved.[462] As a result of this, the problems "had to be stated in factual terms".[463] Concretely, this implied that, using the materials concerning some legal systems, Schlesinger and his team formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected. And it turned out that those cases were formulated in terms that were understandable in all such legal systems. Last but not least, this method is particularly appropriate in the field of administrative and public law. On the one hand, while the less recent strand in comparative studies put considerable emphasis on legislation (under the aegis of *legislation comparée*), such emphasis was and still is questionable with regard to administrative law, because it has emerged and developed without any legislative framework comparable to the solid and wide-ranging architecture provided by civil codes. The first lines of research

461 Schlesinger, R.B. (1995), *The Past and Future of Comparative Law*, American Journal of International Law, Vol. 43, 1995..

462 Schlesinger, R.B. (1968), *Introduction*, in Schlesinger, R.B. (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems*, Oceana, 1968.

463 Rheinstein, M. (1969), *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, University of Chicago Law Review, Vol. 36, Issue 2, 1969 at 448-449.

have confirmed the existence not only of innumerable differences, but also of some common and connecting elements concerning, among other things, judicial review of administration and the liability of public authorities.[464] On the other hand, an attempt must be made to ascertain whether there is common ground not only among written constitutional provisions but also among constitutional conventions.

We have thus included a hypothetical case concerning the maxim *nemo tenetur se detegere* in a questionnaire concerning the relationship between general principles and sector specific rules. The hypothetical case is very similar to that which was at the heart of the dispute that arose in Italy. We suppose that a young stockbroker in a top financial firm, during a casual conversation with an old friend, obtains some inside information about the likely increase, in the near future, of the value of a corporation's share. He reveals this information to his boss, who places an order to buy the corporation's shares, making a huge profit. Sometime later, officers from the financial regulatory authority request the stockbroker s to reveal what he knows about these facts. Whilst being ready to collaborate with public officers, the stockbroker affirms that he is unwilling to reveal everything he knows about those facts, because he's afraid that he could incriminate himself. The officers reply that within the sector-specific legislation there is no rule allowing him to keep silent and warn him that, if does so, his license may not be renewed. The stockbroker challenges the order before the competent court. The question that thus arises is whether the court would be willing the existence of a general principle such as a sort of privilege against self-incrimination or *nemo tenetur se detegere* and the like.

Turning from the hypothetical case to the research findings, a mixture of the expected and unexpected can be observed, as is often the case in this type of research.[465] Comparatively, three options emerge. The first is centred on general legislation on administrative procedure. Germany provides an enlightening example, because according to the general legislation adopted in 1976 the

464 See della Cananea, G. and Andenas M. (eds), *Judicial Review* of Administration in Europe: Procedural Fairness and *Propriety*,Oxford University Press, 2021; della Cananea, G. and Caranta R. (eds), *Tort Liability of Public Authorities in European Laws*,Oxford University Press, 2021.

465 Schlesinger (1969), *supra* note 27, at49. On national legal traditions, see Nicola, F.G. (2016), *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, American Journal of Comparative Law, Vol. 64, Issue 4, 2016.

involved persons have to contribute to the gathering of the relevant elements of fact. However, therein there are no duties to reveal those facts which may be susceptible to lead to the imposition of criminal sanctions. Only the sector legislation has established such duties and they are subject to a scrutiny of strict proportionality before administrative courts and the Constitutional Court. The second option is that the maxim *nemo tenetur se detegere* is included among the general principles elaborated by the courts in order to control the exercise of discretionary powers by public authorities.

Thus, for example in the UK, there is a distinction between common law and statutory law. The right to silence exists at common law, unless Parliament expressly legislates to override the right in specific areas or matters. The third option is that no such principle exists. Thus, for example in France, while in the field of criminal law the right to remain silent is said to be included within the *droit de la defense*, in the field of administrative law the existence of such right is uncertain. It has never been recognized as such by the administrative judge. It is even unclear where it might be recognized in certain circumstances. In sum, while there is a wide area of agreement between those legal systems from the perspective of the right of the defense, particularly as regards the other maxim *audi alteram partem*, there is an area of disagreement concerning the possibility to invoke what American jurisprudence and scholarship call the privilege against self-incrimination.

This conclusion should, however, be qualified in more than one way. The area of disagreement is considerably narrowed if one takes into consideration not only the maxim *nemo tenetur se detegere* but also a host of other principles and doctrines, some of which are not limited to the imposition of pecuniary sanctions, but concern more generally the reviewability of any measure adversely affecting the individual, such as reasonableness. If, for example, of two different rules governing similar administrative procedure one affirms that maxim and the other does not, higher jurisdictions may be requested to review their consequences from the viewpoint of the principle of equality. Moreover, the existence of areas of agreement and disagreement should be considered in a dynamic manner, as opposed to a static one. On the one hand, studies concerning fundamental rights regard it as historically demonstrated that certain process rights that initially develop in one field are subsequently generalized, as a result of

the consolidation of process values.[466] On the other hand, as domestic administrative laws are increasingly intertwined with EU law, the contrast between the former may decrease in the light of the jurisprudence of the ECJ examined in the previous section.

6. Conclusion

No attempt will be made to summarize the entirety of the preceding argument. The problem which has been analysed within this paper is one which most legal systems, though not necessarily all, have to tackle; that is, whether the individual has the right to remain silent within an administrative procedure, if it can be reasonably assumed that the consequences that follow from testifying or producing evidence include – at least potentially – the imposition of criminal sanctions. The recognition by both the ICC and the ECJ that there can be cases in which the individual can exercise the right to remain silent within an administrative procedure is to be welcomed and it is to be hoped that this view will be endorsed by other higher courts. However, David Hume's well-known caveat applies, in the sense that it is not correct to derive an 'ought' from an 'is'.[467] In this paper, I have reiterated the reasons that lead to consider as unduly limiting and misleading the theoretical approach which, in examining procedural requirements within the European legal area, overly emphasises – depending on the case – the common or distinctive aspects. The positive indication that can be drawn from these considerations is, above all, that, in order to make the comparison more rigorous, it is essential to take both into account. Moreover, though we cannot hide the difficulties that the full application of the maxim *nemo tenetur se detegere* meets, this needs to be viewed from a dynamic rather than static perspective.

---

466 Fiss, O (1979), *The Forms of Justice*, Harvard Law Review, Vol. 93, Issue 1979 (holding that constitutional values are ambiguous, in the sense that they can have various meanings, and evolve, as they are given operational content).

467 Hume, D (1739), *A Treatise of Human Nature* (1739), Book III, Part. I, Section I (observing that "For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it").

10. Multilevel (administrative) cooperation in the EU: the unique case of the Banking Union

Diane Fromage[468], Professor of European Law, University of Salzburg and Affiliated researcher, Law School, Sciences Po

Il y a près de neuf ans, en novembre 2013, je soutenais ma thèse – co-dirigée par Jacques Ziller - sur le rôle des parlements nationaux au sein de l'Union européenne. Au cours des trois années que durèrent ces recherches, Jacques m'a énormément appris, et inspirée. Il m'a inculqué son sens de la rigueur, et m'a transmis son goût pour le droit comparé. Il m'a aussi ouvert de nouveaux horizons, et n'a jamais été avare en conseils précieux ou en recommandations utiles, n'hésitant jamais à me faire profiter de ses contacts et de ses connaissances. Il fait partie des personnes grâce auxquelles je suis parvenue à faire moi-même également une carrière universitaire, et je lui en suis profondément et sincèrement reconnaissante. Merci, très cher Jacques, et que cette période de retraite te soit riche et heureuse.

Si ma thèse portait sur les parlements et le droit comparé, cette brève contribution traite d'un des autres sujets de prédilection de Jacques, le droit administratif européen.

468 The present research was conducted as part of "IMPACTEBU", a project that received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie grant agreement No 895841 (Sept. 2020 – April 2022).

1. Introduction

As is well-known, multilevel administrative cooperation[469] between national and European institutions has always been essential to the good functioning of the European (Economic) Community (E(E)C) first, and to the European Union (EU) since 1992. Indeed, the European Commission has always relied on national administrative systems to implement or (co-)define EU norms and as such, the European integration process has affected the functioning of national administrations even though they may have originally failed to perceive this change.[470] The Banking Union (BU) introduced in 2012 is no exception to the pre-existing practice in that to function properly, it, too, is dependent on the good cooperation between EU and national administrations. In fact, it is 'only the second or third area of full integration in 60 years of existence – after EEC/EC/EU competition law in the founding years of the Community/Union, and, completely diverse in nature, (Euro) monetary policy installed in the Maastricht Treaty' where full integration is understood as 'a term to describe a regional (supranational) legal order both at the legislative and at the administrative level, with directly applicable and fully fledged, self-standing EU regulations, ie not requiring national law or doing so only to a very limited extent, and with an EU institution being responsible for implementation in particular cases, again self-standing and with no significant leeway for discretion by the national authorities which might be called to help.'[471] However, as will be shown in this contribution, multilevel administrative cooperation in the BU is radically different from the more classical patterns of cooperation

469 I am referring here to "multilevel administrative cooperation" as a generic term. See for a discussion on the terminology used to describe this phenomenon: von Danwitz, T. (2008), *Europäisches Verwaltungsrecht*, Springer, 2008, p. 610 et seq.

470 Auby, J.-B. and J. Dutheil de la Rochère, *Traité de droit administratif*, 2014, Bruylant, p. 21. See for a historical account of this evolutionCraig, P. (2018), *EU administrative law*, Oxford University Press, 2018, p. 4 et seq.

471 Grundmann, S. and H.-W. Micklitz (2019), *The European Banking Union and constitution – The overall challenge*', in Grundmann, S. and H.-W. Micklitz (eds)*, The European Banking Union and constitution: Beacon for advanced integration or death-knell for democracy?,* Hart Publishing, 2019, pp. 1 and 2.