

Giacinto della Cananea

## **The ‘Common Core’ of Administrative Laws in Europe: A Research Agenda (\*)**

### *Abstract*

This paper aims at ascertaining whether, despite many differences between European systems of administrative law, there are some connecting elements, or a “common core”, and, if so, whether such ‘connecting elements’ can be formulated in legal terms, as opposed to generic idealities. After a quick introduction, the paper is divided into three parts. Part 2 illustrates the background, in two respects: the transformation of administrative law within European countries and the variety of views about the possibility to compare them. In Part 3, it is argued that there are two main difficulties with traditional approaches to comparative administrative law: the tendency to juxtapose a variety of legal systems, without comparing them, and the excessive emphasis on institutional design. In part 4, the main choices of the research are explained; that is its purpose is that of the advancement of knowledge, as opposed to the attempt to harmonize national laws, the focus on administrative procedure, and the choice of legal systems. Last but not least, there is a combination of a synchronic comparison, based on a ‘factual’ approach which draws on the experience gathered in the context of the ‘Common Core of European private law’, with a diachronic comparison; that is, a retrospective that sheds light on some aspects of history of legal institutions that look particularly relevant for understanding the processes of cross-fertilization.

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(\*) Paper for the workshop organized by the University of Trieste on May 18, 2017, in the context of the ERC advanced grant (COCEAL). The project is funded by the European Research Council (ERC) under the Horizon 2020 Research and Innovation Programme – Advanced Grant – Excellent Science (grant agreement No 694697). I am grateful to Jean-Bernard Auby, Mauro Bussani, Roberto Caranta



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and Carol Harlow for their helpful comments on an earlier draft. However, I am the only responsible for any error or omission.



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## 1. Introduction

It is self-evident that administrative law in Europe has been transformed over time. Understanding the nature of this transformation and its consequences, is more difficult. Arguably, a comparative perspective can be very helpful, but the study of comparative administrative law is in an unsatisfactory condition <sup>(1)</sup>, due to two main reasons, concerning the object of existing literature and its methodology.

First, in the last years several scholarly works, often with the contribution of a plurality of authors, have examined the legal developments that are influencing the role of governments in our epoch. However, some of such works look at public law, broadly intended, and thus they fail to devote attention to the more specific questions concerning administrative law (how should administrative decision-making processes be regulated, whether public officers should be subject to the ordinary processes of law in the same manner as private bodies, and the like). Other works, whilst focusing on administrative law, do not pay specific attention to the European area <sup>(2)</sup>, while it can be argued that it does deserve it <sup>(3)</sup>, in view of the processes of cross-fertilization that have characterized this region of the globe, well before the beginning of integration within the European Community and now the European Union (EU). The best known example is that of the spread of administrative courts, “largely unknown” in Anglo-saxon countries, during the nineteenth century <sup>(4)</sup>. The French *Conseil d'État* constituted a “model” for most European countries, either in a positive sense (a model to replicated, though with some adjustments, for example in Italy) or in a negative sense (a model not to be followed, for example in Belgium). A more recent example is the codification of administrative procedures, for which Austrian legislation has variably influenced that of other European countries. Europe is also characterized by the action of supranational regimes: not only the EU, with its strong vertical interaction between EU and national courts <sup>(5)</sup>, but also the Council of Europe with its ramifications, including the European Convention of Human Rights (ECHR) and the Venice Commission. In view of these developments, it has been argued that administrative law should be reconceived as a transnational project <sup>(6)</sup>.

Second, the comparative study of administrative law is in an unsatisfactory condition from the viewpoint of its methodology <sup>(7)</sup>. Despite the increase of the

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<sup>1</sup> See M. Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press, 1981), vii (arguing that “comparative law has been a somewhat disappointing field”); M. Shapiro & A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002).

<sup>2</sup> See S. Rose-Akermann & P. Lindseth (eds.), *Comparative Administrative Law* (Elgar, 2013).

<sup>3</sup> M. Fromont, *Droit administratif des Etats membres de l'Union européenne* (PUF, 2006).

<sup>4</sup> See M. Shapiro, *Courts*, cit. at 1, 153.

<sup>5</sup> P. Craig, *UK, EU, and Global Administrative Law* (Cambridge University Press, 2015), 9.

<sup>6</sup> M. Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in id. (ed.), *The Transformation of Administrative Law in Europe* (European Law Publishers, 2008), 15. For some remarks concerning private law, see M. Van Hoecke & M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a new model for Comparative law*, 26 *Int'l & Comp. L. Q.* 495 (1998).

<sup>7</sup> The discussion that will follow refers to the comparative method, which is not intended as an area of the law: see J. Rivero, *Cours de droit administratif comparé* (1954-55), 5; E. Stein, *Uses, Misuses-*



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seminars and workshops that are organized in virtually every corner of Europe and the publication of scholarly works, there is a persistent tendency to juxtapose the solutions adopted by two or several legal systems, without really comparing them. This tendency is all the more questionable in view of the attempts that have been made to improve the methodology of comparative studies, during the last forty years, in the field of private law. It ought to be stated at the outset that what will be argued in this paper is not that public lawyers should adopt the comparative methodology elaborated by some private lawyers. It will be argued, rather, that public lawyers should take such methodology into due account, in order to ascertain whether it can be helpful for a better understanding of our systems of administrative law. Interestingly, there is more than a loose analogy between such methodology and that which has been used by administrative judges in their regular meetings. The frequency of such meetings is well known<sup>(8)</sup> and some scholars have been invited to join them, including the author of this paper. It would be interesting, therefore, to consider whether the approach followed by those experts of administrative law can be of interest also for theorists.

My intent in this paper is precisely to examine some of the questions which arise when a comparative inquiry is undertaken, with a view to ascertaining, in an important area of administrative law, that of administrative procedures, whether and to what extent there exists a common ground or a “common core” of European administrative laws; that is, that behind and beyond innumerable differences, there are some “shared and connecting elements”, which can be formulated in legal terms, in the guise of general principles of law and mechanisms for their application<sup>(9)</sup>. It remains to be clarified that the main focus here is not on the European Union (EU): it is, rather, on the national laws that interact across Europe, though it can be interesting to consider the experience of the supranational administration.

The paper is divided into three parts. The discussion begins – in Part 2 - with the institutional and theoretical background, which is essential, on the one hand, to understand the evolving nature of administrative law and, on the other, to suggest that in this field there is, in addition to the contrastive and integrative approaches to comparative law, a strand of theory that has emphasized not simply the analogies, but the connecting elements between national legal systems. This is followed – in Part 3 - by a critical analysis of some difficulties with the methodology traditionally used in the comparative study of administrative law; that is, the tendency to juxtapose national legal systems, rather than comparing them, and the excessive emphasis on their institutional design. There is then more detailed discussion of the salient features of the ‘common core of European private law’ project and of the lessons that can be learnt from it. The focus then shifts – in Part 4 - to the main

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*and Nonuses of Comparative Law*, 72 Nw. U.L. Rev. 198 (1977); O. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53 Rev. int. dr. comp. 275 (2001); J.S. Bell, *Comparative Administrative Law*, in M. Reimann & F. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1259.

<sup>8</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the EU: see [www.aca-europe.eu](http://www.aca-europe.eu).

<sup>9</sup> See the seminal study by R. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *Twentieth Century Comparative and Conflicts Law-Legal Essays in Honor of Hessel E. Yntema* (Sijthoff, 1961), 65.



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choices facing the comparative study that is presented here: its purpose is the advancement of knowledge, as opposed to an attempt to pave the ground for a harmonization of administrative laws; the heart of the study is constituted by administrative procedure, broadly intended; the legal systems that are selected for comparison are not only those of the Member States of the EU. Last but not least, the methodology of comparative analysis is described. It is both a synchronic and a diachronic analysis. The factual method developed in the field of private law since the Cornell seminars convened by Rudolf Schlesinger will thus be complemented by a retrospective of some salient phases in the development of administrative law.

## 2. The Background

There is, not surprisingly, considerable diversity of opinion concerning the nature and evolution of administrative law. The reason is not only that, as Paul Craig has convincingly observed, “description and prescription are not easily separated”<sup>(10)</sup>, given that much of public law is inherently political, because of the liberal ideologies that shaped the early decades of administrative law, as well as of the other ideologies that characterized the last century<sup>(11)</sup>. The reason is also that part of our ideas and thoughts about administrative law before the twentieth century rest on weak bases, as Craig and Mashaw have recently argued with regard to the UK and the US, respectively<sup>(12)</sup>. This raises an important point of method, to which we will return later, with regard to the importance of historic analysis. Meanwhile, it can be helpful to give a quick glance at the history of legal institutions, with an eye on the history of ideas, in particular on the variety of views about the possibility to compare them.

### A) A Quick Glance at the Transformation of Administrative Law

Lawyers and historians of law have debated the birth and foundations of administrative law. According to what is probably the dominant opinion today, administrative law is a recent creature, a product of the late maturity of the State<sup>(13)</sup>. According to another school of thought, of which Alexis de Tocqueville is perhaps the most famous theorist, the origins of administrative law may be traced back to the absolute State of the eighteenth century. He added that the administrative constitution of France did not change radically when its political constitution was completely transformed by the Revolution<sup>(14)</sup>.

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<sup>10</sup> P. Craig, *Administrative Law* (Sweet & Maxwell, 2003, 5<sup>th</sup> ed.), 3.

<sup>11</sup> See M. Hauriou, *Principes de droit public* (Sirey, 1910); Y. Gaudemet, *Droit administratif* (LGDJ, 2016, 21<sup>th</sup> ed.), 25. See also M. Loughlin, *Public Law and Political Theory* (Clarendon, 1992) (contrasting liberal and functional theories).

<sup>12</sup> P. Craig, *UK, EU, and Global Administrative Law*, cit. at 4, ch. 1; J. Mashaw, *Creating the Administrative Constitution. The Lost One Hundred Years of American Administrative Law* (Yale University Press, 2012).

<sup>13</sup> See, recently, L. Mannori & B. Sordi, *Storia del diritto amministrativo* (Laterza, 2001), 6.

<sup>14</sup> Tocqueville, *L'Ancien régime et la Révolution* cit. at 10, part I, book III, ch. 7. For a reappraisal, see J.L. Mestre, *Introduction historique au droit administratif français* (PUF, 1985); *Le traitement du contentieux administratif dans le XVIII<sup>e</sup> siècle*, 52 *Revue administrative* 83 (1999).

For our purposes here, there is no need to take a side in this discussion. Suffice it to observe that, even though some institutions of public law did not change when the *Ancien Régime* collapsed, two main changes occurred after 1790. The first was the emergence of a set of special arrangements for protecting individuals against the action of the executive. Some hold that whether the main factor was the doctrine of separation of powers adopted by the revolutionary governments, and which was at the heart of the Act of 1790, which broke with the tendency that dominated the *Ancien Régime*, though it has been argued that this determined a ‘deviation’ from the tradition of judicial review<sup>(15)</sup>. For others, the event that provided the opportunity for the birth of administrative law was the post-revolutionary creation of the *Conseil d’Etat*, viewed as a manifestation of the felt necessity to protect citizens from any undue interference with their rights. Whether this was a unique feature of French public law or it was gradually shared by other European legal systems, it is an important question to which we will return, when considering the ‘contrastive’ approach in the field of comparative law.

Meanwhile, it is important to mention a second important change, the growth of the positive State. While the emergence of new functions and powers assigned to public institutions and bodies can be traced back earlier than the beginning of the twentieth century, it is during that period that such functions and powers has an impressive growth. The new wave of the industrial revolution in some parts of Europe and its first one in other parts changed the role of the State, which was driven to assume a positive character. Important legislative reforms thus had the effect of making the State apparatus “simply grown up around us”<sup>(16)</sup>. Once again, there are various views about the causes and consequences of this change. There is no doubt that an important case was technological progress, which required new standards, for example in the fields of railways and posts and telegraphs. However, for others the main driving force was that, as more citizens gained political rights, free market doctrines were gradually replaced by the demand of State intervention, in particular through government largess<sup>(17)</sup>. More recently, the rise of the regulatory State<sup>(18)</sup> has made administrative law even more complex because of the enriched typology interests which are regarded as being legally relevant, including those of newcomers and consumers, viewed both as individuals and groups.

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<sup>15</sup> J. Merryman, *The French Deviation*, 44 Am. J. Comp. L. 109, at 111 (1996). But see F. Burdeau, *Histoire du droit administratif. Du 18e au 20e siècle* (Themis, 1994, 2<sup>nd</sup> ed), 46 (discussing the meaning of the prohibition that ordinary courts ‘interfere’ with the executive branch). See also M.J. Remington, *The Tribunaux Administratifs: Protectors of the French Citizen*, 51 Tulane L. Rev. 59 (1976) (arguing that administrative courts have controlled the administration, safeguarding citizens’ rights) and A. Mestre, *Le Conseil d’Etat, protecteur des prerogatives de l’administration. Etudes sur le recours pour excès de pouvoir* (LGDJ, 1974) (for the opposite thesis).

<sup>16</sup> C. Harlow & R. Rawlings, *Law and Administration* (Cambridge UP, 2010, 3<sup>rd</sup> ed.), 50. Others have referred to the “explosion” of functions and powers: J. Stone, *The Twentieth Century Explosion and After*, 52 California L. Rev. 513 (1964).

<sup>17</sup>: See C.A. Reich, *The New Property*, 73 Yale L. J. 733 (1964); *The New Property after 25 Years*, 24 Un. San Francisco L. Rev. 223 (1990) (arguing that this has created a new kind of property). For an analysis of public expenditure, see P. Flora & A. J. Heidenheimer (eds.), *The Development of Welfare States in Europe and America* (Transaction publishers, 1981); A. Hurrelmann, S. Leibfried, K. Martens & P. Mayer, *The Golden-Age Nation State and its Transformation: A Framework for Analysis*, in id. (eds.), *Transforming the Golden-Age Nation State* (2007) (observing that the 1960s and 1970s witnessed the ‘golden age’ for the modern State, now declining)

<sup>18</sup>. G. Majone, *The Rise of the Regulatory State*, 17 West Eur. Pol. 77 (1994).

What Jerry Mashaw observed for the US, namely that especially after 1945 there has increasingly existed much more than a cradle-to-grave administrative welfare state, is meaningful also for Europe. By deciding on access to prenatal care, abortion in public hospitals and abortion pills, public administrators affect private, individual choices concerning births. Other decisions affect access to basic education, unemployment and pension schemes. Still another set of decisions may determine whether and how it is possible to “rest in peace”, when cemeteries have to accommodate the building of infrastructures such as highways and railroads, for example <sup>(19)</sup>. This allows us not simply to shed light on the complexity of the machinery of government, but also to rescue the study of administrative law from an oversimplification; that is, that its first phase was dominated by the dimension of authority, while in the new phase the salient feature is the delivery of goods and services to the public. This oversimplified vision of administrative law neglects that the delivery of such services presuppose taxation and the choice of which goods must be delivered to the citizenry and, thus, the dimension of authority. This explains why standards of legality, propriety and fairness are defined and refined in Europe, especially in the context of the codification of administrative procedure, with the goal of preventing misuses and abuses of power by public authorities and making the exercise of power more efficient.

However, as observed earlier, there is considerable diversity of opinion concerning the ambit or scope of administrative law. While some legal cultures focus mainly on the legal control of government power <sup>(20)</sup>, others devote considerable attention to the study of organizational aspects (principles, types of public bodies and relations between them) <sup>(21)</sup> and still others focus on public administrations, as distinct from administrative law <sup>(22)</sup>. Similarly, while some legal cultures focus essentially on what may be called “general” administrative law, which pertains to the fundamental principles and mechanisms of law in this field (how decision-making processes are shaped and external controls carried out), others recognize the importance of the substantive law that applies to a variety of sectors, including urban planning and the regulation of public utilities, and thus provide specialized courses for them <sup>(23)</sup>.

The question that thus arises is whether the diversity of opinion concerning the ambit and purpose of administrative law is simply the inevitable consequence of the diversity of legal institutions or it depends, at least to a certain extent, on ‘national’ schools of thought <sup>(24)</sup>. By referring to the national dimension, my intent is not to deny the existence of distinct, and sometimes very distant beliefs and ideas within the same legal culture, for example between ‘green and red lights’ about judicial

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<sup>19</sup> See J. Mashaw, *Due Process in the Administrative State* (Yale University Press, 1986), 14.

<sup>20</sup> For a discussion of this vision of administrative law, see P. Craig, *Administrative Law*, cit. at 7, 3.

<sup>21</sup> See, for instance, G. Vedel & P. Delvolvé, *Droit administratif* (Puf, 1984, 9<sup>th</sup> ed.), 98.

<sup>22</sup> See, for example, D. Sorace, *Diritto delle pubbliche amministrazioni* (Il Mulino, 2009).

<sup>23</sup> The distinction between general and specific courses is traditional, in particular, in France and Germany: see E. Schmidt-Aßmann, *Besonderes Verwaltungsrecht* (de Gruyter, 2008). It is not completely unknown, though, to US lawyers: see S.A. Shapiro, *Reflections on Teaching Administrative Law*, 43 Admin. L. Rev. 501, at 505 (1991).

<sup>24</sup> For this line of reasoning, S. Cassese, *La construction du droit administratif. France et Royaume-Uni* (Montchrestien, 2000), 139; M. Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, cit. at 4, 45.



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review in the UK, as well as between traditional scholarship and the ‘new administrative scholarship in Germany’<sup>(25)</sup>. My intent is, rather, to call into question the relevance of beliefs and ideas about administrative law, which contribute to shaping our views about what scholars should study and how. Consider, for example, the question whether the UK can be said to have not simply its own administrative law, but a “settled *system* of administrative law”<sup>(26)</sup>. This explains why, together with a heightened attention to legal realities, we must pay attention to theories.

## **B) Three Approaches to Comparative Administrative Law in Europe**

There is a considerable variety of opinions concerning the possibility to compare the laws of European countries. This important point can be demonstrated in two ways, generally and specifically<sup>(27)</sup>. Following the American comparatist Rudolf Schlesinger<sup>(28)</sup>, two approaches in the history of European law can be distinguished: the contrastive and the integrative approach. There is still another approach that emerges in the field of public law, in particular from the work of Otto Mayer, the founder of German administrative law.

Schlesinger’s starting point is a point which is widely shared among historians of law<sup>(29)</sup>. For a long period of time, not only were scholarly writings by European jurists consulted in all parts of the Old Continent, but also reported judicial opinions formed part of the legal materials and authorities that were consulted in that epoch by anyone who sought to ascertain the principles of the *jus commune*. This had important consequences for judicial interpretation. It was accepted that the courts should whenever possible resolve disputes in conformity with domestic law. However, in the case in which the law was unclear or there was no law at all, it was accepted that the courts should make every effort to construe the legal standards for solving the disputes brought before them. As Gino Gorla has shown, this could be done through, for example, the use of the law of another land, provided that there was a sufficient *vicinitas*, that is to say proximity, not merely in the geographical

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<sup>25</sup> See C. Harlow & R. Rawlings, *Law and Administration*, cit. at 12, 22; E. Schmidt-Aßmann, G.F. Schuppert (Hrsg.), *Reform des Allgemeinen Verwaltungsrechts* (Nomos, 1993); A. Voßkuhle, *The reform approach in the German Science of Administrative Law: the Neue Verwaltungsrechtswissenschaft*, in M. Ruffert, *The Transformation of Administrative Law in Europe*, cit. at 4, 89.

<sup>26</sup> G. Anthony & P. Leyland, *Administrative Law* (Oxford University Press, 2016, 6th ed.) 492.

<sup>27</sup> The analysis that will be presented in this section draws on a longer paper, that will be published in the same book, on “*Three Approaches to Comparative Administrative Law*”.

<sup>28</sup> R. Schlesinger, *The Past and Future of Comparative Law*, 43 *American Journal of International Law* 747 (1995).

<sup>29</sup> See R. C. van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (Cambridge University Press, 2001) (pointing out that the *ius commune* developed in the faculties of law. It was thus a common “learned law”. It consisted of two theoretically distinct, but in practice interconnected elements: the canon law of the Catholic Church and the civil law of Justinian’s *Corpus Juris Civilis*). For further analysis, see A.M. Hespanha, *Panorama histórico da cultura jurídica europeia* (Publicações Europa-América, 1999<sup>2</sup>).





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sense, but from the point of view of the analogies between the home and the host legal system (30).

All this changed in a period that varies from one European country to another, in particular since the end of the seventeenth century. The emphasis previously put on natural law faded, due to the imposition of a positivist framework, as well as to the rise of legal nationalism: Latin had long been replaced by national languages and materials of other legal systems were treated as “foreign” law (31). Due to these factors, all those who were engaged in the study and practice of comparative law were compelled to emphasize differences rather than similarities. Perhaps the best way to illustrate this is to refer to Dicey’s well-known critique of French “*droit administratif*”. His use of the contrastive approach emerges clearly in the twelfth chapter of his *Law of the Constitution*, titled “Rule of law compared with *droit administratif*”, where Dicey affirmed that what he calls “a scheme of administrative law – known to Frenchmen as *droit administratif*” is not only absent but even unconceivable in England, because it “rests on ideas foreign to the fundamental assumptions of our English common law” (32).

Dicey’s theory has been criticized by several other scholars on two grounds: because it was anachronistic (33) and because it has been superseded by subsequent developments (34), eventually recognized by himself. However, it still deserves attention for at least three reasons. First, whatever the soundness of the contrast he was pointing out between France and England, Dicey was using a comparative approach for founding his theory, the theory of an administration without administrative law. Secondly, his theory was not simply that administrative law had different scope and nature in England, as opposed to France. Quite the contrary, what Dicey argued was that administrative law is not a feature of the modern State, but only of some States, in the sense that others may not have it and, factually, do not have it. Interestingly, several scholars in England and elsewhere agreed on the theory of the administration without administrative law, which explains why there has been so little consensus amongst public lawyers about the basic contours of their discipline. Finally, Dicey acknowledged the analogies between the French and German legal systems of administrative law.

The importance of such analogies becomes particularly relevant for our purposes, if are considered from a different viewpoint. Unlike Dicey, Mayer argued that French administrative law could be considered not only as an ideal-type, but as a model. He brought this line of reasoning to a somewhat extreme consequence when he affirmed that some principles of public law were shared by European systems. Interestingly, Mayer’s studies initially focused on private law. When he turned to

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<sup>30</sup> See G. Gorla, *Il ricorso alla legge di un “luogo vicino” nel diritto comune europeo* (1973), in *Diritto comune e diritto comparato* (Giuffrè, 1981), 617.

<sup>31</sup> R. Schlesinger, *The Past and Future of Comparative Law*, cit. at 28, 751.

<sup>32</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1959, 10<sup>th</sup> ed.), 328-9.

<sup>33</sup> M. Shapiro, *Courts*, cit. at 1, 112. For similar remarks, see W. Robson, *Justice and Administrative Law* (MacMillan, 1928) and W.I. Jennings, *Review of R. Bonnard, Le controle juridictionnel de l’administration. Etude de droit comparé*, 1 Univ. Toronto L. J. 397 (1936) (affirming that Dicey “misunderstood the nature of French administrative jurisdictions”).

<sup>34</sup> S. Flogeaitis, *Administrative Law et Droit Administratif* (LGDJ, 1986).

public law, though he did not ignore the works of constitutionalists and political scientists, he referred to such works specifically to illustrate the necessity of adopting a more precise and restrictive object of legal study – that of administrative law. It is for this purpose that he devoted great attention to the French system, of which he gave a full account in his book of 1886<sup>(35)</sup>. Not only did Mayer accurately study the French system of administrative law, but he specifically used it as a sort of model for his ambitious project to elaborate a systematic analysis of German administrative law, of which he can be regarded as the founder. This issue was approached by Mayer in clear terms by making the important claim that French administrative law was not simply more structured and systematic<sup>(36)</sup>, but that it could be considered as a model. Mayer pointed out that two phenomena, related but distinct, were legally relevant. One was the influence played by French law on German law either indirectly, when it was adapted to the realities of the host State, or directly, when it was simply copied (“*simplement copié*”)<sup>(37)</sup>. The other was the parallelism of ideas and theories that were developed (“*parallélisme des idées communes à tous les Pays*”) in the various countries of Europe.

Two aspects of Mayer’s systematization are particularly significant for our purposes. First, the manner in which he regards the relationship between national systems of administrative law builds upon the first approach in the following way. According to Mayer, fundamental rights were to be protected against misuses and abuses of power by public authorities because the State itself was subject to the law, but the task of public lawyers was not simply to interpret existing legislation. They had to articulate a system of procedural and substantive principles. Second, as Mayer asserted in the opening statement – the *incipit* – of the preface to the French edition of his treatise, in the various nations that constituted the “old European civilization”, administrative law was based on certain general principles which were everywhere the same<sup>(38)</sup>. Such principles included, in particular, separation of powers and “*Rechtsstaat*”. While this concept did not coincide with the ideal of the Rule of Law, as conceived by Dicey, it largely corresponded to the French concept of «*régime de droit*», which he used throughout his treatise<sup>(39)</sup>. A third principle was that which in Anglo-saxon legal cultures is expressed by the maxim *audi alteram partem*; that is, everyone should be provided with a reasonable opportunity to be heard before either a decision or a measure adversely affecting him is taken. But Mayer held that this right (*droit à l’audition légale*, *Anspruch auf rechtliches Gehör*) was a common feature of judicial proceedings, but it was not a general feature of administrative procedures<sup>(40)</sup>.

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<sup>35</sup> O. Mayer, *Theorie des Französischen Verwaltungsrechts* (Strasbourg Verlag, 1886).

<sup>36</sup> O. Mayer, *Theorie des Französischen Verwaltungsrechts*, cit. at 30, § 1.

<sup>37</sup> O. Mayer, *Detutsches Verwaltungsrecht* (1894), *Le droit administratif allemand* (Giard et Brière, 1905).

<sup>38</sup> O. Mayer, *Le droit administratif allemand*, cit. at 37, 3 (“*le droit administratif ... a pour base certains principes généraux qui sont partout les memes*”). For an analysis of the influence on French administrative doctrines in Italy, see F. Merusi, *La legalità amministrativa tra passato e futuro. Vicende italiane* (Editoriale scientifica, 2016).

<sup>39</sup> O. Mayer, *Le droit administratif allemand*, cit. at 37, § II.6.1.

<sup>40</sup> For an American viewpoint, see the review written by E. Freund, 1 *Am. Pol. Sc. Rev.* 136 (1906) (observing that Mayer’s treatise was “primarily an attempt to construct a scientific system”, rather than a description of the law).



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Mayer's understanding of the commonality of general principles of administrative law was not isolated. In the same years in which he wrote his treatise, Vittorio Emanuele Orlando, the founder of the modern study of administrative and constitutional law in Italy, emphasized the fact that, while the accounts of public law largely diverged from one State to another, their principles were largely the same<sup>(41)</sup>. Few years later, in his treatise on the principles of public law, Maurice Hauriou pointed out that the main change between Roman public law and modern public law was the emergence of administrative justice, viewed as the most important manifestation of the *Etat de droit* (42). For our purposes here, there is no need to subscribe to Hauriou's vision of a system of courts with public law jurisdiction, in order to understand the importance of either the Rule of law or *Etat de droit*, viewed as background ideas that shape administrative law (43). What really matters is that all these eminent scholars thought that the range of general principles could vary, but normally included fundamental legal concepts such as legality and legal certainty, procedural propriety, and rationality.

This confirms the two conjectures that have been proposed at the beginning of this paper: that administrative law in Europe deserves specific attention and that we need a methodology that helps us understanding the existence and significance of some "shared and connecting elements", which can be formulated in legal terms, in the guise of general principles of law and mechanisms for their application. It also permits us to clarify the distinction made initially between European administrative laws and that of the EU. The existence of a set of public law values and general principles of law is one thing, while the deepening of such values by the political institutions of the EU and the development of such principles by courts is quite another. This distinction between these things becomes more evident if we use different words to designate them. Jean Rivero, who has been one of the first public lawyers who examined the comparative method used by the ECJ, in his seminal study on public law in Europe emphasised that by distinguishing what he called the "*droit commun européen*" from Community law (44).

This opens up a range of important issues for examination and encourages us to call for a heightened attention on the soundness of the methods that could be used in order to identify such analogies and differences and to try to make sense of them. Are the main approaches to the comparative study of legal systems adequate for an enquiry of an area that is characterized – *ex hypothesi* – by common constitutional traditions that are, by virtue of this, legally relevant for the EU and, indirectly, for its Member States (45)? Are the traditional methods adequate for such an endeavour? Could it be helpful to take new methods into due account, in particular the method

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<sup>41</sup> V.E. Orlando, *Principi di diritto costituzionale* (Barbera, 1894), 8.

<sup>42</sup> M. Hauriou, *Principes de droit public* (Sirey, 1910), 333.

<sup>43</sup> P. Craig, *Administrative Law*, cit. at 9, 3.

<sup>44</sup> J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif*, in M. Cappelletti (sous la direction de), *Nouvelles perspectives du droit commun de l'Europe* (De Gruyter, 1978), 389.

<sup>45</sup> See S. Cassese, *Beyond Legal Comparison*, 1 *Annuario di studi legislativi* 387 (2012) (for the negative thesis).



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elaborated in the context of the studies on the common core of European private law carried out <sup>(46)</sup>?

### **3. Comparing Administrative Laws: Some Issues in Methodology**

What has been said in Part 2 shows that it is a commonplace that the literature about administrative law has paid only scant attention to other legal systems. Indeed, in the last two centuries the salient features of administrative law have been examined comparatively by several observers. Judicial review of administration is the best known example. Interestingly, after the seminal work of Laferrière <sup>(47)</sup>, another French scholar, Roger Bonnard, observed that, despite the diversity of national legal systems (“*la très grande diversité des systèmes positifs*”), they had some similarities and could thus be included in few ‘groups’ <sup>(48)</sup>. The same approach is shared by some recent comparative works, through with a more articulated classification, though not by all <sup>(49)</sup>. Consider also the autonomy of local authorities. Tocqueville compared the role of central departments and local authorities in France and the U.S. and observed that the former was based on centralization, the latter on decentralization and autonomy. Few decades later, the peculiarity of the English system of self-government was highlighted by a German observer, Rudolf Gneist <sup>(50)</sup>, as well as by Frank Goodnow, an American expert of public administrations <sup>(51)</sup>. That said, it is also necessary to add that several accounts of other legal systems have indulged in a sort of juxtaposition, instead of carrying out a comparison, and have shown an excessive reliance on their institutional design. Criticism of the traditional methodology is helpful, but we must put something in its place. The question that thus arises is whether there are some lessons that can be learned from the comparative studies carried by private lawyers on the basis of the methodology launched by Rudolf Schlesinger.

#### **A) From Juxtaposition of National Laws to Comparison**

As observed by Schlesinger with regard to the field of private law, very often scholars coming from different jurisdictions were simply involved in the compilation and juxtaposition of the various solutions that could be found in their own legal systems, without proceeding to the further step of comparison, properly

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<sup>46</sup> See M. Bussani & U. Mattei, *The Common Core Approach to European Private Law*, 3 *Columbia Journal of European Law* 339, 340 (1997).

<sup>47</sup> E. Laferrière, *Traité de la juridiction administrative et des recours contentieux* (Berger-Levrault, 1896); A. Salandra, *La giustizia amministrativa nei governi liberi* (UTET, 1904).

<sup>48</sup> R. Bonnard, *Le contrôle juridictionnel de l’administration. Etude de droit administratif comparé* (1934; Dalloz, 2015), 125.

<sup>49</sup> See M. Fromont, *Droit administratif des Etats membres de l’Union européenne*, cit. at 4, and F. Bignami, *Comparative Administrative Law*, in M. Bussani & U. Mattei, *Comparative Law* (Cambridge University Press, 2012), 153. But see also M. D’Alberti, *Diritto amministrativo comparato* (Il Mulino, 1992) (discussing the idea of models).

<sup>50</sup> R. Gneist, *Self-government, Communalverwaltung und Verwaltungsgerichte in England* (Julius Springer, 1871).

<sup>51</sup> F. Goodnow, *Comparative Administrative Law. An analysis of the administrative systems, national and local, of the United States, England, France and Germany* (Burt Franklin, 1903).



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considered (52). It ought to be said at the outset that such critique in no way affects the quality of the research that was carried out, sometimes by some of the most distinguished specialists of administrative and constitutional law. What is at issue is, rather, the methodology followed by those works, considered as a whole.

A glance at some of some comparative works dating from the last decades of the nineteenth century to the end of the the twentieth sustains the opinion that the the critical remark made by Schlesinger with regard to private law were valid also in the field of public law. Consider, for example, Laferrière's pioneer treatise of administrative justice. His treatise was an excellent product of a science of law through systematic presentation from first principles. It had the merit, moreover, of paying constant attention to the solutions given by the administrative judge to any particular problem. Interestingly, Laferrière thought it was helpful to furnish a vast portrait of national systems of administrative justice (53). He was well aware of both national particularities and common trends, which he pointed out at the beginning of his analysis. But his was an analysis of foreign laws, in the sense that he described them analytically, without an attempt to carry out a thorough comparison.

Consider also what is perhaps the most extensive work on administrative justice in the last two decades of the twentieth century: the collective work on "*Administrative Law: the Problem of Justice*" (54). Such collective enterprise benefited from the participation of some of the best national experts – including professors Eduardo Garcia de Enterría, Peter Strauss, Georges Vedel, and William Wade - and was not limited to the major European systems of administrative law, but also considered that of the U.S. Each of those individual studies was so accurate and interesting that it still constitutes a good starting point for the first phase of a comparative project; that is, understanding the nature and functioning of the institutions of administrative law. Each of those studies, moreover, was based on the same 'grid', which was divided into four areas: constitutional background, the scope of administrative law, the principles of judicial review, and, finally, enforcement and liability. What is problematic is an evident feature of this collective work, as well as of others. It does not suffice to describe each system of administrative justice individually. It is incumbent on those who intend to compare national systems to explain, more precisely, how such systems work in relation to a certain set of issues. The lack of an adequately developed introductory essay in this collective work only accentuates this weakness.

Consider, now, the book written by Jean-Marie Auby and Michel Fromont on the judicial systems of the six founders of the EC (55). Even a quick look at it shows at

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<sup>52</sup> R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), 11. In a similar vein, see M. Shapiro, *Courts. A Comparative and Political Analysis*, cit. at 2, vii ("comparison consists of presenting descriptions of a number of legal systems side by side, ... with no particular end in view").

<sup>53</sup> E. Laferrière, *Traité de la juridiction administrative* (Berger-Levrault, 1887), book I, 25, where the study of comparative legislation (chapter 2) followed the essential concepts of administrative justice.

<sup>54</sup> G. Motzo (ed.), *Administrative Law: the Problem of Justice*, 3 volumes (Giuffrè, 1990-1991). The initiator of the project was the late professor Aldo Piras, himself an expert of judicial review of administrative action.

<sup>55</sup> J.M. Auby & M. Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté économique européenne* (Daloz, 1971).



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least two important differences with regard to the collective work just mentioned. First, the ambit or scope of their analysis was much narrower, in that they focused on judicial review of administrative action. Secondly, and more importantly, not only did they include a final chapter that examined the common and distinctive traits of the six legal orders selected, but in the previous chapters when examining national institutions, they pointed out either their distinctiveness (for example, Germany's solution concerning actions brought against regulations) of their commonality (in particular, the principles underlying judicial review). Last but not least, as the authors commented in their *Preface*, one reason of their comparative attempt was that firms and individuals doing business within the Six needed to know what were the possibilities of challenge: a practical concern, thus, though their study had a great theoretical interest, as observed by Mitchell<sup>(56)</sup>, who always paid considerable attention to continental systems of administrative justice<sup>(57)</sup>. It is not so much the object of their study but, rather, their method that is important for our purposes. Before explaining how such method could be used with respect to administrative procedures, we must turn critically to the excess of attention for what I called the institutional design of national legal systems.

## **B) Beyond *Legislation comparée*: the Factual Approach**

In addition to the prevailing tendency to juxtapose national systems of administrative law, there is another difficulty with the uses of the comparative method in traditional works. It is the over-emphasis on legislation, as distinct from other sources of law or – to borrow the terminology introduced by Rodolfo Sacco – ‘legal formants’<sup>(58)</sup>.

It is fair to say that this is neither a recent trend nor one that concerns only or mainly administrative law. Indeed, during the nineteenth century and in the first half of the twentieth, under the influence of legal positivism, there emerged an interest in the study of ‘foreign’ legislation<sup>(59)</sup>. It concerned a project within the sphere of legal science, as it was then conceived, the objective of which was to gather and organize knowledge about the main features of national legal systems and to derive some conclusions. This is not the place to discuss whether such project was successful in the field of private law and in every part of Europe (the attempt made by Bentham in the UK, for example, was unsuccessful). What can be said is that, in the field of administrative law, something was missing.

What was missing was that administrative law emerged and developed in all corners of Europe without any legislative framework that was comparable to the solid and wide-ranging architecture provided by civil codes or similarly developed legislative instruments. Nor there were so many *leges speciales* as those that have been enacted by several States particularly after 1945. As a result of this, as many

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<sup>56</sup> D.B. Mitchell, Review of J.M. Auby & M. Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté économique européenne*, 21 Int. & Comp. L. Q 193 (1972).

<sup>57</sup> M. Loughlin, *Public Law and Political Theory* (Clarendon, 1992), 151.

<sup>58</sup> For further details, see § 2 D).

<sup>59</sup> See, for instance, R. Bonnard, *Le contrôle juridictionnel de l'administration. Etude de droit administratif comparé*, cit. at 45, the second part of which was devoted to “legislation comparée”.

specialists have pointed out, not only the formative period of administrative law, but also that of its consolidation was largely based on judge-made law <sup>(60)</sup>. Others have gone further and have argued that administrative law can be properly understood only by analyzing both the main judicial decisions and those of lesser importance that have followed them. Still others, instead, observe that statutes form an increasing proportion of the law applied by administrations and courts. Again, what is being suggested here is not that many important experts of public law simply erred. It is, rather, is that they were inevitably and heavily influenced by the legal culture of their epoch, a culture that emphasized the role and significance of legislation.

The main difference between the traditional approach and the comparative inquiry elaborated and conducted 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. As a result of this, the problems "had to be stated in factual terms" <sup>(61)</sup>. Concretely, this implied that, drawing on the materials concerning some legal systems, Schlesinger formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected; his method, therefore, must not be confounded with the mere consideration of judge-made law. And it turned out that those cases were formulated in terms that were understandable in all such legal systems.

### **C) Private Law, Public Law, and Their Comparative Study**

At this stage of our discussion, it is time to pause a little and to clarify the sense in which the factual approach elaborated by private lawyers can be helpful in the field of public law. Two distinct, albeit related, questions must be considered when determining the relationship about those research projects and that concerning administrative law, the contours of which will be delineated in Part 5. The first is the broader question of the relationship between private law and public law, while the second concerns their comparative study.

The first issue has been debated so many times and from so many points of view that no more than a few quick remarks are required. There are, first, those who deny

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<sup>60</sup> See C. Eisenmann, *Cours de droit administratif* (L.G.D.J., 1982), 481 (for whom the law must be viewed "tel qu'il est, et non pas tel qu'il est promulgué"). For similar remarks about the importance of judge-made law, see E. Schmidt-Aßmann & S. Dagrón, *Les fondements comparés des systèmes de droit administratif français et allemand*, cit. at 16, 527; J. Rivero, *Droit administratif* (L.G.D.J., 1987, 12th ed.) 35; F. Merusi, *Lo sviluppo giurisprudenziale del diritto amministrativo italiano*, in *Legge, giudici, politica. Le esperienze italiana e inglese a confronto* (Giuffrè, 1983), 124. On the failure of Benthamite attempts, see M. Shapiro, *Courts*, cit. at 1, 105.

<sup>61</sup> See, for further comments, M. Rheinstein, *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, 36 *Univ. Chicago L. Rev.* 448, 449 (1969). See also R. Schlesinger et al. *Comparative Law. Cases, Text, Materials* (Foundation Press, 1988, 5th ed.), xxiii (holding that "only an inquiry into actual results reached in response to concrete fact situations will show that those surface differences hide an amazingly large area of agreement among various legal systems").

not just the separatedness of administrative law, but also its distinctiveness, asserting that even the law that applies to the activities that have a strong connection with the supreme functions of the State can be conceptualized by using the categories of private law, as Carl Gerber did in the nineteenth century (62). Others argue that between the standards of fairness and legality that apply to private bodies and those that govern the conduct of public authorities there is a more or less profound difference, though it is a difference of degree, not of nature (63). Yet others adopt a more extreme position, the effect of which is that public law is viewed as being a body of law that is governed by a distinct set of principles, because this is the consequence of a deeper difference that concerns the nature of the interests that must be protected and promoted – collective or public interests, as opposed to individual interests – and also based on a different philosophy.

That said, it is important to be clear about the relationship that exists between the object and method of a comparative research. If we were seeking, say, to carry out a study concerning the delivery of public utilities – an area of law that has been more or less heavily affected, in Europe, by liberalizations and privatizations – one could hardly see how some traditional principles of private law could be excluded. Of course, the more significant the power of dominance exercised by one or few economic operators the more difficult does it become to assume that only private law principles should be deemed to be applicable. For example, it might be natural to think of some procedural principles, such as that of fair hearing for all stakeholders, applying in such cases. Conversely, if we were to focus on a particular, but important province of public law, such as that of public order and security, we would perhaps be induced to exclude the application not only of most, if not all, principles of private law, but also of several principles of public law or at least of some general standards concerning openness and participation, if the “public interest” (itself a crucial concept of public law, and distinct from that of ‘public policy’, which is used by private lawyers) so requires. In our case, the choice of administrative procedure has some consequences that are worth considering. On the one hand, for all types of administrative procedures there are some principles of public law that have been applied to public authorities for some considerable time in most European countries, if not all, including, in particular, due process of law and transparency. It looks reasonable, therefore, to use such principles as a starting point. On the other hand, for every institution which possesses power over the lives of others, either on the basis of a statutory basis or *de facto*, the issues of accountability and liability are particularly intense and there is no reason to exclude that, in addition to the principles of public law, other principles can play a role, for example diligence and good faith. It is of course true that the latter can be regarded as being principles of public law themselves. But this would still require us to

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<sup>62</sup> C. Gerber, *Ueber öffentlichen Rechte* (1852). For a recent account, see J.B. Auby & M. Friedland (sous la direction de), *La distinction du droit public et du droit privé. Regards français et britanniques* (LGDJ, 2004); G.A. Benacchio & M. Graziadei (eds.), *Il declino della distinzione tra diritto pubblico e diritto privato* (Editoriale scientifica, 2016) (asserting that the traditional distinction has lost importance).

<sup>63</sup> D. Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999), 7.





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ascertain whether they operate in the same manner as they do when they are applied to private bodies, when exercising some kind of power over others <sup>(64)</sup>.

Keeping in mind these remarks about the first question, we can consider the other, which concerns the use of the methodology defined and refined by private lawyers. In our earlier discussion, it was already mentioned that such methodology has two main pillars. First, there is a factual approach, in the sense that some hypothetical cases are formulated and submitted to the participants. It is only if such cases are formulated in terms that are understandable in all such legal systems that the participants are requested to explain how they would be solved within each of their legal systems. Of course, there might be solutions that are not entirely explicable on the basis of existing legislation, but depend on judicial interpretation or government practice. This brings us back to the second pillar, the theory of legal formants <sup>(65)</sup>, which refers, in addition to legal sources, to all unwritten elements – including general propositions and particular propositions, the role of the courts and scholarly debates – that concur in determining the outcome of the cases. An adequate awareness of the interplay between such legal formants enriches the methodology used in the project, making it quite different from a mere collection of cases <sup>(66)</sup>.

This is but an oversimplification, which does not render justice to an important theory. However, it allows us to understand some aspects of the methodology that has been developed in the field of private law. The task undertaken by Schlesinger and his colleagues in the context of the Cornell project <sup>(67)</sup> was perhaps more difficult than it might be in our case, because the activities leading to the formation of contracts are less regulated by legal norms than the administrative activities that must be carried out before an authority sets out standards or issues an act or or delivers certain goods <sup>(68)</sup>. The emphasis placed on the role played by the courts and scholarly theories may raise less difficulties in the field of public law, for the reason that for a long time legislation has played a less fundamental role that it did in the field of private law.

Two conclusions can be drawn from these remarks. First and foremost, nothing, in the preceding discussion, suggests that the institutions of private law ought to be regarded as a sort of model for public law. Whether a certain principle or group of

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<sup>64</sup> See, with regard to UK law, see G. Anthony & P. Leyland, *Administrative Law*, cit. at 20, 222 (seeking to identify ‘public law decisions’).

<sup>65</sup> R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. L.* 1 (1991).

<sup>66</sup> The ‘Trento project’ begun in 1997, has involved more than 300 scholars from several nations and has given rise to fifteen collective volumes. For further analysis, see M. Bussani & U. Mattei, *The Common Core Approach to European Private Law*, 3 *Columbia J. Eur. L.* 339 (1997-1998).

<sup>67</sup> See R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, cit. For a discussion of Schlesinger’s (as well as Sacco’s) fundamental contributions to comparative law research, see U. Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence*, in A. Riles (ed.), *Rethinking the Masters of Comparative Law* (Hart, 2001), 238-56.

<sup>68</sup> See M. Shapiro, *The Common Core: Some Outside Comments on*”, in M. Bussani & U. Mattei, *The Common Core Approach to European Private Law* (Kluwer, 2003), 224 (pointing out that the law of contracts largely depends on contractual practices and that these are heavily influenced by US law firms).



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principles of private law can be, and is, used for solving a problem concerning the action or inaction of public authorities is an issue that must be considered factually. Second, it would be naïve to think that the experience gathered in the field of private law can be simply transplanted to the field of public law. What this experience in effects presents is a challenge to the traditional methodology of comparative studies based on the mere juxtaposition of the legal systems chosen for analysis. It confirms our claim that what is required is an approach to the study of public law that goes beyond the more ‘static’ comparison between the principles and institutions of two or more legal systems and, of course, beyond what is suggested by the law in the books (69). What is needed is an empirical understanding of how those principles and institutions live in and shape the legal reality of European legal systems and an adequate understanding of the interplay between the various legal formants.

#### **4. The Study of the Common Core of European Administrative Laws: Basic Choices**

After dealing with these issues in methodology, the agenda which we think must be set for the study of administrative laws in Europe must be clarified in several respects. It must be clarified, first and foremost, with regard to the purposes of our study. Second, a proper justification is needed for choices concerning both the subject – administrative procedure - and the legal systems that will be studied. Finally, as much of the earlier discussion in Part 2 indicates, we must approach this exercise with a high degree of historical sensitivity. Synchronic comparison will thus be supplemented by diachronic comparison.

##### **A) Purposes of the Research**

We may explain the purposes of our study by referring briefly not so much to the traditional distinction between the theoretical and practical purposes of comparative legal research but, rather, to some recent projects in the field of private law. Many of such projects aimed either at harmonizing national laws or at replacing them, for example by way of a European civil code (70). In this cases, legal comparison was not not meant to be a purely scientific endeavour, but was involved law ‘reform’, even though its product was ‘formally a law making activity’ (71). In this respect, there is an analogy with a project in which I took part, that of Renewal (a network of administrative lawyers) on the ‘model rules’ for the administrative procedure of the EU (72). However, this project dealt with the codification of the administrative procedures of the EU and did not, therefore, seek to to harmonize national administrative procedure, even though this is one of those instances where

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69 G. Gorla, *Diritto comparato e diritto comune europeo* (Giuffrè, 1981), 89.

70 See, for example, C. von Bar, *Towards a European Civil Code* (Kluwer, 1998).

71 M. Shapiro, *The Common Core: Some Outside Comments*, in M. Bussani & U. Mattei (eds.), *The Common Core of European Private Law*, cit., 221.

72 The text of the model rules is published on the website of Renewal: [www.renewal.eu](http://www.renewal.eu).



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EU law can have a “spillover” effect for the resolution of analogous problems of a purely domestic character (73).

That said, it is important at the outset to clear the ground by clarifying the main distinctive trait of the comparative inquiry that is presented here. The study that is presented here draws on the experience that I gathered in the context of *Renewal*, for the elaboration of our proposals was mainly based on the comparative analysis of the solutions envisaged by domestic legal systems for the problems the EU is confronted with. However, its purpose is different. It is only the advancement of knowledge about administrative law, viewed as an increasingly important element of European societies, much more than it could be in 1815 or 1915.

This main difference has several implications, three of which are particularly important. Firstly, our task is not so much the discovery that there exists, among the legal systems of Europe, ‘common ground’ or ‘common core’. What we intend to study is the nature and scope of such common core, which implies a series of attempts to delineate and weigh it (74). The method that we are proposing to adopt, therefore, does not coincide with that used by the ECJ (75), not only because – as observed earlier – we have not a normative purpose, but also because we must seek to provide adequate explanation for both common and distinctive traits.

Secondly, precisely because ours is an attempt to understand both common and distinctive traits, not just to put them side by side, due attention must be given to all factors that determine them, including not only legislation and general principles of law, as elaborated by the courts, but also other factors that determine the solutions envisaged, including the theories that shape our views about a given subject. The development, for example, of a certain vision of legal certainty, which permits the withdrawal of an unlawful administrative act or measure, can be seen as a demonstration of the fact that “ideas have consequences”. Another example might be a certain doctrine of “interest” that guides the courts to allow or refuse citizens’ participation in administrative procedures.

Thirdly, and consequently, the question to be addressed is not simply whether national systems of public law subscribe to the same standards of administrative law, such as the duty upon the public administration to give reasons, the duty to hear the addressees of its decisions, and to allow these addressees to have access to the files concerning them. It is also whether, that being the case, similarities are limited to the broad formulations of such principles or do they extend to certain

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73 Whether the ‘model rules’ could have some indirect effects on national legal systems is another question: see G. della Cananea, *A Law on EU Administrative Procedures: Implications for National Legal Orders*, in G. Balazs, L. Berkès & A. Varga (eds.), *Current Issues of the National and EU Administrative Procedures (the RENEUAL Model Rules)* (Pazmany Press, 2015), 283.

74 See O. Kahn-Freund, *Review of Schlesinger, Formation of Contracts. A Study of the Common Core of Legal Systems*, 18 Am. J. Comp. L. 429 (1970) (pointing out that “the hypothesis itself hardly needs verification, but the extent to which it applies, the extent it can be used as a working tool does so very much”).

75 See J.A. Usher, *General Principles of EC Law* (Longman, 1998) and T. Tridimas, *General Principles of EU Law* (Oxford University Press, 2013, 3<sup>rd</sup> ed.).



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mechanisms, in particular to administrative procedure, viewed as a central element of modern systems of public law, an aspect to which we will soon return.

A final caveat is necessary. It cannot be excluded that if an adequate body of knowledge is collected in the framework of this research, it can be helpful also for concrete or practical purposes. Such purposes may be connected first, with legal education *tout court*, that is with the courses to be taught, the materials to be used, and the textbooks to be read by law students; second, with professional education in the field of public administrations, for which there is an increasing need of better knowledge about common and distinctive standards of conduct; third, with the legislative regulation of administrative action. However, these are but potential by-products of a project whose main purpose is to produce accurate scientific results.

## **B) Choice of Subject: Administrative Procedure**

After clarifying the purposes of this research, let us consider its subject more in detail. Two opposite risks must be taken into account: over-inclusiveness and under-inclusiveness.

The risk of over-inclusiveness has been pertinently observed by Jorge Luis Borges in his novel about the Chinese Emperor's cartographers: the good intention to draw an accurate and complete map of the real, with all its complexities and subtleties, may give rise to a work that is too broad to be meaningful for the advancement of knowledge. As Sir Ivor Jennings pointed out in his review of the comparative study dedicated by Bonnard to the systems of administrative justice, "a comparative survey on the whole field of administrative law must necessarily be based on externals" (76). For example, the three volumes on "*Administrative Law: the Problem of Justice*" could not discuss in depth the salient structures of administrative law, due to their broad scope. Conversely, the comparison led by Schlesinger covered the law of formation of contracts, an area that in the French Civil Code was not even mentioned at all, while in the German Civil Code it was covered in twelve sections (77).

The opposite risk is that of under-inclusiveness. This risk was neatly pointed out by Schlesinger. He observed that too often the "topic chosen for comparative exploration [was] too narrow to permit the discovery, within each of the legal systems selected, of the functional and systematic interrelationships among a large number of precepts and concepts" (78). In short, following the metaphor of the map, administrative law may not be as vast the Chinese Empire, but it is certainly a vast province<sup>79</sup>, and it would not be helpful to focus only on the least of its districts.

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<sup>76</sup> W.I. Jennings, *Review of R. Bonnard, Le controle juridictionnel de l'administration. Etude de droit comparé*, cit. at 28, 398.

<sup>77</sup> See M. Rheinstein, *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, 36 Univ. Chicago L. Rev. 448 (1969).

<sup>78</sup> R. Schlesinger, *Introduction* in Id. (ed.), *Formation of Contracts. A Study of the Common Core of Legal Systems*, I, cit., ...

<sup>79</sup> For this metaphor, see M. Taggart (ed.), *The Province of Administrative Law* (Hart, 1997).

In the light of these remarks, the topic that has been chosen for comparative exploration is administrative procedure. There are three main reasons that justify this. First, the emergence of procedures has characterized more or less all European legal systems. Second, the concept of administrative procedure is increasingly legally important. Third, the concept of procedure is not neutral, because there is not a single underlying rationale, but a variety of rationales. The discussion that follows is not exhaustive, of course. It is rather a sketch of the main themes that supported the formulation of the research project.

The first reason can be appreciated from an historical perspective. Not only in traditional societies that recognize a sort of superiority of public authorities vis à vis individuals, but also in a liberal democracy there are “occasions when an official, face to face with an individual, orders him to do something”<sup>(80)</sup> or not do it. In this respect, there was no radical change between the negative and the positive State. What did change was that the courts, initially, and legislators, subsequently, increasingly required administrators to carry out certain activities, including fact-finding and the hearing of affected parties. In particular, the courts sought to ensure that the essential elements of fact were correctly gathered or to ascertain that there were no misuses or abuses of power against affected parties. During the second half of the twentieth century, the emergence of an institutional landscape where State bodies interact with a variety of other territorial or functional public bodies has further accentuated these necessities. It is in this sense and within these limits that it can be said that during the twentieth century administrative activities have become increasingly procedural in nature<sup>(81)</sup>.

Secondly and consequently, the concept of administrative procedure is increasingly important in modern public law. It is through procedures that the law plays a key role in promoting collective goals and protecting individual interests. This explains – together with certain ways to conceive separation of powers - why the courts have developed procedural standards for assessing the validity of administrative acts and measures. It also explains a phenomenon that is often described in terms of codification of administrative procedure<sup>(82)</sup>. But while this description catches an important part of reality, it is reductive, because what characterizes the whole Europe – including the UK - is the growth of primary, secondary and tertiary rules that define and refine standards of procedural propriety and fairness. It is in this sense and within these limits that it can be said that the concept of administrative procedure is “a concept at the heart of administrative law”<sup>(83)</sup>. Whether its importance in the European legal space is increasingly similar to that of the Due

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<sup>80</sup> H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1994, 2<sup>nd</sup> ed.), 309.

<sup>81</sup> For this thesis, see C. Lavagna, *Considerazioni sui caratteri degli ordinamenti democratici*, 16 *Riv. Trimestrale dir. Pubblico* (1966).

<sup>82</sup> See S. Cassese, *Legislative Regulation of Adjudicative Procedures: An Introduction*, 5 *Eur. Rev. Public L.* 15 (1993); J.B. Auby (ed.), *Codification of Administrative Procedures* (Bruylant, 2014).

<sup>83</sup> Neil Walker, ‘Review of Dennis J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*’ [1999] 62 *Modern L. Rev.* 962. For further remarks, see R. Caranta, *Procedimento amministrativo nel diritto comparato*, *Nss. Dig. It.* (UTET, 2008).



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Process Clause in the US Constitution, is another question and a very interesting one <sup>(84)</sup>.

Third, as I observed elsewhere more in detail, an administrative procedure can, and does have, a variety of functions. It is generally regarded by public lawyers as a sort of shield against improper exercises of discretionary powers, coherently with the ideals of both a “thick” conception of the Rule of law and a “thin” conception, in the logic of *Rechtsstaat*. But it can also be viewed as an instrument for making complex administrative apparatuses work. And it can even be regarded as a instrument of political control over the administration <sup>(85)</sup>. In this respect, administrative procedure is a flexible tool.

A possible objection must now be considered. The objection is that in this way our research would not be connected with what is perhaps the more traditional subject in comparative studies of administrative law, that is to say judicial review of administrative action. There are, however, two possible replies to this objection. First, a closer look at this literature reveals that it has focused more on the organization of justice than on the services it provides. Moreover, more than a century after Laferrière’s treatise, it would be necessary to consider alternative forms of dispute resolution <sup>(86)</sup>. Second, while the nineteenth century has been characterized by the adjustment of existing legal remedies against public authorities or the introduction of new ones, especially after 1950 there has been a growing codification of administrative law in the field of administrative procedure. Thus, arguably, both common and distinctive aspects can be identified more easily and clearly.

That said, it remains to explain how the caveat against under-inclusion and over-inclusion will be taken into account in concrete terms. While an analysis of the typology of administrative procedures in several European jurisdictions would largely exceed the task of a study to be conducted within five years, the topic chosen for comparative exploration should not be too narrow – as observed by Schlesinger <sup>(87)</sup> – to permit the discovery of the interrelationships among many precepts and concepts. In light of this observation, first, an attempt will be made to understand whether there exists, among the legal systems of Europe, ‘common ground’ or ‘common core’, relating not only to some general principles law, including the Rule of Law and Due Process, but also to some operational mechanisms, such as administrative procedure. To illustrate two other lines of research, it can be helpful to refer to two important collective works published by the Max Planck Institut of Heidelber more than fifty years ago. While one of such studies was about “*The State*

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<sup>84</sup> See A. Massera, *Introduzione* in A. Massera (ed.), *Le tutele procedimentali. Profili di diritto comparato* (Jovene, 2007), 5 (affirming that due process has a quasi-constitutional status in many EU countries).

<sup>85</sup> G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (OUP, 2016), 27.

<sup>86</sup> See A. Le Sueur, *Administrative justice and the rise of informal dispute resolution in England*, in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe*, cit. at 4, 243 and S. Boyron, *Mediation in Administrative Law: the Search for Experimental Comparative Law*, ivi, 283.

<sup>87</sup> See M. Rheinstein, *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, 36 Univ. Chicago L. Rev. 448 (1969).

and *Public Property*”<sup>(88)</sup>, we will examine some administrative procedure that interfere with private property, including expropriation and requisition, with a focus on procedural propriety and fairness, leaving aside other aspects, such as the right to compensation. Similarly, while another colloquium organized by the MPI concerned the liability of the State for the illegal conduct of his organs, we will make an attempt to examine government liability from a narrower point of view; that is, excluding issues concerning legislation and jurisdiction and focusing on exercises of power within administrative procedures. The same focus will be used to look at judicial review of administrative action, in the sense that attention will be devoted essentially to the standards of procedural fairness and propriety that are set out by the courts for the exercise of their review. A final sub-topic is one that might provide a vision of administrative procedure quite different from traditional adjudication; that is, mass administrative justice in areas such as health and public housing<sup>(89)</sup>. What is particularly interesting in this case is not so much the emergence of the positive State, as distinct from the limitation of rights. It is, rather, the question whether the traditional procedural constraints on the exercise of power – the right to be heard, the giving reasons requirement, and the like – equally apply or they apply in a more limited or distinct manner, because of another imperative, that to ensure the efficient and prompt implementation of public policies.

### C) Choice of Legal Systems

Another crucial choice regarded the legal systems to be considered. In this respect, three aspects had to be considered: the focus on Europe, the choice of the national legal systems and, last but not least, the desirability of including a non-State entity such as the EU.

From the first point of view, the choice of Europe is justified by not only by the existence of common roots and values<sup>(90)</sup>, but also by both the similarity and diversity of solutions concerning the ways in which public authorities and other entities perform their functions and exercise their powers and, perhaps more evidently, the diversity of conceptual tools used by jurists. Additionally, this part of administrative law is increasingly influenced by the principles enounced by regional organizations. There is, first, a Europe of rights, based on the ECHR and thus much wider than the EU, that goes from the Atlantic to the Urals<sup>(91)</sup>, let alone the other regional institution dealing with security, the Organization for co-operation and security in Europe (OSCE). There is, second, a European legal space, in which some

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<sup>88</sup> *Staat und Privateigentum* (1960).

<sup>89</sup> Clearly, all these are issues that can hardly be regarded as being “ethically, socially, and politically near the point of absolute indifference”, unlike those that – according to Otto Kahn-Freund (cit. at 64, 430)– were dealt with by the team led by Schlesinger.

<sup>90</sup> See, for example, the third indent of the Statute of the Council of Europe (1949): “Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”. On the values of the EU, see J. Rideau, *Les valeurs de l’Union européenne*, *Revue des affaires européennes*, 329 (2012).

<sup>91</sup> See, in particular, A. Stone Sweet & H. Keller (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008); B. Stirn, *Vers un droit public européen* (Montchrestien, 2012).

States – including Norway and Switzerland - have joined the Members of the EU<sup>(92)</sup>. There is, finally, the EU, for which it is disputed whether it is closer either to a federation or to a confederation<sup>(93)</sup> and even the sense in which it can be regarded as a ‘union’ of legal systems. What is not disputed is that it has the effect of “bringing the public law systems of the its Member States closer together”<sup>(94)</sup>. However, whilst being based on some shared values and principles of public law, the EU must recognize national constitutional traditions, especially those that contribute to shape the constitutional identity of each State<sup>(95)</sup>. This reinforces the arguments brought by Carol Harlow against the excesses of harmonization; that is, that “diversity and pluralism are greatly to be preferred”<sup>(96)</sup>, though this does not exclude the mutual learning between legal cultures.

While all this confirms that the choice of Europe is particularly suited to an inquiry on the institutions covered by administrative law, it leaves open the question of which legal systems should be selected. Schlesinger’s methodological remarks provide again a helpful starting point. For a long time, he argued, the comparative study of public administrations and their laws was confined to the two main political systems of Europe, France and the UK, while more limited attention was devoted to Germany, Italy and few other countries. Of course, no research project escapes from limits of budget and workforce. But within such limits, we strongly believe that an effort must be made to go beyond the circle of more ‘influential’ legal systems. There are good reasons, general and specific, for this. From a general point of view, for all the importance of England and France, they have several important common and distinctive elements with other legal systems, including Ireland and Scandinavian countries for the former and Italy, Portugal and Spain for the latter<sup>(97)</sup>. Moreover, even though Dicey and others have been inclined to consider the German administrative system closer to the French than to the English, it differs from the former in a variety of aspects. A word should be said, in particular, about the importance of Austrian law, in itself and for the group of countries that are traditionally included in Central and Eastern Europe. The jurisprudence of Austrian imperial courts has variably influenced the structures of public law and the significance of Austrian codification of procedures cannot be neglected<sup>(98)</sup>.

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<sup>92</sup> For this concept, see M.P. Chiti, *Lo spazio giuridico europeo*, in *Mutazioni del diritto pubblico nello spazio giuridico europeo* (Clueb, 2003), 321; A. von Bogdandy, *National legal scholarship in the European legal area – A manifesto*, 10 I-CON 614, 618 (2012).

<sup>93</sup> See A. von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 Colum. J. Eur. L. 27 (2000) and W. Wallace, *Less than a federation, more than a regime: the Community as a Political System*, in H. Wallace et al. (eds.), *Policy-Making in the European Community* (Wiley, 1983), 43, respectively.

<sup>94</sup> P. Craig, *Administrative law*, cit. at .., 324.

<sup>95</sup> See Article 67 (1) TFEU, according to which within such area there ‘shall’ be respect for fundamental rights and the different legal systems and traditions of the Member States. See also Article 82 (2), according to which EU rules on judicial cooperation “shall take into account the differences between the legal traditions and systems of the Member States”.

<sup>96</sup> C. Harlow, *Global Administrative Law: the Quest for Principles and Values*, 16 *European Journal of International Law*, 207 (2006).

<sup>97</sup> M. Fromont, *Droit administratif des Etats membres de l’Union européenne*, cit. at 4, 15.

<sup>98</sup> R. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Study*, cit., 68 (for the remark that “both the quantum of influence of a legal system and the quality of its contribution will vary from subject to subject”).





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An effort must be made, moreover, to include countries with an adequate geographical distribution, with varying legal systems, at varying stages of development, and with a different pattern of exchanges with other systems. Consider, for example, Poland, Hungary and Roumania. A non-EU State, Serbia, with its strong influence of the law of the former Yugoslavia, is another promising example. Considered as a whole, Central and Eastern Europe is central to our study for a twofold reason. On the one hand, it is interesting to see whether certain structures and processes that pre-existed the inclusion of those countries in the area of influence of the USSR survived or re-emerged before the dissolution of socialist regimes<sup>(99)</sup>. On the other hand, it is even more interesting to understand the choices that have been made after the fall of the Berlin Wall. For instance, did they look at their Western neighbours before codifying administrative procedure? Did they opt for a system of judicial review of administration that is entirely in the hands of ordinary courts or did they set up administrative courts? And, independently from this, which standards of review are followed by their courts?

These remarks make clear the reasons for most of the selections and omissions that characterize our research. From the first point of view, we have included legal systems that can be said to be representative not only of the systems of civil law and common law that are traditionally examined by comparatists, but also of other regions of Europe, though not all of them. There is, however, an important point of method, that should not be neglected. As observed earlier, the main task of our study is not so much the discovery that there exists, among the legal systems of Europe, 'common ground' or 'common core', but the nature and scope of such common core. The question that thus arises is whether, in addition to selecting a group of European countries on the basis of the criteria just explained, we should also select some non-European countries, in order to see if certain commonalities that exist - *ex hypothesi* - in Europe can be identified also elsewhere, though with in a different guise or with different effects. This is probably one of those cases in which what really matters is not so much the number of countries selected for a comparison, but their appropriateness in terms of both similarities and dissimilarities. Both Latin-American countries, for their traditional ties with Europe<sup>(100)</sup>, and countries that are geographically closer to Europe, for instance in the Mediterranean area, could suit to this purpose.

Finally, there is another important trait that differentiates our research from those which have been carried out in the field of private law. It is the consideration of non-State legal entities in a comparative project of this type. We have thought that a study in the field of public law in Europe could benefit from a consideration of EU law, with the caveat that we are less interested, in this respect, in the law that the EU applies to its Member States than to the law that applies to its institutions. What characterizes this 'new legal order' is not just the kind of distinction between public and private law that was drawn from civilian systems. It is also the fact that since the beginning the 'new legal order' had its own administration, with strong

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<sup>99</sup> See, for example, M. Wiersbowski & S C. McCaffrey, *Judicial Control of Administrative Authorities: A New Development in Eastern Europe*, 18 Int'l Lawyer, 645 (1984).

<sup>100</sup> See, for example, E. Garcia de Enterría & M. Clavero Arevalo, *Prologo*, in *El derecho publico de finales de siglo. Una perspectiva iberoamericana* (Civitas, 1997), 15 (pointing out the strengthening of the 'Estado de derecho').



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regulatory powers over business, and its own administrative law <sup>(101)</sup>. This challenges the idea according to which administrative law is consubstantial to the State, and raises interesting issues about the origins and adaptations of the principles and rules that govern the conduct of EU institutions.

## **D) Synchronic Comparison: Operational Aspects**

After clarifying the goals and object of our comparative research, we must now turn to its methodology. Its antecedents in the field of private law have been briefly illustrated in the previous sections, and we have touched upon some of the problems that it can raise in the field of public law. It is, however, helpful to consider the operation of our ‘synchronic’ comparison more in detail, and this paragraph will be devoted to that task, while the following will deal with our ‘diachronic’ comparison. It is necessary, once again, to keep distinct some different issues which arise from an operational point of view. They concern, in particular, the factual analysis, the use of legal formants and, last but not least, the choice of experts.

It is important, first and foremost, to be clear about the formulation of the cases on which our synchronic comparison is based. For each of the sub-topics previously indicated, our comparative experiment does not begin with a questionnaire that is sent to the participants together with a request to follow it when writing their national reports, as has been done, for example, for the symposium on administrative law organized by a leading comparative journal in the 1950s <sup>(102)</sup>, as well as for the symposia organized by the Heidelberg’s MPI during the 1960s. Concretely, after one or several editors have produced a first draft of a factual questionnaire (with a number of cases ranging from ten to fifteen), this is sent to the participants, with a view to be discussed during the seminar. The main task of the seminar is precisely to ascertain whether those cases make sense within all the legal systems selected. It is only after the cases have been discussed, and there is an agreement as to whether or not they make sense in all the legal systems to be covered, that the questionnaire is approved <sup>(103)</sup>. It is, then, sent to all participants, who will explain how those hypothetical cases would be solved within their legal systems and the underlying reasons, which often will require them to refer not only to existing legal sources, but also to other elements (or legal formants), including doctrinal opinions, judicial trends, bureaucratic practices, and the like. This will provide a key to understand the role played by history as well as by ideas and beliefs about public law. Finally, the national reports form the basis of the comparative report, which is sent to all participants.

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<sup>101</sup> Interestingly, already in the 1960s the MPI’s research on judicial review included a report on the European communities: *Judicial Protection Against the Executive* (Oceana, 1969-71, III vol).

<sup>102</sup> *Questionnaire on Administrative Law*, 2 Int. & Comp. L. Q. 217 (1953). The first article was published by professor Herlitz on Sweden. Among the other articles published there was that of Bachof on Germany and of Miele on Italy.

<sup>103</sup> The cases in the questionnaire should be drafted as short plausible stories, whose ending always poses the same questions: how would this hypothetical case be solved under the concerned legal system? What legal rules would be applicable to the case? What legal remedy, if any, can be pursued by the characters of the story to obtain justice? Which meta- or extra-legal factors are important in determining the final outcome?



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What has just been said explains concretely what I meant when I argued that what is needed is not just a set of individual studies, but a collective work. Only a collective work, arguably, can throw light on both common and distinctive aspects of legal systems from the point of view of the daily machinery of law. However, this also raises a delicate issue, which concerns the choice of legal experts. On the one hand, it is self-evident that it is necessary to have at least one national expert for each legal system selected for our comparative experiment. On the other hand, as Schlesinger and his colleagues have convincingly argued, if it is true that a lawyer can really be an expert only of the legal system of which he or she has a constant and direct experience, it is also true that without any idea about how other legal systems work it might be very hard to engage in a fruitful discussion. This is a serious issue, the importance of which cannot be neglected. However, in the last decades there has been a growth of bi-national and multi-national groups and networks. The former include, for example, the Italian-Spanish seminars of administrative law (meeting every two years since 1964), the German-Italian workshops of public law (meeting every two years since 1971), the Franco-German seminars of administrative law (meeting since 2005). The latter include, in particular, the European Group of Public law, founded in Athens in 1991, with many ramifications, the *Societas Juris Publici Europei*, and, more recently, ReNEUAL. It can be said, therefore, that there is a certain number of public lawyers with a constant interest for comparative experiments and with some knowledge of other legal systems, though the risk of misunderstanding can never be excluded.

## **E) Diachronic Comparison**

Finally, more than a word should be said with regard to a parallel avenue of our study; that is, the retrospective on some salient aspects of the evolution of administrative law in Europe. The underlying idea is that an adequate comparison must be not only synchronic, but also 'diachronic'. More precisely, synchronic comparison should go hand in hand with the diachronic comparison, that is, with the study of how institutions and rules have changed through time<sup>(104)</sup>.

History is of crucial importance for our research and for several reasons. First, although we neither intend nor can, as public lawyers, carry out an exhaustive historical analysis of each of the general principles that we have selected, we do not simply think that an understanding of the antecedents of our administrative institutions is important, because it enables us to comprehend how our present institutions have developed, but that it is necessary because of the lack of accurate comparative knowledge about some salient aspects of administrative law in the course of the last two centuries. For example, while there is no lack of studies about the influence played by the institutional design of the French system of administrative justice elsewhere, either as a sort of model to be replicated or as a simple source of inspiration, scant or no attention has been paid to the influences that might have been exerted by the case law of the powerful French administrative judge in the formative years of other judicial institutions.

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<sup>104</sup> R. Sacco, *Legal Formants (I)*, cit., 24-26.



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Second, as Gino Gorla observed rephrasing Maitland's opinion that "history involves comparison" <sup>(105)</sup>, "comparison involves history" <sup>(106)</sup>. History (of law) shows, in particular, not only that ideas and theories about the law have been largely transnational, but that often legal principles and institutions originating in one nation have been influential elsewhere. History also gives a sense of the relativity of cultural exchanges. For instance, English public law has been a model for the initial design of some fundamental values of US public law, including due process of law. However, American legal institutions have evolved across the centuries and now provide, according to several observers, a model for those of England in this respect.

We do not wish to underestimate the complexity of this exercise, not to pretend that we may cover all significant periods of the history of administrative law in the more than two centuries that followed the French Revolution. The task of confronting the development of administrative procedure across Europe is a complex task. But there is much to be learned, for example, from the development of judicial doctrines about infringements of essential procedural requirements and evident errors of fact after 1890 and in the period of the *Belle époque*. Furthermore, and as noted earlier, the influence of the Austrian legislation on administrative procedure in other European countries in a period of the history of Europe (1924-1958) that is generally neglected in the 'standard' accounts of public law can enrich our understanding of how legal cultures interact notwithstanding important political changes and differences <sup>(107)</sup>. We may probably find not so much 'new' evidence, but we might be able to use such evidence to give a more interesting and more fruitful look at the interaction between legal cultures in Europe.

It is in this sense that the method we will follow is both comparative and historical. The method employed will be comparative in the sense of confronting problems and solutions in a variety of European jurisdictions, in order to discern common and distinctive aspects, with a view to ascertain whether a sort of common core exists. Our method will be historical, not only in the sense of being rooted in the relentless dynamics of government, but also in the sense of seeking to identify the most significant exchanges between and across legal cultures.

## 5. Final remarks

No attempt will be made to summarise here the entirety of the preceding argument. What is important is to recall briefly, in negative terms, the problems which has been analysed and, in positive terms, the solutions that have been formulated.

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<sup>105</sup> F.W. Maitland, *Why the History of English Law Was not Written*, in *Frederic William Maitland Historian. Selection from his Writings* (ed. by Robert Livingston Schuyler, 1960), 132 (affirming that "History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history" and that "an isolated system cannot explain itself").

<sup>106</sup> G. Gorla, *Diritto comparato e diritto comune europeo*, cit. at 44, 39.

<sup>107</sup> For further details, see L. Adamovich, *Handbuch des österreichischen Verfassungsrechts* (Springer, 1954), I and, more recently, H. Schaffer, *Administrative Procedure in Austria. 80 Years of Codified Procedure Law*, 17 *Eur Rev Public L* 871 (2005).



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The two approaches that have dominated, for almost one century and a half, the discussion about the comparative study of administrative law in Europe can be seen in the terms of the distinction drawn by Schlesinger between the contrastive and integrative approach. It is precisely because they are opposite approaches that they tend to marginalize or even exclude the analysis of certain aspects or issues, that are considered as being more distant from what scholars should study <sup>(108)</sup>. More importantly for our purposes, there are some difficulties with such approaches from the point of view of administrative law in Europe. One difficulty posed by both approaches is the overemphasis on institutional design. Another, and more serious one, is that too often what is carried out is a juxtaposition of the legal systems selected rather than a comparison.

In positive terms, this paper argued that it is not only scientifically but also practically important to seek to distinguish the distinctive traits of national administrative laws and their connecting and shared elements. Topics of this nature, including the procedural guarantees of private property and the withdrawal of unlawful administrative acts, will be examined in the context of the research that is presented here.

A research of this type is inevitably a collective enterprise, as opposed to the more traditional approach, and an enterprise for which there are some interesting lessons to learn from the experience gathered in the field of private law. For those who believe that public law is founded on different structures, not only because it serves a different typology of interests, but also because it reflects a different philosophy, it might be difficult to accept it. For this reason, it is important to repeat that our comparative experiment is not based on the assumption that the structures of private law can, or should, be seen as a sort of model for the construction of public law but, rather, that there are some things to learn from the researches carried out on the common core of modern systems of private law. These lessons, it is argued, can be very helpful for a synchronic comparison, which addresses current issues that are more or less common to a plurality of legal orders in Europe.

However, I am aware that, for a study in the field of administrative law, there is another important necessity, namely that to consider at least some of our administrative institutions in a historic perspective. For this reason, our study will include a diachronic comparison, which may shed some light on aspects that have been overlooked in the past, including the elaboration of standards of judicial review of administrative action.

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<sup>108</sup> See F. Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 Am. J. Comp. L. 859 (2011) (observing that the categories that guide comparative administrative law remain similar to those used at the founding of the discipline, in the late 1800s).