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A New Comparative Research on Administrative Laws in Europe: Implications for Latin America

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A New Comparative Research on Administrative Laws in Europe: Implications for Latin America*

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Abstract

There is diversity of opinion concerning the importance of context for administrative law. Some think that it is entirely shaped by culture and history. Others point out the importance of functional considerations and cross-fertilization. This paper delineates the theoretical background and operational methodology of a research that aims at ascertaining whether such connecting elements, or a "common core", exist in European administrative laws and, if so, whether they can be formulated in legal terms, as opposed to generic idealities. The paper is divided into two parts. In Part I, I briefly illustrate the weaknesses that beset the traditional uses of the comparative method in the field of administrative law. In Part II, I discuss the reasons why this research, especially in view of its focus on administrative procedure, might be interesting for the future works concerning the administrative laws of Latin American countries.

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1. Introduction

There is diversity of opinion concerning the importance of context for administrative law[1]. Some argue that it is entirely shaped by culture and history. Others point out the importance of functional considerations and cross-fertilization. This paper contributes to the debate in two ways. First, it illustrates a new comparative research concerning administrative law in Europe. Second, it seeks to promote a dialogue with Latin American public lawyers. The paper is thus divided into two parts. The first examines 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. In particular, the paper argues that an attempt must be made in order to understand how both similarities and difference characterize the administrative laws of Europe. The second part considers whether such an inquiry can be interesting also for public lawyers in other jurisdictions. Attention is devoted, in particular, to some issues that can be interesting for a Latin American audience. Included among such issues is the existence of a sort of common legal patrimony, as well as the suitability of administrative procedure for legal comparison.

2. A New Research on European Administrative Laws

As noted earlier, the new comparative research concerns administrative law[2] and aims at ascertaining whether and to what extent there exists a common ground, or a "common core" of European administrative laws. The goal of this paper is not to indicate the arguments in favour of this approach. My views on these matters have been set out on an earlier occasion[3]. It can be helpful, rather, to explain three

[1] See P. Craig, *Comparative Administrative Law and Political Structure*, 37 Oxford J. L. St. 1 (2017) (for the remark that "comparative administrative law reveals commonality and difference between the systems studies. This is axiomatic and self-evident"). See also, among less recent works, J. Rivero, *Cours de droit administratif comparé* (Les cours de droit, 1954-55).

[2] There are many definitions of this field of study and they evolved across the last 150 years, as the scope of administrative law widened and several public functions were carried out by private bodies under the supervision of the State. The definition used at the beginning of this paper is broader the traditional picture according to which administrative law is the "law relating to the control of government power" (for further analysis, see P. Craig, *Administrative Law*, 5th ed. (Sweet & Maxwell, 2003) 3; it is also broader than that of G. Vedel – P. Delvolvé, *Droit administratif* (1984, 9th ed.), 98, identifying administrative law as the law that relates to the administration).

[3] See G. della Cananea & M. Bussani, *The Common Core of European Administrative Laws: A Framework for Analysis*, 26 Maastricht J. Eur. & Comp. L. 217 (2019).

features of the new research. They concern the purpose, the object and the methodology of the comparative research on the administrative laws of Europe.

A) The purpose of the research

I have observed earlier that there is variety of opinion about administrative law. To some extent, this is inevitable, because there are different visions of the nature and objectives of administrative law, which is inherently political. We must be aware of this, as well as of the risk that a comparative research on Europe has an harmonizing bias. This issue will be analyzed in two stages. I shall consider the difficulties surrounding comparative studies that are explicitly aiming at harmonizing national laws in one way or another. I shall then illustrate the meaning of a research for the advancement of knowledge and the difficulties with this concept.

There is an increasing body of comparative surveys promoted by international institutions, such as the Organization for Economic Co-operation and Development (OECD), which examine national legal institutions, in order to assess their effectiveness and transparency, often with a view to making them more attractive to trade and foreign investments[4]. These descriptions are helpful, because they gather and disseminate knowledge about 'best practices'. There are, however, two difficulties with this approach. First, the underlying premise that it is possible to identify an "optimal" set of rules is, to say the least, very questionable[5]. Second, it is even more questionable whether a legislative technique – codification - that has been successful in a national context may be used in a supranational context. This difficulty becomes evident when considering the project of a common frame of reference for national private laws[6]. This type of approach is inevitably centred on legal rules, as distinct from other components of legal systems, and its purpose is clearly normative. This project received both consent and criticism. In particular, there is a cautionary note in the literature, which focuses not only on the more or less explicit legislative intent, but also on the underlying assumption, that a comparative research should have a practical

[4] On the importance of the OECD for administrative law, see J. Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & Cont. P. 189 (2005).

[5] For further remarks, see O. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53 Revue internationale de droit compare (2001), 279 (criticizing the idea of assembling the best practices).

[6] See C. van Bar *et al.*, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (Sellier European Law Publishers, 2009).

purpose of this type[7]. It might be said, however, that there is nothing new in this. Indeed, at least since the early nineteenth century national reformers have sought to learn from their neighbours. Consider, for example, judicial review of administration. While in other countries several reformers decided to follow the French model, the drafters of the Belgian Constitution in 1831 opted for the English model, based on review by the ordinary courts of the land. They were followed by the Italian reformers of 1865, who literally replicated the words of the Belgian Constitution.

The question could, therefore, be converted into another one; that is, if not only legislative projects but also those aiming at ascertaining whether there is a common core may easily turn into some kind of normative exercise[8], how is it possible to attenuate this risk? A fair manner to answer to this question is to distinguish between direct and indirect goals. In our case, the purpose of the research is the advancement of knowledge. Our purposes are essentially empirical and interpretative. The research must be empirical, in the sense that it must be rooted in an understanding of the functions which administrative law is expected to perform in relation to the interplay between the individual and collective interests protected by a given legal order. It must be interpretative, too, in the sense that the rules of administrative law must be confronted with the real world, and with a sense of the changing needs of society through time. It is important to repeat that our intent is to seek to make sense of the factors – not only positive norms, but also judicial doctrines and 'background theories' - that determine the solutions envisaged, for example when the addressee of an administrative decision adversely affecting his or her interests claims that the underlying reasons were not disclosed by the administration or contests the possibility that it does so subsequently, during the judicial process against the contested measure.

That said, 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*,

[7] See N. Jansen & R. Zimmermann, *"A European Civil Code in All But Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference*, 69 Cambridge L. J. 98 (2010) (discussing its technical and political aspects). See also P. Legrand, *Against a European Civil Code*, 60 Modern L. Rev. 44 (1997) (for the remark that, paradoxically, while nineteenth civil codes broke the unity that had emerged in previous centuries, at the end of the twentieth century some thought that legal unity could be attained by way of a code). The author of this paper has been involved in a different exercise, consisting in the drafting of the 'model rules' for EU administrative procedures. The English text is published on the website of the network: www.renueal.eu. The same text has been published in six other languages, including Italian: see G. della Cananea & D.U. Galetta, *Codice ReNEUAL del procedimento amministrativo dell'Unione europea* (Editoriale scientifica, 2016).

[8] See, however, M. Shapiro, *The Common Core: Some Outside Comments*, in U. Mattei & M. Bussani (eds.), *The Common Core of European Private Law* (University of Trento, 2003), 229 (arguing that both the common core and other projects are part of the harmonization agenda).

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.
In sum, the goal of this comparative research is neither to tutor public lawyers on the most appropriate theory of administrative action which all could employ or on the proper legal framework for administrative procedures, nor to suggest a set of 'model' rules. We are interested in ascertaining whether, in the field of public law, there are both differences and some common and connecting elements within legal systems which are part of the same legal tradition and to seek to understand the underlying reasons.

B) The Choice of Administrative Procedure

The choice of subject is particularly important for a comparative inquiry. The question that thus arises is which criteria can guide this choice. Three criteria will be discussed: inclusiveness, topical development, and the existence of both similarities and dissimilarities, on the assumption that it is this that prompts legal comparison.
Inclusiveness is an important requisite, in the sense that the subject must be neither too narrow nor too wide, because this would not permit the discovery of significant elements or would it make too difficult. This suggests that the vast "province of administrative law"[9] must be considered from a particular angle. The choice of administrative procedure reflects not only traditional concerns for the requirements of the rule of law; that is, the constraints that are imposed on the exercise of official power, in order to protect the rights and interests of individuals and groups, thus ensuring the legitimacy of governmental processes. It also reflects the concern for the proper and prompt discharge of governmental functions and processes, a point to which we will return later in Part III.
Meanwhile, we may wonder whether another key topic, judicial review, might be preferable. A negative answer is justified by the second criterion; that is, topical development. Judicial review of administration was at the heart of the comparative

[9] See M. Taggart, *The Province of Administrative Law Determined?*, in M. Taggart (ed.), *The Province of Administrative Law* (Hart, 1997), 2-3 and J.M. Beermann, *The Reach of Administrative Law in the United States*, *ivi*, 171.

studies carried out not only by Dicey and Laferrière in the last two decades of the nineteenth century and in the first decade of the twentieth century, but also by Bonnard in the 1930s[10], as well as by Auby and Fromont in the early 1970s[11]. However, for all its importance, judicial review only provides an indirect vision of administrative action, not a direct one. Moreover, all experts of administrative law are aware that there are some types of governmental activities for which judicial challenges are less likely to be brought, due to the nature of the interests at stake or to judicial self-restraint in some public affairs or with regard to certain types of measures.

A quick retrospective shows the increasing importance of procedure. Both the proceduralization of administrative action[12] and the related necessity of canons of conduct for public authorities have emerged, sooner or later, in all corners of Europe, but they have taken a different shape depending on national traditions and policy preferences. Everywhere, administrative action has become more complex as a result of the increasing number of interests, often different if not opposite, at stake, as well as of the increasing variety of holders of such interests. A first question that arises is thus whether, beyond the innumerable procedures that exist for both adjudication (including orders, licenses and authorizations, sanctions) and rule-making (including both rules and interpretative statements), there is a concept of administrative procedure and, if so, which consequences flow from it[13]. The development of standards of conduct, often in the guise of process rights, has had another important consequence. The canons of conduct set out by administrators have been regarded as insufficient. Everywhere, such canons of conduct have been refined by the courts. Somewhere, legislators have done so, in the context of general statutes called administrative procedure acts[14]. When they have done so, however, a difference has emerged between statutes that simply aimed at defining some principles and standards and more complex legislative documents with numerous and detailed prescriptions. Elsewhere, notably in England and Belgium, there is no codification. There are, however, some legislative rules, for example with regard to access to documents. There is also an increasing recourse to government guidance through guidelines and policy[15].

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[10] See R. Bonnard, *Le contrôle juridictionnel de l'administration. Etude de droit administratif comparé* (1936; Dalloz, 2006).

[11] J.M. Auby & M. Fromont, *Les recours contre les actes administratives dans les Pays de la Communauté économique européenne* (Dalloz, 1971).

[12] For this thesis, see C. Lavagna, *Considerazioni sui caratteri degli ordinamenti democratici*, 16 *Riv. trim. dir. pubb.* (1966).

[13] For further remarks, see G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (2016), 27.

[14] 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).

[15] See P. Craig, *Perspectives on Process: Common Law, Statutory and Political*, Public Law 276

This is not to contend that canons of conduct and process rights can be regarded as sufficient within public law. Especially after 1945, many studies have revealed the difficulties of sustaining any purely process-related conception of public law and democracy. 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"[16]. It is, at the same time, a concept that looks particularly suitable to a comparison, for it is appears to be characterized by both similarities and dissimilarities.

Two further caveats can be helpful, at this stage of our analysis. First, the preceding remarks must not be intended as meaning that there is a permissible ambit of legal comparison in the field of administrative law or that a certain part of it is generally to be preferred to others[17]. They serve, rather, to explain the choice that has been made on objective grounds. Secondly, and more importantly, it is precisely because there are no limits of acceptable comparative study for a public lawyer that it is important to have an adequate awareness of the goals of the research, as well as of the coherence between the inquiry's goals and methodology.

C) A Synchronic and Diachronic Comparison

There is another and by no means less important feature of our comparative research; that is, two types of comparison will be used, synchronic and diachronic. Conventional as these terms are, they communicate something about the nature of the work to be done.

When considering not only differences, but also 'shared and connecting elements', the first question that arises is whether the latter are really common, as distinct from apparent similarities. That being the case, the next question that arises is whether they relate only to generic idealities that can be found in every civilized legal system in one way or another, or do they constitute principles or legal institutions or doctrines that can be formulated in normative terms. In this respect, we will follow a factual approach. This suggests a further clarification about the main task of our study, which is not so much the discovery that there exists, among the legal systems of Europe, 'common ground' or 'common core'. There is no lack of studies about, for example, the general principles of public law that are shared

(2010).

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

[17] See P. Craig, *Administrative Law*, cit. at 2, 3-45.

by the legal systems of the Member States of the EU. 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[18] and requires adequate explanation for both common and distinctive traits. This we call it synchronic comparison.

Precisely because it is reasonable to assume that the similarity of at least certain solutions has been accentuated by several decades of integration between the European Community, and now the EU, we have chosen to look outside it. We have thus included Switzerland, Norway and Ukraine. Switzerland looks particularly interesting for a comparative research for its openness towards the legal cultures of France, Germany and Italy. Norway is an interesting example of a Nordic legal system more oriented towards the English legal system than to the French[19]. Ukraine provides interesting insights of how administrative law is shaped in a legal system that used to be part of the Soviet Union, in itself an important and under-theorized issue. Additionally, and this is another important trait that differentiates our research from those that have been carried out in the field of private law, we have considered whether it was correct and helpful to include non-State legal entities, such as the EU, in a comparative project of this type. There are, in our view, two main arguments in favor of this choice. First, since the early decades of European integration, there has been the 'new legal order' had its own administration, with strong regulatory powers over business, and its own administrative law. Secondly, and consequently, this challenges the traditional opinion according to which administrative law exists only in the States, if not only in some of them. It also opens the path for an analysis aiming at identifying the styles of administration that have prevailed within the EU and their interrelationship with national legal cultures.

The synchronic comparison will be complemented by a 'diachronic' comparison; that is, the study of some phases of the transformation of European administrative laws. There is a twofold argument supporting this choice. First, as Gino Gorla observed rephrasing Maitland's opinion that "history involves comparison"[20], "comparison involves history"[21]. Secondly, there is obviously something absurd about discussing administrative law with only a very vague idea of how it has

[18] 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").

[19] M Fromont, *Droit administratif des Etats européens* (PUF, 2006).

[20] 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").

[21] G. Gorla, *Diritto comparato e diritto comune europeo* (Giuffrè, 1981), 39.

evolved in the last centuries. An understanding of the antecedents of our present of administrative institutions is important for a variety of reasons: on the one hand, for tracing not only the currents of migration and reception of legal ideas, but also the development of legal institutions; on the other hand, for acting as a counterweight to the idea, that is implicit in many narratives of administrative law, that its institutions are driven only or mainly by history and culture and that they are characterized by a fundamental continuity, which is not the case in many national contexts. A word should be said also 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[22].

That said, it must also be clarified that what we have in mind is not an exhaustive historical analysis of the salient institutions of administrative law, such as the concept of authority, or *puissance publique*, the ways in which it has shaped the nature of the powers exercised by public bodies and the remedies against them. It is, rather, an analysis that focuses on some central moments of the development of our subject-matter, that is, administrative procedure. They include the period in which the early judicial standards or canons of administrative action were defined and refined, between the last decade of the nineteenth century and first of the twentieth century, and the period in which the Austrian codification of administrative procedure was considered by other countries of Central and Eastern Europe as a model from which they could draw inspiration for their legislative regulation of procedure. These remarks make clear the reasons for most of the selections and omissions that characterize our research.

3. Comparing Administrative Laws: Europe and Latin America

After explaining the main choices of our comparative research, we may wonder whether it can be of interest for Latin American scholars. What ensues thereafter is a series of more particular remarks about our comparative inquiry, some of

[22] R. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Study*, in K Nadelmann, AT von Mehren and JN Hazard (eds.), *XXth Comparative and Conflict of Law. Legal Essays in Honour of Hessel E. Yntema* (Sijthoff, 1961), 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").

which are methodological, others of which focus on the implications of the research for those who study administrative law in Latin America. Before so doing, it is important to return to the choice of subject, administrative procedure, in part because this casts some light over all the rest, in part because there is an important connection between our research and the studies promoted by experts such as professors Eduardo Garcia de Enterria[23] and Allan Brewer Carias[24].

A) Administrative Procedure in Latin America

What was said earlier with regard to the choice of administrative procedure as the main focus for our comparative research on administrative law can be helpful to show its importance from the viewpoint of Latin American legal systems.
Consider, first, the meta-functions of administrative procedures. One can begin by surveying the extent to which national legal systems at present fulfil the traditional goal of ensuring an adequate protection against the improper or arbitrary exercise of public powers. In this respect, it is interesting to understand not just whether there are rights to be heard and to know the reasons adduced by the administration to justify an adverse decision, but also which kind of hearing must be granted prior to the reaching of such decision and which type of giving reasons requirement exists. Moreover, administrative procedures also serve to achieve collective interests that are of fundamental social and political importance. Consider, for example, the expeditious implementation of urban planning and the definition of policies that have an impact on concessions and licenses previously issued in favour of national or foreign investors, of which there are several cases in recent judicial and arbitral practice. This can be particularly significant for national governments that place a particular emphasis on reforms, for the simple reason that it is easier for the courts and for other public agencies, such as arbitral tribunals, to contest the arbitrary or unfair nature of the decision-making process than to criticize governmental objectives and policies. Last but not least, an increasing emphasis has been put on participation in the administrative process.

[23] Of his many academic works, two are particularly important for our purposes here: i) E. Garcia de Enterria, *Reflexiones sobre la Ley y los principios generales del Derecho en el Derecho Administrativo*, in Revista de Administraction Publica 40 (1963) (observing that, unlike other fields of law, administrative law has not been codified, with the consequence that general principles are particularly important); ii) *Un punto de vista sobre la nueva ley de régimen juridico de las administractiones publicas y de procedimiento administrativo comùn de 1992*, in Revista de Administraction Publica 205 (1993) (observing that the Spanish law on administrative procedure of 1958 has been "transcrita màs o menos literalmente en varios pàises hispanoamericanos").
[24] See A. Brewer Carias, *Les principes de la procédure administrative non contentieuse. Etude de droit comparé (France, Espagne, Amérique Latine)* (Economica, 1992); *Procedimiento administrativo América Latina. Estudios* (Olejnik, 2019).

It is trite wisdom but still wisdom that openness and participation are greatly to be preferred to their opposites. However, this in itself does not take us very far, because a legal system may simply say that only those who have legal rights are entitled to be represented within a procedure, while another may relax the requisites for participation, in order to allow the representation of collective interests. This requires an accurate factual analysis, in the sense that will be specified in the last paragraph of this part.

Whatever the precepts that are applied in the guise of general principles of law or – as English lawyers would call them - the rules of natural justice, it is important to consider the legislative regulation of administrative procedure. In this respect, we do not need to take side in the debate whether, given the predominant choice of presidential regimes on the US model, administrative institutions that are based on the experience of Continental Europe should be dismissed, in order to avoid contradictions[25]. For our purposes here, it suffices to observe that, while in all its legal systems there is a variety of administrative procedures, only in some them, not in all, have administrative procedure acts been enacted by parliaments. For example, Argentina and Chile have done so, while Brazil has not. For the sake of clarity, this remark must not be intended as suggesting that the Brazilian legal framework should be viewed as being as an "exception", let alone one that should be changed. Rather, it is precisely the existence of different legislative frameworks governing administrative procedures that permits us to consider whether the problems and the solutions are similar or diverge.

Two remarks can be helpful to clarify this point. On the one hand, it might be the case that government officers and judges use similar solutions, for example when deciding about who is entitled – as an "interested party" – to take part in administrative procedure, notwithstanding the different legal frameworks; that being the case, it is interesting to seek to understand whether this depends on the similarity of background theories or even on processes of borrowing and cross-fertilization. On the other hand, although several legal systems have imposed a giving-reasons requirement, it can be conceived and applied very differently. As Martin Shapiro has observed, the giving reasons requirement can be conceived as a procedural instrument, in the sense that if suffices that reasons are provided, whatever their content. But it can also be considered in substantive terms, notably as a requirement to provide adequate or even sound reasons[26]. There is still

[25] For further discussion, see G. della Cananea, *Due Process of Law Beyond the State*, cit. at 13, ch. 2.

[26] See M. Shapiro, *The Giving Reasons Requirement*, University of Chicago Legal Forum 179 (1992). See also P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 Cambridge L. J. 282 (1994).

another important distinction concerning this requirement, depending on whether it is imposed only on administrative adjudication or also on rule-making and planning. These choices, whether legislative or judicial, can tell us much with regard not only to the rationales underlying the giving reasons requirement, but also to the background theories that are followed by lawyers and judges or – to borrow Rodolfo Sacco's expression – their legal formants[27].

B) Variety of Judicial Remedies

As a continuation of the preceding argument, it can be interesting to look at the solutions concerning judicial remedies against public authorities entrusted with the discharge of administrative functions and powers.

It can be helpful to begin by observing that the traditional line of inquiry that emphasises the contrast between the French and English legal systems is too limited to provide an adequate basis for our comparison[28]. First and foremost, the "natural instinct" to select those legal systems provides no more than a starting point. It permits a differentiation between the (supposedly) most influential systems. But it does not show which type and degree of influence they exerted on others. Second, the emphasis traditionally put on those legal systems may obscure the importance of others, in our case of Belgium, which exerted a strong influence on other European countries during the 19th century. Third, such emphasis obscures other distinctive traits, including those between the administrative courts created in many countries of Continental Europe, such as Austria and Germany. Their situation lies between the French and the Italian choice of an administrative court that is at the same time the government's advisory body, a *Conseil d'Etat*, and the English-speaking world's choice of a sharp distinction between advice and judicial review[29]. Last but not least, it does not pay adequate attention to the increasing specialization of the bodies that review administrative action even within the legal systems where claims against the administration are heard by ordinary courts.

In this perspective, judicial review of administration in Latin America presents varying and subtle problems. It is easy to contrast the Anglo-American refusal of

[27] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1 (1991).

[28] See R. Bonnard, *Le contrôle juridictionnel de l'administration. Etude de droit administratif comparé*, cit. at 13.

[29] See M. Fromont, *Droit administratif des Etats européens*, cit. at 19, distinguishing four groups: i) one heavily influenced by the French tradition; ii) another including Austria, Germany, Switzerland and Poland; iii) a third group, including both Iberian countries and Finland and Sweden, which is in-between the first two groups; iv) the British group, including the UK, Ireland, Denmark and Norway).

the idea that special administrative courts hear many or most administrative law matters with its increasingly widespread acceptance in Europe and Latin America within the "civil law tradition"[30]. But neither choice tells us much about the remedies that are available for individuals and firms, after administrative remedies have been exhausted, and the intensity of judicial review of administration.
Far more important, an analysis limited to the organization and hierarchy of the courts that exercise judicial review of administration is of little use for a better understanding of the standards of conduct for public authorities, which the courts defined and refined; that is, with what the French call *le fond du droit*[31]. This opens up an important issue in methodology; that is, whether a 'factual analysis' is more suitable for a comparison concerning Latin American countries. We will return to this issue at the end of the next paragraph.

C) A Common Legal Substratum?

There are, in my view, three distinct ways in which our comparative research might be interesting for public lawyers outside Europe: first, for lawyers working in all parts of the world; second, for those who work within an area which is characterized by some commonality, deriving from either history and tradition or political preferences; third, for those who work within the same legal tradition.
From the first point of view, as observed by Schlesinger and other eminent scholars, an inquiry into the general principles of law that are common to most legal systems, though not to all, is particularly relevant in view of the provision laid down by Article 38 of the Statute of the International Court of Justice, which refers to the principles that are valid *in foro domestico*. It has been observed that, with few exceptions, both the ICJ and other international tribunals have been reluctant to identify and apply such general principles of law, also in view of the controversial reference to the principles that are recognized by civilized nations. There is some truth in this, but it is also true that several dispute resolution bodies, have defined and refined standards of administrative conduct. The most apposite example of this is that arbitral tribunals, in the context of the fair and equitable treatment clauses, have ensured the respect of the right to be heard, of the duty to give reasons

[30] JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1985, 2nd ed.), 2-3 and E. Garcia de Enterria, *Las trasformaciones de la Justicia Administrativa: de Exception Singular a la Plenidud Jurisdictional. Un cambio de Paradigma?* (Civitas, 2007).
[31] M. Hauriou, *Police juridique et fond du droit* (1926), in Id., A*ux sources du droit. Le pouvoir, l'ordre et la liberté* (Blaud et Gay, 1933), 130.

and, finally, of the right to have access to the documents held by public authorities. The extent to that such standards can be regarded as being not just of general application, but also tend to be universal is however questionable. It is equally questionable whether, outside the standards that govern administrative adjudication, there are shared canons of conduct for rule-making and planning. Consider rule-making by a minister or a more or less independent market regulator and suppose that one of these authorities intends to change existing rules or to interpret them differently. That being the case, the questions that arise is whether an individual or a group who has relied on existing rules is entitled to be consulted before the regulatory change, as well as that individual or group may be entitled to insist that the existing policy continues to be followed in relation to their interests. In this respect, precisely because ours is not an exercise in fence building, but a discovery of relative (as opposed to absolute) analogies and differences, we have included among the legal systems to be considered for our comparative inquiry both some that pertain to other regions of the world, such as Latin America and China. As our first experiment has shown with regard to the judicial review of procedural propriety and fairness, there are striking differences deriving from the principles the shape the form of government. In other words, there is an administrative law also within an authoritarian government, but it is a different one and it is important to have a better understanding of the salient differences. Symmetrically, public lawyers who work in China, and *a fortiori* in the Americas can have an interest in understanding the general standards that apply in Europe. With regard to the Americas, however, there is a further reason of interest in a comparative inquiry concerning Europe. Within these regions of the world, there are both multilateral treaties such as the American convention on human rights, which based on the recognition of some fundamental values of public law – in particular, democracy and the respect of the rule of law and of human rights – and treaties that provide some measures of liberalization of economic rights, such as NAFTA. If the former have an impact on process rights, as it is exemplified by due process clauses, the latter imply that some process rights must be extended not only to interests that in some legal systems are not traditionally included within substantive rights, but also to the holders of those interests who do not possess the status of citizens. This is the case of two very different classes of subjects; that is, foreign investors and refugees. In this scenario, it is to the canons of conduct that are shared in Europe that lawyers can look in order to see the extent to that the protection of fundamental rights has facilitated the development of participatory rights for example with a view to the protection of the environment. Whether the liberalization of economic fields has resulted in the extension of some process requirements to legal interests that used to be regarded as privileges, such as concessions or licences, is another issue that can be of interest.

It may be argued the line of reasoning that has been discussed thus far can be pushed one step further with regard to Latin America. Three distinct but related arguments might be adduced towards this end. First, it could be argued that there are strong historical ties between Europe and Latin America. The underlying conjecture is that, similarly to what happened in the period of *jus commune*, it is not just the relative geographical vicinity that matters, but what at that time was called *affinitas*, that is to say the awareness to be part of a common legal tradition. Hence the interest for confronting the solutions that are provided for the same problems that modern systems of government must face, and even more for the underlying background theories about public law. This does not mean, of course, that the existence of such *affinitas* can be taken for granted. Quite the contrary, it must be tested concretely, not just on the level of abstract values and general principles of law. However, a reasoning that derives its authority from general statements about a common past, especially if it is not recent, should be viewed with caution.

For this reason, it is important that in this case such reasoning can be reinforced by the fact that many eminent lawyers in countries such as Argentina and Brazil have referred to the doctrines of public law elaborated by European scholars and that sometimes such doctrines have become *jus receptum*. This is the case, among others, of Otto Mayer's concept of the administrative act (*Verwaltungsakt*) and of the French concept of *service public*, with all its implications. Some scholars have raised doubts about the cherry-picking manner in which some legal concepts and tools have been "transplanted". However, this is an argument in favour of a greater awareness of both the common and distinctive elements that characterize modern legal systems, a theme which is central to our comparative inquiry.

There is, finally, a complementary argument that draws not only on the multilateral treaties between the EU and a variety of Latin American countries, but also on the measures issued by the former to protect and promote democracy and the rule of law within the latter. The premises underlying the argument is twofold: on the one hand, that the meaning and relevance of such concepts cannot be deduced from doctrines of natural justice or general theory of law; on the other hand, that these processes of cooperation operate in such a way that, on each occasion in which reference is made to general concepts such as due process of law, the question as to whether a hearing must be accorded or consultation in the rule-making process is required must be carefully considered.

In sum, 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.

The argument based on the constant attention devoted by Latin American scholars to the ideas and beliefs about public law elaborated in Europe may, as I have suggested earlier, be reinforced by the contention that, especially in the past, such attention was limited to treatises and other academic works, while it is important to have an understanding of which variable or non-variable standards – to borrow the distinction laid down by Hart - are used in the daily work of administrative institutions.

This contention itself has two aspects that are relevant for our reasoning. One aspect of the argument is that, following the methodology elaborated by Schlesinger in the 1960's and refined in the context of the 'Trento project'[32], instead of seeking to describe such legal institutions, an attempt is made to understand how, within the legal systems selected, a certain set of problems would be solved. As a result of this, the problems selected for our legal analysis have "to be stated in factual terms"[33]. Concretely, this implies that, using the materials concerning some legal systems, we formulate hypothetical cases, in order to see how they would be solved in each of the legal systems selected. And it is only after it turns out that those cases are formulated in terms that are understandable in all such legal systems that the questionnaire is sent to national experts.

The other aspect of the argument is that there is more than a loose analogy between such methodology and that which is used by European administrative judges in their regular meetings. The frequency of such meetings is well known. But no-one, to my knowledge, has sought to consider whether the approach followed by those specialists of administrative law can be of interest also for theorists. The fact that the legal systems of Latin America have either administrative courts or specialized bodies or panels within general courts of law further reinforces the argument.

4. Conclusion

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. The

[32] 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).

[33] 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, 449 (1969).

problems derive from the choice to focus either on common traits between the legal systems selected for analysis or on the distinctive traits, as well from the frequent juxtaposition of national institutions instead of comparing them. In positive terms, coping with these problems requires an adequate consideration of both common and distinctive traits and the use of a factual analysis, that permits to identify the solutions envisaged for the same or similar problems and the underlying doctrines or background theories.

A research of this type is inevitably a collective 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 research carried out on the common core of modern systems of private law.