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

Abstract
It is self-evident that administrative law has evolved, and remarkably, over time. Understanding the nature of this evolution, and its consequences, is more difficult. There is, in particular, a variety of opinions concerning the possibility to discern, despite innumerable differences between legal systems, some connecting and shared elements. 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 three parts. In Part I, which contains a quick *pars destruens*, I briefly illustrate the weaknesses that beset the traditional uses of the comparative method in the field of administrative law. In Part II, which contains the *pars construens*, I explain the main features of the new comparative research concerning administrative law in Europe; that is, its goal, object and methodology. Finally, in Part III, 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

This paper focuses on comparative administrative law in Europe, but with a view to promoting a dialogue with Latin American public lawyers. My intent is 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. Arguably, such an inquiry can be interesting also for public lawyers in other jurisdictions, notably in Latin America.

The paper is divided into three parts. The first will briefly explain what I have argued in a somewhat more detailed manner elsewhere; that it, the difficulties that beset traditional approaches to legal comparison in our field. In the second part, I will explain in a somewhat more detailed manner the main features that characterize the new comparative research that is being presented here. 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 third part will focus on some issues that can be interesting, in particular, for a Latin American audience. Included among such issues is the existance of a sort of common legal patrimony and the question whether, particularly in Latin America, administrative procedure provides a sound basis for legal comparison.

2. Comparing Administrative Laws: Issues in Methodology

This part examines the state of comparative studies in the field of administrative law. It discusses three main issues. First, it looks at recent academic works and argues that it can be helpful that some of such works consider the interrelationship between administrative law and public law, but at the same time it is necessary to conduct comparative analyses with a focus on administrative law. Second, it discusses the traditional approaches that focus either on similarities or on differences. Thirdly, it criticizes the traditional juxtaposition of national studies without a real comparison.

A) A Focus on Administrative Law

It can be argued that the comparative study of administrative law is in an unsatisfactory condition, first of all, for the lack of a specific focus. For current purposes, administrative law can be regarded as the body of law that deals with the arrangements that establish public authorities and regulate the exercises of public powers and functions, including the regulation and delivery of services ([1]), while the comparative method is intended in the sense of German *Rechtsvergleichung* ([2]).

[1] 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* (Sweet & Maxwell, 2003, 5th ed., 3); it is also broader than that of G. Vedel – P. Delvolvé, *Droit administratif* (PUF, 1984, 9th ed., 98, identifying administrative law as the law that relates to the administration).

[2] For this fundamental point of method, see J. Rivero, *Cours de droit administratif comparé* (1954-55), 5; E. Stein, *Uses, Misuses-and Nonuses of Comparative Law*, 72 Nw. U.L. Rev. 198 (1977); O. Pfersmann, *Le droit comparé comme interpretation et comme théorie du droit*, 53 Rev. int. dr. comp. 275 (2001).

Several scholarly works, often with the contribution of a plurality of authors, seek to describe and understand the legal developments that are influencing the role of governments within the legal systems of Western countries and elsewhere. However, sometimes the object of such works is public law, broadly intended. As a consequence, these studies thus fail to devote attention to the more specific questions concerning administrative law. Such questione include, in particular, how should administrative procedures be regulated, whether public officers should be subject to the ordinary processes of law in the same manner of private bodies, and the like.

Though other works focus on administrative law, they do not pay specific attention to the European area ([3]), while it can be argued that a renewed discussion of this is central to the study of administrative law, also in view of the influence exerted by European Union law. It is also timely in the light of recent cultural and political steps aiming at codifying administrative procedures within most of the States that are members of the EU ([4]), as well as within the legal order of the EU.

B) Examining Common *and* Distinctive Traits

The second difficulty that beset this field is, in part, common to the literature about *comparative* law. Some years ago, the American comparatist Rudolf Schlesinger described the two main strands of thought in the history of European law; that is, the contrastive and the integrative approach ([5]). In brief, while in the long epoch of *jus commune* lawyers were used to consult legal materials and authorities from all parts of the Old Continent ([6]). But when the age of codifications begun, lawyers were "compelled to emphasize differences rather than similarities" and national languages and materials of other legal systems were treated as "foreign" law ([7]). Schlesinger deemed that these approaches were not the only ones that could be used and vigorously engaged in the development of a method that he considered as more suitable to ascertaining whether there were not only innumerable differences, but also some common and connecting elements, with a view to considering whether there was a "common core" ([8]). His was a pioneer's attempt, whose success has been assessed several times by others. There is, therefore, no need to rediscuss about it here.

It is more interesting to observe that the distinction between these approaches was even more evident in the field of administrative law. Well after the beginning of the age of codifications, much of the literature concerning administrative law was based on the assumption that, unlike private law, it was nation-specific. According to this strand of thought, even the fundamental values and principles inevitably differed. Perhaps the best way to illustrate this is to refer to Dicey's well-known critique of French "*droit administratif*". In his major work, Dicey recognized the importance of the comparative method for the study of public law. However, he used comparisons instrumentally, to support his claim that the English Constitution was not simply different from those of

[3] See S. Rose-Akermann & P. Lindseth (eds.*), Comparative Administrative Law* (Elgar, 2013).
[4] M. Fromont, *Droit administratif des Etats membres de l'Union européenne* (PUF, 2006).
[5] R. Schlesinger, *The Past and Future of Comparative Law*, 43 *American Journal of International Law* 747 (1995).
[6] 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 well distinct, but in practice interconnected elements: the canon law of the Catholic Church and the civil law of Justinian's *Corpus Juris Civilis*). See also P. Grossi, *L'ordine giuridico medievale* (Laterza, 1995) and A.M. Hespanha, *Panorama historico da cultura jurìdica europeia* (Publicações Europa-América, 1999[2]).
[7] R. Schlesinger, *The Past and Future of Comparative Law*, cit. at 5, 751.
[8] R. Schlesinger, *Introduction*, in R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968).

continental countries, but also better. This approach emerges clearly in the twelfth chapter of his *Law of the Constitution*, titled "Rule of law compared with *droit administratif*" (9). The *incipit* of this chapter deserves full quotation:

> "In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law. This opposition is specially apparent in the protection given in foreign countries to servants of the State… The extent of this protection has in France … varied from time to time. It was once all but complete; it now far less extensive than it was thirty-six years ago. It forms only one portion of the whole system of *droit administratif*, but it is the part of French law to which in this chapter I wish to direct particularly the attention of students" (10).

Interestingly, Dicey was aware that *droit administratif* was not a unique French feature, because it had emerged in "most of the countries of continental Europe", though not in England. He also paid attention to the dynamics, in the sense that, especially in the editions of his fortunate treatise that were published after 1910, he acknowledged the changes undergone by French administrative law. That said, his analysis can be considered as exemplary of the contrastive approach. He was not alone in this respect. Indeed, the contrastive approach was closely connected with a philosophical tradition that is related to Hegel. He and his contemporaries or heirs in the legal field, particularly Friedrich Karl Savigny and Georg Friedrich Puchta, saw law generally as reflecting the spirit of the people from which it sprung (*Volksgeist*). From this point of view, legal systems "inevitably" differed. They differed, *a fortiori*, in the field of public law. The reason was, according to Savigny, that unlike private law public law was heavily "political" and thus lacked a universal character (11).

Quite the contrary, a contemporary of Dicey, the German public lawyer Otto Mayer not only studied accurately the French system of administrative law, but 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. The underlying reason was, according to Mayer, that French administrative law had exercised a huge influence on other administrative laws not for political reasons, but because it was more structured and systematic (12)

Whatever the intellectual soundness and the historical accuracy of these distinct ways to look at public law, nothing in this paper can be intended as meaning that one or another is to be preferred. No such claim is being made here. Rather, my claim is that both approaches are similarly incomplete, in the sense that they miss something. They put a similar emphasis on two opposite features of the systems of public law, that is to say their differences and similarities, respectively. This basic feature of both approaches is questionable descriptively and prescriptively.

From a descriptive viewpoint, each approach tends to consider only one side of the coin. While one emphasizes the differences between national legal systems, the other points

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9 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1959, 10th ed.).
10 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, cit. at 9, 328-9.
11 F.K. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), § 2 (where the author referred to the customs of a people, as opposed to the arbitraryness of a legislator).
12 O. Mayer, *Deutsches Verwaltungrecht* (1894), French tr. by the author *Le droit administratif allemand* (Giard et Brière, 1905). 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).

out their analogies. Either way, a part of the real, of existing realities, is under-evaluated if not neglected. An accurate comparative analysis must pay attention to differences, as well as to similarities and their causes ([13]). Otherwise, there is a strong risk to choose only those legal realities that fit with the perspective chosen for comparison. In particular, when considering judicial review of administrative action, it soon becomes evident that there is a sharp difference between the British choice of the 'ordinary' courts and the French creation of a distinctive set of courts for the disputes involving public bodies. However, this does not necessarily exclude that there can be some analogies in the standards elaborated by the courts ([14]).

Prescriptively, the force of the point adumbrated above is even stronger in view of the realization, first, of the existance of common constitutional traditions and, second, of the supranational legal systems that exist in Europe. From the first point of view, there are certainly several national traditions, including the way to intend separation of powers and the existance of autonomous norm-making power of the executive branch. However, there are also common constitutional traditions, including parliaments' power of the purse and the idea – common to the concept of Rule of law and *Rechtsstaat* – that the powers exercised by public authorities are different from those of private bodies are must, therefore, be constituted and limited by the law ([15]). Hence the idea that there is something that precedes and integrates the rules of law adopted by regional organizations; that is, a common ground or substratum ([16]). Such rules differ in their nature and effects. At one extreme, there are the recommendations issued by the Committee of Ministers of the Council of Europe, which have no binding effects. At the other extreme, there are the provisions of EU treaties and the European Convention of Human Rights, the respect of which is ensured by the Court of Justice and the European Court of Human Rights, respectively. Interestingly, these two sets of legal realities are distinct, but related. An important manifestation of this commonality of values and principles, though not the only one, consists in the inclusion of fundamental rights, "as they result from the constitutional traditions common to the Member States" (Article 6.3 TEU) within the "general principles of the Union's law", together with those guaranteed by the ECHR. The case-law of supranational courts provides another manifestation, to the extent to that it shows the wide use of the general principles of law, that are shared by the legal orders of the member States ([17]). At the same time, beneath this "convergence" ([18]), there are several differences, which derive from history and culture, as well as from political preferences. There is thus an admixture of analogies and differences, which makes this topic particularly challenging. The question that thus

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[13] See M. Adams & J. Griffiths, *Against 'comparative method': explaining similarities and differences*, in M. Adams & J. Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012), 279 and 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").

[14] See R. Bonnard, *Le contrôle juridictionnel de l'administration. Etude de droit administratif comparé* (1934; Dalloz, 2015), 125.

[15] For further remarks, see G. della Cananea, *Ius Publicum Europaeum: Divergent National Traditions or Common Legal Patrimony?,* in M. Ruffert (ed.), *Administrative law in Europe: between common principles and national traditions* (Europa Law Publ., 2013), 123.

[16] 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.

[17] See J.A. Usher, *General Principles of EC Law* (Longman, 1998) and T. Tridimas, *The General Principles of EU Law* (OUP, 2017, 3rd ed.); S. Cassese, *Le problème de la convergence des droits administratifs nationaux. Vers un modèle administratif européen ?*, in R. Abraham (ed.), *L'Etat de droit. Mélanges en l'honneur de Guy Braibant* (Dalloz, 1996), 49 (observing a tendency to converge).

[18] See P. Birkinshaw, *European Public Law* (Cambridge University Press, 2003), 4 (noting that some years ago "it was very popular to argue for convergence

arises is whether there is, beyond innumerable differences, some common and connecting structural elements; that is, a "common core", consisting not just of idealities, but that can be expressed concretely.

C) From Juxtaposition to Comparison

The further question that arises is how both similarities and dissimilarities can be properly examined and understood. As Schlesinger observed fifty years ago with regard to private law, very often comparative law scholars simply focus on the compilation and juxtaposition of the various solutions that can be found in their own legal systems, without proceeding to the further step of comparison, properly intended ([19]). This line of reasoning has been developed by those who argue that it is very reductive to conceive the task of comparative legal analysis as a mere description of foreign law ([20]).

My 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. At the end of the nineteenth century, under the influence of the *Institut de legislation comparée*, much attention was devoted to legislation, for example in Laferrière's vast portrait of national systems of administrative justice ([21]).

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.

To sum up, it is central to my argument that traditional approaches, which focus either on differences or on similarities, are descriptively and prescriptively incomplete because they provide too limited a view of legal realities and fail to adequately consider the legal context of Europe. But there is also an excess of emphasis on the legislative design, which is questionable in itself and even more so from the angle of administrative law. The field of administrative law must now be considered constructively.

2. Is There a Common Core of European Administrative Laws?

This Part will, as indicated previously, be concerned with the consequences that ensue from the critical remarks made earlier. Three issues will be discussed. They concern the

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[19] See R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), 2 (for whom "the difference between juxtaposition and true comparison is crucial one"); M. Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press, 1981), vii (noting that generally "comparison consists of presenting descriptions of a number of legal systems side by side, … with no particular end in view"); 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 criteria of comparative studies are largely those of the nineteenth century).

[20] R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1 (1991); O. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53 Rev. int. dr. comp. 275 (2001).

[21] See E. Laferrière, *Traité de la juridiction administrative* (Giard et Brière, 1907, 2 ed.), 25, and the review written by Frank Goodnow, who pointed out that Laferrière had relied upon the works of the *Société de Législation Comparée*: 11 Pol. Sc. Quart. 352, at 353 (1896).

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 both Dicey and Mayer were not simply describing the administrative institutions of their epoch, but had normative intents, in the sense that they were system-builders. 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 ([22]). These descriptions are helpful, because they gather and disseminate knowldege 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 ([23]). 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 ([24]). 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 purpose of this type ([25]). 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 neighbors. 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

[22] The importance of the OECD for administrative law is pointed out by J. Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & Cont. P. 189 (2005).

[23] For further remarks, see O. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, cit. at 17, 279 (criticizing the idea of assembling the best practices).

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

[25] 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).

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 ([26]), 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*, 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" ([27]) 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;

[26] See, however, M. Shapiro, *The Common Core: Some Outside Comments*, cit., at 45, 229 (arguing that both the common core and other projects are part of the harmonization agenda).
[27] 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.

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 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 ([28]), as well as by Auby and Fromont in the early 1970s ([29]). 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 ([30]) 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 ([31]).

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 ([32]). 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 ([33]).

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

[28] See R. Bonnard, *Le contrôle juridictionnel de l'administration. Etude de droit administratif comparé*, cit. at 14.
[29] J.M. Auby & M. Fromont, *Les recours contre les actes administratives dans les Pays de la Communauté économique européenne* (1971).
[30] For this thesis, see C. Lavagna, *Considerazioni sui caratteri degli ordinamenti democratici.*, 16 *Riv. Trimestrale dir. Pubblico* (1966).
[31] For further remarks, see G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (OUP, 2016), 27.
[32] 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).
[33] See P. Craig, *Perspectives on Process: Common Law, Statutory and Political*, Public Law 276 (2010).

of administrative procedure is "a concept at the heart of administrative law" ([34]). 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 ([35]). 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 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 ([36]) 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 ([37]). 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

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[34] 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).

[35] See P. Craig, *Administrative Law*, cit. at 1, 3-45.

[36] 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 nees verification, but the extent to which it applies, the extent it can be used as a working tool does so very much").

[37] M. Fromont....., .

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" ([38]), "comparison involves history" ([39]). Secondly, there is obviously something absurd about discussing administrative law with only a very vague idea of how it has 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 ([40]).

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.

4. 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 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

[38] 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").

[39] G. Gorla, *Diritto comparato e diritto comune europeo*, cit. at 44, 39.

[40] 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").

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 and Allan Brewer Carias ([41]).

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. 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 section.

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 ([42]). 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 conjectures 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

[41] See A. Brewer Carias, *Les principes de la procédure administrative non contentieuse. Etude de droit comparé (France, Espagne, Amérique Latine)* (Economica, 1992).
[42] For further discussion, see .....

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 ([43]). There is still 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 ([44]). We will return to this issue in the last section. Meanwhile, another possible reason of interest of our research for a Latin American audience must be explored. It concerns the legal systems that are selected for comparison, in particular within the "civil law tradition" ([45]).

B) 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 treatament clauses, have ensured the respect of the right to be heard, of the duty to give reasons 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

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

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

[45] J. Merryman....., 2-3.

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 authoritary 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 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 existance 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 favor 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 premiss 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.

C) A Factual Analysis

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' ([46]), instead of seeking to describe such legal institutions, an attempt is made to understand how, withing 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" ([47]). 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.

5. 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 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

[46] 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).
[47] 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 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.