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Is there a "Common Core of European Administrative Laws"?

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A first cut at the argument

1. need to steer a course between the assumption that all systems are singular, shaped by factors that cannot be replicated elsewhere (*Volksgeist*, history), and the opposite assumption that differences are on the surface because the problems are the same and solutions, too, tend to be the same (functionalism). Both common and distinctive features are important and must be considered
2. What is presented here is a new comparative research on the "common core of European administrative laws". Its main features are the following:
   - it focuses on administrative procedure, as distinct from judicial review of administration
   - methodologically, it combines history and comparison, or diachronic and synchronic comparison
   - in order to shed light on the 'common core', it considers also the EU and non-European systems. Particular importance of the UK and of Austria
3. First research achievements:
   A. *Fin de siècle* administrative justice (1890-1910)
   B. The liability of public authorities

1. Comparative administrative law: A) traditional approaches

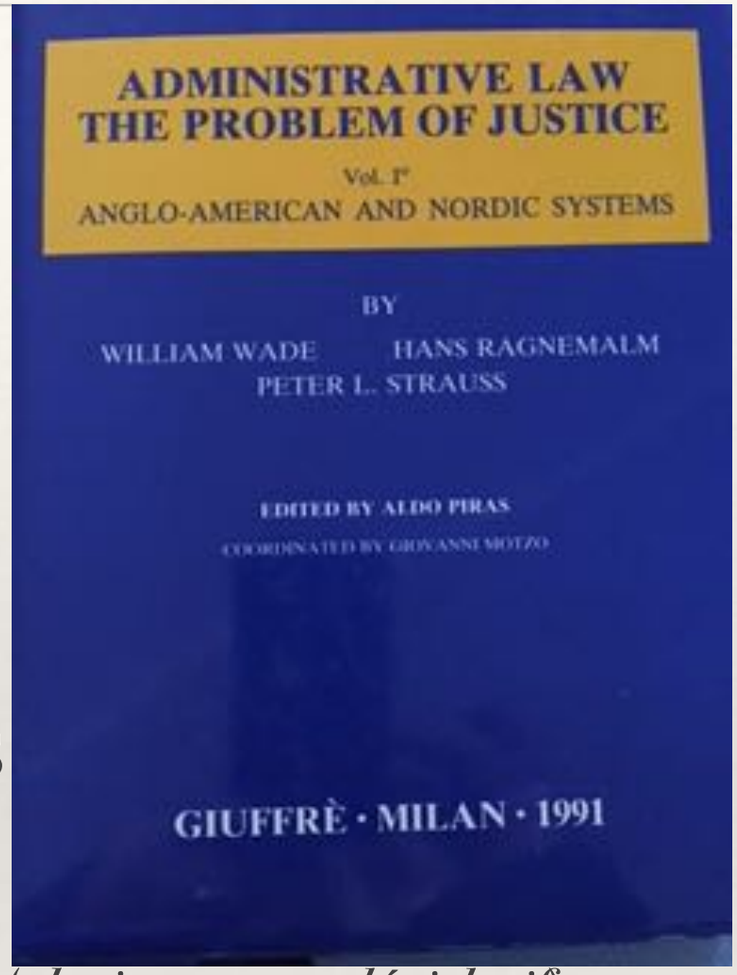
- Two main approaches to legal comparison in the field of Administrative (and Public) Law
  - contrastive approach: e.g. Dicey's *Law of the Constitution*
  - integrative approach: e.g. Otto Mayer's *Droit administratif allemand*

- Dicey: "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 … to servants of the State… it is the part of French law to which in this chapter I wish to direct particularly the attention of students"

- Mayer: strong influence played by French AL on German AL either indirectly, when it was adapted to the realities of the host State, or directly, when it was simply copied ("*simplement copié*")

1. Traditional approaches and their weaknesses: B) three weaknesses

- A focus either on analogies or on differences is questionable, both normatively (see, e.g. Art. 6 TEU) and descriptively
- "juxtaposition rather than comparison"
  - Schlesinger's critique to private law studies
  - similar remarks apply in the field of AL
  - See e.g. this collective study on Western legal systems: Europe & US
- Too much emphasis on legislation
  - *Société de legislation comparée (*1869): over-emphasis on legislation (*droit commun législatif*)
  - unlike private law and criminal law, <u>AL is not based on codes</u>
  - Fundamental importance of <u>unwritten general principles of law</u>, e.g. legality and proportionality



2. A new comparative research:
A) an overview

- Distinctive features
  - a <u>research for the advancement of knowledge:</u>

no prescriptive purposes (i.e. no harmonization).

Critique of the Trento project:Shapiro, Frankenberg

- <u>a focus on administrative procedure</u>
- methodology: a research that combines

  <u>history and comparison</u>

- a research concerning <u>administrative laws in Europe</u>, but which considers the legal system of the EU and some non-European systems, in order to shed light on the 'common core'.
- Implications concerning the specificity of the European legal area: beyond 'legal comparison' (Cassese)? the concept of '*fonds commun*' (Rivero) 'legal heritage' (AG Warner)

2. A new comparative research:
B) a focus on administrative procedures

- Reasons supporting a focus on administrative procedure
  - direct vision of what public authorities do, as opposed to indirect vision through courts
  - increasing proceduralization of administrative action: interests + public and private bodies
  - increasing number of Administrative Procedure Acts, guidelines for agencies in the UK
- sub-topics of synchronic analysis include, *inter alia*:
  - Due process of law and administrative limitations of private ownership
  - Participation in administrative rule-making and planning
  - Judicial review of procedural propriety and fairness
  - Liability of public authorities

2. A new comparative research:
C) methodology of synchronic comparison

- Schlesinger's "factual method", refined in the context of the 'Trento project on the common core of private law'. A questionnaire, with 10 hypothetical cases, which is discussed during the workshop. At a later stage, national experts provide answers about the solutions that are likely to be given and the underlying reasons, including especially background theories (Craig) or 'legal formants' (Sacco)
- An example: a license withdrawal *inaudita altera parte:* "Ms.Tramp has a license for selling certain products. The licensing authority decides to withdraw her license because it intends to renew the offer of such services, but without giving her any opportunity to be heard. Ms. Tramp challenges the withdrawal before a court, arguing that the decision was taken in breach of duties of fairness and rationality in decision-making". Questions
  - solution based on general principles (e.g. natural justice) or specific rules?
  - would the court consider only procedural justice or would consider the reasonableness of the decision?
  - would it quash the contested decision and/or award damages?

2. A new comparative research:
D) the legal systems to be compared

- Beyond the European Union and the EEA
- National legal orders. Three 'types'
    A. France, Italy, Spain and Portugal
    B. Austria, Germany, Switzerland, and Poland
    C. United Kingdom, Ireland and Norway (Sweden is partially different)
- Other European countries: e.g. Ukraine
- A non-State legal order: the EU
- Non-European legal orders: Latin America, Mediterranean basin (e.g. Egypt, Turkey), the US, China

3. First research achievements: A) diachronic comparison

- this is a major difference with respect to the 'Trento project' in the field of private law. Underlying reasons: Maitland's thesis that *comparison involves history*; lack of accurate knowledge about facts
- first volume on *fin-de-siècle* administrative justice: judicial standards in the years 1890-1910 in Austria, Belgium, France, Germany, Italy and the UK. Reasons for selecting them and those decades. What emerges:
  - rapid increase of judicial decisions everywhere (see http://www.coceal.it/index.php/data-base) and 'creative' role played by the courts, well beyond the few existing norms;
  - similarity of issues, as well as of solutions, e.g. as the right to be heard and the giving reasons requirement (Austrian Court: '*nature der Sache*'). Conjecture: *nature des choses* (Montesquieu)
  - common wisdom, trite but true: the French Austrian on nineteenth century admin. institutions
  - a conjecture: the overlooked Austrian influence on XXth century administrative law
- the next steps (2020): influence of the Austrian codification of administrative procedure elsewhere in the years 1925-1960

3. First research achievements:
B) synchronic comparison concerning the liability of the executive branch

- No *Handbücher:* in the volume, national reports will be disaggregated. They show:
  - several significant differences, including whether liability falls within public or private law tools and the jurisdiction of ordinary or administrative courts
  - the erosion, everywhere, of the maxim '*the King can do no wrong*' (*Rex non potest peccare*)
  - the persistence of a certain reluctance, by the courts, to admit that liability may arise from certain types of action (or inaction)
  - diffusion of standards (e.g. *damnun emergens*) that are common to public law and private law
  - importance of background theories (Craig) or legal formants (Sacco), e.g. when courts decide that the Civil Code does not apply (*Blanco*, 1872) or that the Constitution must be interpreted in a certain way. This applies, e.g., to some legal systems of Central and Eastern Europe
- Comparative analysis, both 'meso' (another difference with the Trento project) and 'macro'