
The ‘Common Core’ of administrative laws in Europe: A framework for analysis

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Abstract

This essay presents the framework for new comparative research in the field of administrative law, with a focus on the European legal area. It is divided into two parts. In Part I, we argue that some difficulties that beset the traditional uses of the comparative method are even more evident when considering the field of administrative law. Accordingly, a methodological shift is needed in more than one sense. First, instead of focusing on either similarities or differences between national legal systems, both analogies and differences must be considered. Second, legal comparison, properly intended, differs from a mere juxtaposition of national administrative laws. Third, the over-emphasis on legislation is even less justified in the field of administrative law, which calls for careful attention to judicial and institutional practices. In this perspective, we briefly illustrate the methodology grounded in a factual approach that has been developed in the field of comparative private law in the last few decades and the way we are going to apply it into our research on administrative law, viewed through a procedural lens. In Part II we discuss the main pillars that characterize our research concerning administrative law: first, its goal, which is the advancement of knowledge; second, the choice to focus on administrative procedure, instead of judicial review of administrative action; third, the methodology, which combines a synchronic comparison, concerning modern legal systems, with a diachronic comparison, that is to say a retrospective on some aspects of the history of legal institutions that look particularly relevant; and fourth, the choice of the legal systems selected for comparison, including a variety of states and a non-state, the European Union.

Keywords

Common core, comparative law, administrative law, European laws, EU law, constitutional traditions

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I. Introduction

Since 1989, increasing attention has been devoted to the comparative study of administrative law.¹ Within a first strand, several scholarly works, which are increasingly carried out with the contribution of a plurality of authors, have sought to describe and understand the legal developments that are influencing the role of government in the various regions of the world. Another strand of thought focuses on the administrative law of the European Union (EU), which calls into question what was regarded as a biunivocal relationship between administrative law and the state.² There is still another strand arguing that much of the law that governs ‘global’ regulatory regimes can be conceptualized as ‘administrative’ and that their development has triggered a process of convergence between national administrative laws.³

The goal of this essay is neither to provide a general overview of these topics nor to discuss the comparative method(s) in general terms. On these matters, the views of the authors of this essay have been set out on earlier occasions.⁴ This essay, rather, illustrates new comparative research in the field of administrative law in Europe, which has two main themes. The first theme is how administrative law can be better understood comparatively, which requires a methodological shift. The second theme is how to promote an advancement of knowledge with regard to an increasingly important part of administrative law; that is, administrative procedure. The underlying idea is that the nature and purposes of administrative law can be better understood comparatively,⁵ but this requires a methodological shift because some difficulties that beset the traditional uses of the comparative method are even more evident in this field.

All this is discussed in Part I, which will prepare the ground for our comparative research concerning administrative law. Part II will explain the reasons underpinning the choice of this topic, as well as clarify three fundamental choices concerning the purposes of our research, that is, the advancement of knowledge; its methodology, which is characterized by both a synchronic comparison and a diachronic comparison; and the legal systems that will be studied, which do not include only national laws, but also those of the EU.

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1. See S. Rose-Akeremann & P. Lindseth, *Comparative Administrative Law* (2nd Edition, Elgar, 2017); J.S. Bell, ‘Comparative Administrative Law’, in M. Reimann and F. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 1259. See also, with a focus on Europe, M. Fromont, *Droit administratif des Etats européens* (PUF, 2006).
 2. The first systematic work is J. Schwarze, *Europäisches Verwaltungsrecht* (Nomos, 1986), later translated into French and English. See also P. Craig, *EU Administrative Law* (2nd Edition, Oxford University Press, 2012) and C. Harlow, P. Leino and G. della Cananea, *Research Handbook on EU Administrative Law* (Elgar, 2017) (devoting attention to new fields subject to EU regulation).
 3. See B. Kingsbury, N. Krisch and R.B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law & Contemporary Problems* (2005) and S. Cassese, ‘Administrative Law Without the State: the Challenge of Global Regulation’, 37 *New York University Journal of International Law and Politics* (2005).
 4. See G. della Cananea, ‘Globalisation et grands systèmes du droit’, in P. Gonod, F. Melleray and P. Yolcka (eds.), *Traité de droit administratif* (Volume I, Dalloz, 2011), p. 773, and M. Bussani, ‘Comparative Law Beyond the Trap of Western Positivism’, in T.I. Cheng and S. Mancuso (eds.), *New Frontiers of Comparative Law* (LexisNexis, 2013), p. 1.
 5. For this thesis, see J. Rivero, *Cours de droit administratif comparé* (Les cours de droit, 1956-57), p. 5; E. Schmidt-Aßmann and S. Dagron, ‘Les fondements comparés des systèmes de droit administratif français et allemand’, 127 *Rev. Fr. Adm. Publ.* (2008), p. 525.

2. Part I – Comparing administrative laws: Issues in methodology

A. Traditional approaches to comparative administrative law and their flaws

Many writers in various countries and epochs have pointed out the differences of both law and custom between neighbour countries, often in a negative vein. Some have regarded differences as inconveniences or obstacles to be overcome.⁶ Others have pointed their importance, with a view to protecting national traditions. Following the US comparatist Rudolf Schlesinger,⁷ two approaches in the history of European law can thus be distinguished: contrastive and integrative. Whatever the intrinsic soundness of these approaches, it will be argued that they provide a limited vision of administrative law. Another problem with these approaches is the tendency to juxtapose the solutions adopted by two or several legal systems, without really comparing them. There is still another problem: the excess of emphasis put on legislation.

1. Examining analogies and differences

The literature about administrative law has considered other legal systems in different ways. Many scholars have not deemed the comparative method necessary for their textbooks and treatises about administrative law, an opinion that is readily apparent from the table of contents of their works. Others have based their views on something more than a quick glance at other legal systems.⁸ What is striking is the even sharper division between the contrastive and integrative approaches individuated by Schlesinger. Following Alexis de Tocqueville's holding that administrative law is one of the salient features of the new state of the world,⁹ a first school of thought has endorsed a functionalist vision of administrative law, arguing that the problems and the solutions are more or less the same in all developed countries.¹⁰ Another school of thought, of which the main representative was Albert Venn Dicey, the Victorian constitutionalist, argued that the differences between English and French public law were so striking there could not be such thing as an 'administrative law' in the United Kingdom (UK).¹¹ What was denied, therefore, was not the shape of administrative law, but its existence.

Our intent is not to argue that either approach to the comparative study of administrative law is preferable. Rather, our claim is that both approaches are incomplete. From a scholarly point of

6. J.H. Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', 17 *Stanford Journal of International Law* (1983).

7. R. Schlesinger, 'The Past and Future of Comparative Law', 43 *American Journal of International Law* (1995), p. 747.

8. See, for example, R. Gneist, *Self-government, Communalverfassung und Verwaltungsgerichte in England* (Julius Springer, 1871) (focusing on local government); F. Goodnow, *Comparative Administrative Law. An analysis of the administrative systems, national and local, of the United States, England, France and Germany* (Burt Franklin, 1903); E. Laferrière, *Traité de la juridiction administrative et des recours contentieux* (2nd Edition, Berger-Levrault, 1896).

9. A. de Tocqueville, *Rapport sur le livre de M. Macarell intitulé Cours de Droit Administratif* (1855), in *Œuvres. Etudes économiques, politiques et littéraires* (Lévy, 1866) IX, 60.

10. See, for example, F.H. Lawson, 'Review of C.J. Hamson, Executive Discretion and Judicial Control and B. Schwartz, French Administrative Law in the Common-Law World', 7 *Stanford Law Review* (1955), p. 159 (holding that 'in the field of administrative law all civilized countries have much the same problems and much the same desire for their proper solution').

11. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th Edition, MacMillan, 1959). But the first edition of Dicey's treatise was published in 1886. Among his contemporaries, Gaston Jèze criticized him, for the failure to understand the evolution of administrative law in both countries: G. Jèze, *Principes généraux du droit administratif* (3rd Edition, Giard, 1925), p. 1-2.

view, there is a necessary distinction between description and prescription, although this distinction is conventional and its precision has often been contested. Empirically, each approach tends to consider only one side of the coin. Whereas one emphasizes the differences between national legal systems, the other points out their analogies. Prescriptively, the force of the point adumbrated above is even stronger in view of the realization that the supranational legal systems that exist in Europe acknowledge the relevance and significance of both national and common constitutional traditions.

The descriptive validity of both traditional approaches is dependent on the ‘correctness’ of some differing, albeit connected, claims. First, there is the claim that focusing *either* on the analogies between the legal systems selected for analysis *or* on their differences will provide us with an adequate understanding of the legal realities that we wish to study. The correctness of this claim is far from self-evident. Quite the contrary, most of those who work in this field would probably agree that an accurate comparative analysis must pay attention to differences, as well as to similarities and their causes.¹² Second, there is a way to proceed to legal comparison that pays little attention, or none, to the context. Last but not least, there is a strong risk to choose only those legal realities that fit with the perspective selected 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.¹³

An approach that emphasizes only analogies or differences is also, normatively, particularly weak in the European context. On the one hand, there are not only national constitutional traditions but also common constitutional traditions. The case-law of supranational courts shows the increasing use of the general principles of law¹⁴ reflects the idea that there is something that precedes and integrates the rules agreed by political authorities; that is, a common ground or substratum. On the other hand, regional organizations influence the evolution of national legal orders, for example with regard to the standards of procedural justice in the light of Article 6 of the European Convention of Human Rights. At the same time, beneath this ‘convergence’¹⁵ 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 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.

12. See M. Adams and J. Griffiths, ‘Against “comparative method”: explaining similarities and differences’, in M. Adams and J. Bombhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012), p. 279 and P. Craig, ‘Comparative Administrative Law and Political Structure’, 37 *Oxford Journal of Legal Studies* (2017) (for the remark that ‘comparative administrative law reveals commonality and difference between the systems studies. This is axiomatic and self-evident’).

13. See R. Bonnard, *Le contrôle juridictionnel de l’administration. Etude de droit administratif comparé* (Daloz, 2015), p. 125.

14. See J.A. Usher, *General Principles of EC Law* (Longman, 1998) and T. Tridimas, *The General Principles of EU Law* (3rd Edition, Oxford University Press, 2017).

15. See 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* (Daloz, 1996), p. 49 (observing a tendency to converge) but see also P. Birkinshaw, *European Public Law* (Cambridge University Press, 2003), p. 4 (noting that some years ago ‘it was very popular to argue for convergence’).

2. From juxtaposition of national laws to comparison

There is another difficulty with using the comparative method. As Schlesinger observed 50 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.¹⁶ This line of reasoning has been developed by those who argue it is very reductive to conceive the task of comparative legal analysis as a mere description of foreign law.¹⁷ It ought to be said at the outset that our 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.

Consider what is perhaps the most extensive work on administrative justice in the last two decades of the 20th century: the collective work on '*Administrative Law: the Problem of Justice*'.¹⁸ Such collective enterprise benefited from the participation of some of the best national experts – including professors Eduardo Garcia de Enterría, Peter Strauss, Georges Vedel and William Wade – and was not limited to the major European systems of administrative law, but also considered that of the USA. Each of those individual studies was so accurate and interesting that they still constitute a good starting point for the first phase of a comparative project; that is, understanding the nature and functioning of the institutions of administrative law. Each of those studies, moreover, was based on the same 'grid', which was divided into four areas: constitutional background, the scope of administrative law, the principles of judicial review and enforcement and responsibility. In our view, what is questionable is not the choice to focus on those issues as distinct from the administrative process, but another feature of this kind of collective works. Collecting descriptions of a series of legal systems can be helpful, but is not, of itself, a comparative work. It is important to understand how such systems work in relation to a certain set of issues and find out the common and distinctive traits and the explanations of both.

Consider, instead, the book written by Jean-Marie Auby and Michel Fromont on the judicial systems of the six founders of the European Community.¹⁹ Even a quick look shows a twofold difference with regard to the other work. The ambit or scope of their analysis was narrower, in that they focused on judicial review of administrative action. Moreover, not only did they include a final chapter that examined the common and distinctive traits of the six legal orders selected, but in the previous chapters when examining national institutions, they pointed out either their distinctiveness (for example, Germany's solution concerning actions brought against regulations) or their commonalities (in particular, the principles underlying judicial review). As the authors observed in their *Preface*, one reason for their comparative attempt was that firms and individuals doing

16. See R.B. Schlesinger, 'Introduction', in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), p. 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), p. vii (noting that generally 'comparison consists of presenting descriptions of a number of legal systems side by side, (...) with no particular end in view').

17. R. Sacco, 'Legal Formants. A Dynamic Approach to Comparative Law', 30 *American Journal of Comparative Law* (1991); O. Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', 53 *Revue internationale de droit comparé* (2001).

18. G. Motzo and A. Piras, *Administrative Law: The Problem of Justice* (Giuffrè, 1990-1991).

19. J.M. Auby and M. Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté économique européenne* (Daloz, 1971).

business within the Six needed to know the possibilities of challenge: a practical concern, thus, although their study had a great theoretical interest.²⁰

3. Beyond legislation comparée: The factual approach

In addition to the prevailing tendency to juxtapose national systems of administrative law, there is another difficulty with the uses of the comparative method in traditional works. It is the over-emphasis put on legislation. It is fair to say this is neither a recent trend nor one that concerns only or mainly administrative law. During the 19th century, under the influence of legal positivism, there emerged an interest for the study of 'foreign' legislation. The influence of the *Institut de législation compare* was evident, for example, in Laferrière's vast portrait of national systems of administrative justice.²¹ The question is whether such focus on legislation was justified in itself and with regard to administrative law.

With regard to private law, the main difference between the traditional approach and the comparative inquiry elaborated and conducted by Schlesinger in the 1960s is precisely this: instead of seeking to describe the legal institutions of a group of states, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved. As a result of this, the problems 'had to be stated in factual terms'.²² Concretely, this implied some hypothetical cases were formulated to see how they would be solved in each of the legal systems selected. And it turned out that those cases were formulated in terms that were understandable in all such legal systems.

The excessive emphasis put on legislation is even more questionable in the field of administrative law, because in England and continental Europe it emerged and developed without any legislative framework comparable to the solid and wide-ranging architecture provided by civil codes. In particular, in Austria, France, Germany and Italy, there were few general rules concerning administrative law and they accorded centre stage to control by the courts of administrative departments and agencies (a partial exception was the Spanish statute of 1889). Nor were there so many particular statutes as those that have been enacted by several states particularly after 1945, with a view to achieving a system of social security 'from the cradle to the grave'. As a result, both the formative period of administrative law and the period of its consolidation were largely jurisprudential.²³ This salient aspect has been neglected by writers who were more influenced by the

20. See D.B. Mitchell, 'Review of J.M. Auby & M. Fromont, Les recours contre les actes administratifs dans les pays de la Communauté économique européenne', 21 *International and Comparative Law Quarterly* (1972).

21. See E. Laferrière, *Traité de la juridiction administrative*, p. 25, and the review written by Frank Goodnow, who pointed out that Laferrière had relied upon the works of the *Société de Législation Comparée*: F. Goodnow, 'Review of E. Laferrière, *Traité de la juridiction administrative et du recours contentieux* (1896)', 11 *Pol. Sc. Quart.* (1896), p. 352, 353.

22. See M. Rheinstein, 'Review of R. Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems*', 36 *University of Chicago Law Review* (1969), p. 448, 449.

23. See, in the context of the comparative survey promoted by the *International and Comparative Law Quarterly* in the early 1950's, O. Bachof, 'German Administrative Law with Special Reference to the Latest Developments in the System of Legal Protection', 2 *International and Comparative Law Quarterly* (1953), p. 366, 370 (for the remark that administrative law was not codified) and G. Miele, 'Italian Administrative Law', 3 *International and Comparative Law Quarterly* (1954), p. 421, 427 (same remark); N. Herlitz, 'Swedish Administrative Law', 2 *International and Comparative Law Quarterly* (1953), p. 224, 231 (same remark), though few years later the same author noted the increasing importance played by the Norwegian Administrative Procedure Act of 1967: N. Herlitz, 'Legal Remedies in Nordic Administrative Law', 15 *American Journal of Comparative Law* (1968), p. 687, 694. For the strongest assertion of the

legal culture of their epoch, a culture that emphasized the role and significance of legislation. But it is of great importance for any attempt to understand the distinctiveness of administrative law, as well as the importance of external control by the courts, an aspect to which we will return later, in Part II, together with the question of whether the steps taken within most national legal orders to codify the rules governing administrative procedure have modified the general picture.

B. The experience of 'The Common Core of European Private Law' project

'The Common Core of European Private Law' project was started in 1993 by Ugo Mattei and one of the authors of this essay,²⁴ and has since received quite substantial attention in the comparative law literature.²⁵

Over its duration, the Common Core project has involved more than 300 scholars, mostly from Europe and the USA. The research carried out under the Common Core flag is published as volumes in a dedicated series by Cambridge University Press.²⁶ So far the series comprises 17 volumes²⁷ and many others are in preparation.

distinctiveness of administrative law, in the sense that it would continue to exist even if all statutes were abrogated all of a sudden, see G. Vedel and P. Delvolvé, *Droit administratif* (9th Edition, Presses Universitaires de France, 1984), p. 107 ('si l'on abrogeait d'un trait de plume le Code civil, il n'y aurait plus de droit civil (...) Si l'on abrogeait (...) toutes les lois administratives (...), l'essentiel du droit administratif survivrait, car la jurisprudence a dégagé sans référence à des textes les règles fondamentales du droit administratif'). On more recent trends, see Y. Gaudemet, *Droit administratif* (21st Edition, LGDJ, 2016), p. 33; E. Gamero Casado and S. Fernandez, *Manual basico de derecho administrativo* (14th Edition, Tecnos, 2017), p. 48.

24. For a more extensive and complete presentation of the project, see M. Bussani, "'The Common Core of European Private Law' Project Two Decades After: A New Beginning', 15 *The European Lawyer Journal* (2015), p. 9; M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law', 3 *Columbia Journal of European Law* (1998), p. 339.
25. Among the many scholarly papers that have discussed the Common Core methodology and results, see O. Lando, 'The Common Core of European Private Law and the Principles of European Contract Law', 21 *Hastings International and Comparative Law Review* (1998), p. 809; J.M. Smits, 'Convergence of Private Law in Europe: Towards a New *Ius Commune*?', in E. Öricü and D. Nelken (eds.), *Comparative Law: A Handbook* (Oxford-Portland, 2007), p. 219, 231; G. Frankenberg, 'How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core', in P.G. Monateri (ed.), *Methods of Comparative Law* (Elgar, 2012), p. 120; J. Basedow, 'Comparative Law and Its Clients', 62 *American Journal of Comparative Law* (2014), p. 821, 829. See also M. Bussani and U. Mattei, *Opening Up European Private Law* (N.C. Academic Publishers, 2007) and M. Bussani and U. Mattei, *Making European Law. Essays on the 'Common Core' Project* (Università di Trento, 2000).
26. Some books, though, were published by Stämpfli and Carolina Academic Press: see B. Pozzo (ed.), *Property and Environment* (Stämpfli-Carolina Academic Press, 2007); F. Werro and V.V. Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law* (Stämpfli-Carolina Academic Press, 2004).
27. M. Infantino and E. Zervogianni (eds.), *Causation in European Tort Law* (Cambridge University Press, 2017); S. Martin Santisteban and P. Sparkes (eds.), *Protection of Immovables in European Legal Systems* (Cambridge University Press, 2015); V.V. Palmer (ed.), *The Recovery of Non-Pecuniary Loss in European Contract Law* (Cambridge University Press, 2015); C. van der Merwe (ed.), *European Condominium Law* (Cambridge University Press, 2015); E. Hondius and H.C. Grigoleit (eds.), *Unexpected Circumstances in Contract Law* (Cambridge University Press, 2014); C. van der Merwe and A-L. Verbeke (eds.), *Time-Limited Interests in Land* (Cambridge University Press, 2012); G. Brüggemeier, A. Colombi Ciacchi and P. O'Callaghan (eds.), *Personality Rights in European Tort Law* (Cambridge University Press, 2010); M. Hinteregger (ed.), *Environmental Liability and Ecological Damage in European Law* (Cambridge University Press, 2008); J. Cartwright (ed.), *Precontractual Liability in European Private Law* (Cambridge University Press, 2008); T.M.J. Möllers and A.B. Heinemann (eds.), *The Enforcement of Competition Law in Europe* (Cambridge University Press, 2008); M. Graziadei, U. Mattei and L. Smith (eds.), *Commercial Trusts in European Private Law* (Cambridge University Press, 2005); R. Sefton-Green (ed.), *Mistake, Fraud and Duties to*

1. Cartography vs. city planning

In very simple terms, the Common Core project is seeking to unearth the common core of the bulk of European private law within the general categories of contract, tort and property.²⁸ The search is for existing commonalities and existing divergencies in the different private laws of the EU Member States, which, as is well known, originate from the civil and common law heritages, as well as a number of other Western legal traditions or sub-traditions, depending on the taxonomy adopted.²⁹

The project's short-term aim is to draft the outlines of a reliable map of European private law. The future use of this map is of no concern to the cartographers who are drafting it. However, if reliable, it may be indispensable for whomever is entrusted with drafting legislation or with pursuing legal harmonization at the European level. Indeed, for the transnational lawyer, the present European situation is like that of a traveller compelled to use a number of different local maps, each containing misleading information. The project wishes to correct this. It does not wish to force the actual diverse reality of the law into one single map to attain uniformity. The project is not concerned with drafting a city plan to affect change or predict future developments. Rather, the Common Core project seeks only to analyse the present, complex situation in a reliable way. Although a fundamental assumption of the Common Core project is that cultural diversity in the law is an asset, the project neither takes a preservationist approach nor does it push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core project and the other remarkable 'integrative' private law enterprises that have been carried out in Europe in the last 30 years with the aim of undertaking city planning rather than 'mere' cartographic drafting.³⁰

2. The parents of the Common Core project

To grasp the working method of the Common Core project, it is important to start from its scholarly roots, which are the Cornell Project launched by Rudolf Schlesinger in the 1960s and the dynamic comparative law methodology as principally developed by Rodolfo Sacco over the last 40 years.³¹

At Cornell, in 1957 Schlesinger launched his collective comparative research project on the 'Formation of Contracts', which under his general editorship resulted in the publication of two

Inform in European Contract Law (Cambridge University Press, 2005); E-M. Kieninger (ed.), *Security Interests in Movable Property* (Cambridge University Press, 2004); M. Bussani and V.V. Palmer (eds.), *Pure Economic Loss in Europe* (Cambridge University Press, 2003); J. Gordley (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001); R. Zimmerman and S. Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge University Press, 2000).

28. For a discussion of such categories, see A. Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law', 40 *American Journal of Comparative Law* (1992), p. 683.

29. For instance, Scandinavian systems are considered a tradition per se by K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd Edition, Oxford University Press, 1998), Scotland, Malta, and Cyprus are generally considered to be mixed legal systems. See E. Reid, 'Scotland', in V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family* (2nd Edition, Elgar, 2014), p. 216; B. Andò, K. Aquilina, J. Scerri-Diacono, D. Zammit, 'Malta', in V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family* (2nd Edition, Elgar, 2014), p. 528; N. Hatzimihail, 'Cyprus as a Mixed Legal System', 6 *Journal of Civil Legal Studies* (2013), p. 38.

30. M. Bussani, "'The Common Core of European Private Law' Project Two Decades After: A New Beginning", 15 *The European Lawyer Journal* (2015), p. 24, 9.

31. See R.B. Schlesinger, in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, p. 16.

monumental volumes in 1968.³² The fundamental problem that Schlesinger had to resolve in his worldwide comparative study was how to obtain comparable answers to the questions he wished to pose about different legal systems. The answers had to refer to identical questions interpreted as similarly as possible by all those replying. Additionally, the answers had to be self-sufficient, needing no additional explanations and, hence, had to be on par with the most detailed rules. The issues that arose included how to formulate each question in a uniform way to different experts and how to obtain consistency.

These concerns led to working out one of the most critical and significant methodological features of the research. Each question presented a case that asked the respondents about the results that would be reached under those circumstances. It was formulated with the aim of taking into account, for every legal system under review, any relevant factor affecting the answer to guarantee these factors would be considered and would therefore be comparable with the analysis of every other system. Thereby, another important objective was achieved. Often, the factors that operate explicitly and officially in one system are ignored and considered to be irrelevant in another system. These factors may still operate secretly, slipping silently between the formulation of the rule and its application by the courts. For instance, it is well known among private law comparativists that there is a wide area of disagreement between legal systems in which offers are normally irrevocable, and legal systems in which offers are normally revocable. Yet, if one takes into consideration rules concerning revocability and the related rules dealing with the time when acceptance becomes effective, it becomes evident that courts in systems where offers are revocable are sensitive to the same policy concerns that in other jurisdictions make offers irrevocable.³³

The work done at Cornell made it clear that to have a reliable knowledge of a legal system, one cannot trust entirely what the jurists usually say as there may be wide gaps between operative rules and the rules as commonly stated and described. This is why the Cornell methodology compelled jurists to think explicitly about all the factors that matter, regardless of whether they operate explicitly or implicitly, by forcing them to answer identically formulated questions. As a result, the respondents gave a very different picture of the law than did the monographs, handbooks or casebooks circulating in their own legal systems.

The lesson learned from the Cornell Project was taken on and developed by Rodolfo Sacco. The core of his comparative law methodology is well known, having been translated into many languages.³⁴ To sum up his theory,³⁵ a list, even an exhaustive one, of all the reasons given for the decisions made by the courts is not the entire law. The statutes are not the entire law nor are the definitions of legal doctrines given by scholars. To know what the law is, it is necessary to analyse the entire complex relationship between what Sacco calls the 'legal formants' of a system, those formative elements that make up any given rule of law. Legal formants include statutes, general propositions, particular definitions, reasons, holdings and so forth. All of these formative elements are not necessarily consistent within each system – only domestic jurists assume such coherence.

32. *Ibid.*, p. 16. For a discussion of Schlesinger's (as well as Sacco's) fundamental contributions to comparative law research, see U. Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence', in A. Riles (ed.), *Rethinking the Masters of Comparative Law* (Oxford University Press, 2001), p. 238-56.

33. R.B. Schlesinger, 'Formation of Contracts—A Study of the Common Core of Legal Systems: Introduction', 2 *Cornell International Law Journal* (1996), p. 49-50.

34. See R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Economica, 1991), p. 33.

35. For the following remarks, see R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)', 39 *American Journal of Comparative Law* (1991), p. 1, 17, 21-27.

To the contrary, legal formants usually conflict and may be in a competitive relationship with one another.

From this perspective, we must know not only how courts acted, but also consider the influences to which the judges are subject. Such influences may have a variety of origins. They may arise because scholars gave wide support to a doctrinal innovation, or they may arise because of a judge's individual background. A judge appointed from an academic position will tend to emphasize scholarly opinion more than a judge who was a practitioner. Taking into account the contribution of different legal formants allows one to understand the reasons why similar rules in different legal systems are subject to different applications and interpretations,³⁶ or why different rules in two systems give rise to largely similar outcomes.³⁷ By delving into what the legal formants are and how they relate to each other, we may ascertain the factors that affect operative outcomes, making clear the weight that interpretive practices and rhetoric (grounded in scholarly writings, legal debate aroused by previous judicial decision, and so on) have in moulding those solutions. Herein lies the importance of distinguishing between the rule announced by the court and the rule as it is actually applied or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, the facts on which the court based its result.

For all these reasons, within a given legal system a legal rule is not uniform, in part because one rule may be given by case law, one by scholars and one by statutes. Within each of these sources there are formants competing with one another. This complex dynamic may change considerably from one legal system to another as well as from one area of the law to another. In particular, each legal system has certain legal formants that are clearly leading in different directions. Awareness of those differences and of how they are at work explains why the exploitation of a ripe factual approach in the 'Common Core' project implies an accurate analysis of legal doctrines and theories.

3. How to do projects with details

As in the Cornell project, the key tool of the Common Core project is the questionnaire. The three principal areas of property, tort and contract are divided into a number of topics. Each participant, when charged with the responsibility of editing a particular topic volume, is first required to draft a factual questionnaire and discuss it at the topical sessions during the general meetings that take place every year. Editors of each project are required to follow the general guideline of drafting the questionnaires to a sufficient degree of specificity so as to require the reporters to answer them in such a way that all of the circumstances affecting the law in their system are addressed, including circumstances that may not have any official role but have a practical impact on the operative rules.³⁸ This method also guarantees that rules formulated in an identical way (such as by using an

36. For example, vicarious liability of parents for the harms caused by their children is enforced much more strictly in France than it is in Italy, despite similar code provisions (compare Article 1242(4) of the Code civil – former Article 1384(4) in the original version of the Code – and Article 2048 of the Italian Civil Code): see F. Werro and V.V. Palmer, *The Boundaries of Strict Liability*, p. 25, 399-400; on this point see also M. Bussani, *La colpa soggettiva* (CEDAM, 1991), p. 16, 180.

37. A good example is compensation for pure economic loss in Germany and Austria: see M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, p. 26, 148-154.

38. To make the simplest example, consider the impact of the presence / absence of a comprehensive health insurance system on the cases concerning damages for personal injury: for all, see D. Jutras, 'Alternative compensation schemes

identical code provision), but that may produce different applications, will not be regarded as identical.

In answering the questionnaire, every contributor is asked to set their answers up on three levels, labelled 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants'. The level dealing with 'Operative Rules' is designed to be a concise summary of the basic rules applicable to the case and the likely outcome that would be reached under the law of the legal system concerned. Reporters are also asked to indicate whether that outcome would be considered clear and undisputed or doubtful and problematic. The level called 'Descriptive Formants' has a twofold goal. On the one hand, its aim is to reveal the reasons that lawyers feel obliged to give in support of the operative rule presented under the previous heading, and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with general principles (traditional as well as emerging ones), as well as to devote attention to majoritarian and minoritarian doctrines, (including dissenting opinions in leading cases, opposite opinions in scholarly writings, and so on) also from a diachronic point of view. On the other hand, the goal at this level is to understand whether the solution depends on legal rules and/or institutions outside private law, such as procedural rules (including rules of evidence) and administrative or constitutional provisions. Finally, the 'Metalegal Formants' level asks for a clear picture of the other elements that may be affecting the operative and descriptive patterns, such as policy considerations, economic factors, social context and values, as well as the structure of the legal process (such as organization and competence of courts). From the 'Common Core' perspective, these are data a researcher can never leave out whenever the aim is to understand what the law is.

A further note on reporters is necessary. For the purpose of comparative scholarship, a domestic lawyer is not necessarily the best reporter on their own system. A comparative knowledge of the law is of a different nature than an internal knowledge of it. The former is inherently theoretical, and the latter is practical (legal scholars acting within a legal system can themselves be seen as legal formants because they 'make' the law, although indirectly). Hence, a nationally trained lawyer may control more information about the system than a comparative law-trained (or a foreign) one. Yet lawyers who have not been exposed to legal cultures other than their own may be less well equipped to detect the hidden data and the rhetorical attitude of the system because they are misled by automatic assumptions. This is why the participants in the Common Core project are usually comparativists and, as such, are asked to deal with the questionnaires as if they had to describe their own law.

4. Caveats

The 'Common Core of European Private Law' project has so far enjoyed remarkable success, as it is witnessed not only by the long list of its scientific outputs and by the recognition it received in academic debates, but also by the fact that it is the most long-standing and largest academic network dealing with European private law.³⁹ Needless to say, through time, the project has been

from a comparative perspective', in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law. Global Perspectives* (Elgar, 2015), p. 151, particularly p. 154-164.

39. This is noted, for instance, by L. Miller, 'The Notion of a European Private Law and a Softer Side to Harmonisation', in J. Bell and D. Ibbetson (eds.), *Development of the Law of Tort in Europe: Impact of Ideas on Legal Development* (Cambridge University Press, 2011), p. 274.

challenged by a series of critiques that is helpful to address here, to both clarify what the project is about and clear possible misunderstandings.

First of all, the very title of the project might easily misguide superficial observers, and has actually misguided some of them,⁴⁰ suggesting the reference to ‘the common core’ of European private law means only, or foremost, a search for commonalities. However, nothing could be farther from the spirit of the project, whose title emphasizes commonalities over differences (not as much as for the sake of brevity) as a tribute to Schlesinger’s path-breaking work.⁴¹ Other misunderstandings have given rise to more substantial critiques. For instance, some commentators have stressed the Common Core project, insofar as it relies upon Schlesinger’s and Sacco’s theories, as refined and revised by the project’s editors, implies a methodological monism that provides too strict a framework for comparative research.⁴² Others have challenged the project’s methodological reliance on factual questionnaires, either because the factual focus of the questionnaire would allegedly overemphasize judge-made law,⁴³ or because the discretionary choices made by specific projects’ editors at the time of drafting the factual cases composing the questionnaire would implicitly and inevitably channel national reporters’ answers in pre-determined, largely convergent directions.⁴⁴ Still others have contested the naiveté of the Common Core project’s claim to carry out ‘neutral’ and ‘purely descriptive’ research, noting that this claim not only seems to be based on the over-simplistic assumption that there is something like a ‘truth’ of legal phenomena that can be described in objective terms by ‘neutral’ observers,⁴⁵ but also it aims to de-politicize – more or less consciously – the project and its possible outcomes.⁴⁶

Insofar as they refer to the unavoidable limitation of any collective and comparative enterprise – that of compressing individual creativity, biases and ideologies to put them at the service of guaranteeing the comprehensibility and comparability of the results – these critiques are fully

40. For this remark, see F. Fiorentini, ‘Un progetto scientifico che stimola e affascina l’Europa’, 5 *Annuario di diritto comparato* (2014), p. 277-278. Even less superficial observers might fall in the same trap: G. Frankenberg, ‘How to Do Projects with Comparative Law’, in M. Bussani and U. Mattei (eds.), *Opening Up European Law*, p. 24, 35 (‘Ultimately they intend nothing less than to seek unity (...) and to build a common European legal culture’); M. Reimann, ‘Of Products and Process. The First Six Trento Volumes and Their Makings’, in M. Bussani and U. Mattei (eds.), *Opening Up European Law*, p. 25, 83, 85-88; O. Lando, 21 *Hastings International and Comparative Law Review* (1998), p. 25, 809.

41. See Section 3.1. above.

42. F. Fiorentini, ‘Un progetto scientifico che stimola e affascina l’Europa’, p. 41, 34-36.

43. P. Legrand, ‘Paradoxically Derrida: For a Comparative Legal Studies’, 27 *Cardozo Law Review* (2005), p. 631, footnote 159 (calling the Common Core volumes ‘snippets compilations’ accumulating ‘selected titbits extracted largely from legislative texts and appellate judicial decisions’).

44. G. Frankenberg, ‘How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core’, p. 40-47; on the same lines, see also D. Cabrelli and M. Siems, *A Case-Based Approach to Comparative Company Law*, in D. Cabrelli and M. Siems (eds.), *Comparative Company Law: A Case-Based Approach* (Hart, 2013), p. 17-18. On the institutional level, others have noted that the choice of the themes on which Common Core questionnaires focus could be less fragmentary and more coordinated in light of the project’s final cartographic aim: M. Reimann, ‘Of Products and Process. The First Six Trento Volumes and Their Makings’, p. 83, 92-93.

45. G. Frankenberg, ‘How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core’, p. 27, 36.

46. See for instance D. Kennedy, ‘The Politics and Methods of Comparative Law’, in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law. Essays on the Project* (Kluwer, 2003), p. 131 et seq., 175 et seq.; V. Grosswald Curran, ‘On the Shoulders of Schlesinger’, in M. Bussani and U. Mattei (eds.), *Opening Up European Law*, p. 1, 10; G. Frankenberg, ‘How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core’, p. 35 (‘the Trentinos reveal their desire to move from archaeological and cartographic work to a colonizing project with political implications for legal science and education’).

acceptable. As to the rest, the above critiques largely miss the mark. True, the project's methodological guidelines and the ways in which questionnaires are framed and the instruction for a (as much as possible) neutral and descriptive approach constrain national reporters in their own legal language. Yet it holds equally true that none of these constraints can suppress reporters' subjective and cultural understanding of the factual cases and their views on how their legal system would handle these cases. When writing their responses, national reporters convey not only their picture of the legal systems they represent, but also their own commitment to given schools of thought, methodological style, deeply embedded beliefs, hopes and self-narratives. Although this might limit, to a certain extent, the heuristic value of the substance of their answers,⁴⁷ it also enriches the scientific output of the project with meta-legal information that is usually out of the reach of comparative research activities. In other words, the balance the Common Core project strikes between methodological monism and pluralism, neutrality and political transparency, as questionable as it might be, always serves the project's final aim: getting more, deeper knowledge.

3. Part II – The common core of European administrative laws: Basic choices

So far we have illustrated the first theme of this essay. Our argument, in brief, is that traditional approaches to the study of administrative law have failed to provide an adequate methodology for comparative legal analysis in the present epoch because they are beset with difficulties, both descriptively and normatively. The nature of the challenge is thus to seek to elaborate a methodology that is adequate for the area in which we intend to carry out our comparative research; that is, administrative law. With regard to this, there is considerable variety of opinions with regard to its scope and distinctiveness. The traditional picture according to which administrative law is the 'law relating to the control of government power' is diminishingly accepted.⁴⁸ We must, however, push further if we are to understand what characterizes administrative law in the 21st century. One crucial issue is how we can seek to take into account not only the traditional function of administrative law, which consists of preventing unlawful or arbitrary exercise of coercive power by public authorities, in a negative manner, but also the functions and powers that characterize the positive state, which provides welfare benefits to individuals and social groups.⁴⁹ Another important issue is whether the differences that exist between the standards of fairness and legality that apply to private bodies and those that govern the conduct of public authorities is either a difference of degree⁵⁰ or one of nature, as a result of the public interests that must be protected and promoted.⁵¹ In this part, it will be argued that such issues can be better understood from a comparative

47. This is emphasized, for instance, by N. Jansen, 'Dogmatik, Erkenntnis und Theorie in Europaischen Privatrecht', 13 *ZeutP* (2005), p. 750-773.

48. For further analysis, see P. Craig, *Administrative Law* (5th Edition, Sweet & Maxwell, 2005), p. 3 and Y. Gaudemet, *Droit administratif*, p. 23. See also G. Vedel and P. Delvolvé, *Droit administrative*, p. 98 and D. Sorace, *Diritto delle pubbliche amministrazioni* (Il Mulino, 2009) (both proposing to conceive administrative law as that which concerns public administrations).

49. See J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 2003); R.B. Stewart, 'Administrative Law in the Twenty-First Century', 78 *New York University Law Review* (2003), p. 439.

50. D. Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999), p. 7.

51. For this characterization of the public interest, see A.H. Feller, 'Administrative Procedure and the Public Interest – the Results of Due Process', 25 *Washington University Law Review* (1940), p. 308; G. Vedel, *Essai sur la notion de cause en droit administratif français* (Sirey, 1934).

perspective⁵² if attention is focused on the administrative process, instead of judicial review. Our framework for analysis will, moreover, be clarified in four fundamental respects: first and foremost, with regard to the purposes of our comparative research; second, with regard to its object, which is administrative procedure; third, with regard to the methodology of the research; and fourth, with regard to selection of the legal systems that will be studied.

A. Purposes of the research

1. A research for the advancement of knowledge

We may explain the purposes of our research by referring not just to the traditional distinction between the theoretical and practical purposes of comparative legal studies, in particular between those who place emphasis on the satisfaction of a ‘need for knowledge’⁵³ and those who point out the persistent interest of both foreign law and comparative law in view of the reform of national legal institutions,⁵⁴ but also to some recent research projects in the European legal space. An understanding of the recent antecedents of our research is important. It enables us to comprehend what can be learned from them, as well as clarify the distinctive traits of our enterprise.

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 to assess their effectiveness and transparency, often with a view to making them more attractive to trade and foreign investments.⁵⁵ These descriptions can be helpful, because higher standards of administrative conduct are preferable to lower standards, unless the latter are justified by political exigency or expediency. That not being the case, it can be conceded that the processes through which standards are defined can be improved in a variety of ways. There are, however, two difficulties with this approach. First, the point should be made that there is a necessary distinction between description and prescription. The descriptive validity of a comparative study aiming at selecting an ‘optimal’ set of rules is itself dependent upon the ‘correctness’ of a number of claims.⁵⁶ That the same legal rule can work in the same way in a different context, national or supranational, is questionable. That the formulation of a rule valid for a plurality of countries can be as detailed as that of the rule of a national code is equally questionable. Second, at the basis of these surveys there is an implicit assumption; that is, that a comparative analysis of the rules governing public administration can reveal what is the ‘optimal’ law, for every administrative system, regardless of its peculiarities. This is questionable because it neglects two important elements: the standards governing the conduct of public authorities are largely influenced by the context and such standards can be ‘technical’ but are hardly ‘neutral’. Space precludes a thorough discussion of this issue. Suffice it to say that in the current project we have different targets.

52. See M. Ruffert, *The Transformation of Administrative Law in Europe* (European Law Publishers, 2008) (discussing the possibility to conceive administrative law in a transnational perspective).

53. See R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, p. 17.

54. A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd Edition, University Press of Virginia, 1974).

55. The importance of the OECD is pointed out by J. Salzman, ‘Decentralized Administrative Law in the Organization for Economic Cooperation and Development’, 68 *Law and Constitutional Politics* (2005), p. 189.

56. For further remarks, see O. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, p. 17, 279 (criticizing the idea of assembling the best practices) and J.H. Merryman, ‘On the Convergence (and Divergence) of the Civil Law and the Common Law’, p. 6, 376 (criticizing the idea of evolution from a less to a more highly developed legal system).

The distance between description and prescription is even more evident in the body of academic work aiming either at harmonizing national laws or at replacing them, albeit in particular fields, within the common framework established by the EU. One of these projects, in the field of private law, is explicitly aimed at elaborating a common frame of reference for national laws.⁵⁷ This type of approach has two principal features. First, it is inevitably centred on legal rules, as distinct from other components of legal systems, such as institutions, processes and legal culture, which are particularly important in the field of administrative law. Second, its purpose is constructive or normative. This project received both consent and criticism. In particular, there is a cautionary note in the literature, which seeks to deter the making of such a piece of legislation.

Another project in which one of us took part concerned the codification of the administrative procedures of the EU in the framework of the Research Network on European Administrative Law (ReNEUAL).⁵⁸ Unlike its predecessor in the field of private law, it did not aim at unifying national rules, but at regulating the administrative procedures managed by the institutions and agencies of the EU. A proposal was elaborated, by way of a comprehensive body of provisions, called the ‘model rules’. The model rules were eventually included in a text that was shaped as if it were a draft regulation, to be enacted by EU institutions on the basis of Article 298 TFEU.

It is evident from the preceding analysis that recent comparative projects have variably combined descriptive and normative elements. Clearly, if a project supports more or less directly the making of new rules, it will pay less attention to legal processes and doctrines. However, we are not assuming that practical considerations must be totally ruled out in favour of ‘pure’ research. They can be considered in a sort of continuum. At one extreme is the view that comparative research can be instrumental to defining or refining legal rules. At the other extreme is the view that a comparison serves to gather and check data to ensure the validity of legal analysis, similar to other social sciences. There are also intermediate positions that are legitimate and helpful depending on the main purposes of each researcher or group of researchers. Delineating a continuum, instead of clear-cut boundaries, helps us to clarify that the goal of our research is to have more and better knowledge than is presently available, although such research is susceptible to some practical implications.

2. A research on common and distinctive traits of administrative laws

In the light of the critical remarks that some scholars have made with respect to other research projects, it is helpful to consider two possible objections. First, if the new project aims at considering both common and distinctive traits, the question that arises is why it emphasizes the former.⁵⁹ The other question is whether, despite all good intents, a legal comparison that was meant to be a

57. See C. van Bar et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (European Law Publishers, 2009). But see also P. Legrand, ‘Against a European Civil Code’, 60 *Modern Law Review* (1997), p. 44 (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) and J.M. Smits, ‘European Private Law and the Comparative Method’, in C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010) (observing that the relationship between the comparative method and the creation of a common private law for Europe is not so straightforward as is often assumed).

58. See P. Craig et al., *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press, 2017). The same text has been published in other languages, including French, German, Italian, Polish, Romanian and Spanish.

59. We are grateful to Bruno De Witte for this remark.

purely scientific endeavour may turn out to be something different, in the sense of being used for prescriptive ends.⁶⁰

We observed earlier that both common and distinctive traits must be taken into account, a point to which we will return when we explain why, beneath the increasing adoption of administrative procedure acts, there are many more differences than it appears. Meanwhile, it is helpful to say that both history and comparison help to explain why these differences can be better understood through a framework for analysis that seeks to make sense of the common and connecting elements between national administrative laws descriptively and normatively. Descriptively, the fact that administrative law has had a very limited legislative basis, unlike the statutes that codified private law under the influence of Roman law, has a series of consequences. It is important to understand whether the principal gateway was that of natural justice or a set of beliefs about public law and, if so, whether it was partially common to various legal systems, and whether the courts have admitted similar process rights and have justified them similarly even when statutes did not accord such rights. There is a further reason why attention for common and connecting elements is justified. We have already seen that in Europe there is not just the ‘higher’ law that comes from regional organizations, but there is also the recognition of the existence of ‘common constitutional traditions’, which under Article 6 TEU have the status of general principles of law.⁶¹ The full ramifications of this recognition cannot be examined here. Suffice it to say that, if a common constitutional tradition can be identified, it should at least imply that the courts and other public agencies should choose, among the many possible interpretations of national rules, those that are more coherent with the common constitutional tradition, for example when deciding whether reasons must be provided for a decision adversely affecting someone’s interests.

The other objection must now be considered. Two remarks can be made in this respect. First, it is important to repeat that our research is focused on generating knowledge about the administrative laws of Europe. Our intent is not only to pay attention to the different or similar solutions that emerge for the problems with which public authorities are confronted with, but also to try to make sense of the factors that determine those solutions. The task of the research is to render explicit the legal structures and theories that shape our views about a given subject. Second, 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 practical purposes, including a better awareness of the nature and implications of general principles of administrative law, an improvement of national legislative and regulatory rules of procedure,⁶² and a better use of comparative methodology by the courts. However, these are but possible and indirect uses of a ‘basic’ research, to use the word that is common in the natural sciences.

60. For this remark, see M. Shapiro, in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, p. 221. See also J.H. Merryman, ‘On the Convergence (and Divergence) of the Civil Law and the Common Law’, p. 379 (noting that a search for general principles may have the effect of facilitating a *rapprochement*).

61. For further remarks, see S. Cassese, ‘The “Constitutional Traditions Common to the Member States of the European Union”, 65 *Rivista trimestrale di diritto pubblico* (2017), p. 939 (discussing this concept, which is now the object of a research promoted by the European Law Institute).

62. The drafters of national rules often hesitate to acknowledge the importance of this: an exception, concerning the Italian APA, is G. Pastori, ‘The Origins of the Law n. 241/1990 and Foreign Models’, 2 *Italian Journal of Public Law* (2010), p. 260.

B. Choice of subject: Administrative procedure

After having explained the purposes of our comparative research, the discussion that follows is concerned with its subject; that is, with the research questions we want to analyse and with the degree to which our enquiry is adding to the knowledge that already exists with regard to public administrations and the law that applies to them.

1. Inclusiveness and topical development

It is always useful for a discipline to reflect on its objects and to take stock of more or less recent developments, as well as to gauge future directions. But this is not an easy task, as the following remarks will show with regard to the inclusiveness and the significance from the viewpoint of the development of the law.

With regard to inclusiveness, two opposite risks must be taken into account. The first is the risk of over-inclusiveness that was masterly pointed out by Jorge Luis Borges in his novel about the Chinese Emperor's cartographers: the good intention to draw an accurate and complete map of the real, with all its complexities and subtleties, may give rise to a work that is too broad to be meaningful for the advancement of knowledge. The opposite risk is that of under-inclusiveness. Such risk was neatly pointed out by Schlesinger. He observed that not only was the number of legal systems taken into consideration very small, ordinarily restricted to two, but there was another inconvenience with the topic chosen for comparative exploration. The topic was 'too narrow to permit the discovery, within each of the legal systems selected, of the functional and systematic interrelationships among a large number of precepts and concepts'.⁶³ The topic he chose, that is to say the legal framework concerning offer and acceptance, was relatively narrow.

The evolution of legal institutions is equally important. This can be considered in more than one way. One option is to focus on selecting 'classic' or 'timeless' concepts. These rather general categories may serve well over time. But there is a strong risk they are disconnected from legal realities. Another option is to focus on legal institutions that were and are relevant and significant, such as judicial review of administrative action. In this way, one can have an idea of the increase of litigation concerning public authorities from the late-19th century to the present. However, we must ask ourselves whether such an analysis would be really significant because 'public law is not solely concerned with judicial review'⁶⁴ and, more generally, because we should consider the dynamic dimension of administrative law, as opposed to its statics.⁶⁵ There is still another option, therefore: to devote attention to a more innovative part of public law, such as the discharge of administrative functions and powers through a variety of procedures. There are three reasons that justify it: whereas the first two reasons concern inclusiveness and topical development, the last regards the interplay between similarities and differences and thus requires separate treatment, in the next paragraph.

63. R.B. Schlesinger, in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, p. 3, 11.

64. P. Craig, 'Theory and Value in Public Law', in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe. Essays in Honour of Carol Harlow* (Oxford University Press, 2003), p. 27. See also E. Gellhorn and G.O. Robinson, 'Perspectives on Administrative Law', *75 Columbia Law Review* (1973), p. 773 (arguing that 'the subject of judicial review of administration (...) has diminished somewhat in importance vis-à-vis the administrative process') and S. Cassese, *Le basi del diritto amministrativo* (3rd Edition, Einaudi, 2003), p. 295 (same thesis).

65. See W. Wade, 'Administrative Justice in Britain', in G. Motzo and A. Piras (eds.), *Administrative Law: The Problem of Justice*, p. 29; S. Cassese, *Le basi del diritto amministrativo*, p. 3, 64 (same remark).

From the viewpoint of inclusiveness, an increasing body of literature has focused on the variety of procedures by which administrative agencies reach their decisions and, in a growing number of cases, set out rules or issue plans. It shows that administrative procedure is not too narrow to permit us to identify, within the legal systems selected, of a variety of ‘functional and systematic inter-relationships’ among some central structures of administrative law, including the range and typology of interests recognized and protected by the legal order, the interaction between the various units of the executive branch of government, and citizens’ participation. Moreover, although legislative and judicial powers are exercised through a limited set of processes, administrative action must face ‘through its varied and commodious channels, the torrents of demand pressing against the dam of the State’.⁶⁶ As a result of this, research on administrative procedure has become increasingly important.

Moreover, administrative procedure has been an increasingly important subject of study since the early-20th century.⁶⁷ Although there were scholarly works concerning administrative procedure in earlier decades, it is in this period that the importance of procedures became more evident due to several reasons. The emergence of an institutional landscape where state bodies interact with a variety of other territorial or functional public bodies has contributed to making administrative activities increasingly procedural. Another cause is the impact of governmental functions on an increasing range of interests, both individual and collective, which must be considered and balanced. The adoption of general procedural codes, which regulate process rights across a variety of subject matter areas, is another cause. For all these reasons, it is increasingly accepted that administrative procedure is ‘a concept at the heart of administrative law’.⁶⁸

Our choice thus deviates from what has traditionally been the main subject of comparison in this field, that is, judicial review of administrative action. It could, therefore, be contested on grounds that the legal control of government is still the main purpose of administrative law and that it is for this purpose that the principles of administrative law are developed by the courts. Although we partially agree with the latter remark, the vision of administrative law that accords centre stage to control by the courts of agencies has several disadvantages in our epoch. First, it is affected by a sort of perspective distortion, because it implies the use of an indirect vision of the organization and functioning of public authorities. These are not considered for what they should do, what they do (or do not do) and how they do it, but for how their action is reviewed by the courts.⁶⁹

Second, judicial review of administrative action concerns a limited part of administrative law. There are measures that are not subject to judicial review, under the doctrine of *acte de*

66. L.J. Jaffe, ‘Administrative Procedure Re-Examined: the Benjamin Report’, 5 *Harvard Law Review* (1943), p. 707. See also R.B. Stewart, ‘The Reformation of American Administrative Law’, 88 *Harvard Law Review* (1975), p. 1667, 1669 and, for a comparative analysis, J.B. Auby, *Droit comparé de la procédure administrative* (Bruylant, 2015).

67. See M. Shapiro, ‘Administrative Discretion: The Next Stage’, 92 *Yale Law Journal* (1983), p. 1487 (for the remark that ‘the history of American administrative law consists in large part of a game of procedural catch-up’). Some years earlier, also E. Gellhorn and G.O. Robinson, 75 *Columbia Law Review* (1973), p. 68, 770 had observed the change occurred in US course books of administrative law. On the other side of the Atlantic, changes in basic textbook have been slower, though some scholars analyzed procedure since the late 1930’s, for example A.M. Sandulli, *Il procedimento amministrativo* (Giuffrè, 1940).

68. Neil Walker, ‘Review of Dennis J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*’, 62 *Modern Law Review* (1992), p. 962.

69. See J.B. Auby, ‘General Report’, in J.B. Auby, *Codification of Administrative Procedure* (Bruylant, 2014), p. 3 and G. Berman, ‘Foreword’, in J.B. Auby, *Codification of Administrative Procedure* (for the thesis that ‘administrative procedure, rather than judicial review of administrative acts, lies at the heart of administrative law’).

gouvernement or the like. There are issues that are less easily susceptible of being reviewed by the courts, because of limitations around standing. The range of the interests that are recognized and protected by legal orders is thus broader than that of the scope of judicial intervention, let alone the will of the parties to initiate litigation and the propensity of judges to hear cases against government.

There is a third difficulty that has become increasingly manifest, as the machinery of government has expanded. Traditional approaches tend to overemphasize the negative role of the state when it expropriates individuals or issues sanctions,⁷⁰ and conversely underestimate the importance of the positive state, particularly in the field of the management of benefits for individuals and groups. It is only if we focus on these manifestations of the positive state that we can understand the managerial side of due process.⁷¹ As a variant of this argument, it can be observed that the traditional vision of administrative law neglects the emergence of the regulatory state, whereby there is not so much a dialectic relationship between a public authority and one physical or legal person, but a more complex relationship. Consider, for example, the duties of notice and comment that are imposed by EU directives on national regulators of electronic communications.⁷² Regulators thus interact with both providers and users, in a tripolar relationship.

These remarks support the view that judicial review is not ‘the’ angle through which current issues must be considered. However, they do not exclude that an eye must be kept on it. For example, the concepts of procedural impropriety and unfairness or of ‘procedural injury’⁷³ can be helpful for understanding the relevance and significance of the principles and rules that an administrative agency must respect before issuing or refusing an authorization to the applicant and the techniques that must be used to set new tariffs for public utilities.

2. *An admixture of similarities and differences*

In addition to the reasons concerning the inclusiveness and increasing importance of the topic that we have selected, it is necessary to consider in more detail the implications that flow from the critical remarks made earlier with regard to a difficulty that characterizes many comparative studies in the field of administrative law. We noted that, depending on the contrastive or integrative approach followed, emphasis is placed either on differences or similarities, respectively. It may be helpful to move beyond this remark and consider more in detail the features that characterize administrative procedure from this angle: the various purposes of administrative procedure; the differing extension of legislative rules that govern it; and the differing conceptualization of the administrative process.

70. See M. Shapiro, ‘Predicting the Future of Administrative Law,’ 6 *Regulation* (1982), p. 18 (noting that the standard liberal theory of the late nineteenth century simply rejected administrative law).

71. J. Mashaw, ‘The Managerial Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims’, 50 *Cornell Law Review* (1973), p. 772.

72. See Article 24 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, [2002] OJ L108/33 (‘framework directive’). For further discussion, see R. Caranta, ‘Pleading for European Comparative Administrative Law’, 2 *Review of European Administrative Law* (2009), p. 155, 158 (noting that the same EU rules raise different legal issues within the Member States).

73. For this concept, see R.J. Pierce, ‘Making Sense of Procedural Injury’, 62 *Administrative Law Review* (2010), p. 1.

As one of us has observed elsewhere, an administrative procedure can, and does, have a variety of functions, including the protection of citizens from arbitrary exercises of power and implementing public policy.⁷⁴ There are also different attitudes concerning the codification of administrative procedure. As George Berman observed, ‘interest in codification in this area has accelerated in recent years’ for ‘only a minority of states . . . lack administrative procedure codes of one kind or another at the present time’,⁷⁵ and even France has ceased to be on this side, for it issued an act that codifies several standards defined and refined by its administrative judge. These remarks support the belief that within the EU there is a common trend.⁷⁶ But in England and Ireland there is no such thing as a codification of administrative procedure. Nor is there a codification some parts of continental Europe, including Belgium. Moreover, even where there is a codification of one kind or another, a closer look reveals important differences. The earlier scholars who have tried to identify the variables have tried to order them according to time (some date back to the early 20th century, whereas others are very recent) and scope (there are general and sector-specific administrative procedure acts). However, the number of variables is greater and their nature more complex than it was suggested. One important variable regards the constitutional basis of codification. Another concerns its nature. Some acts contain hundreds of detailed provisions, whereas others tend to encompass general principles. Other important variables concern limitations (tax law is often excluded) and the distinction between adjudication, rule making and other forms of administrative action, such as contract or dispute resolution.⁷⁷ The existence of a plurality of sources, especially in federal and confederal systems, is still another distinctive feature. Last but not least, the relevance and significance of the general principles of law differs from one legal system to another.

Finally, and not surprisingly, there are different ways to conceptualize procedures. Although German and Italian studies in this field have showed a strong tendency for abstraction,⁷⁸ the approach of French administrative law is fundamentally empirical⁷⁹ and that of most UK lawyers is even more so. Only recently has the distinction between administrative process and procedure emerged.⁸⁰

3. Process and substance

We have so far considered the reasons supporting the choice to focus on administrative procedure. It is helpful to move beyond the general propositions discussed above and to consider in more

74. G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (Oxford University Press, 2016), p. 27.

75. G. Berman, ‘Foreword’, in J.B. Auby, *Codification of Administrative Procedures*, p. 69.

76. See S. Cassese, ‘Legislative Regulation of Adjudicative Procedures: An Introduction’, 5 *European Review of Public Law* (1993), p. 15 and A. Brewer-Carias, *Principes de la procédure administrative non contentieuse* (Economica, 1992) (for a comparison between France, Spain and Latin America).

77. See J.B. Auby, *Codification of Administrative Procedures*, p. 69.

78. See E. Schmidt-Aßmann, ‘Due Process und Grundrechtsschutz durch Verfahren, Eine vergleichende Untersuchung zum amerikanischen und deutschen Verwaltungsverfahren’, 142 *Archiv des öffentlichen Rechts* (2017), p. 325 (for a comparison between the USA and Germany).

79. M. Fromont, ‘Les types de procédure administrative’, in M. Fromont (ed.) *La procédure administrative non contentieuse en droit français* (Esperia, 2005), p. 16. For a similar remark, see J.F. Garner, ‘Review of E. Forsthoft, *Traité de droit administratif allemand* (1969)’, 19 *International and Comparative Law Quarterly* (1970), p. 720, 726.

80. See D. Galligan, *Due Process and Fair Procedures. A Study of Administrative Procedures* (Clarendon, 1999). Earlier writers referred to the administrative process, intended as the discharge of administrative functions: W. Wade, ‘Recent Trends in the Administrative Process in England’, 13 *Administrative Law Review* (1960), p. 27 (considering various issues of ‘fair decision and just procedure’).

detail some issues in methodology. There is, however, a preliminary issue that must be taken into account. It concerns the distinction between process and substance.

The increasing importance of procedural fairness is a sort of *leitmotiv* in many scholarly works concerning administrative law. For some, it is necessary because of the broader scope of government powers in the sense that ‘citizens will endure it only if they are fairly and impartially administered’, whereas for others fairness is also important for ensuring the machinery of government runs smoothly. Precisely because procedural fairness serves to achieve distinct goals, procedural tools must be flexible.⁸¹

However, some have observed that no attempt to separate process from substance is likely to be successful, because procedures often determine outcome. Moreover, the discontents of a given outcome often contest the fairness of the process that determined it. Others have argued the idea that the rule of law or sound governance can be explicated mainly or only from a procedural point of view is simply untenable, because the meaning accorded to such ideas depends on broader conceptions of justice. There is much truth in these remarks.⁸² However, we believe that none is decisive, for two reasons.

First, two types of fairness can be, and are generally, distinguished. On the one hand, fairness is relevant from the viewpoint of procedural justice, that is, the belief the activities carried out to make a choice are proper and fair in themselves. On the other hand, fairness is meaningful in the context of substantive justice; in this case, what matters is whether some specific avenues or results are ‘just’ or acceptable. Accordingly, in all fields of law it is important to evaluate not only the *results* of a process, but the *process* itself, either to prevent errors or to ensure the impartiality of the decision maker,⁸³ which is one of the fundamental maxims recognized by most legal systems, if not by all.

Second, the distinction between process and substance is particularly important in the field of administrative law because several doctrines derived from separation of powers hold that courts and other public agencies can contest the legitimacy of the decision taken by a public authority, not its merit. This is the case, for example, when the immigration officer refuses to let a foreigner enter the country, so long as the affected person has had some kind of hearing and the decision is not unreasonable. Precisely for this reason, public authorities are subject to duties of fairness and transparency that are particularly intense, as well as to judicial review.

That said, a number of points from this debate should be noted because they are of general importance and have an impact on the fundamental features of our research, which must be both empirical and theoretical. Our research must be empirical in the sense that it must be rooted in an understanding of the functions that administrative law is expected to perform in relation to the

81. The quotation is drawn from W. Wade, in G. Motzo and A. Piras (eds.), *Administrative Law: The Problem of Justice*, p. 169. The flexibility of procedural tools has been pointed, among others, by C. Harlow and R. Rawlings, *Law and Administration*, p. 89, 616 and M. Loughlin, ‘Procedural Fairness: A Study of the Crisis in Administrative Law Theory’, 28 *University of Toronto Law Journal* (1978), p. 215, 219.

82. See L.H. Tribe, ‘The Puzzling Persistence of Process-Based Constitutional Theories’, 89 *Yale Law Journal* (1979), p. 1065 (pointing out the ‘substantive roots of procedural norms’) and J. Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985), p. 9 (affirming that the distinction is conventional).

83. For these remarks, see R.S. Summers, ‘Evaluating and Improving Legal Processes – A Plea for “process values”’, 60 *Cornell Law Review* (1974), p. 1 and J. Lever, ‘Why Procedure is More Important than Substantive Law’, 48 *International and Comparative Law Quarterly* (1989), p. 285. For a philosophical discussion, see J. Roland Pennock and J.W. Chapman, *Due Process* (Nomos, New York University Press, 1977).

interplay between individual and collective interests that are regarded as coming within the ambit of administrative law, a classic example being the recognition and generalization of procedural protections when the state deprives someone of property rights or issues administrative sanctions. What is needed, to use Loughlin's metaphor, is a 'map that enables us to move around the legal landscape',⁸⁴ as well as a sense of the changing needs of society through time. At the same time, it is important to consider theoretical issues.⁸⁵ In this sense, the research to be done should be seen less as on administrative process and more on procedure.⁸⁶

4. An overview of research questions

We have selected five sub-topics that can be helpful to test the feasibility of the research method that we intend to use in the project, as well as to provide an adequate representation of the variety of issues that concern administrative procedures⁸⁷ and we have involved many specialists of administrative and public law to discuss them. The sub-topics include, first, expropriations and authorizations under due process of law; second, the administrative management of the benefit or compensation programs established by welfare states, such as health and public housing; third, administrative rule making and planning; fourth, judicial review of procedural propriety and fairness; fifth, the liability of public authorities. We have thus sought to combine both more traditional issues, such as those that concern the control of procedures, and the issues that are related to the forms of administrative action that are more distant from the traditional paradigm of administrative law that is based on the individual act or measure.

The practical significance of these sub-topics makes comparative research particularly interesting. However, some specific remarks can be helpful to explain this selection. The first is a traditional topic, for it concerns the exercise of public powers affecting property and trade.⁸⁸ However, the research will cover both traditional 'takings' and the so-called 'regulatory expropriation',⁸⁹ also in the light of investment treaties. It will thus consider all sorts of factors and variables that influence exercises of discretion by public officials. The second sub-topic is connected to our earlier remark about the necessity of research on the positive state. There will thus be an attempt to understand whether, and the extent to which, the traditional principles governing administrative law are called into question by the advent of 'mass administrative justice'.⁹⁰ Similarly, the third sub-topic – administrative rule making and planning – abandons the traditional

84. M. Loughlin, *Public Law and Political Theory* (Clarendon, 1992), p. 37.

85. For further remarks, see J. Chevallier and D. Lochak, *La science administrative* (PUF, 1980), p. 43 (pointing out the flaws of 'empiricism') and T. Prosser, 'Towards Critical Public Law', 9 *Journal of Law and Society* (1982), p. 1 (calling for heightened attention on theory).

86. See F. Moderne, 'Préface', in A. Brewer-Carias, *Principes de la procédure administrative non contentieuse*, p. 9, 81 (arguing that an administrative procedure is not necessarily 'non-judicial'). For further remarks, see J. Chevallier and D. Lochak, *La science administrative*, p. 43 (pointing out the flaws of 'empiricism').

87. See O. Kahn-Freund, 'Review of Schlesinger, Formation of Contracts. A Study of the Common Core of Legal Systems', 18 *American Journal and Comparative Law* (1970), p. 429, 430 (asserting that the issues dealt with by the team led by Schlesinger were 'ethically, socially, and politically near the point of absolute indifference').

88. The distinctiveness of administrative powers is pointed out not only within the legal literature but also within that concerning public administration: see J. Chevallier and D. Lochak, *La science administrative*, p. 78, 31

89. For this concept, see W. M. Reisman and Robert D. Sloane, 'Indirect Expropriation and its Valuation in the bit Generation', 74 *British Yearbook of International Law* (2004), p. 115.

90. This distinction between the two roles of the State is not immune from problems: see J. Rivero, *L'Etat moderne peut-il être encore un Etat de droit?* (Faculté de droit, 1957), p. 76. See also J. Mashaw, *Cornell Law Review* (1973), p. 75, 780.

model of administrative action based on single-case decisions and devotes attention to a rationale of due process that is less frequently considered in the context of single case decision making; that is, citizens' consultation and participation.⁹¹ Fourthly, although traditional theories of administrative law centred on judicial review are unsatisfactory, this does not imply that a comparative research concerning administrative law should neglect judicial review. It implies, rather, the issues that are selected for comparison cannot encompass all the salient features of judicial review, let alone every feature, but must reflect the research's main focus; that is, administrative procedure.⁹² Similar remarks apply to the last sub-topic; that is, the analysis of the liability of public authorities. Once again, heightened attention on procedural issues will be necessary. Consider, for example, the losses that may derive from a local authority's decision to withdraw a licence regardless of the procedure previously established.

Two further sub-topics will be examined in the framework of what we call 'diachronic' comparison; that is, the study of some phases of the transformation of European administrative laws. We will explain them more in detail in the next section, after the explanation of the methodology that will be used for our comparative inquiry.

C. Research methodology

At this stage of the essay, it is time to clarify one crucial issue: precisely which type of comparison we wish to carry out. The discussion that follows is thus concerned with the nature of the comparative enquiry that will be undertaken. For this enquiry, 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, in the sense that the synchronic comparison focuses on administrative systems of our epoch, whereas the diachronic comparison provides a retrospective.

I. A synchronic comparison

At the heart of our research is the issue of which common and distinctive traits exist between European administrative laws. Our main task is not so much the discovery that exists among the legal systems of Europe, 'common ground' or 'common core'. There is certainly 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.⁹³ What we intend to study is the nature and scope of such common core, which implies a series of attempts to estimate the depth of the similarities and divergences that emerge from comparative legal analysis and to provide adequate explanation for both.⁹⁴ This we call synchronic comparison and it focuses on what the law is, as distinct from what it ought to be.

91. For an analysis of participation in some legal systems, see T. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Ashgate, 2001).

92. For a similar remark concerning legal remedies, see M. Galabert, 'The Influence of the Conseil d'Etat outside France', 49 *International and Comparative Law Quarterly* (2000), p. 701.

93. See, again, J.A. Usher, *General Principles of EC Law*; and T. Tridimas, *The General Principles of EU Law*. See also the seminal works by J. Rivero, 'Le problème de l'influence des droits internes sur la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier', 4 *Annuaire Français de Droit International* (1958), p. 295–308; and Vers un droit commun Européen: nouvelles perspectives en droit administratif', in L.N. Brown, M. Cappelletti and M. Kohnstamm (eds.), *Nouvelles Perspectives du Droit Commun de l'Europe* (Sijthoff, 1978), p. 389.

94. See P. Craig, *Comparative Administrative Law and Political Structure*, p. 12, 1; O. Kahn-Freund, 18 *American Journal of Comparative Law* (1970), p. 429 (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').

It is helpful to consider the operation of our ‘synchronic’ comparison more in detail. It is important, first and foremost, to be clear about how our synchronic comparison is structured: on the one hand, it is a collective enterprise in the sense that the questionnaire at the heart of our comparison is not simply decided by two or three scholars, but discussed in detail during a workshop to ascertain whether it makes sense for all the legal systems selected for comparison. On the other hand, it is based on the factual method. The methodology that we intend to follow owes much to the comparative inquiry elaborated and conducted by Schlesinger in the 1960s, with the intent to identify the common and distinctive elements of the legal institutions of a group of states, and is precisely this: instead of seeking to describe such legal institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved. As a result of this, the problems ‘had to be stated in factual terms’.⁹⁵ Concretely, this implied that, using the materials concerning some legal systems, Schlesinger formulated hypothetical cases to see how they would be solved in each of the legal systems selected. It turned out that those cases were formulated in terms that were understandable in all such legal systems.

Consider, for example, the following case. A public authority decides to withdraw the licence for selling a certain type of product, such as journals or pharmaceuticals, on grounds that certain prescriptions specified by the licence have not been respected. The licensee claims the withdrawal of the licence without a ‘hearing’ on the facts that are alleged by the public authority constitutes a deprivation of benefits that is in contrast with due process of law. What is interesting is not simply whether the licensee’s claim is likely to be successful before a court. What matters for our purposes is also which arguments would be relevant, including constitutional provisions and those of general and particular statutes, and how they would be interpreted by the courts, for instance whether what is required is a hearing before the withdrawal is formally decided or at some stage after the decision. As a variant of this case, consider the termination of a recipient’s welfare benefit. Would it be subject to the same standard that applies to a manifestation of the traditional ‘negative’ role of the state or to a less demanding standard because welfare benefits are managed through more expedite procedures? Would the termination of the recipient’s welfare benefit be subject to more stringent standards than the rejection of the initial application and, if so, why? Consider also the issues raised by the issuing of a new rule. There may be several circumstances in which a social group may wish to intervene in a rule-making procedure. For example, a group of users may want to contradict the arguments on the basis of which the regulator of a public utility intends to allow an increase of the tariffs for one or several services. It is interesting to understand whether this can be done because of a due process clause or a broader constitutional value such as *Rechtsstaat*, or because a right to intervene before regulatory agencies is implicit in a certain general clause protecting users.

These examples show the importance of examining the daily machinery of law and, thus, ‘bring to consciousness the assumptions secreted within the structures’ of each legal systems.⁹⁶ For example, it is the meaning to be accorded to a statutory term referring to the ‘relevant interests’ that must be considered that defines the decision maker’s discretionary powers. We are also interested in throwing light on both common and distinctive aspects of legal systems from the point of view of the daily machinery of law and, thus, ‘bring to consciousness the assumptions

95. See M. Rheinstein, 36 *University of Chicago Law Review* (1969), p. 448, 449.

96. M. Loughlin, *Public Law and Political Theory*, p. 93, 35.

secreted within the structures' of each legal system.⁹⁷ What is needed, therefore, is not just a set of individual studies, but a collective work.

Practically, for each sub-topic two editors will draft a factual questionnaire and discuss it with the experts during a workshop. Once the questionnaire is approved, it is sent back to experts. The reliance on factual questionnaires can attenuate the misunderstandings that are susceptible of occurring from certain legal doctrines that are common somewhere but are of little significance elsewhere. Moreover, the recourse to factual cases will facilitate the subsequent process of comparing the answers received. In their answers, reporters will thus have to describe how each case would be solved under the law of the legal system with which they are concerned. Following the 'common core' style, reporters will also be required, when outlining the possible outcomes, to explain which factors – statutes, doctrinal opinions, judicial trends, bureaucratic practices and so on – are responsible for those outcomes and to what extent. All this serves to explain the importance of context⁹⁸ and unveil the factors that, officially or not, have an impact on their legal system's law and outcomes. For example, it is the meaning to be accorded to a statutory term referring to the 'relevant interests' that must be considered that defines the decision maker's discretionary powers. By offering such insights on the legal and meta-legal factors affecting the probable outcome of each case, answers to the questionnaires are expected to shed light on the characteristic features of legal systems, including the plurality of rules co-existing (or conflicting with one another) within them.

Precisely because what is needed is a collective work, a further issue must be considered. It concerns the choice of the legal experts. On the one hand, it is self-evident that it is necessary to have at least one national expert for each legal system selected for our comparative experiment. On the other hand, as Schlesinger and his colleagues have convincingly argued, if it is true that a lawyer can really be an expert only on the legal system(s) of which they have constant and direct experience, it is equally true that without any idea about how other legal systems work it might be very hard to engage in a fruitful discussion. This is a serious issue, the importance of which cannot be neglected. However, fortunately, in the last few decades there has been an unprecedented growth of bi-national and multi-national groups and networks. The former include, for example, the Italian-Spanish seminars of administrative law (meeting every 2 years since 1964), the German-Italian workshops of public law (meeting every 2 years since 1971) and the Franco-German seminars of administrative law (meeting since 2005). The latter include, in particular, the European Group of Public Law, founded in Athens in 1991, with many ramifications, the *Societas Iuris Publici Europaei* and, more recently, ReNEUAL. As a result, there are increasing numbers of public lawyers with a constant interest for comparative experiments. This renders it much easier to understand the rules and practices of other European countries, although the risk of misunderstandings can never be excluded.

2. A diachronic comparison

Finally, it is helpful to explain more in detail our idea that an adequate comparison of administrative laws must be not only synchronic, but also diachronic.

97. Ibid.

98. The importance of the context has constantly been pointed out by the main experts of administrative law, including Gaston Jèze: G. Jèze, *Principes généraux du droit administrative*, p. 11, IV ('il faut connaître le milieu social, économique, politique').

There are, again, both general and specific reasons supporting this choice. From a general point of view, as Gino Gorla observed rephrasing Maitland's opinion that 'history involves comparison',⁹⁹ 'comparison involves history'.¹⁰⁰ History shows that not only ideas and theories about the law have been largely transnational, but that often legal principles and institutions originating in one nation have been influential elsewhere. Moreover, history gives a sense of the relativity of cultural exchanges. Both features soon become evident when considering the principles and rules of public law. As observed earlier, French 'special' administrative courts and the underlying conception of separation of powers have been very influential elsewhere.¹⁰¹ There are also reciprocal exchanges. For instance, English public law has been a model for the initial design of some fundamental values of US public law, in particular the requirements of natural justice lie at the heart of the concept of due process of law. However, US legal institutions have evolved across centuries and now provide, according to several observers, a model for those of England with regard to the procedural constraints imposed on exercise of power by public authorities. More generally, the growth of the States in the Western world accorded administrations not simply a new importance, but a much more complex relationship with social forces, even in stateless societies. For these reasons, at the heart of our research is a strong belief that our understanding of administrative law can be greatly enriched by history. Our method will thus be comparative and historical, not only in the sense of being rooted in the relentless dynamics of government, but also in seeking to identify the most significant exchanges between and across legal cultures.

We do not underestimate the complexity of this exercise, which calls into question the capacity of public lawyers to look at the legal institutions of the past without thinking they are simply the antecedents of the institutions of our time, nor to pretend that we may cover all significant periods of the history of administrative law in the more than two centuries that followed the French Revolution.¹⁰² From the first point of view, we believe the work of the public lawyers who will be involved in the research will benefit from the contribution of experts of other disciplines, including historians of law and legal theorists, as well as political scientists.¹⁰³

From the other point of view, we have selected two main areas of interest. The first is the development of judicial standards for reviewing administrative action in the years 1890–1910; the second concerns the codification of administrative procedure in the decades that followed the

99. F.W. Maitland, 'Why the History of English Law Was Not Written', in R.L. Schuyler, *Frederic William Maitland Historian. Selection from his Writings* (California University Press, 1960), p. 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').

100. G. Gorla, *Diritto comparato e diritto comune europeo* (Giuffrè, 1981), p. 39. See also J.H. Merryman, 'The Italian Style II: Law', 18 *Stanford Law Review* (1966), p. 396, 398 (1966) (highlighting the 'ahistorical nature of Italian legal orthodoxy', in contrast with Gorla's approach, which was based on "concrete cases", as Merryman observed when reviewing his book: *Review of G. Gorla, Diritto comparato e diritto comune europeo*, 31 *Am. J. Comp. L.* 358, at 359 (1983).

101. For this remark, see J. Rivero, *Cours de droit administratif comparé* (Les cours de droit, 1956-57), p. 5, 27.

102. Limits of space do now allow us to discuss the traditional thesis according to which administrative law, properly intended, is a product of the French Revolution: for this thesis, see L. Mannori and B. Sordi, *Storia del diritto amministrativo* (Laterza, 2001). But see also, for a discussion of the importance of administrative institutions before 1789, J.L. Mestre, *Introduction historique au droit administratif français* (PUF, 1985). For an analysis of late nineteenth century changes, see G. Bigot, *Ce droit qu'on dit administratif* (La mémoire du droit, 2015).

103. There is already some academic work in this field, including T. Le Yoncourt, A. Mercey and S. Soleil, *L'idée du fonds juridique commun dans l'Europe du XIX^e siècle. Les modèles, les réformateurs, les réseaux* (Presses universitaires de Rennes, 2014).

Austrian codification. The first period is under studied, but important. It is interesting to see which standards of conduct were elaborated by the courts in the absence of an extended legislation. From a common law viewpoint, of course, there is nothing odd about a set of variable and invariable standards elaborated by the courts. From a continental viewpoint, instead, this fact does not simply call into question the idea of an omnipotent legislator, but marks a profound difference with private law.¹⁰⁴ The further question that arises is whether, as some earlier writers suggested, administrative law had only a loose connection with Roman law, in contrast with what Carl Schmitt observed.¹⁰⁵

What has just been said with regard to judicial standards opens up the field for other issues concerning the development of legislative codification of administrative procedure. Earlier writers, such as Georges Langrod in the 1950s, pointed out the influence of the Austrian legislation on administrative procedure in other countries, especially those of Central and Eastern Europe. We may, therefore, probably find not so much 'new' evidence, but we might be able to use such evidence to give a more interesting and more fruitful look at the interaction between legal cultures in Europe that is at the heart of our comparative research. A first question that arises is whether the Austrian codification was regarded as a model by the legislators of both neighbours, such as Hungary and Poland, and other countries, including Spain.¹⁰⁶ Because the former had just become independent, they were certainly not bound to replicate Austrian legal institutions. Thus there is no reason to assume they passed their laws for reasons other than the intrinsic quality of those legal institutions and the systematic nature of codification. However, what matters more from the viewpoint of the 'common core' is another aspect; that is, the persistent ties between legal cultures, regardless of political borders. This may provide us with a key to understanding the overlooked Austrian influence on the regulation of administrative procedure.¹⁰⁷ It may also stimulate further analysis and reflection concerning socialist legal systems, whose quick disappearance after 1989 may not mean certain ideas about the state no longer exert any influence on the behaviour of public administrators and judges.

It remains to be said that in this case, the methodology is partially different from that which concerns synchronic comparison. The reason is that attention must be devoted to the development of legal institutions, as distinct from the elaboration of hypothetical cases, to be examined within all the legal systems selected for comparison. However, this type of research involves the testing of hypotheses, too. Moreover, it is a collective enterprise in the sense that both the elaboration of the relevant research questions and the individuation of the keywords to be used when examining judicial decisions concerning a variety of legal systems. The selection of such legal systems is the next issue that must be considered.

104. For a similar remark, see G. Vedel and P. Delvolvé, *Le système français de protection des administrés contre l'administration* (Sirey, 1991), p. 22.

105. C. Schmitt, *Ex Captivitate Salus* (Grevem Verlag, 1950).

106. Incidentally, the Spanish statute of 1958 heavily influenced the laws of several Latin American countries, according to On the Spanish statute of 1889, see E. Garcia de Enterría, 'Un punto de vista sobre la nueva ley de régimen jurídico de las administraciones públicas y de procedimiento administrativo común de 1992', *Revista de Administración Pública* (1993), p. 205.

107. See R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, p. 11, 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'). See also R.B. Schlesinger, *Introduction*, p. 24 (for a discussion of the comparability of socialist and 'bourgeois' legal systems).

D. Choice of legal systems

For every comparative research, the choice of the legal systems to be considered is a crucial issue and requires adequate justification. The discussion begins with an overview of the options available concerning the borders of our comparative analysis of national administrative laws. It continues with a reflection on the desirability of a comparison with a non-state administrative system, that of the EU.

I. A focus on Europe

The choice of Europe¹⁰⁸ is justified by several reasons: first, the historical relationships between its legal cultures, which have been pointed out by historians of law and comparative experts, such as Gorla and Schlesinger; second, the contrast between the high degree of compatibility of national treatment of several ways in which public authorities and other entities perform their functions and exercise their powers, and the diversity of solutions and, perhaps even more evidently, of conceptual tools;¹⁰⁹ and third, the emergence of regional organizations, such as the Council of Europe and the EU, which provides a new challenge for comparative studies.¹¹⁰

That said, there are several options available to researchers for the delineation of the boundaries of legal comparison. They include, first, the EU; second, the European legal space created by the Treaty of Oporto (1991), which connects the EU with both the European Free Trade Association and Switzerland; and third, the so-called Europe of rights, based on the European Charter on Human Rights (ECHR) and much wider than the EU, going from the Atlantic to the Urals.¹¹¹

There are arguments in favour of each of those options. The first option, which is based on the legal systems integrated within the EU, would be coherent with a vast body of legal literature. But, on the one hand, it would give too much weight to the influence played in the last 60 years by EC/EU law, whereas the intent of the research project is to highlight the 'common' elements and, as the necessary counterpart, the distinctive traits. On the other hand, such an option would leave out some legal systems that look particularly interesting for a comparative research, such as Switzerland, for its openness towards the influence played by the legal cultures of France, Germany and Italy. It can be interesting, moreover, to compare the administrative laws of Nordic countries,¹¹² within and outside the EU. This suggests the second available option, which focuses on the

108. A choice made when the research project has been presented to the European Research Council and that develops the earlier work of both authors of this essay. Other writers have recently called for heightened attention on common principles in Europe, including see R. Caranta, *2 Review of European Administrative Law* (2009), p. 79, 161 and A. von Bogdandy, 'Common principles for a plurality of orders: A study on public authority in the European legal area', *12 I-CON* (2014), p. 980. See also B. De Witte and A. Vauchez (eds.), *Lawyering Europe: European law as a Transnational Social Field* (Hart, 2013) (proposing different perspectives on legal integration in Europe).

109. J. Rivero, *Cours de droit administratif comparé*, cit. at 101, p. 6, 43 (observing that national administrative laws, especially in continental Europe, showed 'une certaine air de famille').

110. See M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *47 International and Comparative Law Quarterly* (1998), p. 47.

111. See A. Stone Sweet and H. Keller, *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008). See also P. Birkinshaw, *European Public Law*, p. 4, 15 (noting the influence of the Council of Europe on the substantive and procedural laws of its members) and B. Stirn, *Vers un droit public européen* (Montchrestien, 2012), p. 45 (same remark).

112. See N. Herlitz, 'Legal Remedies in Nordic Administrative Law', *15 American Journal of Comparative Law* (1968), p. 687 (for the remark that these countries have both similarities and differences, attenuated by their increasing cooperation).

European legal space¹¹³ established by the Treaty of Oporto and other agreements, would be preferable. However, precisely because we are interested in examining both similarities and differences, it is helpful to confront these legal systems with others that are included within the Council of Europe. This brings us to the second choice, that of the legal systems to be selected for comparison.

2. *Selecting national administrative laws*

Once again, Schlesinger's methodological remarks about the small number of legal systems taken into consideration for comparative purposes are quite helpful, because for a long time the comparative study of public administrations and their law has been confined to the two main political systems of Europe, France and the UK, whereas more limited attention was devoted to Germany, Italy and few other countries.¹¹⁴ Of course, no research project escapes from the limits of budget and workforce. But within such limits, we strongly believe an effort must be made – first to cover a sufficiently large number of legal systems and, second, to go beyond the circle of more 'influential' legal systems, so the ultimate results would have significance and validity in view of comparisons with legal systems not directly considered, as those of other regions of the world.

There are good reasons, both general and specific, for this. From a general point of view, for all the importance of England and France, they have several significant common and distinctive elements with other legal systems, including Ireland and Scandinavian countries for the former and Italy, Portugal and Spain for the latter.¹¹⁵ Moreover, even though Dicey and others have been inclined to consider the German administrative system closer to that of the French than of the English, it differs from the former in a variety of aspects, including its focus on individual rights, the role of the constitutional court and the importance of internal appeals. The Spanish choice of a specialized panel within its highest ordinary court, as opposed to the existence of a system of administrative courts, in France, Germany and the Netherlands, is a further demonstration of the variety of laws. The choice to focus on administrative procedure reveals other significant distinctive traits, including not only the scope and purposes of codification, but also the different role played by traditional constraints on power to protect individuals and more recent forms of participation of social groups within administrative procedure.¹¹⁶ These remarks make clear the reasons

113. For this concept, see M.P. Chiti, *Lo spazio giuridico europeo*, in *Mutazioni del diritto pubblico nello spazio giuridico europeo* (Clueb, 2003), 321; A. von Bogdandy, 10 *I-CON* (2012), p. 614, 618.

114. See R.B. Schlesinger, 'Introduction', p. 2. For a comparison between France and the USA, see B. Schwartz, *French Administrative Law and the Common-Law World* (New York University Press, 1954), also published in French.

115. See M. Fromont, *Droit administratif des Etats membres de l'Union européenne*, p. 3, 15. Also Motzo and Piras' series (G. Motzo and A. Piras, *Administrative Law: The Problem of Justice*, p. 19) included Sweden in the same volume of the UK (and the USA), as well as Belgium and Spain in the same volume with France. Sixty years ago, instead, Rivero identified three main groups of administrative law in Europe: those of most continental countries, those of the UK and northern Europe, and those of the countries of Central and Eastern under Soviet influence. He argued, moreover, that there was no administrative law, properly intended in Muslim countries (*Cours de droit administrative comparé*, p. 101, 34), a remark that is questionable in the light of recent developments. Conversely, it would be interesting to consider the existence of administrative law in a totalitarian government, as distinct from an authoritarian one: for the positive thesis about the USSR, see W. Gellhorn, 'Review of Administrative Acts in the Soviet Union', 66 *Columbia Law Review* (1966), p. 1051, 1076.

116. Consider, for example, the importance of the jurisprudence of the German Constitutional Court on administrative procedure, which was pointed out already thirty years ago by E. Denninger, 'Effetti della giurisprudenza costituzionale sull'amministrazione e sul procedimento amministrativo', 36 *Rivista trimestrale di diritto pubblico* (1986), p. 331.

for most of the selections and omissions that characterize our research. We have included legal systems that can be said to be representative not only of the systems of civil law and common law that are traditionally examined by comparatists, but also of other regions and legal traditions.¹¹⁷

It remains to be said that a partially different choice was simply inevitable for our diachronic comparison.¹¹⁸ For research on the ‘common core’, it was obviously interesting to see which standards of review were used by the courts in legal systems where judicial protection was provided either by ordinary courts or by both civil and administrative courts, such as those that existed in France since the end of the 18th century and were created in other parts of Europe in the last decades of the 19th century.¹¹⁹ England, France and Germany were thus obvious candidates, coherently with the tradition of this type of comparative study in this field.¹²⁰ Three other legal systems have been selected for this comparative analysis. Belgium and Italy initially had much in common. Not only did both decide at the end of the 19th century to follow the monistic model of judicial review, but the former was viewed by the reformers of the latter as a sort of continental application of the English model.¹²¹ Finally, Austria had several interesting features: not only the choice of creating a special administrative court for the empire, but also the first general legislative provision mandating it to focus on the disregard of essential requirements.

As regards the other sub-topic, which concerns the influence of the Austrian codification of administrative procedures after 1925, countries such as Hungary, Poland, Czechoslovakia and Yugoslavia were obvious candidates. It is interesting to understand whether the Austrian codification was regarded not just as an ideal type, but as a model. Another interesting and important question concerns the post-1948 scenario. Between 1956 and 1960, codes of procedures were enacted in Spain, then under the authoritarian rule of Francisco Franco, in Hungary and Poland, which were under the Soviet rule, and in Yugoslavia,¹²² which enjoyed wider margins of political manoeuvre. The question that arises is whether, and why, countries with different forms of government looked at the Austrian codification. This could shed more light on the different goals or functions of codification of administrative procedure and, more generally, on the ambiguity of administrative law, in contrast with the theories that take for granted its necessary connection with democracy.

3. From European administrative laws to those of the EU

There is another trait that differentiates our research from that carried out in the field of private law. It is about the consideration of non-state legal entities in a comparative project of this type. We have thought that a study in the field of public law in Europe could benefit from a consideration of EU law.

117. Countries selected for the first comparative workshop, held in Trieste in 2017, included Austria, France, Germany, Italy, the Netherlands, Norway, Poland, Spain, Switzerland and the UK.

118. See Section 6.C.

119. See E. Garcia de Enterría, ‘Contentieux administrative objectif et contentieux administrative subjectif à la fin du XX^e siècle: analyse historique et comparative’, 53 *Revue administrative* (2000), p. 125.

120. There is discussion, among specialists of administrative justice, as to whether the English and French judicial systems can be regarded as two ‘ideal-types’ (see Y. Gaudemet, *Droit administratif*, p. 24) or the situation is more complex and nuanced (see M. Nigro, *Giustizia amministrativa* (Il Mulino, 1983)).

121. J. Rivero, *Cours de droit administratif comparé*, cit. at 101, p. 39.

122. The International Institute of Administrative Sciences gave account of those codes: see G. Langrod, ‘La nouvelle loi Yugoslave sur la procédure administrative non contentieuse’, 10 *Revue administrative* (1957), p. 635; see also (for a quick comparison between the codes issued in the mid-1950’s).

Many public policies are heavily influenced by EU principles and rules. This is an important impact that EU law has on the public law systems of its Member States. Another impact derives from the ‘spill-over’ effects that its law has for the resolution of problems arising outside the policy areas that are subject to EU legislation. The application of the principles of legitimate expectation and proportionality by national courts provide interesting examples of this.¹²³ A quick look at the existing literature shows there is certainly no lack of studies on these principles, even though some of them do not escape the risk of oversimplification, such as the narrative according to which proportionality was simply ‘transplanted’ from the German legal system to that of the EC and then to the legal systems of the other Member States. What can be interesting, for our purposes, is not just to compare the application of EU principles and rules within the Member States, but also to compare their government practices and judicial doctrines with those of other countries. There may be similarities between the former and the latter and, that being the case, we should ask ourselves whether they are induced, as Montesquieu would say, by the ‘nature of the things’ or by borrowings. There may be differences concerning not only the latter, but also the former, and this could be explained either by culture or by political preferences.

However, this is just one side of the coin. There is another side: the law that applies to the institutions and agencies of the EU, in short the European administration, narrowly intended. Its existence is a powerful counterweight to the idea that nothing has changed since the advent of the positive state. It challenges the idea according to which administrative law is consubstantial to the state and raises interesting issues about the origins and adaptations of the principles and rules that govern the conduct of EU institutions. It shows the difficulties that beset the traditional idea according to which administrative law simply reflects national legal traditions. There is ample evidence that, at the beginning of European integration when the problem of protecting private interests emerged,¹²⁴ French administrative law exerted a strong influence on the design of the new legal institutions. Consider, for example, the grounds of judicial review for the acts adopted by the institutions of the community: they clearly reflect the ‘*voies d’ouverture des recours*’ before the French administrative judge. As observed by a former advocate-general, when interpreting the meaning of ‘*détournement de pouvoir*’, the Court took for granted that the concept had its origins in France and should, therefore, be seen in that light.¹²⁵ Whatever the intrinsic soundness of this idea, the provisions of the EEC Treaty concerning the non-contractual liability of the officers of the EC implied a different type of judicial elaboration, for they laid down a *renvoi* to the general principles of law common to the legal systems of the Member States. Consider also the increasing willingness of the Court to enforce procedural constraints on exercises of power by public authorities, including the Commission, after the enlargement of 1973.¹²⁶ Consider, finally, the

123. See J. Jowell and A. Lester, ‘Proportionality: neither Novel nor Dangerous’, in J. Jowell and D. Oliver, *New Directions in Judicial Review: Current Legal Problems* (Stevens, 1998), p. 51; A. Biondi, ‘The influence of EU law on English Administrative Law: some exemplary tales’, in M.P. Chiti and G. Greco (eds.), *Remedies and public procurement: a comparative analysis* (Giuffrè, 2012), p. 195.

124. See G. Bebr, ‘Protection of Private Interests Under the European Coal and Steel Community’, 6 *Virginia Law Review* (1956), p. 879.

125. T. Koopmans, ‘The Birth of European Law at the Crossroads of Legal Traditions’, 39 *American Journal of Comparative Law* (1991), p. 493, 500. But see also P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015), p. 318 (pointing out the Germans’ dissatisfaction with the constant reference to the French experience made by Advocate General Lagrange).

126. T. Koopmans, 39 *American Journal of Comparative Law* (1991), p. 124, 504, referring to Case 17/74 *Transocean Marine Paint Association v. Commission*, EU:C:1974:106.

framework that regulates access to files, which has been introduced on the impulse of Nordic countries. Of course, it remains to be seen whether there is a juxtaposition of legal institutions based on different legal traditions or such institutions form a coherent whole, for example in the logic of *Rechtsstaat*.¹²⁷

We are aware that this inclusion is not without problems, which can be identified in two main respects. First, it is important to bear in mind the particularity of the European administration, in the sense that its rule is generally indirect and more distant from the lives of the citizens of the Union.¹²⁸ There are, however, cases in which its officials carry out inspections on the premises of firms or deliver funds to projects. As a result of this, the relevance of the European administration for a comparative research differs. It is likely to be greater in areas in which the EU administration issues authorizations or sanctions, whereas it will be less relevant when it is for national agencies to issue the measures that impinge on the interests at stake. Second, it can be interesting to consider whether EU courts follow the same standards when judging the conduct of the European administration and that of national agencies, for example with regard to non-contractual liability.

A final *caveat* is helpful. The frontiers of a scientific enterprise cannot be constrained by contingent geopolitical borders. This is why we plan – as much as time and economic factors will allow us – to take into our research the study of legal systems that may help one to understand whether European legal models circulated beyond our region, which model(s) in particular did, what features were adopted elsewhere and for which reasons. The gates of our research will always be open to the collection of data showing the inverse route has been taken, namely that European legal experiences have been affected in one or more aspects by other Western models, as well as by legal solutions developed outside the West.¹²⁹ In this sense, the research may reveal commonalities and differences between European legal systems and thus set the stage for discussion concerning the points of contact and contrast with other systems.

4. Conclusion

No attempt will be made here to summarise the entirety of the preceding argument. What is important is to recall briefly, in negative terms, the problems that have been analysed and, in positive terms, the solutions we elaborated to cope with them.

The first problem, which is methodological, concerns the approaches that have dominated the discussion about the comparative study of administrative law in Europe. We argued that they do not reflect simply a different sensibility to use the comparative method in the field of administrative law. They are, rather, two opposite approaches, one denying that the concepts and principles that characterize it within the countries of continental Europe have anything in common with the

127. J. Schwarze, *Europäisches Verwaltungsrecht*. For further discussion, see R. Dehousse, “Comparing National and EC Law: the Problem of the Level of Analysis”, 42 *American Journal of Comparative Law* (1994), p. 761 (discussing the methodological difficulties raised by such cross-level comparison).

128. J. Schwarze, ‘Judicial Review of European Administrative Procedure’, 68 *Law and Contemporary Problems* (2004), p. 85.

129. If the European end of this ‘inverse’ route has to be better explored, the fascination that the Founding Fathers of the US legal system had for the Chinese model of government is illustrated by J.J. Kroncke, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (Oxford University Press, 2016), p. 1. Whether the critical remark of Glendon Schubert about the ‘parochialism of (...) the American approach to the reform of administrative law’ is still valid is another question, and an interesting one: G.A. Schubert, ‘Review of Schwartz, French Administrative Law and the Common-Law World’, 11 *University of Toronto Law Journal* (1956), p. 311, 313.

distinctive tradition of public law in England, and another based on the assumption that the growth in government inevitably obliges public authorities to be confronted with more or less the same problems and, thus, to consider similar solutions. It is precisely because they emphasize either similarities or differences that they tend to marginalize or even exclude the analysis of certain aspects or issues that are considered less relevant. More importantly for our purposes, there are further difficulties with such approaches from the point of view of European law. It is precisely because they are general approaches, and thus claim to be potentially applicable everywhere, that they do not really pay attention to the particularity of legal realities in the current European context. Another difficulty posed by several studies in the field of public law is that what is carried out is a juxtaposition of the legal systems selected, rather than a comparison. In positive terms, we argued that several elements, including positive norms and the jurisprudence of European courts, indicate there are cases in which 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. Cases of this nature, including the procedural guarantees of private property and those concerning rule making, will be examined in the context of the research presented here.

The second problem concerns the substance of our comparative endeavour. If there is a tradition of comparative studies in the field of public and administrative law, it is undoubtedly focused on the control of government carried out by the courts. It would be wrong to dismiss this issue, but an adequate awareness is necessary of the fact there is more in public law than judicial review. In particular, this only provides a sort of indirect vision of public authorities, because the latter are not considered for what they do and how they do it, but for how their action is reviewed by the courts. For this and other reasons, our research focuses on an important part of administrative law; that is, administrative procedure. A research of this type is inevitably a collective enterprise, for which there are some helpful lessons that can be learnt from the experience gathered in the field of private law. For those who are minded to accept this because they think the difference between the duties of legality and fairness that are imposed on public authorities and private bodies are differences of degree rather than of nature, it might be easier to accept our point about methodology. For those who believe public law is founded on a different structure, because it reflects a different philosophy, it might be more difficult. For this reason, it is important to repeat that our endeavour 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.

Our research also seeks to balance a synchronic comparison, which addresses current issues that are more or less common to a plurality of legal orders in Europe, and a diachronic comparison, which may shed some light on aspects that have been overlooked in the past, including the elaboration of standards of judicial review of administrative action and the codification of administrative procedure before and after the Second World War. It is self-evident that this can lead to various consequences for some theories of public law, which may be found to be unconvincing, and more generally for the reluctance to use the comparative method in this field. This is not the place to rehearse these lines of argument once again. Suffice it to remind the reader that the method we are proposing to adopt does not coincide with that used by the Court of Justice of the European Union, first, because we do not have a normative purpose, but one of an advancement of knowledge, and, secondly and consequently, because we are particularly interested in understanding the reasons that underlie both common and distinctive aspects of national administrative laws.

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