'PUBLIC LAW DISPUTES' IN A UNIFIED EUROPE [1]

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Abstract

This essay is an attempt to contribute to the discussion on legal comparison in the field of public law. First, it argues that, historically, rival approaches to comparative legal analysis have been followed in the European context and that, methodologically, the time is ripe for considering whether a new approach is justified by the existence of a common core of principles. Second, the essay argues that, for all the importance that has traditionally been given to the distinction between judicial monism and dualism, other aspects are arguably more important, notably the distinction that emerges from law and institutional practice between a particular class of disputes – which is called 'public law disputes' - and other classes of disputes and the principles and criteria that govern proceedings related to such disputes. Finally, on the basis of this analysis, some remarks are made with regard to the relationship between dissimilarity and similarity.

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1. Introduction

It is trite wisdom – but wisdom nonetheless - that, whenever interests and visions of the good differ, conflicts or

disputes are likely to arise[2]. If disputes may inevitably arise in all human affairs, the question that arises is, first and foremost, how is it possible to solve a conflict in a fair, just, timely and (possibly) cost effective manner. There is much, in this respect, that might be learnt from our neighbours[3]. Not surprisingly, both legal academics and practitioners have always devoted attention to how legal systems solve disputes, in an attempt to understand and import best practices, with regard to both private law and public law. A different approach has been followed by those who deny that legal comparison in the field of public law may be meaningful, whether on normative or on epistemological grounds[4].

This essay is an attempt to contribute to this debate. It has three main goals. First, it argues that rival approaches to comparative legal analysis have been followed in the European context (sections 2-3). Second, for all the importance that has traditionally been given to the distinction between judicial monism and dualism (examined in section 4), other aspects are arguably more important: the distinction that emerges from law and institutional practice between a particular class of disputes – which is called 'public law disputes' - and other classes of disputes (section 5) and the principles and criteria that govern proceedings related to such disputes. Finally, this analysis will suggest some remarks on the relationship between dissimilarity and similarity, also in view of harmonization of legal institutions in this field (section 7).

2. Three Rival Approaches

It is important to point out that two very different methods have been followed in the course of history. But it is precisely the awareness that history matters that suggests that such methods ought to be considered dynamically, as opposed to a static

[2] S. Hampshire, *Justice Is Conflict* (2000), 5 (holding that conflicts are inevitable even within a unitary polity); A. MacIntyre, *After virtue. A study in moral theory,* 2nd ed (2007) (noting that there is no self-evident truth).

[3] R. Caranta, *Learning From Our Neighbours*: *public law remedies harmonization from bottom up*, 4 Maastricht J. Eur. & Comp. L. 220 (1997).

[4] For an epistemological approach, P. Legrand, *Droit comparé* (1999), 2; *European Legal Systems are not Converging*, 45 Am. J. Comp. L. 90 (1998).

manner. Next, an alternative approach, that looks consistent with some contemporary developments of public law and that emphasizes the importance of a common core, will be examined.

A) The Traditional Approaches: Contrastive and Integrative

For American comparative lawyer Rudolf Schlesinger[5], two main approaches in the history of European law can be distinguished; that is, the contrastive and the integrative approaches.

Schlesinger's starting point is one that is shared among historians of law[6]: for a long period of time, not only were scholarly writings by European jurists consulted in all parts of the Old Continent, but that also reported judicial opinions also formed part of the legal materials and authorities that were consulted in the past by anyone who sought to ascertain the principles of the *jus commune*. All this changed in a period that varies from one country to another, during the age of codification that begun in the second half of the eighteenth century. This change justified Schlesinger's argument that the approaches to comparative law should be seen in a dynamic perspective.

Such a dynamic perspective is important because it shows that several schools of though have existed in relation to the explanation of the legal realities of different epochs, a methodological point to which we will return later. It also permits to fully appreciate a salient distinction – among others - between hard sciences and legal science. While in the former the success of a new scientific paradigm within a given epistemic community – such as Copernican astronomy - may be based only on the attraction that it exercises, as a more accurate representation of

[5] R. Schlesinger, *The Past and Future of Comparative Law*, 43 Am. J. Int'l L. 747 (1995).

[6] See R.C. Van Caenegem**,** *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (2001), (pointing out that the *ius commune* developed in the faculties of law. It was thus a common "learned law", that consisted of two theoretically well distinct, but in practice interconnected elements, i.e. the canon law of the Catholic Church and the civil law of Justinian's *Corpus Juris Civilis)*. See also A.M. Hespanha, *Panorama historico da cultura jurìdica europeia* (1999, 2nd ed.).

unchanged realities, in the latter a paradigm shift may derive from important changes in the order of the reality. This is what happened in the case of the French Revolution, according to those who hold that it produced an entirely new public law in the Continent, because it ushered in a new language of rights that were based on equality and. not only was the whole of society redefined in terms of "nation", but the relationship between the State and individuals changed as well[7]. The integrative approach that characterized the long era of the *jus commune* implied a strong emphasis on analogies. As another comparative lawyers, Gino Gorla, has shown, this allowed jurists to invoke the use of the law of another land, on the basis of criteria that enhanced *vicinitas*, that is to say proximity, not merely in the geographical sense, but from the point of view of the analogies between the home and the host legal system[8].

The age of codification was characterized by a very different institutional and cultural context. The emphasis previously placed on natural law faded, due to the imposition of a positivist framework, as well as to the rise of legal nationalism: Latin was replaced by national languages and materials of other legal systems were treated as "foreign" law[9]. Because of these factors, all those who were engaged in the study and practice of comparative law (for example, legislators and their advisors considering whether a certain legal institution could be "transplanted" into their home legal system) were "compelled to emphasize differences rather than similarities". This emphasis on differences characterized the contrastive approach that continued to prevail well into the second half of the twentieth century[10], when a revival of the integrative approach seems to have emerged.

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[7] E. Garcia de Enterria, *La lengua de los derechos. La formaciòn del derecho Publico tras la Revoluciòn Francesa* (1995), 58 (holding that a new language emerged for the new legal order). See, however, Tocqueville, *De la démocratie en Amerique* (1835) (pointing out that the Revolution transformed the political constitution of France, not the administrative constitution).

[8] See G. Gorla, *Il ricorso alla legge di un "luogo vicino" nel diritto comune europeo* (1973), in *Id.*, *Diritto comune e diritto comparato* (1981), 617.

[9] R. Schlesinger, *The Past and Future of Comparative Law*, cit. at 5, 751.

[10] *Id.*, 751.

B) Dissimilarity and Similarity: the Legacy of Albert Venn Dicey

Probably the clearest example of the contrastive approach is that which was used by Albert Venn Dicey, the Victorian constitutionalist, in the oft-cited *incipit* of the twelfth chapter of his treatise of constitutional law, entitled "Rule of law compared with *droit administratif*". It deserves to be quoted in full:

"In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law. […] The extent of this protection has in France … varied from time to time. It was once all but complete; it now far less extensive than it was thirty-six years ago. It forms only one portion of the whole system of *droit administratif*, but it is the part of French law to which in this chapter I wish to direct particularly the attention of students"[11].

In France, Dicey observed, public law was characterized by dualism, reflecting the principle that the judiciary should not have the power to annul acts of the executive. This power was reserved to the *Conseil d'État*, which obtained greater autonomy only after 1872, when the system of *justice déléguée* replaced that of *justice retenue*. In sharp contrast with this vision of separation of powers, Dicey observed, in England public authorities were subject to the ordinary law of the land and, consequently, their actions could be challenged in the ordinary courts of the land. Dicey argued that this organizational difference reflected a more profound cultural and political divide. His argument was essentially that while the French system developed as an instrument of despotism, in England the traditional liberal ideas required the control of governmental power.

Whatever its intellectual soundness and adherence to legal realities, Dicey's idea of administration without administrative law had important practical consequences. It lent force to the arguments of all those advocating a liberal order in which public administrations and citizens are subject to the same law, administered by the same judiciary. For example, the founder of

[11] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959, 10th ed.) (hereinafter: *Law of the Constitution*), 328-9.

modern administrative law scholarship in Italy, Vittorio Emanuele Orlando, proposed such a vision of administrative law, whilst accepting German theories about the specificity of public law[12]. As it is so often the case with *idées reçues*, these ideas enjoyed a long currency. As recently as forty years ago, Dicey's successor at Oxford, Sir William Wade, still conceived administrative law narrowly, as the judicial review of administration and Massimo Severo Giannini, an eminent Italian administrative lawyer, stated in his textbook that administrative law was not a general feature of modern States[13].

Dicey has been criticized by his compatriots – including Robson and Jennings, Craig and Loughlin[14] – and by other scholars – Hauriou and Goodnow[15], Cassese and Fromont[16]. They all criticized his polemic approach to *droit administratif*. He did not pay attention to the legal institutions of his epoch, which in England were increasingly characterized by the conferral of discretionary powers to public authorities. He also overemphasized the 'illiberal' traits of French administrative law, relying essentially on how Alexis de Tocqueville had illustrated them half a century earlier. In both respects, he was not simply describing the institutional framework, but was 'building' it. But, paradoxically, had he looked at the case law of the French Council

[12] V.E. Orlando, *Introduzione*, in *Id*. (ed.), *Primo trattato completo di diritto amministrativo italiano* (1900).

[13] M.S. Giannini, *Diritto amministrativo* (1988, 2nd ed.), 21 where the author repeated the opinion set out in his *Foreword* to the Italian translation of Wade's *Administrative Law* (1964): *Diritto amministrativo inglese (*1969), VII. For a critical – though questionable – interpretation of the Italian legal framework, see A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"* (2005).

[14] W. Robson, *Justice and Administrative Law* (1927); W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, 20 J. Comp. Legisl. & Int'l L. 99 (1938); M. Loughlin, *Public Law and Political Theory* (1992), 3; P. Craig, *Administrative Law* (2003, 5th ed.), 7.

[15] F. Goodnow, *Comparative Administrative Law. An analysis of the administrative systems, national and local, of the United States, England, France and Germany* (1903), 6.

[16] S. Cassese, *La construction du droit administratif: France et Royaume Uni* (2000), 40; M. Fromont, *Droit administratif des Etats européens* (2009). See also S. Flogaitis, *Administrative law et droit administratif* (1986).

of State, he might have seen that it was the only English-like institution that France had in that epoch[17].

These remarks are undeniably forceful and serve to warn against the misuses and abuses of the comparative method[18]. Anyway, three important points should be borne in mind. First, Dicey was writing primarily for his students[19] and this may in part explain his use of a clear-cut contrast between the two models. Second, it is fair to observe that Dicey clarified that *droit administratif* was not a unique French feature, because it had emerged in "most of the countries of continental Europe"[20]. Indeed, an administrative court existed in Germany since 1863. Last but not least, Dicey added that what prompted comparison was not only dissimilarity, but also similarity. In particular, in the latest editions of his treatise Dicey did not hesitate to acknowledge that what he still called *droit administratif* had "of recent years, been so developed as to meet the requirements of a modern and democratic society and thus throws light upon one stage at least in the growth of English administrative law"[21]. This remark signals an essential point of method: the dimension of change, which can be better appreciated from a comparative viewpoint, coherently with the maxim "history involves comparison"[22].

C) An Alternative Approach: Building on a Common Core

The relationship between comparison and history is not important only for a better understanding of the fact that the institutionalization of a positivist and nationalist outlook in legal studies can be properly regarded as an ideological triumph, not without relevant achievements in terms of the construction of a legal science based on some "knowledgeable" legal sources. It is

[17] F. Moderne, *Origine et evolution de la jurisdiction administrative en France*, 9 Revue administrative 15 (1999).
[18] E. Stein, *Uses, Misuses-and Nonuses of Comparative Law*, 72 Nw. U.L. Rev. 198 (1977).
[19] W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, cit. at 14, 100 noted that probably "very few of those who took their constitutional law from Dicey took the trouble to found out if Dicey was right".
[20] A.V. Dicey, *Law of the Constitution*, cit. at 11, 330.
[21] *Id*., 356.
[22] See F.W. Maitland, *Why the History of English Law is Not Written*, in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland* (1911), vol. 1, 488.

also important in order to understand why by the late twentieth century it has become evident that an approach emphasizing only similarities or differences fails to respond to the felt necessities of our time, in the realm of public law.

Europe is no longer characterized only by a plurality of national legal systems. In fact, there are 'regional' institutions, such as the Organization for Co-operation and Security in Europe (OSCE), which deals with security, and the Council of Europe, with its Convention of Human Rights. There is, thus, a Europe of rights, much wider than the EU, that goes from the Atlantic to the Urals[23]. There is, secondly, a European legal space, in which other States have joined the Members of the EU[24]. There is, finally, the EU itself, a union of legal systems based on the assumption that at least some values and principles of law are shared and that such values and principles are constitutive elements of the political decision to create the EU.

An important manifestation of these shared values and principles, though not the only one, consists in the inclusion of fundamental rights, "as they result from the constitutional traditions common to the Member States" (Article 6.3 TEU) within the "general principles of the Union's law", together with those guaranteed by the ECHR. It is precisely because a certain constitutional tradition is recognized as being common, that it produces the legal effects that are attributed to the general principles of law. In other words, this "fact" has its own legal importance, independently of the effects stemming from EU law.

This opens up a range of important issues for examination and encourages us to call for a heightened attention not only to the adequacy of approaches that emphasize either similarities or differences. The assumptions underlying the adoption of the same theoretical approach for, say, a comparison between the U.S. and a Japan and an analysis focusing on Europe should be subject to critical scrutiny. At the same time, the question that arises is whether it is possible to draw a map of the values and principles

[23] See, in particular, A. Stone Sweet & H. Keller (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (2008).

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

that form a sort of common core, in the field of public law[25]. My conjecture thus comes close to the research on the common core of European private law carried out, in the wake of Schlesinger's research, by scholars such as Mauro Bussani and Ugo Mattei[26].

3. A Retrospective

Let us return now the thoughts from which the previous section began. I emphasized that we would make a mistake in believing that Dicey, for all its rejection of French *droit administrative*, did not use comparison and history. I suggested, rather, that the way in which he did use them was in part flawed for his didactic purposes, as well as for his normative purposes; that is, to construct a system that did not allow collectivism or at least could contain its development. Incidentally, this may seem a more plausible suggestion when referring to comparative legal analysis than that which refers to it as a method that only has the purpose of knowledge. Practical use seems far more intimately bound up with the circumstances in which administrative justice is considered than theoretical knowledge. Nevertheless, it is true that a more accurate knowledge of legal institutions is a prerequisite for legal theories. A major example, in this respect, is provided by Eduard Laferrière's treatise about administrative justice. Otto Mayer and Antonio Salandra, though in different senses, provide a more normative analysis. This quick retrospective will be completed by some remarks about the development of legal institutions.

A) Comparison and History in Eduard Laferrière

Edouard Laferrière, who was the vice-president of the French *Conseil d'Etat* (that is to say the 'effective' head of that fundamental advisory and judicial body) and – according to

[25] For further remarks, see M. Van Hoecke & M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 Int'l & Comp. L. Q. 495 (1998); S. Cassese, *Beyond Legal Comparison*, Annuario di diritto comparato e di studi legislativi, 2012, 388.

[26] M. Bussani and U. Mattei, *The Common Core Approach to European Private Law*, 3 Colum. J. Eur. L. 339, 340 (1997).

another influential French public lawyer, Réné Chapus - has founded the scientific study of administrative justice[27].

Laferrière was, in particular, the author of the leading treatise of his time, the *Traité de la jurisdiction administrative et du recours contentieux*. This was by all means a landmark text, due to the richness of the data gathered and, most of all, for its structure. Like Dicey, Laferrière opened his treatise with a comparative analysis and he expressed the opinion that the structures of public law were heavily influenced by national traditions[28]. Unlike Dicey, however, he did not hesitate to highlight the similarities to other European countries. He observed that, despite contrary opinions, the system of administrative justice was not the sole prerogative of France. Quite the contrary, he forcefully argued, administrative justice existed in all other continental systems of public law[29].

When illustrating the main "foreign" systems[30], he began with the usual remark that they were characterized by many variables ("*grande diversité*"). But he soon added that it was not impossible to order them according to some main types and, more interestingly for our purposes, that some of them (those of most German States, Portugal and Spain) had the same principal structures of French public law, notably separation of powers and a dual jurisdiction over the disputes between citizens and the State[31]. He distinguished these systems from two other categories. One was characterized by the absence of a dual jurisdiction but at the same time the enforcement of severe limitations to the review carried out by ordinary judges (Belgium and Italy). The last group was based on a radically different way to conceive the separation of powers between administrative and judicial bodies (UK and US)[32].

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[27] R. Chapus, *Droit du contentieux administratif* (2006, 12th), § 5. For an assessment of his works, see P. Gonod, *Édouard Laferrière, un juriste au service de la République* (1998).

[28] E. Laferrière, *Traité de la jurisdiction administrative et du recours contentieux* (1896, 2nd ed.), XI ("*l'empreinte de nos traditions nationales et de notre génie propre*").

[29] *Id.*, X ("*la legislation comparée offre d'utiles enseignements. Elle montre que la juridiction administrative n'est pas, comme on l'a dit quelquefois, une institution spéciale à la France, elle existe dans tous les grands Pays*").

[30] *Id.*, 25.

[31] *Id.*, 27.

[32] *Id.*, 84-87.

Interestingly, like Dicey, Laferrière used a dynamic approach. For example, he pointed out that Italy, after the choice made in 1865 to suppress all special administrative proceedings, had been obliged to create a new panel within its Council of State, in order to solve the disputes between citizens and the State[33]. He likewise observed that England had increasingly set up administrative tribunals, in order to solve the disputes of this type, vesting quasi-judicial powers in officials, although he thought that the main principles were left unchanged[34].

Using a comparative approach, Laferrière thus provided a much richer picture of the legal realities of his time. He also took the dimension of change into due account, in the sense that "comparison involves history"[35]. This is, as observed before, a fundamental methodological point, to which we will return later.

B) 'Tempering Power through Justice': Otto Mayer, Vittorio Emanuele Orlando and Antonio Salandra

A combination of history and comparison also connotes both the "foundational" treatise of Otto Mayer on German administrative law[36] and one of the first comparative treatises, that of Antonio Salandra.

Unlike Dicey, Mayer argued that French administrative law - of which he gave a full account in his book of 1886[37] - could be considered not only as an ideal-type, but as a model. Mayer, who taught in Strasburg, annexed to the German Empire after 1870, was profoundly and almost inevitably influenced by the French legal culture, to the extent that he affirmed that it was only after writing about French administrative law that he felt ready for the

[33] *Id.*, X.

[34] *Id.*, 28. He also noted that, for centralized services, the English legal framework was increasingly more similar to those typical of continental systems (81).

[35] G. Gorla, *Comparison involves history*, in *Id.*, *Diritto comparato e diritto comune europeo*, cit. at 8, 41.

[36] O. Mayer, *Deutsches Verwaltungsrecht* (1894), *Le droit administratif allemand* (1903-1906). On this influence, see E. Kaufmann, *Verwaltung und Verwaltungsrecht* (1914).

[37] O. Mayer, *Theorie des Französischen Verwaltungsrechts* (1886).

task he had set to himself, and that he translated his treatise into French[38].

But if we were to observe only this, we would not render justice to his thoughts about public law, for three reasons. First, Mayer was fully aware of the differences that in many respects existed between French and German concepts and legal institutions, especially in view of the contrast between the uniform nature of the former and the differentiated nature of the latter. Second, Mayer pointed out that two phenomena, related but distinct, were legally relevant. One was the influence played by French law on German law either indirectly, when it was adapted to the realities of the host State, or directly, when it was simply copied ("*simplement copié*"). The other was the parallelism of ideas and theories that developed ("*parallélisme des idées communes à tous les Pays*"). Although such parallelism might be constructed in a purely functional manner, in the sense of the new necessities produced by the growth of government, this was not the case. Indeed, Mayer followed a different path and this brings us to the third issue. Mayer put French administrative law in the broader European context. He observed that in the various nations that constituted the "old European civilization", administrative law was based on certain general principles that were the same everywhere[39]. One of such principles was separation of powers. Another was the belief that there should be a legal machinery for ensuring that public authorities do not exceed their powers, which he encapsulated in the concept of «*Rechsstaat*». While this concept was distant from the ideal of the Rule of Law, as theorized by Dicey, it largely corresponded to the French concept of «*régime de droit*», which he used throughout his treatise[40]. Last but not least, Mayer affirmed that he had followed the French doctrines of fundamental rights and *res judicata*, because German legal culture lacked corresponding doctrines[41].

Mayer was not isolated in his belief that there were common principles of public law. The scholar who founded on

[38] For this remark, see R. David, *The Major Legal Systems in the World Today. An Introduction to the Comparative Study of law* (1984), 82.
[39] O. Mayer, *Le droit administratif allemand*, cit. at 36 ("*le droit administratif […] a pour base certains principes généraux qui sont partout les memes*").
[40] O. Mayer, *Le droit administratif allemand*, cit. at 36, § II.6.1.
[41] O. Mayer, *Préface de l'edition française*, in *Id.*, *Le droit administratif allemand*, 2.

entirely new bases the study of public law – administrative and constitutional law – in Italy, i.e. Vittorio Emanuele Orlando, shared the same belief. Interestingly, Orlando neither engaged in critical theory nor developed ponderous methodologies with which to root out the exact meaning of legal theory. He simply and bluntly affirmed that a new political regime – that of Italy after political re-unification – required new legal theories and that new and more satisfactory legal theories could be taken from German scholarship, in particular the distinction between private law and public law and the construction of distinct theories for the latter, under the prism of *Rechtsstaat*[42]. And he involved the best talents of his time in his treatise of administrative law.

It was precisely in those years, soon after 1900, that Salandra published his treatise of administrative justice[43]. Like Dicey, he placed at the heart of his work the contrast between authority and liberty and expressed concern that the growth of government activities, which was manifest in increased budgets and staff, could gravely diminish individual freedoms[44]. Unlike Dicey, however, he expressed the view that it was precisely the increasing mass of public business that required the introduction of new bodies and procedures, suited to avoiding a significant departure from the principles of free government[45]. In other words, administrative courts were viewed as instruments of *Rechtsstaat*[46]; that is, for all its mightiness, law limits even the State. Using a slightly different order of concepts, fifty years later sir William Wade considered American and English efforts in "tempering power with justice"[47].

But the most significant departure from the contrastive approach followed by Dicey regards the method followed by Salandra. Like Laferrière, Salandra distinguished the public law systems of continental Europe on the basis of a criterion of affinity. He thus accentuated the common traits of the systems of

[42] V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico* (1887), in *Diritto pubblico generale* (1956), 3.
[43] A. Salandra, *La giustizia amministrativa nei governi liberi* (1904).
[44] *Id.*, 5.
[45] *Id.*, 9.
[46] K.F. Ladford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914*, 37 Central European History 203 (2004).
[47] W. Wade, *Towards Administrative Justice* (1963), 48. See also the review of this book by L.L. Jaffe, 16 Stanford L. Rev. 485, 486 (1964).

administrative justice that existed in France, Italy, and Spain, as well as in the German States at the beginning of the twentieth century. But he went one step further, and a very important one at that, when he affirmed that the principles governing the French system of administrative justice were not only principles widely shared elsewhere, especially in some jurisdictions, but could be considered as legally significant. This was not simply a way of emphasizing their importance. Indeed, Salandra's intention was quite different. He argued that, unlike the rules of other legal systems that were set out in any orderly account of comparative legislation, the French principles could fulfill a twofold function. They could be included among national sources of law or, at least, be used for their interpretation. The underlying assumption was the "commonality of the principles" upon which the French and Italian systems of public law were based, which was particularly evident in the circumstances in which the French provisions had been directly reproduced or imitated[48].

C) Administrative Law: the Third Century

This far we have seen that the objection raised by Dicey against the French and other systems of continental Europe, i.e. that of the risk for liberal democracy was contrasted by other scholars, according to whom there was no disconnection between the values and principles of liberal democracies and the existence of a specialized jurisdiction for public law disputes. The crucial questions are thus normative and empirical. Normatively, all these authors believed that those values and principles had to be preserved, though they dissented on how to do so. Empirically, two developments have emerged, i.e. the growth of government and administrative law and the emergence of public law disputes.

As Dicey himself recognized in his other great work, the *Lectures on Law and Public Opinion*, radical developments of society and government took place in the period between 1880 and 1914. The "legislative public opinion" had changed "running more and more in the direction of collectivism"; that is, requiring several new public activities[49]. There were not simply an unprecedented

[48] A. Salandra, *La giustizia amministrativa nei governi liberi*, cit. at 43, 94.

[49] A.V. Dicey, *Lectures on Law and Public Opinion in England* (1905; 1926 2nd ed.), 64.

growth in the quantity of government business and important qualitative changes, by way of legislation increasingly attentive to new social needs. There was also, as a result of these changes, a growing need to adjust the structures and procedures used by public authorities. New administrative bodies were set up, altering the simple structures of governance that characterized Victorian England. Moreover, legislation entrusted government with discretionary powers to implement public policies. What was significant was not just this practice but, rather, its scale. At the same time, the courts were often excluded from the review of administrative action and increasingly often the executive branch of government was allowed to be a judge in its own cause, thus acting outside the dictates of the Rule of Law[50].

Similarly, recent studies on the early period of US administrative law confirm that, although it was fully recognized only at the beginning of the twentieth century, it has been a part of American law since the founding of the Republic[51], though it has evolved as consequence of the "changed nature of society and the altered role of government to deal with those changes"[52].

These developments were, sooner or later, common to most European countries. Since specialists have already told this story in far greater detail, only a couple of aspects need be mentioned here. First, the States of the twentieth century were not simply those of the nineteenth century with a few changes. They reflected, rather, a new kind of social and legal organization with unlimited goals. Since 1950, there has increasingly existed much more than a cradle-to-grave administrative welfare state. As observed by Jerry Mashaw, by deciding on access to prenatal care, abortion in public hospitals and abortion pills, public administrators affect private, individual choices concerning births. Other decisions affect access to basic education, unemployment and pension schemes. Still another set of decisions may determine whether and how it is possible to "rest in peace", when cemeteries have to accommodate the building of infrastructures such as

[50] P. Craig, *UK, EU and Global Administrative Law* (2015).
[51] J. Mashaw, *Creating the Administrative Constitution* (2012).
[52] B. Schwartz, *Administrative Law: the Third Century*, 29 Admin L. Rev. 291 (1977).

highways and railroads, for example[53]. Second, everywhere legislation has entrusted public authorities with wide discretionary powers. Sometimes, it has even been as a substitute for administrative adjudication[54]. In both respects, it has raised serious issues of justice, not attenuated by the more recent shift of administrative action from direct intervention to regulation[55]. The question that thus arises, as we entered into the third century of administrative law[56], is what happened to administrative justice.

D) The Development of Administrative Justice

We may note that French legal institutions are characterized by a remarkable continuity, in the sense that more than two centuries ago the *Conseil d'Etat* was created and 140 years ago, in 1875, a system of *justice déléguée* (delegated justice) replaced the old system of *justice retenue*. Similarly, in England there is no such thing as a special judge for public law disputes. Scholars such as Robson and Jennings argued for the rationalization of what they regarded as haphazard arrangements for tribunals. While the Donoughmore Committee endorsed their call for some general rules, their proposal to create a sort of administrative court of appeal, distinct from the High Court, was rejected ([57]).

Even a quick look at the rest of Europe, however, shows that deep changes have occurred. Between 1865 and 1889, both Belgium and Italy followed the English model. They abolished their bodies entrusted with administrative and judicial functions and left all disputes concerning public authorities in the hands of civil law courts, regarded as 'the ordinary courts' of those legal orders. However, in Italy the ways in which the courts handled

[53] For these remarks, see J. Mashaw, *Due Process in the Administrative State* (1986), 14.

[54] E. Forsthoff, *Rechtsstaat im Wandel* (1964).

[55] Much literature describes the shift from the interventionist State to the regulatory State: for an excellent synthesis, see G. Majone, *From the Positive to the Regulatory State*, 17 J. of Public Policy 139 (1997) and S. Rose-Ackermann, *Law and Regulation*, in K.E. Whittington *et al*. (eds.), *Oxford Handbook of Law and Policy* (2008), 576.

[56] B. Schwartz, *Administrative Law: the Third Century*, cit., 291; M. D'Alberti, *Diritto amministrativo comparato* (1992), 7.

[57] M. Loughlin, *Public Law and Political Theory*, cit. at 14, 178.

public law disputes was not satisfactory. Accordingly, from 1890 a new panel of the *Conseil d'Etat* was entrusted with the task of handling such disputes. Belgium made more or less the same choice in 1948[58], while in the Netherlands the Council of State was entrusted with the task of resolving disputes since 1861, similarly to French *justice retenue*, a form abandoned almost thirty years ago. Meanwhile, other legal systems had followed a similar path. In Germany, administrative courts had been set up by Baden in 1864 and Prussia in 1872. The Weimar Constitution explicitly acknowledged their role in 1919[59]. Austria, too, set up administrative courts and kept them distinct from the judiciary. Sweden did created its Court of Government in 1908[60], as well as separate courts for taxation and insurance, while Finland did so in the framework of its Constitution (1918), but they had many features in common[61].

What is even more interesting, for present purposes, is the destiny of administrative courts in Central Europe. After 1919, with the dissolution of the Austrian Empire, the political landscape changed dramatically. In particular, Poland was reunified, after centuries, Hungary was divided from Austria, and Czechoslovakia was created. All these countries set up their own administrative courts, with a view to defending the rights of citizens against misuses and abuses of power[62]. Their systems were more or less influenced by the model of the Austrian Supreme Administrative Court, and were thus distinct from ordinary courts[63]. After those countries were annexed or occupied by the Nazi, administrative courts were abolished and, being

[58] F.G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 2 It. J. Public L. 126 (2009) (explaining the reasons adduced by the supporters of 'administrative justice'); A. Piras, *Trends of Administrative Law in Italy*, in *Id.* (ed.) *Administrative Law: The Problem of Justice* (1997) 241 (discussing the 'liberal' reasons of the reform of 1865).

[59] Weimar Constitution, Article 107 "In the *Reich* and in the states administrative courts have to exist, according to the laws, to protect the individual against bureaucratic decrees".

[60] N. Herlitz, *Swedish Administrative Law*, 2 Int'l & Comp. L. Quart. 226 (1953).

[61] N. Herlitz, *Legal Remedies in Nordic Administrative Law*, 15 Am. J. Comp. L. 687, 7002 (1967).

[62] See the note *The Czechoslovak Juridical Council: A Bold Attempt at Solving the Problem of Administrative Justice Abroad*, 6 Modern L. Rev., 143 (1943).

[63] M. Wierzborski and S.C. McCaffrey, *Judicial Control of Administrative Authorities: A New Development in Eastern Europe*, 18 Int'l Lawyer 645 (1984).

considered as 'bourgeois' institutions, they were not reestablished under the Soviet Rule; incidentally, the same thing happened in East Germany in 1952. However, as the century progressed and both political and legal reforms were introduced, administrative courts were reestablished, in Poland before the fall of the Berlin Wall (1989)[64], in Czechoslovakia soon after it. In Bulgaria, too, the Supreme administrative court was restored in 1991. Meanwhile, the consolidation of the administrative judge was – together with the creation of the Constitutional Court – an important element in the strategy of judicial empowerment in Turkey[65]. More recently, after the dissolution of USSR, Czechoslovakia and Yugoslavia, some of the newly created States have set up administrative courts (for instance, the Czech Republic and Croatia).

At this stage it ought to be clarified that all this does not suggest that continental countries are simply 'converging' towards the French model, while England keeps its 'distinctiveness'. It suggests, rather, two things. First, legal realities evolved and legal theories should take this into due account. Otherwise, they risk becoming mere abstractions. Second, although various kinds of public law disputes are cognizable in the civil courts of Continental Europe, most of its States have an elaborate structure of administrative courts parallel to the civil courts[66].

E) A Constitutional Dimension

The steps directed to setting up administrative courts in so many countries of Europe are symptoms of an important fact, namely that administrative justice has a constitutional dimension. This dimension can be appreciated in three respects that are related but distinct.

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[64] M. Wierzborski and S.C. McCaffrey, *Judicial Control of Administrative Authorities: A New Development in Eastern Europe*, cit., 646; C.T. Reid, *The Approach to Administrative Law in Poland and the United Kingdom*, 36 Int'l & Comp. L. Quart. 817, 822 (1987).

[65] H. Shambayati and E. Kirdig, *In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey*, 62 Political research Quarterly 767, 771 (2009). See also R. David, *The Major Legal Systems in the World Today. An Introduction to the Comparative Study of law*, cit. at 38, 82 (noting the influence of French law on Turkish institutions).

[66] M. Shapiro, *From Public Law to Public Policy, or the "Public" in "Public Law"*, 5 Political Science 410, 412 (1972).

First, although there are several distinctive traits between national systems of administrative justice, their underlying rationale is that judges must "secure the legality of all acts of administration", to borrow the words of the Austrian Constitution[67]. This echoes the statement by scholars such as Laferrière, Mayer and Orlando that a public authority may not act outside its powers. Similarly, a comparative survey recently published by OSCE on administrative justice asserts that its existence "is a fundamental requirement of a society based on the rule of law. It signifies a commitment to the principle that the government, and its administration, must act within the scope of legal authority"[68]. A more ambitious conception of modern systems of judicial review emphasizes their efforts to meet the growing demand of "tempering power with justice"[69].

Secondly, and consequently, unlike the systems of administrative justice of the nineteenth century, modern systems of administrative justice are characterized by a development of profound constitutional significance, the enactment of national bills of rights. For instance, Article 19 (4) (1) of the *Grundgesetz* has been interpreted as establishing an approach to administrative law that focuses on the protection of individual rights[70]. The rights that national constitutions recognize and protect are not entirely the same, but they have much in common. Their commonality is increased by supranational bills of rights such as the ECHR and the Charter of Fundamental Rights of the EU. From the viewpoint of EU law, while the latter has the same legal value of the treaties, the rights recognized by the former have been included by the Court of Justice between the general principles of law of which it has to ensure the respect and are nowadays referred to in these terms by Article 6 TEU.

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[67] Austrian Constitution, Article 129. For similar doctrines in other continental countries, see A. Travi, *Lezioni di giustizia amministrativa* (2014, 11th ed.), 2; G. Vedel – P. Delvolvé, *Le système français de protection des administrés contre l'administration* (1991), 82 (conceiving legality as requiring the administration be subject to law). See also P. Craig, *Formal and substantive conceptions of the rule of law: an analytical framework,* 31 Public L. 487 (1997).

[68] OSCE, *Handbook for Monitoring Administrative Justice* (2013), 12.

[69] W. Wade, *Towards Administrative Justice*, cit. at 47, 48.

[70] J. Schwarze, *Europaisches Verwaltungsrecht* (1985), English translation *European Administrative Law (*1992), 125.

Thirdly, various safeguards concerning administrative justice are constitutionalized. These safeguards include the independence of administrative courts and their judges[71] and access to justice for public law issues, which is provided without limitations. A direct connection between administrative and constitutional courts has also been established, for example in France, by way of the preliminary question of constitutionality[72].

4. Identifying Public Law Disputes

The discussion in the previous sections focused on the dynamics of administrative justice. We now turn our attention to two main topics in as follows: the emergence of 'public law disputes', and the arguments in favour of an 'objective' criterion to distinguish them from other types of disputes.

A) The Emergence of 'Public Law Disputes'

Both history and comparative constitutional analysis show that while legal actions long consisted essentially in disputes between private parties (citizens and other individuals, groups, business), with few exceptions, the last two centuries have seen the rise of disputes between private individuals and public authorities.

Let us consider how some European constitutions acknowledge this distinction. Since Article 74 (1) of the German *Grundgesetz* distinguishes between private law ('*burgerliches Recht'*) and public law ('*öffentliches Recht'*), and Article 34 (1) states that liability rests with the relevant public body if a person entrusted with a public office infringes his duties, the distinction between private law and public law has a constitutional significance[73]. Since the German Code of Administrative Court Proceedings specifies that the Federal Administrative Court has jurisdiction, among other things, over "public law disputes which are not of a constitutional nature between the Federation and the *Länder* and between individual *Länder*", it can be argued that the distinction is

[71] See, e.g., Austrian Constitution, Article 129 A (concerning administrative tribunals); Italian Constitution, Article 108 (2); Greek Constitution, Article 87 (1).

[72] For further remarks, see D. Costa, *Contentieux Administratif* (2014, 2nd ed.), 28.

[73] J.P. Schneider, *The Public-Private Law Divide in Germany*, in M. Ruffert (ed.), *The Public-private Law Divide: Potential for Transformation*? (2011), 85.

well established in German law[74]. Following an only partially similar approach, after clarifying that "against administrative acts", judicial review is always allowed (Article 113), the Italian Constitution makes a distinction between rights and legitimate interests, in the sense that the disputes that concern them fall within the jurisdiction of civil and administrative courts, respectively. But this provision also allows the legislator to decide that certain disputes concerning rights may fall within the jurisdiction of administrative courts. While this confirms that there is no fixed division of labour between administrative and civil courts, it can be argued that the questions that it raises are neither few nor trivial. We should ask ourselves whether there is a 'sound' criterion for deciding matters of jurisdiction, as distinct from whatever the Parliament of the day opines. Whether limits to parliamentary discretion exist and the Constitutional Court can enforce them is another matter[75].

Let us look now at the situation that emerged in England after the House of Lords ruling in *O'Reilly v. Mackman*. Their Lordships dismissed the action brought by some prisoners on grounds that, due to the improvements made to the judicial review procedure in 1978, it would be an abuse of process for the court to allow an ordinary action, rather than judicial review, to be pursued by a person seeking to establish that a decision of a public authority infringed rights protected by public law. Two important principles were thus laid down. First, by referring to the procedure consisting of application for judicial review as the "procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law"[76], the court distinguished public law remedies from others. Secondly, it affirmed the procedural exclusivity of the judicial review procedure, meaning that this is the only way in which claimants may raise public law issues in the courts. However, this raised numerous problems. Not only did it require English courts to distinguish private and public

[74] A similar provision is established by the Austrian Constitution, Article 133 (1).
[75] A. Travi, *Giustizia amministrativa* (2010, 3rd ed.), 351.
[76] *O'Reilly v Mackman* [1983], § 38, for Lord Denning.

law in a way that they had never done before[77], but it also drew the attention of academics and practitioners to the influence played by European Community (EC) law, which was based on the distinction between these fields[78].

Whatever the historical and institutional differences between the legal systems of England, Germany and Italy, they are facing a similar problem; i.e., how to distinguish public law issues from other issues. At the same time, they are influenced by a powerful force for change, EC/EU law, which is characterized by primacy and direct effect. It is necessary, therefore, to consider the available criteria for distinguishing public law issues in the light of EU law, seen in terms of its strict connection with the ECHR.

B) Deficiencies in the Subjective Criterion

It may be helpful to examine briefly the options available to legal systems in determining the nature of disputes, from the viewpoint of the distinction between public law and private law. A legal system may well use more than one option. It may do so in a variety of ways. Once a certain option has been chosen, it may be enshrined in constitutional provisions, which have the advantage of stability. Alternatively, the option may be enshrined in legislation, with or without constitutional mandate. This has the advantage of certainty, although the variety of claims brought before the courts may well require that the general rules established by legislation be supplemented by a *lex specialis*. There is also a further option, consisting of the judicial adaptation of one or more criteria. Courts generally enjoy considerable latitude as to how they define and refine such criteria.

That said, concerning the sources of law, let us return to the criteria that may be used, either alternatively or jointly. There is, first of all, a criterion that focuses on the claimants' counterparties, i.e., the public authorities and which can thus be called 'subjective'. Another criterion, on the other hand, focuses on the public nature of the functions performed and can thus be called

[77] M. Elliott and R. Thomas, *Public Law* (2014, 2nd ed.), 522. For further discussion, see C.F. Forsyth, *Beyond O'Reilly v. Mackman: The Foundations and Nature of Procedural Exclusivity*, 44 Cambridge L. J. 415 (1984).
[78] M. Loughlin, *Public Law and Political Theory,* cit. at 14, 215.

'objective'. Constitutions and statutes do not explicitly use the terms 'subjective' and 'objective', but such terms express the ideas that underlie both criteria and permit us to compare two different approaches.

The 'subjective' criterion is instinctively appealing. It distinguishes public authorities and public bodies from both physical persons and moral persons acting in the private sector. There is no need to subscribe to the philosophical theories – such as that of Hegel - that emphasize the role of the State viewed as a moral person, to realize that it must protect and promote a much wider range of interests and, therefore, be subject to a particular set of principles and standards, though some of them (such as fairness and good faith) have much in common with the principles and standards that apply to individuals and private bodies[79].

This explains why this criterion is used in national and supranational rules. Thus, citing once more Article 113 (1) of the Italian Constitution as an example, judicial review is "always" granted for the "acts of public administrations". The fact that the legislative intent refers to public authorities is confirmed by the third indent of the same provision, whereby legislation determines which judicial bodies may annul the acts issued by public administrations. Similarly, one the fundamental principles of Economic and Monetary Union (EMU), the prohibition of excessive government deficits[80], applies to Member States, as well as to their regional and local authorities[81]. Likewise, EU Directive 2014/24, which "establishes rules on the procedures for procurement by contracting authorities with respect to public contracts"[82], clarifies that the term 'contracting authorities' means first of all "the State, regional or local authorities"[83].

However, it is precisely these legal provisions, and others with a similar content, that show how insufficient the subjective criterion is. It is over-inclusive and under-inclusive at the same time. It is over-inclusive, because it tends to include all activities

[79] D. Oliver, *Common Values and the Public-Private Divide* (1999), 12.
[80] Article 126 (1) TFEU.
[81] Consolidated version of the TEU, Protocol (n. 12) on the excessive deficit procedure, Article 2 (1).
[82] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, Article 1 (1).
[83] Directive 2014/24/EU, Article 2 (1) (1).

carried out by public authorities and their acts, while only some of those activities aim at achieving the general interests of society and are thus characterized by authoritative features.

An example regarding ownership may clarify this. In all the legal systems in continental Europe, all directly influenced by Roman law to some extent, all rights concerning goods can be transferred by way of transaction; moreover, the right to be registered as proprietor either of a piece of land or of a building may be acquired without a transaction, provided that the interested party has been in adverse possession – with the intention to posses it - for at least a certain period of time. Neither option is available, however, for public lands, buildings, or chattels such as vehicles and pieces of furniture[84]. At the end of the nineteenth century, especially in Germany and Italy, these safeguards were regarded as the symptoms of the existence of a legal regime of public ownership entirely divorced from the legal regime of private ownership. Gaston Jèze, who observed – ironically - that the stationery used by public employees was not protected by such safeguards, highlighted the excesses deriving from this conception[85]. But still today it is important to clarify that many activities performed by public authorities, including purchasing a computer, simply do not have authoritative traits. Accordingly, the disputes concerning these activities may not be regarded as public law disputes.

The subjective criterion is also under-inclusive, because it considers only the cases in which public functions are performed by public authorities, while in an increasing number of cases, such functions are performed by private bodies. Consider again the two EU provisions mentioned before. It was noted that the prohibition of excessive government deficits applies to national and local governments alike. It must be added that it also applies to social security funds to the exclusion of commercial operations. The 'nature' of the body that manages them is thus legally irrelevant for these purposes. Consider also public procurement. Much of this, such as the delivery of utilities, is carried out by private bodies with some public function. EU law thus requires both public authorities and 'bodies governed by public law' to respect

[84] J.B. Auby et a., *Droit administratif des biens* (2008, 5th ed.), 5.
[85] G. Jèze, *Définition du domaine public*, Revue de droit public 695 (1910).

certain principles and procedure. 'Bodies governed by public law', in this respect, means that such bodies have legal personality, are established for the purpose of achieving certain goals in the public interest, and are funded or controlled by the State or another public authority[86].

The subjective criterion is also under-inclusive, because it considers only the cases in which public functions are performed by public authorities, while in an increasing number of cases such functions are performed by private bodies. For this reason, national legislators and courts have set out criteria and indicators of 'publicity', because public bodies – broadly conceived – must be subject to distinct and higher legal requirements[87]. The two EU provisions mentioned before do the same thing. The prohibition of excessive government deficits applies, in addition to national and local governments, to social security funds to the exclusion of commercial operations. The 'nature' of the body that manages them is thus legally irrelevant, for these purposes. Consider also public procurements. Many of them are carried out by private bodies charged by some public function, such as the delivery of utilities. EU law thus requires both public authorities and 'bodies governed by public law' the duty to respect certain principles and procedure. 'Bodies governed by public law', in this respect, means that such bodies have legal personality, are established for the purpose of achieving certain goals of public interests, and are funded or controlled by the State or another public authority[88].

C) The Objective Criterion

To argue from the deficiencies of a certain criterion is, of course, a simple way to justify another criterion; in our case the objective one. But it is not a wholly satisfactory way to proceed. The reason is, the objective criterion is also necessary in order to limit the exercise of authoritative powers, so as to prevent and punish misuses and abuses, which thus reinforces the argument based on the deficiencies of the subjective criterion. Few examples,

[86] Directive 2014/24/EU, Article 2 (1) (4).
[87] Sir J. Laws, *Monism and Dualism*, 12 Eur. Rev. Public L. 401, 405 (2000); W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, in A. Piras (ed.), *Administrative Law* (1998), 4.
[88] Directive 2014/24/EU, Article 2 (1) (4).

taken from national and supranational judicial practice, may clarify this rationale.

In all national legal systems, there is a need to distinguish commercial activities from non-commercial activities for fiscal purposes. Tax law is based on such a distinction and its implications can be very significant. Precisely for this reason, it is often the case that a non-profit organization seeks to obtain better treatment, for example by arguing that it is subsidized by government funds and must, therefore, abide by certain public rules. This does not mean, however, that such an organization may be regarded as a public authority. A UK case, *Riverside Housing Association*, provides an apt example[89]. It was argued that, being a body governed by public law and being subject to a special legal regime, *Riverside* was entitled to tax exemptions. But the Tribunal argued that the concept of a public body is to be construed in a narrow sense. Coherently with the jurisprudence of the Court of Justice, exceptions are justified only for bodies carrying out governmental functions, such as finance regulators, and not for a body that is itself the subject of regulation.

The jurisprudence of the ECJ is relevant also from another point of view, relating to the free movement of persons. This is one of the founding principles of EC/EU law. It implies, in particular, the right to obtain a job elsewhere. It is not, however, an unlimited right. Indeed, Article 39 (4) TFEU provides an exception for posts within the public service. The question that thus arises is whether this term should be taken literally. An affirmative answer has been given, *pour cause*, by national governments, anxious to keep their public employment reserved to their nationals. But since the Commission launched its '1992 programme', it reacted against what it considered as excessive protectionism. Its dispute with Belgium in the late 1970s provides not only a good example, but a precedent. The Commission argued that Belgium, by excluding nationals of other Member States from vacancies for works in its railway stations (plumbers, carpenters, and electricians), had failed to fulfil the obligations stemming from the Treaty of Rome. Belgium replied that it was precisely the Treaty that excluded 'employment in the public service' from free movement. Advocate-general Mayras relied on

[89] House of Lords, *Riverside Housing Association v White*, UKHL 20 [2007], § 29.

a precedent, *Sotgiu*, where the Court had already taken the view that the derogation was justified by a connexion with the exercise of official authority[90]. He wished to integrate the criterion based on authority and thus looked at both the commentaries of the Treaty and national judicial practice. As a result of this, he devised a criterion that would integrate that based on authority. This criterion focused on "the interests whose protection justifies" the derogation[91]; i.e., the general interests acknowledged and protected by the legal order and that justify the exercise of power by States and other public authorities, more precisely of "powers conferred by public law lying outside the ordinary law"[92]. The Court agreed with its Advocate-General and found Belgium liable for infringing EC law; it also followed the same criterion in what rapidly became settled case law, in order to avoid misuses and abuses of power.

It is interesting to observe that the same concern has emerged in the field of human rights. In particular, when interpreting Article 6 ECHR, the European Court of Human Rights has repeatedly affirmed that there is in principle no justification for the exclusion from its guarantees of disputes concerning administrative issues. In order for the exclusion to be properly justified, it is not enough that a certain activity must be carried out by a civil servant. It is also necessary that an employee hold a post that participates in the exercise of public powers and that, as a consequence, there exists, as the Court found in *Pellegrin*, a "special bond of trust and loyalty" between the employee and the State viewed as employer[93]. The Court followed the same criterion in other cases concerning the issuing of building permits[94], and licences for the sale of alcoholic beverages to the public[95]. It is settled case law, therefore, that it is of little consequence that a dispute concerns an administrative act or measure. What really matters is whether the competent body in

[90] ECJ, Case Case 152/73, *Sotgiu v Deutsche Bundespost*.
[91] Conclusions delivered by AG Mayras, Case 149/79, *Commission v Belgium*.
[92] *Id*., 3916.
[93] Eur. Ct. H. R., judgment of 8 December 1999, *Pellegrin v France* (application n. 28541/95).
[94] Eur. Ct. H. R., judgment of 7 July 1989, *Ringeisen v Austria* (application n. 10873/84).
[95] Eur. Ct. H. R., judgment of 7 July 1989, *Traktorer Aktiebolag v Sweden* (application n. 10873/84).

the exercise of the functions of a legally established public authority has carried out such an act or measure[96]. That being the case, the jurisdiction of the competent national court cannot, among other things, be impaired by the recognition and enforcement of judgments rendered by the court of another State[97].

D) A Synthesis

From the remarks made thus far it should be clear, first of all, that I use the objective criterion, not the subjective criterion, in order to determine the field of 'public law disputes', as distinct from private law disputes, regardless of whether the latter arise between individuals or affect public authorities that are acting in the exercise of their rights under private law. As a second clarification, I am not referring merely to the exercise of public powers or *puissance publique*, to borrow the more apt French expression, because it highlights that public authorities (and, in some circumstances, bodies governed by public law) may use powers to which there are no parallels in private law[98]. Although this is a necessary element, it is not a sufficient one, because it must be integrated by another element, which concerns the interests acknowledged and protected by law.

To sum up, general interests must justify the exercise of authoritative powers – *puissance publique* – by States and other public authorities. The underlying assumption – which itself ought to be made explicit – is that the exercise of power, thus understood, should be justifiable to all citizens and social groups

[96] See also, for the UK, the *Human Rights Act*, Article 6(3)(b) (stating that "public authority includes any person certain of whose functions are functions of a public nature) and 6(5) ("a person is not a public authority by virtue only of (3)(b) if the nature of the act is private").

[97] See Council Regulation n. 44/2001 of 22 December 2000, Article 1 (1) (providing that the Regulation "shall not extend, in particular, to … administrative matters").

[98] S. Romano, *Poteri, potestà*, in Id., *Frammenti di un dizionario giuridico* (1948), 134; G. Vedel – P. Delvolvé, *Le système français de protection des administrés contre l'administration*, cit., 17 (characterizing an 'administrative decision' as unilateral and binding).

as a principle common not only to liberal democracies, but also to well-organized polities that do not belong to this category[99].

This notion of 'public law disputes' has the advantage of avoiding the risks of under-inclusiveness and over-inclusiveness that affect the subjective criterion. However, it is questionable for the very same reasons. A first question that arises is whether this way of looking at public law disputes neglects the distinction between administrative and constitutional disputes, while for example the German code certainly distinguishes between them. The problem with this objection, however, is not simply that it obviously reflects a distinction between issues of legality and constitutionality that may not be shared – at least for the purposes of judicial review – by all legal orders included in the European legal space. Another problem is that such distinction is merely negative and residual in nature, because it refers to 'public law disputes that are not of a constitutional nature'[100]. Referring to public law disputes as characterized by exercises of authoritative powers justified by general interests has, instead, the advantage of providing positive criteria for their identification. It is also less narrow than 'administrative jurisdiction', which postulates a special court or system of courts[101].

Finally, it should be clear that this notion of 'public law disputes' does not coincide with the notion of 'public law litigation', as it has emerged in US legal scholarship, although there is some overlapping. The term 'public law litigation' has been coined to designate litigation where a broadly intended public interest, i.e., one that goes beyond the particular interests of the parties, is at stake[102]. While this term includes antitrust, environmental and public utilities and other litigation where the available remedies involve some consideration of public interest, and thus comes close to 'public law disputes' in the sense used

[99] *Contra*: J. Rawls, *Justice as Fairness* (2001), 89.

[100] German Code of Administrative Court Procedure, Article 50 (1) (1). An English translation was published as an appendix in M.P. Singh, *German Administrative Law in Common Law Perspective* (1985).

[101] M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 131.

[102] The term was coined by A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Id. *Foreward: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 5 (1982) from which the citation is drawn. But the substance was not entirely new: see L. Jaffe, *The Citizen as Litigant in Public Actions: the Non-Hohfeldian or Ideological Plaintiff*, 11 Un. Pa. L. Rev. 1033 (1968)

here, at least in some variants it is used to designate disputes involving constitutional rights or broad policy issues[103]. But this is not necessarily the case, if someone contends that a certain procedure rather than another had to be followed to issue an authorization or if the fact-finding activities that preceded the issuing of the permit to modify a building were not performed accurately.

5. Judicial Structures

After clarifying in which sense and within which limits "public law disputes" are distinguished from other disputes that concern public authorities and bodies, it is time to consider how national systems of administrative justice are shaped. The present section and the next will focus on two schools of thought: that which is based on the traditional dichotomy between monism and dualism and the other one that is centered on judicial proceedings.

A) Monism versus Dualism: an Over-emphasized Issue

We began this section with a familiar distinction often made between monism and dualism. The distinction is this: monist systems are based on a unitary jurisdiction, that of the ordinary courts of the land, while dualist systems have both civil and administrative courts. Thus stated, the distinction is clearly an oversimplification, in light of the developments previously considered[104].

At the beginning of the 1980s, Mario Nigro, an Italian administrative lawyer, made an attempt to keep the dichotomy between monism and dualism, whilst trying to provide a more differentiated vision of the reality. He distinguished three main models: first, the systems based on monism, where public law issues were not distinct from others and justice was rendered by ordinary courts (England); second, the systems where public law issues were not only distinct from others, but also fell mainly within the jurisdiction of administrative courts (France and other continental countries); third, dualism in the true sense, i.e. a

[103] O. Fiss, *Forward - The Forms of "Justice"*, 93 Harv. L. Rev. 1 (1979).
[104] *Supra*, Section 3, §§ C-D.

system based on two jurisdictions (Italy)[105]. This picture of reality was certainly to be preferred to the dichotomist accounts that still flourished. However, it was not immune to weakness. Being a realist, Nigro was well aware that national systems of administrative justice were put under pressure by the growth of the positive State, but he hesitated to accept the view that this affected the main pillars of public law.

Anyway, the main problem with his account is neither that of adherence to tradition nor of factual accuracy (for example, the House of Lords' ruling in *O'Reilly* had just been issued), but regards its underlying philosophy. Like most of his predecessors, when trying to draw a map of contemporary systems of administrative justice, Nigro relied on structures; that is, institutional design. Of course, institutional design forms part of conventional legal analysis. However, we may wonder whether it still makes sense to focus mainly, if not only, on the distinction between monism and dualism[106]. Adequate attention ought to be devoted also to the extent to which a 'system' of administrative justice may be regarded as such. Other comparative surveys, for example, distinguish the advisory and judicial role of administrative judges[107]. Moreover, we should not content ourselves with an analysis that describes how institutions are shaped in order to provide justice in the administrative State. From this point of view, the focus should not only be on structures but also, or mainly, on functions; that is, on justice regarded as a service to society. In this respect, aspects other than organization do matter, including access to courts, the intensity of judicial review[108], and the adequacy of remedies[109]. While these aspects will be considered in the next section, in the remaining portion of

[105] M. Nigro, *Giustizia amministrativa* (1983, 3rd ed.), 39. Both Nigro's contemporaries and successors expressed doubts about his characterization of the Italian system of administrative justice.

[106] See M.P. Chiti, *Monism or Dualism in Administrative Law: A True or False Dilemma*?, 12 Eur. Rev. Public L. (463 (2000) (arguing that the divide has lost relevance).

[107] G. Braibant, *Monisme(s) ou dualisme(s)*, 12 Eur. Rev. Public L. 371 (2000); M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 120.

[108] R. Caranta, *Learning from our Neighbours: public law remedies harmonization from bottom up*, cit. at 3, 220.

[109] M. Fromont, *La place de la justice administrative française en Europe*, 47 *Droit administratif* 8 (2008).

this section I will focus on the systematic nature of the remedies against misuses and abuses of power.

B) A More Systematic Structure of Jurisdiction

Initially, with the notable exception of France, where the division of labour between administrative courts (*juge administratif*) and ordinary courts (*juge judiciaire*) was established after the half of the nineteenth century and was put under the supervision of is the *Tribunal de Conflits*, jurisdiction on public law disputes was far from systematic. This was obviously the case in England, not only for the suspicion against administrative law but also for the reluctance to rationalize and systematize the law, viewed as the product of experience. It was likewise the case in countries that had set up administrative courts. For instance, in Italy, there were doubts concerning the legal nature of the new panel of the Council of State that was entrusted with the power to decide about claims regarding legitimate interests. Several observers thought it was an administrative body, not a judicial one, and it was not regarded as a part of the judiciary. Another example is that of Sweden, where still at the half of the twentieth century it was held that administrative had been established for specific purposes, had no universal jurisdiction over the legality of administrative acts and, therefore, did "not form a 'system'"[110]. Other examples might be mentioned, but they would not change the substance of our discourse. Administrative justice was not the product of an architect's design but, rather, the consequence of deep social and institutional changes. Accordingly, it had a limited systematic nature, or none at all.

In order to understand the importance of the systematic nature of available remedies, three aspects will be considered: a) whether the advantages of specialization have been recognized; b) whether there is a single site of judicial authority, though with more than one panel, or a plurality of courts and tribunals and c) if so, whether the relations between such courts and tribunals are relatively rationalized by constitutions, statutes, and judicial decisions. The adverb 'relatively' is used to convey the idea that our legal institutions, though not forming a coherent whole, an

[110] N. Herlitz, *Swedish Administrative Law*, cit. at 60, 227.

ideal that rarely occurs in public law, may be positively influenced by legal standards and institutional practice.

The advantages of specialization have been recognized more or less everywhere, including Britain, with the creation of the Administrative court within the Queen's Bench. While the change of name was, or has been regarded as, a cosmetic change, a more significant change occurred at the end of the twentieth century regarding the composition of the court. There used to be a full rotation of judges between the administrative and commercial courts. But this is no longer the case, in the sense that only some of the judges of the High Court apply to be eligible for the Administrative court. Its administrative division is thus an increasingly specialized body of judges, distinct from those who deal with business matters. Other States, including Romania, have set up an administrative chamber within their supreme or cassation court.

The increasing complexity of the machinery of government is reflected by the plurality of courts and tribunals and by the resulting necessity to rationalize the links between them. Let us consider the country traditionally regarded as the motherland of administrative law, France. It has preserved its framework with the generalized jurisdiction of the administrative judge, at the heart of which there is still the Council of State[111]. However, there are more than forty regional administrative courts and an intermediate level of appeal courts. As a result, the role of the Council of State is different, because for most issues it is a court of last resort.

On the other side of the Channel, very important changes have taken place, too. The House of Lords traditionally had both legislative and judicial competence, even though only the Law Lords exercise judicial functions. The Constitutional Reform Act (2005) has given rise to a separate system of judicial review, with the creation of the Supreme Court of the United Kingdom. Another reform derives from the Tribunals, Courts and Enforcement Act (2007). Where there were disparate boards, commissions, and tribunals there is now a 'two-tier system', with a first-tier tribunal and an upper tribunal in a number of areas or

[111] P. Delvolvé, *Le Conseil d'État, Cour suprême de l'ordre administratif*, 123 Pouvoirs 51 (2007).

sectors[112]. In particular, the Administrative Court exercises a supervisory jurisdiction over lower courts, mainly through the procedure for judicial review. The oft-cited remark made by Lord Diplock that "the development of a coherent system of administrative law in England was the greatest judicial creation" in his lifetime[113] might not be unjustified also in respect to administrative justice.

Consider, now, Austria, Germany, Italy. In Germany the general jurisdiction concerning public law disputes is distributed between three levels: administrative courts and a higher court within each Land, and the Federal Administrative Court (*Bundesverwaltungsgericht*), which holds a competence as court of first and last resort in some particular areas[114]. In Austria, after the reform of 2013, there are a Federal Administrative Court (*Bundesverwaltungsgericht*), a Federal Fiscal Court (*Bundesfinanzgericht*), and nine Administrative Courts in the States (*Verwaltungsgerichte*). Similarly, in Italy, there are two tiers of administrative courts: regional courts and the Council of State. But there is an additional two-tier system of jurisdiction on the responsibility of public employees for the management of public money. The Court of Auditors administers this jurisdiction in its judicial capacity, not without some tensions with civil courts.

While this is a distinctive trait that Italy shares with France, Greece, Portugal[115] and Spain, a cursory look at other European legal systems shows that a two-tier or three-tier system of judicial review exists in all these States, as well as in Bulgaria, Finland, Hungary, Lithuania, Luxembourg, Poland, Slovenia, Sweden. Some States - including Austria, Finland, Germany, Italy, and Slovenia – have also set out codes governing the judicial proceedings that take place before administrative courts. However, some kind of *lex specialis*, either in the form of a code or

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[112] M. Adler, *Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice*, 69 Modern L. Rev. 958 (2006).

[113] Lord Diplock's citation is borrowed from the ruling of the House of Lords in *R. v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd*, 2 All England Reports 93, 104 (1981).

[114] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 155.

[115] Portuguese Constitution, Article 209 (2) (including the Audit Court within the judiciary).

in that of court orders, exists also in legal systems that have not set up administrative courts.

Two conclusions follow from all this. First, not only is it nowadays axiomatic that public law disputes are legally distinct from other classes of disputes, but there is a specialization of the courts that administer them, though not necessarily a special judge. Second, not only may the jurisdiction of administrative courts be concurrent or alternative with that of civil courts, but it is also systematically structured.

6. From Structures to Functions

When considering how public law disputes are dealt with by national legal systems, several important variables emerge concerning actions and remedies. Legal comparison also shows some common traits, which concern the accessibility of judicial review, interim relief, and more generally the role of the courts as masters of their own standards of review.

A) Variety of Actions and Remedies

Comparative surveys point out three main functional differences concerning the handling of public law disputes: preliminary administrative remedies, distinctions between the interests that may obtain judicial protection and, more importantly, actions.

Until some decades ago, it was generally accepted in several legal systems that "administrative remedies must be exhausted" before resort to the courts could be permitted. However, while in some cases – for instance, Germany - this rule has been enforced by the courts ([116]), in other cases application of this rule increasingly lost the certainty that its constant reiteration would have ensured. Interestingly, constitutional courts have, on occasion, be reluctant to accept that exhaustion of administrative remedies was required when an agency's decision was challenged, because this was regarded as negatively affecting the effectiveness

[116] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 6; M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 114.

of judicial protection, in the sense that delayed justice amounts to denial of justice.

A second important distinctive trait concerns the interests that are acknowledged and protected by law. While this may not be particularly problematic in some legal systems, so long as claimants have a sufficient interest, in other legal systems this is not the case. There has been, in particular, much discussion in the literature about the nature of two general categories, legal rights and legitimate interests, especially when such distinction has been related to the division of jurisdiction between civil and administrative courts, respectively. In the past, this discussion has occasionally assumed a sort of metaphysical aspect, which was probably excessive. By contrast, more recently it has been suggested that the over-emphasis on subjective categories is but a further example of both the formalism that besets public law and the inclination of its specialists to indulge in abstract discussions, that might often be avoided by simply using the category of rights. But we use categories in all fields of law, both public and private. It is inevitable that they will require boundaries and distinctions, and this will cause discussion as to whether a particular interest should fall within one category or another. However, this does not imply that the existence of categories is formalistic. They can be, and often are, very helpful not only for the sake of intellectual clarity, but also for practical purposes, in the daily practice of courts. There is also evidence that in most judicial systems process rights are distinct on the basis of the protection that the legal order accords to the substantive interests at stake. As observed by Paul Craig, the term right designates instances where the challenged administrative action affects proprietary or personal right of the applicant, while the term interest "is looser and has been used even when the individual does not in law have any substantial entitlement in the particular case"[117]. The treatment afforded to these categories or to their sub-divisions can moreover differ significantly.

This brings us to the third variable; that is, actions. In the past differences concerning actions were neither few nor of scarce importance. European systems of administrative justice allowed

[117] P. Craig, *Perspectives on Process: Common Law, Statutory and Political*, 52 Public Law 275, 280 (2010).

claimants to bring their cases only if they fulfilled the requisites for a certain action and excluded other claims. The main implication of what is perhaps the most cited decision of French administrative law, the *arrêt Blanco*, is precisely that it excluded the application of the rules laid down by the civil code with regard to non-contractual liability[118]. This did not imply that this form of liability was excluded, but that it was governed by other rules. In other jurisdictions, it functioned in a narrow and limited orbit, due to the reluctance of the judges to impose significant financial burdens on the State. Still today, the panoply of actions (for annulment or rescission, of declaratory nature, for damages, against inaction) that may be brought against public authorities in Germany has no equivalent in other legal systems. Perhaps more importantly, the German model that is based on a general clause concerning judicial protection against public authorities[119] has gained support in other legal systems, including that of Slovenia[120].

The variables just indicated are not the only ones that matter. Other differences include the composition of courts, including the presence of a public officer that is not a member of the court, and the relationship between the rules that govern public law disputes and those that are laid down by codes of civil procedure. Perhaps the greatest diversity exists as to the method of ascertaining facts, especially when they are contested, and it is in this regard that the assessment of those facts made by the competent administrative agency may be particularly influential. There are still other differences concerning the role of precedents[121] and available remedies against judicial decisions. Considered as a whole, these variables influence the capacity to respond to the needs and demands placed upon courts by the rapid changes taking place in the third century of administrative law. It remains to be seen whether the general trend operating in

[118] *Tribunal des conflicts*, 8 February 1873.

[119] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 165.

[120] Slovenian Constitution, Article 153 (1); Administrative Dispute Act n. 105/2006, Article 1.

[121] See W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 9 (noting that, while in Germany there is no rule of the precedent, lower courts generally follow the decisions of the supreme courts, as in France and Italy).

favour of the introduction of a particular framework for public law issues has played a role in the opposite direction, that of similarity.

B) Shared Standards of Review

The question whether national systems of judicial review are characterized not only by numerous variables but also by some similarities ought not to be considered simply in the light of the idea that every civilized government has assumed the duty of doing justice between itself and its citizens.

There is discussion in the literature as to whether other cultures, particularly that of Germany, unilaterally received French legal concepts and principles or there have been mutual influences[122]. But, for present purposes, we do not need to take a side in this debate. Suffice it to note that courts would adjudicate on a matter of public law at the instance of an individual, citizens or business, provided that the latter could show a sufficient interest in the action brought against an allegedly unlawful administrative action (or inaction, where it is falls within the sphere of judicial review). However, the major premise of judicial review of administrative action is that courts perform a supervisory function in order to assure that other bodies adhere to the law. The 'law', in this regard, may be intended either as a particular duty that is claimed to be lodged by law in a certain body or officer to perform a particular action or to issue a particular measure or as the respect of certain standards of conduct. In this sense, jurisdiction contributes to the respect of law, objectively intended.

Two sides of the same coin must be distinguished. The first is based on the duty to render justice, in this case between citizens or business and any body that performs a public law function. For this purpose there has been established a set of principles for the exercise of judicial review. It is axiomatic that, for the safeguard of civil liberty, everyone must have access to courts. It is also axiomatic that judicial review must be carried out independently of control and impartially, in the sense that a court must "provide

[122] A. Fischer, *Aspects historiques: l'évolution de la justice administrative en Allemagne et en France au XIX et au XX siècle et les influences réciproques sur cette évolution*, 7 La révue administrative 6 (1999).

a disinterested determination of the case"[123]. This fundamental principle of justice, which is laid down by both constitutions and codes of judicial procedure, connotes not only civil courts but also, when they exist, administrative courts[124]. It is, in other words, an invariant. Another one regards the judicial process as such. Certain 'forms' that are necessary to justice do not bear simply a general similarity. They are, rather, necessary elements of jurisdiction that are particularly important in view of the structural asymmetry – of information and power – that exists between the parties, as well as of the fact that judges exercise sovereign powers, though acting on behalf of the people. An adequate and equal opportunity to be heard, the right to counsel, and the giving reasons requirement are deemed necessary. And, should national legal systems fail to respect them, private parties can bring an action before the European Court of Human Rights. EU law provides additional safeguards, allowing national courts to bring a preliminary reference to the ECJ and making the infringement procedure available for failure of a Member State court to fulfill the obligations stemming from the treaties.

The other perspective is that of the rule of law applicable. Some general principles of law, including the right to be heard before a public authority takes a decision adversely affecting individual rights or interests and the prohibition of retroactive effects, are shared by all the legal orders of EU Member States. The underlying assumption, which is a corollary either of the Rule of Law or of *Rechtsstaat*[125], is that every State is bound by its own laws, in the logic that is common to the concept of estoppel and to the old maxim *tu patere legem tuam, quem fecisti*. But sometimes the rule of law may be that of some other country. This is the case when a national *jurisprudence* adopts the principles followed by another country. For instance, Jennings held that Belgian courts (at that time, civil courts) since 1920 adopted the main body of French administrative law relating to *fautes de service*[126]. Another example is the way in which an Italian administrative court has interpreted its own law relating to the withdrawal of unlawful administrative

[123] These words are borrowed from L. Jaffe, *The Citizen as Litigant in Public Actions: the Non-Hohfeldian or Ideological Plaintiff*, cit. at 102, 1034.
[124] See, for instance, the constitutions of Germany and Italy (Article 102).
[125] M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 232.
[126] W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, cit. at 14, 100.

acts in the light of German doctrines of public law[127]. This is the case, likewise, when the ECJ has included a certain principle of law among the 'law' of which it has the mission to ensure the respect[128]. The principle of proportionality is probably the best-known example of this method, especially from an English viewpoint[129]. In this sense and within these limits, Schwarze's remark that the European Community was a community of administrative law is not unjustified[130].

C) Recent Trends (I): Accessibility of Public Law Litigation

While the principles just mentioned can be regarded as the foundations of public law systems, it is interesting to consider some recent trends. They concern both accessibility of public law litigation, in the sense specified before, and the granting of interim relief.

With regard to citizens' access to judicial review, it is helpful to mention the traditional limitations of judicial review in this field. First, judicial review was allowed against administrative acts, conceived – following Otto Mayer – as individual decisions or measures. By contrast, claimants could not challenge acts laying down general and abstract precepts, or rules. Nor could *actes de gouvernement* be subject to judicial review. A second limitation concerned standing; that is, whether a particular claimant is entitled to seek judicial protection[131]. The general rule was that an applicant had to show a particular interest before being accorded standing. The degree of practical difference between such limitations should not, however, be over-emphasized. If a court was not willing to judge a certain question, it could justify its decision either way. More recently, as the limitation concerning *actes de gouvernement* has been narrowed in some national legal

[127] Tribunale di giustizia amministrativa di Trento, 16 December 2009; for further remarks, see G. della Cananea, *Transnational public law in Europe: beyond the lex alius loci*, in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking* (2014), 321, 329.

[128] Article 164 (1) of the Treaty of Rome, reproduced by Article 10 TEU.

[129] Sir J. Laws, *Monism and Dualism*, cit. at 87, 404; M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 256.

[130] J. Schwarze, *European Administrative Law*, cit. at 70, 3.

[131] P. Craig, *Administrative Law*, cit. at 14, 717.

systems or even abandoned in others, the courts have showed an inclination to refuse standing on grounds of lack of a sufficient interest.

Well before the entry into force of the ECHR, whose Article 6 broadly recognizes the right to effective judicial protection, the first limitation was redefined by national constitutions and statutes. Consider, again, the German and Italian Constitutions, both entered into force before 1950. Article 19 (4) of the *Grundgesetz*, which states that anyone whose rights have allegedly been infringed by a public authority may have access to courts, has been interpreted in the sense that as a matter of principle access to administrative courts is unlimited. By contrast, although Article 113 (4) of the Italian Constitution prohibits any limitation of judicial review against particular classes of administrative acts, this clause has not been interpreted in the sense that previous legislation excluding that *actes de gouvernement* can be challenged is in contrast with the Constitution[132]. However, the courts have gradually side-stepped this limitation, by narrowing the scope of application of *actes de gouvernement*., for instance with regard to the extradition of foreigners. Similarly, the French administrative judge has narrowed the traditional limitation, by making a distinction between measures that are taken in the exercise of sovereign powers[133] and measures that can be regarded as detached from such powers and are, therefore, subject to duties of legality and fairness and reviewable (*théorie des actes détachables*)[134].

In many cases, judicial review is also allowed against secondary and tertiary rules. A distinction, however, ought to be made. Sometimes, legislation has made judicial review explicitly available. In other cases, the courts have refined the notion of regulation, by distinguishing rules from precepts, under the appearance of having a general content, are susceptible of adversely affecting particular individuals or groups. It is in this context that the French Council of State has taken a famous decision, which is worth mentioning. During the Algerian crisis, two approaches could be discerned. One line of cases appeared to

[132] Article 7 (1) of the recent Code of administrative proceeding still states that there is no judicial review against the acts or measures issued by a governmental authority in the exercise of political power.
[133] Conseil d'Etat, decision of 29 September 1995, *Greenpeace* (nuclear tests).
[134] Conseil d'Etat, decision of 30 May 1952, *Dame Kirkwood*.

show deference towards exercises of power by political authorities. Another line of cases explicitly excluded that legislation granting special powers to the executive branch of government could create military courts for judging citizens, with no appeal. Thus in *Canal et al*, the Council of State annulled the order issued by President De Gaulle precisely because the order was regarded as an exercise of the executive's regulatory power, as distinct from legislation[135].

Diversity and similarity of approach also characterize standing. Even when the same words, such as "person aggrieved" or "sufficient interest", are used it cannot be assumed that mean the same thing, or designate the same legal reality. The reason is that their meaning is heavily influenced by the institutional and cultural context in which such terms are used. Much depends on what a certain remedy seeks to achieve, but much also depends on judicial willingness to interpret it in a new manner, because different interests are at stake. For instance, the standing of non-governmental organizations (NGOs) in cases concerning the protection of either the environment or cultural sites is, more or less everywhere, a praetorian innovation; that is, an innovation decided by the courts and later accepted by legislation.

In many national legal orders a more liberal predisposition by the courts has emerged in respect of direct and indirect governmental interference with interests protected by law. Although the courts have generally kept the traditional view that an applicant must show some interest before being accorded standing, they have relaxed the criteria for considering a certain interest as satisfying the requirements for standing. Thus in the UK a company has been allowed to challenge an assessment for rating purposes without being required to show that it was more aggrieved than other taxpayers[136]; similarly, in Germany the test for standing has become more liberal that that which existed previously.

An issue that is closely related to standing is that of intervention. Traditionally, the rule was more or less rigid, in the sense that, once a claim was brought against an administrative act or measure, it had to be notified to all persons directly affected.

[135] Conseil d'Etat, decision of 19 October 1962, *Canal, Robin et Godot*.

[136] *R. v Paddington Valuation Officer Ex p. Peachey Property Corporation Ltd*, 1 Q. B. 380 [1966].

Such persons included obviously the public authority that had issued the contested measure. They also included the addressee of such measure, if different from the claimant. For instance, if the owner of the building next to the building for which a permit to add a new floor held the permit was illegal on grounds of either process or substance, then the person who had obtained the permit was allowed to take part in the proceeding. More recently, however, the courts have relaxed the rule, admitting persons who wished to be heard in opposition to the claim brought by the applicant.

At this stage of our analysis, it is interesting to pause a little, in order to reflect about dissimilarity and similarity. National judicial systems differ in several respects, including whether there is a generalized access to judicial review against unlawful administrative action or rather a variety of actions: to annul an act, to declare that a public authority has illegally refrained from acting, to seek compensation for damages deriving from administrative action or inaction. However, national systems "display interesting points of contact. Standing is one such instance"[137]. There was an initial recognition of standing in favor of anyone holding that either a right or an interest had been directly and adversely affected by unlawful administrative action. Subsequently, either legislation laying down such criterion has been amended or the courts have redefined its content, especially when constitutions laid down the principle of effective judicial protection in broad terms, as the Spanish Constitution did in 1978.

The importance of the ECHR in this respect cannot be neglected. It was noted earlier that, though Article 6 explicitly concerns civil and criminal proceedings, it has been widely interpreted by the European Court of Human Rights. The Court has devoted particular attention to access to judicial protection. In addition to the direct effect exerted by the ECHR, as interpreted by its Court, there is a sort of indirect effect. Such effect emerged, for instance, when the English Parliament approved the Human Rights Act 1998. Though the Act is grounded on the assumption that the Convention does not have direct effects, it has created a new head of illegality that can be used in judicial review actions. Everyone who claims to be victim of breach of Convention rights

[137] P. Craig, *Administrative Law*, cit. at 14, 740.

can bring an application for judicial review. A particular requisite must be fulfilled, however, from the point of view of the 'sufficient interest' that must be showed; that is, the applicant must be the victim of the unlawful administrative act or measure. Although this may be, and has been, regarded as a narrow test, it must be noted that the Act explicitly refers to Article 34 of the ECHR, the clause governing access to the Strasbourg Court, with a view to identifying the criterion as to whether a person is a victim[138]. In other words, there is a *renvoi* to the rules of another judicial system. While it is clear from both the Convention's wording and the jurisprudence of its Court that there is no *actio popularis* in this area, the Court has followed a liberal approach.

D) Recent Trends (II): Interim Measures and Effective Judicial Protection

Although constitutions and statues provide standards of conduct for public authorities, these may diverge from them. Judicial review is, therefore, an essential, albeit limited, safeguard against public authorities. In particular, an obstacle to the effectiveness of judicial review of administrative actions derives from the binding effects attributed to public authority measures (*décision exécutoire* in French law). Since such binding effects take place without the consent of private individuals[139], the latter are exposed to a risk – that of suffering harm unlikely to be remedied *ex post*, after the judge has upheld their action. Hence the importance of legal remedies to prevent such a risk, ensuring effective judicial protection. In this respect, the judges' power to issue interim relief plays a key role[140]. This role is not without side-effects however. Indeed, the decision-making processes slow down, with adverse effects on other individuals seeking to take advantage of such decisions. Moreover, increasing numbers of administrative decisions then come before the courts. However, these consequences must be balanced with the need to ensure that justice is done. Not only is the essence of judicial process that of ascertaining adequacy, but, as the saying goes, justice delayed is justice denied.

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[138] P. Craig, *Administrative Law*, cit. at 14, 737.
[139] O. Mayer, *Le droit administratif allemand,* cit. at 36, 83.
[140] P. Craig, *Administrative Law*, cit. at 14, 781.

That said, comparative analysis shows both similarities and differences. For example, the French *Conseil d'Etat* follows a restrictive policy with regard to "*conséquences difficilement réparables*" justifying the issue of interim measures[141]. By contrast, Italian administrative courts have often relaxed the prerequisites for this remedy over the last ten years. Their policy is, therefore, more favourable to individual claimants and more similar to the policy of the German courts[142].

However, comparative analysis shows that some basic choices, aiming to prevent the arbitrary exercise of power by public authorities, are shared by several national legal orders. Some of them, including France, have abrogated the norms that excluded interim relief against public administrations. In other countries, such as Italy and Spain, old legislation has been reinterpreted, in order to ensure its conformity with the constitutional principle of effective judicial protection. As a result, administrative judges may grant interim relief also using civil procedure remedies[143]. In common law countries, the courts have wide powers to issue *interim reliefs*, although the latter may be granted only provided that certain conditions are met. Such conditions concern the likelihood of succeeding on the merits, the risk of irreparable injury, the effects of the order on other parties and due consideration of the public interest. Interestingly, both the provision of such interim remedies and their conditions broadly correspond to those existing in European legal orders[144].

This finding is important in the light of both EU directives on remedies in the field of public procurements and the ruling of the ECJ in *Factortame I*. The Court had to evaluate whether the granting of interim relief was a mandatory duty in the specific institutional framework of Great Britain, which prohibited its issue against the Crown. A good dose of deference towards a deep-seated constitutional tradition would not have been unjustified. There also existed a means of showing the Court's reluctance to affect a national institutional framework: the principle that every individual Member State enjoys autonomy to

[141] See D. Lochak, *La justice administrative* (1994, 2nd ed.), 107.
[142] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 178.
[143] Corte costituzionale, sentenza 18 giugno 1985, n. 190.
[144] *La justice administrative en Europe* (2007), 71.

conduct trials according to its own, national procedures. It is true that the Court had set and enforced a precise condition, namely, that the exercise of rights deriving from Community rules should not be compromised. But financial compensation could have been considered sufficient.

It is also true that, proceeding from the specific solutions thought up by the legislators and judges, Advocate-General Tesauro had identified the outline of a general legal principle common to various legal orders, requiring judges to grant interim relief[145]. That happened in almost all the Member States' legal systems, however. The limitative value of the adverb "almost" is not without importance. It denotes the absence of an invariant in the strict sense. Thus the Court could have stated that, if there was a common tendency, it was not shared by the British legal order. There was no pre-existing general principle of Community law the observance of which the Court of Justice was bound to guarantee. It therefore could have shown a sort of deference towards English procedural law, whilst nevertheless observing its difference from *id quod plerumque accidit* (that which happens most of the time).

The Advocate-General's meticulous description of the various national systems contrasts with the summary fashion in which the Court judged interim relief to be indispensable. Of particular significance is the brief passage in which, in a certain sense, he freed himself of the issue of whether a general principle refuted by the Defendant State may be considered common to the Member States. The Court, on the other hand, limited itself to reasserting the established principle of the supremacy of Community law over national law, the premise that there was a need to guarantee the former's effectiveness and the corollary of the Court's own duty to apply Community law in a uniform manner [146]. Once the issue of the relationship between the legal orders had been posed in terms of hierarchy, it was no longer possible to assert the presumption that the British laws were compatible with Community law[147]. This would have prevented

[145] Opinion of Advocate-General Tesauro in Case C-213/89, *Factortame*.

[146] Court of Justice, Case C-213/89, *Factortame*, § 18-22. See also D. Oliver, *Fishing on the Incoming Tide*, 442 Modern L. Rev. (1991).

[147] W. Wade, *What has Happened to the Sovereignty of Parliament?* 107 *Law Quarterly Review* 3 (1991); *Id. Injunctive relief Against the Crown and Ministers*,

the rules being fully effective in a uniform manner in all the Member States. Hence the duty on national judges not to apply the rule that prevents them from granting interim relief.

The interpretation not of a specific rule but, rather, of the legal order's founding principles, in a systematic manner, thus served to rectify the line that the Court had previously followed. It allowed it to hold that non-written principles exist. The latter require judges to suspend the application of a legislative instrument in a situation for which the national legal order does not provide and where interests protected by Community rules are at stake.

E) Balancing Interests

Overall the trend in the last thirty years has been to increase both accessibility of justice and its effectiveness. This is not, of course, to say that judicial protection is as adequate as it could, and should, be. Much remains to be done, particularly from the viewpoint of making prompt and cheap remedies available to all, including those that are alternative to judicial proceedings. That said, the focus here is on common and distinctive traits of the various national systems of administrative justice. In this respect, there are parallels with the way in which accessibility and interim remedies have evolved. There is also an increasing influence exerted by supranational legal orders. Whether these trends may be interpreted in a conjunctive or disjunctive manner is another question, which will be examined in the next section.

Meanwhile, two general features of the various systems of administrative justice, can be highlighted. First, as observed before, all these systems aim at "tempering power with justice". Secondly, and consequently, while jurisdiction on private law issues is a jurisdiction about rights, that which relates to public law issues is essentially a jurisdiction about interests, that must be acknowledged, considered, and weighed. Its dominant form is, therefore, interest balancing.

As a result, with few exceptions, notably when consideration of human dignity is at stake, public law disputes are

ibid., 4 (founding fault with the argument that the *House of Lords* refrained from promulgating an injunction against a minister.

characterized by the judicial elaboration and application of variable standards[148], in the sense that they require from government officials and judges exercises in balancing the interests of private parties with the collective interests that government is trying to protect and promote by following a certain conduct. Such standards include administrative due process of law, reasonableness, and proportionality. Their common feature is the recognition of "trade-offs between collective and individual ends"[149]. Of course, individual ends are not viewed as absorbed by collective ends, as it happened in the eighteenth century, at the epoch of "*KammerJustiz*". But trade-offs between collective and individual ends are permeated by functional criteria, which were – instead - absent from natural rights doctrines and which call into question the ideas that underlie fundamental rights, as recognized by modern constitutions and conventions. The "ambiguity" that connotes administrative justice since its birth, therefore, has not been dissolved by the undeniable progresses of the institutions of public law.

7. Dissimilarity and Similarity: Causes, Consequences, and Limits

We began our analysis by pointing out the opposite comparative approaches that emerged in the history of European law, the integrative approach that flourished at the epoch of *jus commune* and the contrastive approach that emerged in the nineteenth century, when ideas and thoughts about law and government emphasized national cultures. Traditional differences – such as the various ways to interpret separation of powers[150] – were thus over-emphasized and were sometimes viewed as the consequences of different axiological positions, particularly from the perspective of the relationship between authority and freedom. There are, of course, important distinctive traits and there are good reasons for arguing that the essential features of

[148] For this concept, see H.L.H. Hart, *The Concept of Law* (1994, 2nd ed.), 143.
[149] J. Mashaw, *Due Process in the Administrative State*, cit. at 53, 47.
[150] M.J.C. Vile, *Constitutionalism and the Separation of Powers (*1967, 2nd ed.), 193 (contrasting English and French doctrines of separation of powers).

each legal culture must be preserved. However, legal cultures can, and do, evolve. Nowadays, within unified Europe all States distinguish public law disputes – in the sense specified earlier – from other disputes and, whatever their organization, the courts enforce standards of legality and fairness, as well as of objectivity and proportionality, that are distinct and higher from those relating to other classes of disputes. The questions that thus arise are, first, what are the causes of the common trends pointed earlier and, second, which are their limits, in order to protect the autonomy and diversity of national systems of administrative justice.

A) Functionalism and European Integration

The development of modern systems of administrative justice in Europe is incompatible with the views of Dicey and his successors. Whatever the intellectual soundness of such views, neither legislators nor judges have followed them, particularly the suggestion that the fundamental asymmetry that exists between individuals (or business) and public authorities (or bodies charged with public functions) might, and should, be mitigated or dissolved by the use of 'the ordinary law of the land', under the supervision of 'ordinary courts'. Because words are important, particularly in public law, it ought to be noted that the term 'ordinary' is far from being value-free. In fact, this term was coined in a period in which not only in England but also in France, Germany and other countries the institutions of government were profoundly reshaped and administrative and judicial remedies were being reshaped, too.

National systems of administrative justice are now much closer than they were just one century ago, due to three driving forces. First, for functional reasons, the problems that public authorities are confronted with are increasingly similar and this influences the solutions they use to solve such problems. Second, within the European legal space each legal system is more influenced by other legal systems than it used to be. Thirdly, in all fields of public law EU regulations and directives have established 'common' rules and such rules have been extensively interpreted by the CJEU, with a view to ensuring the effectiveness of EU

law[151]. As a result, legal remedies are increasingly homogeneous[152].

The importance of these driving forces cannot be fully appreciated without taking the peculiarity of the European context into due account. The fundamental peculiarity of the European legal space is not just the development of legal principles and rules in the context of its "regional" institutions, such as the EU and the Council of Europe, but the existence of a body of shared general principles of law, deriving from the common cultural roots and the influence exerted by Roman law, as interpreted by professors and judges. There is, in other words, a "*droit commun européen*", as Jean Rivero suggested almost forty years ago[153]. The European legal space is thus particularly favourable to mutual learning[154], if not to transplants[155].

This is not without problems, of course. Scholars have constantly discussed whether the utilitarian approach that underlies the attainment of collective ends undermines or even jeopardizes not only the constraints that the law places on exercises of power, but the place of individuals and social groups in the structure of modern governments. But few of them think that things would go much better if we were to use other standards and remedies, drawn from private law. It seems clear, moreover, that judges do not doubt that they would be far worse off if they were to follow these ideas and thoughts about the law. The standards that they elaborate and apply against exercises of power by public authorities are distinct and higher than those that are applied to private parties, even though the difference is often of degree, not of nature. Because this situation is generic in public law, at least in unified Europe, the doctrines that ignore or undervalue it are largely irrelevant. The crucial questions that

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151 D. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (2010).

152 T. Heukels – J. Tib, *Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence*, in P. Beaumont, C. Lyons, and N. Walker (eds.), *Convergence and Divergence in European Public Law* (2002), 111.

153 J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif*, in M. Cappelletti (sous la direction de), *Nouvelles perspectives du droit commun de l'Europe* (1978), 389.

154 S. Cassese, *La construction du droit administratif*, cit. at 16, 146.

155 There is a vast literature on 'legal transplants' that indicates and weighs their pros and cons: see, A. Watson, *Legal Transplants* (1996, 2nd ed.).

need being discussed are, rather, whether only traditional differences persist or there also new ones and whether there are limits to harmonization of law.

B) Culture Matters: Persistent and New Differences

While the divide between monism and dualism has nowadays a relative importance, there are persistent differences concerning structures; that is, the organization of administrative justice. Whether, for instance, jurisdiction on public law disputes is not just distinct but it is also constitutionalized is, of course, an important element. Another one is whether administrative judges have only judicial or also advisory functions. Last but not least, whether there is a general clause concerning public law disputes or a set of particular clauses can be of both practical and theoretical importance.

Among the implications of the persisting importance played by history and culture is the following, which concerns alternative dispute resolution (ADR) procedures. EU directives on liberalized public utilities requested the Member States to make such procedures available for solving in a quick and cheap manner the disputes that arise between providers and users[156]. The Member States did so, but in so doing they made choices that reflect their different cultural and legal environments. For instance, the UK entrusted its electronic communications regulator (OFCOM) with a function that is supervisory in nature, on the functioning of ADR based on private law schemes. By contrast, Italy entrusted its regulator (AGCOM) with the task of carrying out both conciliation and arbitration, thus further weakening the traditional distinction between administrative rule-making and adjudication, on the one hand, and dispute resolution, on the other. The role of administrative courts, when judging about the decisions taken by the regulator in its arbitral capacity, is also different from that which characterizes traditional disputes.

It is on the basis of these empirical findings, as distinct from apodictically asserted irreconcilable differences of axiological or

[156] See Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, particularly Article 34.

epistemological nature, that the autonomy and diversity of national legal systems should be taken into serious account. Whether the preservation of a certain degree of autonomy and diversity can be argued, on normative grounds, is the question that will now be considered.

C) The Case for a Limited Harmonization of Administrative Justice

Three lines of reasoning sustain the view that harmonization of national laws in this area can be helpful, but within certain limits. They are based on the *telos* of the Union, on the relationship between the Union and its States, and on the legal framework that legitimizes and regulates harmonization, respectively.

The teleological argument is based not just on the genesis of the EC/EU, a union of States, but also on its foundational principle, as enounced by the preamble to the Treaty of Rome. Unlike other treaties, which follow a somewhat static approach, that Treaty followed a dynamic approach, looking at the "further steps to be taken in order to advance European integration"[157], to borrow the words of the TEU. However, the ambitious goal that was set out did not imply the elimination of the founding components of the Union; that is, the plurality of its social groups. Their persistency was mutually agreed by the States' representatives. There is evidence of this agreement in the preamble. By referring to the process of creating "an ever closer union among the peoples of Europe", it excludes a different goal, that of fusing those peoples. In other words, the EU is not simply a polity that comprises twenty-eight Member States and more than 500 million people and is, therefore, very differentiated, but it is a polity that acknowledges and protects such differentiation.

The teleological argument is reinforced by that from principles governing the relationship between the Union and the States. When negotiating the Treaty of Maastricht and the subsequent treaties, national governments did not just express

[157] Preamble of TEU, last indent ("resolved to continue the process of creating an ever closer union among the peoples of Europe"). For further analysis, see R. Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (1994).

concern about the 'creeping competence' of the Union. They raised a more fundamental concern about the safeguard of national identities. The remedy that was found was a declaration that the Union would respect the 'national identities' of the Member States, which are "inherent in their fundamental structures, political and constitutional"[158]. The Treaty should also be read in conjunction with the Charter of Fundamental Rights, which has the "same legal value of the treaties"[159], in particular with its Article 22 that request the Union to respect cultural and linguistic diversity. These words, especially 'culture', should of course be considered with a certain degree of caution. But there is no doubt that a systematic interpretation of these constitutional provisions may support a more robust protection of national legal structures and cultures[160].

A further argument reinforces these principled arguments. It can be inferred from the provisions that regulate harmonization. The main provision is that of Article 114 TFEU. It empowers the institutions of the EU to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action", but it specifies that such measures have a particular 'object'; that is, the "establishment and functioning of the common market". The underlying rationale is ensure an adequate consistency of legal standards, so that citizens and business do not obtain in a Member State a less favorable treatment. Particularly the directives concerning remedies in the field of public procurements have done much to eliminate major differences and create minimum standards. Adaptation processes have a dynamic dimension[161]. There is thus still much that can be done to define and refine such standards. But nothing, in the Treaties, authorizes to conceive and use harmonization of law as a step towards unification of law, in particular in this area, which goes well beyond the single market, broadly viewed.

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158 TEU, Article 4 (2).

159 TEU, Article 6 (4).

160 See C. Harlow, *Voices of Difference in a Plural Community,* 50 Am. J. Comp. L. 339 (1996); J.L. Quermonne, *L'Europe en quête de légitimité* (2001), 47 (emphasising "*le droit à la différence*").

161 C. Knill, *European policies: the impact of national administrative traditions on European policymaking*, 18 J. Public Policy 1, 7 (1998).

8. Conclusions

This essay has argued, first, that, contrary to the received idea that administrative law is a sort of national enclave, the comparative method has been particularly important in the foundation of national cultures and institutions of public law; second, that the European context has a distinctive nature not simply because of parallel developments, more or less reciprocal influences and integration, but for a more profound reason. That is, when considering the values and principles of public law in Europe, there is evidence that a sort of common legal patrimony exists, despite the innumerable differences that persist as well as the new ones that constantly emerge. In this sense, and within these limits, not only has Schlesinger's call for a heightened attention to the general principles of law equal applicability to the way in which we view public law, but adequate awareness of this common legal patrimony suggests that we should not use the comparative method in the same way in which we would do when considering two countries that do not share such an important set of general principles of law. This does in no way means going back to the legal institutions and the related thoughts about the law that were proper of an earlier epoch. It means, rather, that an adequate method of analysis, in our case the comparative method, must take the specific features of Europe into due account.