ADMINISTRATIVE LAW IN EUROPE: A HISTORICAL AND COMPARATIVE PERSPECTIVE [1]

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Abstract

There is currently a growing interest in the question whether a convergence between the administrative laws of European countries is coming into being and, if so, whether this is desirable or otherwise, as well as whether and the extent to which this depends on broader process of European integration and globalization. This article addresses the question of the limited use of comparative analysis with regard to administrative law, by arguing that it depended on cultural prejudices, the underlying idea being that, unlike private law, administrative law was but a product of each State and its national culture. The article challenges this received idea, by pointing out the importance of transplants and cross-fertilization. It argues, secondly, that administrative law must be considered in a dynamic perspective, and thus focuses on some dynamics of change: the growing importance of public authorities within and outside the Nation-States; the emergence of a common core of general principles of law; the procedural principles that have emerged in national administrative law systems; and finally, the gradual erosion of the areas of immunity. The article expresses, however, a sceptical note with regard to any vision of administrative law that emphasizes progress, arguing that some techniques of administration often regarded as innovative are not at all new. It observes, moreover, that administrative law is still characterized by a fundamental ambivalence between different ideals and forces. The article ends

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with a brief glance of some theoretical implications, with specific regard to the importance of comparative analysis.

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I. Introduction

Legal science is by no means a stranger to comparative analysis. Even a cursory glance at this growing branch of legal literature nevertheless reveals an apparent discrepancy between the law's evolution and its portrayal in comparative studies. Although such studies tend to focus on private-law topics, it is arguable that they should have devoted equal attention (especially during the last hundred years) to administrative law, given the latter's importance.

Any attempt to illustrate the evolution of administrative law in purely "quantitative terms" would be an oversimplification but would at least convey the idea of a basic social change. In such terms, public administrations existed and enjoyed a certain importance (albeit only in a limited number of fields) well before the end of the nineteenth century. Administrative law has

expanded very considerably since then. It was not just the end of *laissez-faire* (to quote Keynes ([2])), that had an unprecedented impact on public functions and structures, however. As an influential American administrative lawyer, Jerry Mashaw, has consistently argued in relation to the United States, the life we live nowadays is an "administered" life, whether we like it or not ([3]). Whilst not strictly conceived as public, so many interests are nevertheless influenced and adversely affected by public rules, plans, and decisions concerning birth (when access to assisted reproduction techniques is provided by public hospitals) and life (for example, with regard to access to houses or assistance to disabled persons schemes), that a comparison with other periods is hardly possible. This explains both the growing need of standards aiming at limiting the discretionary powers enjoyed by public administrations and checking its exercise and the rise in litigation ([4]).

Despite the undoubted expansion of administrative law, it soon becomes clear that the comparative method (*Rechtsvergleichung*) has been developed principally, though not solely, in the field of private law. This is evident from comparative law treatises' tables of contents. For example, the concept of "legal

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[2] See J.M. Keynes, *The End of Laissez-faire* (1926), in *Essays in Persuasion* (1931) (for the thesis that the rights of property and of free trade, as conceived during the eighteenth century, "accorded with the practical notions of conservatives and of lawyers" and that "a change [was] in the air" after the end of the *Belle époque*). For a bird's eye view of the shift from the legal theories of the State prevailing in the nineteenth century to those of the twentieth, see J. Rivero, *Droit administratif* (1987), 12 ed., 28 and M.S. Giannini, *Il pubblico potere. Stati e amministrazioni pubbliche* (1986), ch. 1.

[3] J. Mashaw, *Due Process in the Administrative State* (1985), 12. See also, of the same author, *Bureaucratic Justice. Managing Social Security Disability Claims* (1983) (for the thesis that this system is governed mainly by political and administrative criteria). But see also R.B. Stewart, *Administrative Law in the XXI century*, 78 N. Y. U. L. Rev. 437 (2003) (arguing that in the last decades of the twentieth century regulation of private activities has become the salient feature of modern administration).

[4] For this perspective, see K.C. Davis, *Discretionary Justice. A Preliminary Inquiry* (1969). See also M.D. Bayles, *Procedural Justice. Allocating to Individuals* (1990) (considering several issues of procedural justice in the administration of government largess).

families" has (with debatable intellectual and empirical soundness) been applied primarily to private law institutions ([5]).

This apparent imbalance has various possible explanations. The simplest may be formulated in terms of historical legacy. Private law has existed for over 2000 years whereas administrative law is much younger, even if we accept Tocqueville's thesis that it came into being before the French Revolution ([6]). Such fact is historically irrefutable but begs the question as to whether it is the legacy itself that is relevant or whether more recent phenomena may not be of greater scientific significance. If administration is ubiquitous, why would it be so much less relevant than private corporations, for instance? If it regulates so many negotiations between private parties and public authorities, particularly regarding the provision of public services (for example, EC directive n. 21/2002 on electronic communications, lays down the duty to reach agreements on interconnection of networks), why should its role not be the object of comparative analysis?

Another possible explanation is that, due to its remarkable expansion (during the second half of the twentieth century, in particular) administrative law has not yet achieved the degree of stability, coherence and systematic structure enjoyed by other fields, notably the private law ones. A simple response to such an argument is that, precisely because the expansion of public functions requires new structures and tools, it would be scientifically relevant to compare such functions and their related

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[5] See R. David, *Les grands systèmes de droit* (1985), 4th ed. See also J. Merryman, *The Civil Law Tradition An Introduction to the Legal Systems of Europe and Latin America* (1969). For a recent bird's eye view of the two main Western legal traditions, see D. Fairgrieve & H. Muir Watt, *Common law et tradition civiliste* (2007).

[6] See the preface of *L'Ancien régime et la Révolution* (1856) (where Tocqueville argued that the administration was already very powerful in the eighteenth century) and chapter 9 (pointing out that the following century added only the separation of the executive power from the judiciary). See also D. Lochak, *La justice administrative* (1994), 9-10 (pointing out the strong legacy of the *Ancien regime*). In Italy, too, the opinion according to which G.D. Romagnosi's *Introduzione allo studio del diritto pubblico universale* (1805) presupposed the existence of administrative law has been advanced in the past, though more recent studies cast some doubts about it: see S. Cassese, *Culture et politique du droit administratif* (1971, 2008, translated into French by M. Morabito), 14-15.

law, for the purposes of verifying whether and to what extent functional changes produce structural ones.

Yet another possible explanation is that since administrative law concerns, *inter alia*, the internal functioning of states, it has been less open to transnational cross-fertilization. This explanation, in its turn, highlights a well-known fact, namely, that fewer exchanges have occurred in the field of administrative law than in those of contract and corporate law. It would nevertheless be interesting to know why this is so. If the reason is, as Burke argued when denouncing the rational design he identified in the French Revolution, that the history and culture of each people are unique ([7]), then one might wonder why this should not be true of both private and public law alike. More concretely, the question arises whether this quantitative difference was constant or whether it became less marked during particular periods, especially during the last decades of the twentieth century. It would be equally interesting to know, in more qualitative terms, whether those comparisons of public-law principles and tools that were drawn varied in their impact in any way. There is evidence that, at least in some countries and during some periods, their impact was quite significant. The importance of the French constitutional experience for the origins of a German science of administrative law (and Otto Mayer's seminal work, in particular), ought not be forgotten.

As can be seen, none of the explanations considered provides a fully satisfactory answer to the initial question. Each one challenges more general ideas about comparative legal analysis and possible paradigms. Any understanding of why contemporary legal literature is not devoting sufficient attention to administrative law thus requires a slight theoretical digression into paradigms ([8]). While a first paradigm conceives

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[7] See E. Burke, *Reflections on the Revolution in France* (1790), in *Selected Works* (1999), 121. For a critique of Burkean theories, see M. Tushnet, *Darkness on the Edge of Town: the Contribution of John Hart Ely to Constitutional Theory*, 89 Yale L. J. 1039 (1980).

[8] For this concept, see T. Kuhn, *The Structure of Scientific Revolutions* (1970) (holding that paradigms are constellations of beliefs sharedby a group). See also L. Laudan, *Progress and its Problems – Toward a Theory of Scientific Growth* (1977) (describing research traditions as implying different assumptions and different ways of viewing relevant and their measurement). For further remarks from a legal perspective see M. Loughlin, *Public Law and Political Theory* (1992), 31.

administrative law as a sort of national *enclave*, a second emphasizes the importance of legal transplants and cross-fertilization. Following such paradigm, this article proposes to examine administrative law in the European legal area from a historical and comparative angle.

The article is divided into three parts. The first briefly illustrates those dynamics of change that appear particularly useful for critically reconsidering some received ideas about administrative law. The second part focuses on the implications of such dynamics. It argues that while various changes may be identified, they do not necessarily imply that administrative law has made much progress. Last but not least, some theoretical implications are considered, with specific regard to potentially different visions of administrative law and the importance of comparative analysis.

II. Two Paradigms of Administrative Law

A) Administrative Law as a National *Enclave*

The first paradigm owes much to the notion that there exists a sort of spontaneous or natural economic order. According to this line of reasoning, the law's only task is to supervise the action of market forces, either through legislation or by way of judicial rulings. According to this paradigm, the "law" is, by definition, private law (with the possible exception of family law, which is determined by social needs). Continuing within this paradigm, both public administrations and their legal frameworks, on the other hand, have traditionally been regarded as the last enclaves of nationalism. Accordingly, they have seldom been the object of comparative study([9]).

The underlying idea was that such a comparison was useless for a twofold reason. On the one hand, administrative law was regarded as a province of the State, much more than private and trade law. On the other hand, and accordingly, unlike private law institutions, the disparate legal tools existing in different administrative systems could hardly be conceived as part of one "family". On the contrary, each public administration with its

[9] There are exceptions, however, including the treatises of F. Goodnow, *Comparative Administrative Law* (1893), M. D'Alberti, *Diritto amministrativo comparato* (1993), M. Fromont, *Droit administratif des Etats européens* (2006).

particular system of administrative law was seen as rooted in the political and social traditions of its own legal order ([10]).

The differences between systems were particularly obvious in the field of judicial review (considered the heart of administrative law). In the United Kingdom, the traditional liberal idea was that administrative law was concerned with the control of governmental power. The government was subject to the ordinary law of the land and, consequently, its actions could be challenged in the ordinary courts of the land. This idea was not abandoned when the functions of government expanded greatly at the end of the nineteenth century ([11]). Thus judicial review was and still is conceived as one branch of a monistic system. Only more recently has this feature been attenuated by the creation of a specialized court (the Administrative Court).

In total contrast, nineteenth-century public law in France was characterized by dualism, reflecting the principle that the judiciary should not have the power to annul acts of the executive. Hence the division of competences between the ordinary courts and the *Conseil d'État* (which obtained greater autonomy after 1872, under the system of *justice déléguée*). Most continental countries applied a dual system during this period, thus reinforcing the idea of a great divide between civil law and common law jurisdictions.

Whatever its heuristic validity, the concept of a great divide has been challenged more recently by at least two factors. The first of these is the influence that similar trends within various national legal orders are having on each other in the current phase of globalization. The second is the influence of international and supranational institutions. While the relevance of these developments is more or less generally recognized by comparative lawyers, the implications for the traditional paradigm are not

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[10] See, e.g., A. Plantey, *Prospective de l'Etat* (1975), and, for a critical appraisal, S. Cassese, *Toward a European Model of Public Administration*, in D.S. Clark, *Comparative and Private International Law. Essays in Honour of John Henry Merryman* (1990), 353. It is interesting to observe that, after 1945, while Santi Romano argued that administrative law was a "root" of the law of the State (*Prime pagine di un manuale di diritto amministrativo*, in *Scritti Minori* (1950), II, 425), Carl Schmitt argued that the whole of public law goes well beyond the State and positive law (*Ex captivitate salus. Erinnerungen der Zeit 1945-47* (1950)).

[11] See M. Loughlin, *Public Law and Political Theory*, cit. at 8, 140.

always stated explicitly. At a descriptive level, the idea that such developments may give rise to some sort of convergence has been rejected ([12]). At a normative level, with specific regard to the procedural fairness underlying a variety of general principles, it has been argued that "diversity and pluralism are greatly to be preferred" ([13]).

B) Cross-fertilizations and Transplants

Even if one disregards the value of the normative argument just mentioned (or, more precisely, its value in a specifically public-law context, since diversity could be equally preferable in a private-law context), it remains to be seen whether the traditional representation of administrative law in comparative studies is scientifically sound. In this respect, a second paradigm would suggest the importance of a historic and comparative analysis of law.

Historic analysis examines the functioning of specific legal institutions. It sheds light on their effective meaning and implications over time, thereby enriching empirical analysis. What emerges from recent studies is not the isolation of individual legal cultures but, rather, their interaction. Studies have shown that "borrowings", "importations" and "transplants" have been detectable in the public sphere, too, from the spread of the Napoleonic model in continental Europe onwards ([14]). If the English constitutional framework was the model for several countries, French administrative institutions were adopted by others. For example, during the first half of the nineteenth century,

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[12] See P. Legrand, *Droit comparé* (1999); id. *European Legal Systems are not Converging*, 45 Am. J. Comp. L. 90 (1998).

[13] See C. Harlow, *Global Administrative Law: the Quest for Principles and Values*, 17 Eur. J. Int'l L. 207 (2006).

[14] See, for example, S. Cassese, *Toward a European Model of Public Administration*, cit. at 10, 361 (holding that Italy borrowed several administrative law tools from France, despite the very different constitutional foundations). The best account of transplants is still A. Watson, *Legal Transplants* (1993), 2nd, 7. See also N. Garupa & A. Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. of Legal Studies 339 (2006) (arguing that spontaneous convergence is often prevented by free riding strategies) and, with regard to private law, R.C. van Caenegem, *European Law in the Present and the Future. Unity and Diversity Over Two Millennia* (2002).

both the kingdoms of Belgium and Piedmont built their institutional framework on the separation of powers theorized by Montesquieu on the basis of the English experience. However, since the continental version of the doctrine of the separation of powers prevented the courts from annulling administrative orders, both countries set up special bodies. In this, they followed the model of the French administrative jurisdiction which provided for a special judge. Such a model was also adopted after 1861 by Turkey, despite the fact that, unlike those countries of Northern Africa which have maintained a dual jurisdiction ([15]), Turkey had never been a European colony. During the twentieth century, the Austrian law on administrative procedures constituted a model for some central and eastern European countries, such as Poland and Czechoslovakia ([16]). The spread of certain ideas throughout Europe (as has occurred more recently with the "new public management" ([17])), is therefore not at all new.

In the light of these examples, it is unnecessary to consider in the abstract whether comparative analyses of law should serve the sole purpose of enhancing knowledge. The evidence is that national authorities face similar problems and adopt similar solutions, learning from the experience of others in the process. This explains, together with EU rules, the shift from the study of "foreign" law to the increasing use of comparative legal analysis ([18]).

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[15] I'm indebted to professor Il Han Ozay, of the Balcehir University (Istanbul), for these information.

[16] See M. Fromont, *Droit administratif des Etats européens*, cit. at 9, 212.

[17] C. Hood, *A New Public Management for All Seasons*, 69 *Publ. Adm.* 3 *(*1991).

[18] For a similar approach, see. M. Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe* (2007), 4 (arguing that there is a "presumption of convergence below the surface"). See also O. Dubos, *Le droit administratif et les situations transnationales: des droit étrangers au droit compare?*, in F. Melleray (ed.), *L'argument de droit comparé en droit administratif français* (2007), 69. See also B. Kingsbury, N. Krisch & R.B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005) (arguing that much of global law can be conceived as administrative law) and M. Delmas-Marty, *Trois défis pour un droit mondial*, (1998), 108 (for the thesis that globalization makes comparative analysis still more necessary).

III. Dynamics of Change in Administrative Law

A) <<*Une des formes de l'état nouveau du monde*>> ([19])

Probably the most radical way of affirming that administrative law is rooted in national traditions would be to adopt the argument advanced by Albert Venn Dicey, the prominent Victorian public lawyer. He denied the existence of a *droit administratif* in England, seeing it as the herald of despotism ([20]). While this view was, to say the least, controversial, it had several consequences. It gave rise to the idea that whilst some countries had an administrative law, others had an administration, but no administrative law as such. It also 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 the modern science of administrative law in Italy, Vittorio Emanuele Orlando, constantly proposed such a vision of administrative law, whilst simultaneously accepting German theories about the specificity of public law ([21]). As 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. In the 1980s, the then most prominent Italian administrative lawyer, Massimo Severo Giannini, stated in his textbook that administrative law was not a general feature of modern States (although, in my view, this was not necessarily the

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[19] The title of this paragraph is borrowed from Tocqueville's report on Macarel's course of administrative law, quoted by G. Gorla, *Diritto comparato e diritto comune europeo* (1981), 223. See also S. Cassese, *Une des formes de l''Etat nouveau du monde'', reflexions sur le droit administratif français*, in *L'actualité juridique – Droit administratif* (2005) 167.

[20] See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959), 10th ed., 328. Only in the last edition of *Law of the Constitution*, did Dicey admit that the progresses of *droit administratif* brought it "very near to law" (369). For further remarks, see M. Loughlin, *Public Law and Political Theory,* cit. at 10, 141; S. Flogaitis, *Administrative Law et Droit Administratif* (1986); M.P. Chiti, *L'affermazione della giustizia amministrativa in Inghilterra. Dalla common law al droit administratif?*, in id. (ed.) *Cittadino e potere in Inghilterra* (1992), 9.

[21] V.E. Orlando, *Introduzione*, in *Primo trattato completo di diritto amministrativo italiano* (1900). On earlier authors, see G. Rebuffa, *La formazione del diritto amministrativo in Italia. Profili di amministrativisti preorlandiani* (1981).

case then and certainly is not now) ([22]). His was the textbook I used, along with many other law students in Italy. The professor who suggested that textbook nevertheless also warned me that this was an old-fashioned idea. He showed how, in 1885, Dicey had overemphasized the illiberal features of French administrative law ([23]), while neglecting the expansion experienced by government in the United Kingdom ([24]).

Historically, there is no doubt that administrative law has developed remarkably since the end of the nineteenth century. In this sense, it is a product of the late maturity of the State but its origins may be traced back to the absolute State of the eighteenth century. Such fact emerges from the *chef d'oeuvres* of two great Frenchmen. Montesquieu emphasised the impact of public authorities on those rights which an established philosophical tradition included amongst the "natural" rights. He highlighted the vulnerability of private property in the face of expropriation ([25]). For his part, Tocqueville showed most ably how the concept of *puissance publique* did not develop solely out of the King's edicts: it also developed out of the decrees of his administrators and their acceptance by social forces such as the aristocracy, town councils, etc. This old administrative constitution, Tocqueville argued, was not a uniquely French feature. It was, rather, common to other major countries such as Germany and the United Kingdom. Furthermore, it did not alter when France's political constitution was transformed by the Revolution ([26]).

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[22] M.S. Giannini, *Diritto amministrativo* (1988) 2nd ed., 21 where the author refers to Dicey, repeating the opinion set out in the *Foreword* to the Italian translation of Wade's successful textbook on administrative law (*Diritto amministrativo inglese,* 1969, VII).

[23] S. Cassese, *La construction du droit administratif. France et Royaume-Uni* (2002), 40.

[24] See A.V. Dicey, *Lectures on Law and Public Opinion in England* (1905) (for the thesis that the legislative public opinion had changed, requiring several new public activities,). But see also, for critical remarks, S. Cassese, *Albert Venn Dicey e il diritto amministrativo*, 19 Quad. Fior. St. Pens. Giur. Mod., 5 (1990).

[25] Montesquieu, *De l'esprit des lois* (1768), ch. XXVI, § XV. For further remarks on Montesquieu's theory, see M. D'Alberti, *Diritto amministrativo comparato*, cit. at 8, 31.

[26] Tocqueville, *L'Ancien régime et la Révolution* (1856), l. III, ch. 7. See also L. Cohen-Tanugi, *Le droit sans l'Etat. Sur la démocratie en France et en Amerique*, (1985), 15 (for the thesis that for Tocqueville comparative analysis was the fundamental instrument of research). Recent historical research emphasize the

Such transformation and its consequences became much more evident during the second half of the nineteenth century. The Revolution ushered in a new language of rights that were based on equality ([27]). Such fact had a profound influence on public law. Not only was the whole of society redefined in terms of "nation", but the relationship between the State and individuals changed as well. As a result, Europe faced a growing demand for equality. It was the same driving force that Tocqueville had noticed in the United States when he was younger. Prior to the end of the nineteenth century, governmental activity directly affecting individual citizens and their organizations (enterprises, associations etc) had not been unknown. Nevertheless, it had been limited, in line with *laissez-faire* doctrines. Other institutions had also carried out activities in the public interest. In England, such activities were carried out by the gentry. In continental countries, the importance both of religious institutions and of private bodies under public supervision should not be overlooked. It should also be noted that national rulers had not always applied *laissez-faire* doctrines. Indeed, they had nationalised essential public services such as post, telecommunications and sometimes railways, in view of their connections with government functions of defence and public order. That said, the last quarter of the nineteenth century witnessed a new governmental activism. This differed remarkably from that of the eighteenth century. The old doctrines had been based on the well-being of society, but as perceived and envisaged by the Crown. The progressive widening of political (i.e. electoral) rights now reversed the viewpoint, however. Governmental activity on an unprecedented scale was the consequence. Far from carrying out only the basic functions

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development of administrative law during the XIX century: L. Mannori & B. Sordi, *Storia del diritto amministrativo* (2001), 6; F. Burdeau, *Histoire du droit administratif. Du 18e au 20e siècle* (1994), 2nd ed. Huge transformations, however, occurred at the end of that century. Both Dicey (*Lectures on Law and Public Opinion in England*, cit. at 24) and Léon Duguit (*Les transformations du droit public* (1913)), to mention only two of the most prominent scholars of that epoch, were aware of such transformations, though they expressed quite different opinions.

[27] E. Garcia de Enterria, *La lengua de los derechos. La formaciòn del derecho Publico tras la Revoluciòn Francesa* (1995), 58, 80 (holding that a new language emerged for the new legal order). See, however, Tocqueville, *De la démocratie en Amerique* (1835) (pointing out, in the first page of the introduction, that the most striking feature of the US was the «*égalité des conditions*»).

outlined by Adam Smith or Wilhelm von Humboldt, public administrations intervened in an increasing number of social and economic fields. Governmental programs, budgets and apparatus all grew steadily ([28]).

Since this story has already been told in far greater detail by specialists, only a couple of aspects need be mentioned here. First and foremost, 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. 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 highways and railroads, for example ([29]).

Second, and consequently (but with the notable exception of the periods covering the two world wars) public expenditure on national defence and public order has grown much more slowly than that on goods and services such as education, health and pension schemes ([30]). If the number of State employees has not

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[28] Government by budgets is described by national reports. A quick comparison of the size of public expenditure shows in 2006 that it reached 43,8% of the gross national product in the UK, 50% in Italy, 52,9% in France, 54,3% in Sweden (these figures changed after the recent economic crisis). Their growth in the 1960s and 1970s is analysed by P. Flora & A.J. Heidenheimer (eds.), *The Development of Welfare States in Europe and America* (1981) and G. Ritter, *Der Sozialstaat. Entstehung und Entwicklung im internationalen Vergleich* (1991). See also A. Hurrelmann, S. Leibrfied, K. Martens & P. Mayer, *The Golden-Age Nation State and its Transformation: A Framework for Analysis*, in A. Hurrelmann, S. Leibrfied, K. Martens & P. Mayer (eds.), *Transforming the Golden-Age Nation State* (2007) (for the thesis that the 1960s and 1970s witnessed the 'golden age' for the modern western state, now declining). Whether the rise of government largess has created new rights or a new kind of property, it is another question, and a controversial one: see C.A. Reich, *The New Property*, 73 Yale L. J. 733 (1964). See also, of the same author, *The New Property after 25 Years*, 24 U.S.F.L. Rev. 223 (1990).

[29] See J. Mashaw, *Due Process in the Administrative State*, cit. at 2, 14.

[30] 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*

grown at exactly the same rate, this is because part of the implementation of those programs has been carried out by other entities, such as "*Caritas*", and, to a greater extent, by new *ad hoc* bodies (*établissements publics*, *enti pubblici*) ([31]). In any event, the number of civil servants has grown, as has public expenditure. The latter has grown more slowly during the period from the 1970s to the beginning of the twenty-first century, but it has continued to grow nonetheless. Of course, this is but a form of intervention of public authorities, together with the adoption of rules producing binding effects on private parties (employers, producers, providers of services) and the checks on their observance .

To conclude, the distinction between countries with administrative law and those without it was not an accurate criterion on which to base a depiction of the nineteenth-century world. *A fortiori*, it became increasingly inaccurate during the twentieth century as a new world emerged. Administrative law is one of the features of this new world and this fact, as Alexis de Tocqueville argued in his *Democracy in America*, makes new scientific paradigms necessary ([32]).

B) Beyond the State

One of the features of the United States system that struck Tocqueville was the lack of centralization and uniformity ([33]). Once again, this impression was largely determined by his experience in France. In the United Kingdom, the major political and economic power during the nineteenth century, a different situation developed. If Tocqueville could, as a foreigner, fully appreciate the strengths of American democracy, a German observer, Rudolf von Gneist, emphasized the virtues of British

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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.

[31] P. Sadran, *Le système administratif français* (1992), 45.

[32] Tocqueville, *De la démocratie en Amerique*, cit. at 27, *Introduction*.

[33] Tocqueville, *De la démocratie en Amerique*, cit. at 32, 150 («*le caractère saillant de l'administration publique aux Etats-Uni est d'etre prodigieusement décentralisée*»). He observed later (*L'ancien régime et la Révolution*, cit. at 26, ch. 3) that the *tutelle administrative* was a creation of the *ancien régime*.

local government. Self-government, he observed, permitted central authorities to concentrate on a limited number of essential functions, such as foreign policy and defence. However intellectually sound the concept of self-government may have been ([34]), it certainly grasped the crucial point that the justices of the peace carried out both administrative and judicial functions. This suggests that the previously exclusive relationship between administrative law and the State had been reformulated to some extent.

A fortiori, such a relationship could not reflect twentieth-century reality. This was due to two changes that occurred during that century. First, public activities were reorganized within national institutional frameworks in such a way as to enhance the role of other territorial bodies. Second and especially after 1945, other activities were attributed to European and world institutions, such as the European Community and the Bretton Woods agencies, respectively.

From the first point of view, since 1945, an increasing number of countries have tended to devolve rule-making and management tasks to regional and local authorities, well beyond the traditional *tutelle*. Such countries include Italy, Belgium, Spain, and even France, once considered the paragon of centralization ([35]). In all these countries (albeit to a varying extent), regional and local authorities not only implement policies established at a national level (under the "top-down" model) but are also entrusted with the power to lay down legal rules of their own. As a result, the State has ceased to be the sole source of legitimate authority, although it still enjoys a dominant role. To the extent to which regional and local authorities enjoy political autonomy, their rules may differ from area to area. A first consequence of this is an increasing statutory particularity. In other words, legal rules are less general. Uniformity, another postulate of the nineteenth-century State, is also reduced. This phenomenon is not (to quote Montesquieu again) limited to a specific climate. It is a central feature of both Latin and Scandinavian countries ([36]).

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[34] For further remarks, see M. Loughlin, *Legality and Locality. The role of law in central-local relations* (1996).

[35] See M. Fromont, *Droit administratif des Etats européens*, cit. at 9, 14.

[36] See G. Edelstam, *Science of administrative law: Sweden*, in IPE, vol. III, *Administrative Law*, § 1.

One example may suffice to illustrate this. It regards the German legal framework for administrative procedures. Under the constitution, the *Länder* enjoy a wide-reaching autonomy but the *Grundgesetz* sets certain limits on fragmentation (article 31 states, "Federal law shall take precedence over *Land* law"). Unsurprisingly, therefore, the federal law of 1976 governing federal administrative procedures (*Verwaltungsverfahrengesetz*), did not preclude further *Land* legislation being enacted for the purposes of regulating the *Länders'* own administrative procedures. The applicability of the federal legislation was therefore limited to the Federation's administrative bodies and other authorities insofar as they apply federal law on its behalf. Subsequently, the *Länder* all passed their own legislation to regulate their own administration and the administrative bodies under their control, such as the local authorities. Thus although federal law served as a framework, it left room for a certain degree of variety.

A partly similar situation has arisen in Italy. Procedural administrative law was only partly codified by the State in 1990, since the Constitution of 1948 had granted limited legislative competences to regions. Following constitutional reform in 2001, the State now enjoys limited exclusive legislative competences. Such competences include the judicial review of administrative action, but not administrative procedures. Consequently, not only may procedural rules differ from Region to Region, but the State may only lay down general principles of law. This example is not meant to suggest that the connection between the State and administrative law has vanished but, rather that, to the extent to which regional authorities may adopt their own rules, it has ceased to be an exclusive one. The question thus arises whether such rules respect certain basic principles and standards ([37]).

[37] For further remarks, see G. Pastori, *Recent Trends of Italian Public Administration*, 1 It. J. Publ. L., 1, 14 (2009) (observing that the general principles laid down by the law on administrative procedures implement the constitutional value of sound administration, enshrined into Article 97). For the established view, expressed by Santi Romano, according to which Administrative law is a root of national law, see A. Sandulli, *Santi Romano and the Perception of Public Law Complexity*, 1 It. J. Public L. 2 (2009). On the rise of regional and local government, see M. Fromont, *Droit administratif des Etats européens*, cit. at 9, 58 (for an analysis of national constitutional rules); L.J. Sharpe, *The European Meso: An Appraisal*, in L.J. Sharpe (ed.), *The Rise of Meso*

General principles of administrative law are also becoming increasingly important in the context of European Institutions, for which "administrative law is particularly relevant" ([38]). Such principles are laid down by recommendations of the Council of Europe, by the ECHR and by the European Union (EU) treaties. A few examples may serve by way of illustration. In 1977, the Council of Europe's Committee of Ministers passed a resolution on the <<Protection of the individual in relation to the acts of administrative authorities>>, establishing five rights and duties ([39]). These are the rights to be heard and to have access to both essential facts and legal advice and the duties to give reasons and provide a system of judicial review. Another recommendation was adopted in 1980. This concerned the <<exercise of discretionary powers by administrative authorities>> ([40]). It established, *inter alia*, the principles of impartiality and proportionality. The ECHR, by comparison, exerts a stronger influence on national procedural laws, especially with regard to procedural due process of law (under article 6). Moreover, it ensures an additional and higher level of judicial review, and one that provides more effective protection against abuse or misuse of public powers. In many ways, the impact of the EU is even stronger. Since the values upon which the Union is founded include the rule of law and the protection of fundamental rights (as provided both by common constitutional traditions and by the ECHR), the autonomy of its individual Member States is reduced. It is further reduced by general principles of law laid down by directives or elaborated by the European Court of Justice. For example, the ECJ has established through a number of rulings that national procedural autonomy may not encroach on general principles such as the duty to give reasons and the right to seek judicial protection ([41]).

Government in Europe (1993), 1 (arguing that "the emergence of an intermediate level of government" was a "near-universal phenomenon").

[38] T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 Am. J. Comp. L. 493, 494 (1991).

[39] Council of Europe, Resolution n. (77)3 of 28 September 1977.

[40] Council of Europe, Resolution n. (80)2 of 11 March 1980.

[41] See ECJ, Case 222/86, *Unectef* and Case 222/84, *Johnston v. Chief Constable*. For further comments, see L. Dubouis, *A propos de deux principes généraux de droit communautaire*, Rev. Fr. D. Adm. 691 (1988); P. Craig, *European Administrative Law* (2006). The influence of the ECJ is manifest also in other respects, such as the concept of public service: the Court's use of a concept very close to the

A more elaborate account of this evolution would require consideration of the extent to which such general principles derive from national legal orders. Such an account would be extremely interesting in the light of the comparison between the two paradigms illustrated initially. It would illustrate more clearly why the paradigm of administrative law as a national *enclave* is unsatisfactory. In any event, the more limited argument advanced here is that the once exclusive relationship between administrative law and the State has been affected by the development of general principles of law both by European and by global organizations ([42]).

This narrower argument is strengthened by a further point. In 1952, the Treaty of Paris established the High Authority. This involved the creation of a stateless administration (one that was "*apatride*", to borrow De Gaulle's famous and caustic criticism). Since this administration was entrusted with the power to take both "general" and "individual" decisions, having binding effects on private corporations, a system of judicial review was necessary. But the High Authority could not be subject to the jurisdiction of national courts. A Court of Justice was thus set up. The importance of the Court was heightened by the fact that the High Authority lacked the legitimacy usually created by political mechanisms operative in liberal democracies (such as the electoral process, for example). Within such liberal democracies, citizens control the legislature through elections and their representatives control those who govern and thus, indirectly, administrators. Such a transmission belt model ([43]) did not (and does not) work within the EC. As a result, the legitimacy of the

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French *service public* is noted by J. Bell, *The English Lawyer in the Europe of 1993*, 34 U. Leeds Rev. 82 (1992). See also also H.J. Blanke, *Vertrauensschutz im deutschen und europäischen Verwaltungsrecht* (2000) (describing EC intervention in terms of *ingerenz*), and, with regard national procedural autonomy, D.U. Galetta, *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost?* (2009).

[42] See S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 NYU J. Int'l L. & Pol. 663 (2005) (arguing that global principles are emerging) and J.B. Auby, *La globalisation, le droit, l'Etat* (2003) (observing that globalization does not imply less public law, but a new one).

[43] R.B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1967 (1975).

administration lay, more than in national systems, in the legal dimension.

The Treaty of Rome itself entrusted the Court with the task of ensuring that the *régle de droit* be respected. And the Court found *régles de droit* both in the ECHR and in the constitutional traditions common to the legal systems of the Member States. Since 1957, the Court has recognized the existence of general principles of law common to the legal orders of the Member States. The principle of governmental liability at a national level is one example, such principle having been established by the Treaty of Rome with regard to EC institutions and thereafter extended by the Court to the individual Member States. The underlying idea, to borrow the words of an Advocate General, was and still is that there is a philosophical, political and legal substratum ([44]). The Court of Justice has emphasized this from its judgments of the late 1950s and early 1960s onwards. In *Algera*, the ECJ was required to decide whether an administrative measure could be revoked ([45]). It observed that the Treaty did not contain any provision covering this issue. It added, however, that such an issue was familiar in the case law and the <<learned writing>> (i.e. the *doctrine* or jurisprudence) of all the Community's Member States. Therefore, unless the Court was to deny justice, it was obliged to refer to those rules, learned writings and case law, by way of comparative analysis. A few years later, in *Alvis*, the ECJ recognized another accepted principle of law, namely the right to be heard in disciplinary procedures ([46]). Such facts confirm that administrative

[44] See T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, cit. at 38, 495 (distinguishing between the principles laid down by the Treaty of Rome and those common to the legal orders of the Member States, which include: a) the principles that concern "limits to which any exercise of public authority is subjected", such as the protection of human rights and civil liberties; b) the principles "gradually developed in administrative law and practice", such as the protection of legal certainty and legitimate expectations and the principle of proportionality).

[45] European Court of Justice (hereinafter ECJ), Joined cases 7/56, 3/57 to 7/57, *Algera et al. v Common Assembly of the European Coal and Steel Community*. For further remarks, see J. Schwarze, *Judicial Review in EC Law – Some Reflections on the Origins and the Actual Legal Situation*, in 51 Int'l & Comp. L.Q. 17 (2002).

[46] ECJ, Case 32/62, *Alvis v Council*. For further remarks on the early case-law of the Court, see P. Reuter, *Le récours de la Cour de Justice des Communautés Européennes à des principes généraux de droit*, in *Mélanges offerts à Henri Rolin. Problèmes de droit des gens* (1964), 281.

law is not exclusively the product of each individual State, but, rather, is subject to external influences and pressures. This becomes even more evident when European institutions lay down principles and rules which constitute minimum standards national legal orders must comply with ([47]).

C) A Common Core: General Principles of Law

The increasing interconnection between national and European legal orders offers a key to understanding another fundamental change, concerning the legality of administrative action.

Whilst clearly oversimplifying matters, it may be said that the relationship between administrative law and legality developed in three overlapping phases. Consider first how administrative power was legitimated towards the end of the eighteenth century. Tocqueville observed that during the last phase of the *ancien régime,* the King himself believed that he had an obligation to provide reasons in his edicts. His council's documents contained both long preambles and reasons. Similarly, historians specialising in the Austrian Empire and Prussia have noted the importance of the instructions given by the King to his administrators. These also served as a safeguard against arbitrary behaviour on the part of the monarch. They were, however, self-imposed limits which could be disregarded. The sovereign could even reverse a judgment by way of a *Machtspruch* and put the judges into jail ([48]), as Frederick the Great did in the dispute concerning Miller Arnold.

Such fact explains the battle fought against discretion during the nineteenth century. The founders of the science of public law in continental countries raised two basic questions. The first regarded the requisites for a legitimate decision and the conclusion was that legislation was necessary. The second question was how to ensure that legislation be respected and the answer was that review by an independent judiciary was necessary. Both these ideas lie at the heart of the concept of

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[47] See J. Schwarze (ed.), *Bestand und Perspektiven des Europäischen Verwaltungsrechts* (2008).

[48] See A.P. Dawson, *The Oracles of the Law* (1985), 251 (commenting Miller Arnold' story).

Rechtsstaat, as opposed to the *Polizeistaat* ([49]). This concept was received in Italy during the 1880s, largely due to the work of the lawyer and politician, Silvio Spaventa. Legal historians and philosophers correctly point out various crucial differences between the concept of *Rechtsstaat* and that of the Rule of law ([50]). However, at the heart of both lies the idea of legality, in the sense of conformity with legal precepts. This idea expresses the concern about protecting equality and legal certainty that characterised the liberal era.

A different conception of legality emerged during the period between the end of the nineteenth century and the first decades of the twentieth century. Democratic ideals did not simply imply that elected representatives were entrusted with the task of monitoring the activities of administrators, but also that the former should guide the latter by way of legislation. Parliaments accordingly legislated on an increasing number of subjects. Conventional democratic theory sees in this an achievement of the new representative institutions. But it often misses another part of the story, namely, the real possibility of fettering administrative discretion. Analyses carried out by very many learned observers in different European countries during that period show that they were deeply concerned with the unprecedented increase in discretionary powers ([51]). Clearly, administrators exercised more

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[49] O. Mayer, *Deutsches Verwaltungsrecht* (1896, 1924, 3rd ed), vol. I, 53. His "systematisation" has been very influential, though the system has undergone profound changes: see R. Wahl, *Herausforderungen und Anworten: Das Öffentliche Recht der letzten fünf Jahrzehnte* (2007). See also, F.A. von Hayek, *Law, Legislation and Liberty* (1982), vol. I, *Rules and Order*, § 6 (holding that Mayer's view of administrative law was based on a mystic conception of *Herrschaft*).

[50] For further remarks on this point, see *infra* § IV.2. The comparative analysis carried out in this paragraph does not use a statistical analysis, which would be very helpful. Rather, it uses what has been qualified by Shapiro and Stone Sweet as the "crucial case study", to the extent to which it focuses on some cases which are regarded by the existing literature as particularly relevant. For a methodological discussion, see M. Shapiro & A. Stone Sweet, *On Law, Politics and Judicialization* (2002), 209.

[51] This regards both UK and continental lawyers, such as the Italian Guido Zanobini, who elaborated a sort of standard positivist view of the principle of legality, according to which administration may do only what is explicitly provided for by specific laws: *L'attività amministrativa e la legge* (1922), in *Scritti di diritto pubblico* (1956), 25. For an overview of his works, see M.S. Giannini, *Vita e opere di Guido Zanobini,* 14 R. T. D. Publ. 15 (1965).

than a mere implementing discretion when drawing up programs for city development, adopting measures to protect health and granting subsidies to enterprises, for example. Thus the traditional conception of legality as conformity with legal precepts increasingly failed to account for much of the reality of public administrations. In the real world, administrators make choices affecting relevant and competing social values ([52]).

Precisely because choices are made not only by elected politicians but also by administrators, other sources of legitimacy have emerged. Expertise is one such alternative source of legitimacy. Experts are often called to provide objective expertise and thereby legitimate administrative decisions ([53]). Another source of legitimacy is procedural fairness, in the sense that people tend to accept decisions, if the latter are reached by procedures that are regarded as fair ([54]). Yet another dimension of legitimacy is based on general principles of administrative law.

Such principles have constantly been affirmed by the national courts in European countries, particularly since 1945. Not surprisingly, this trend emerged both in Germany and in Italy, where the drawbacks of the majority principle had been strikingly evident ([55]). However, this was not an exclusive feature of the countries that lost the Second World War. Indeed, general principles of law were recognized in France and the United Kingdom, too. From 1944 onwards, the case law of the French *Conseil d'Etat* not only accentuated the use of general principles of law, but also used them to reinterpret legislation enacted during

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[52] Similar views about discretionary powers have been exposed by European scholars, such as M.S. Giannini, *Il potere discrezionale della pubblica amministrazione* (1939) and D.J. Galligan, *Discretionary powers. A Legal Study of Official Discretion* (1986).

[53] For a discussion of the advantages and disadvantages of the expertise model, see J. Mashaw, *Due Process in the Administrative State*, cit. at 3, 19.

[54] For this thesis, see N. Luhmann, *Legitimation durch Verfahren* (1976). See also K. Rohl, *Procedural Justice: Introduction and Overview*, in K. Rohl & S. Machura (eds.), *Procedural Justice* (1997), 3.

[55] See R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (2003)(for the thesis that, under a certain standard, it is not possible to conceptualise a precept or a set of precept as "law"). On the importance of "*allgemeine Grundsätze*", see H. Maurer, *Allgemeine Verwaltungsrecht* (1992), *Droit administratif allemand* (1994), translated into French by Michel Fromont, 71.

the Vichy period ([56]). General principles of administrative law thus restored an acceptable level of morality to public life, protecting individual rights against a narrow conception of legality. Something similar occurred in the United Kingdom ([57]). The judgment of the House of Lords in *Ridge v. Baldwin* (where the Court held that dismissing a civil servant without offering any opportunity to be heard violated the principle of natural justice) was a "historic turning point" ([58]). The principles of natural justice were by no means unknown to the English courts, however. Rather, their importance had gradually dwindled from the end of the nineteenth century onwards. Thus *Ridge v. Baldwin* constituted the beginning of a new wave of tradition-based case law rather than an innovation. That said, the reasons for this new wave would remain to be explained, however. Paul Craig offers one explanation by arguing that, after the end of the war, the courts were more inclined to go beyond legislation and refer to principles of natural justice as well ([59]). It may be surmised that, while the courts were unwilling to strike down controversial decisions on grounds of policy, the same courts were more inclined to recognize and enforce procedural safeguards.

In any event, over the years that followed, the general principles of legality, impartiality and openness have been recognized by the constitutions of other countries (Greece,

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[56] R. Cassin, *Introduction*, *Etudes et documents du Conseil d'Etat*, 1951, n. 3, 3. The earliest decisions taken by the *Conseil d'État* are those of 5 May 1944, *Dame veuve Trompier* (on the revocation of a license) and 26 October 1945, *Aramu* (on epuration): see B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative* (1954).

[57] See A. Lefas, *A Comparison of the Concept of Natural Justice in English Administrative Law with the Corresponding General Principles of Law and Rules of Procedure in French Administrative Law*, 4 *Queen's L. J.* 197 (1978). See also F. Bignami, *Creating European Rights. National Values and Supranational Interests*, 11 Colum. J. Eur. L. 265 (2005) (for a comparison between the French and German concepts of defence rights).

[58] See W. Wade, *Administrative Justice in Great Britain*, in A. Piras (ed.), *Administrative Law. The Problem of Justice* (1999), I, 174; P.P. Craig, *Administrative Law* (2004), 5th ed., 415.

[59] P.P. Craig, *Administrative Law: Great Britain*, in IPE, vol. III, *Administrative Law*, § 2a. See also C.H. McIlwain, *Constitutionalism – Ancient and Modern* (1947) (pointing out that in the eighteenth century the principles of natural law were regarded as inherent in the English Constitution).

Portugal and Spain, in particular)([60]). It remains to be seen whether and to what extent this trend was motivated by the desire to prevent encroachments on individual liberty or influenced by the spread of new principles of administrative governance. What matters for our purposes is that, despite the respect for traditional visions of legitimacy ([61]) encapsulated in the principle of legality, new general principles such as those of transparency, openness and participation ([62]) have increasingly been affirmed. Considered collectively, such principles constitute a sort of "common core" ([63]). In other words and as Jean Rivero suggested more than thirty years ago, general legal principles have been providing the basis of a "*droit commun européen*" ([64]).

D) Procedural Fairness in Administrative Law

The remarks made thus far regarding procedural fairness as a source of legitimacy would suggest that the procedural

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[60] For example, in Portugal: see V. Pereira da Silva, *Die Grundzuge des nationalen Verwaltungsrecht in Gemeinschafter Perspektive – Portugal*, in IPE, vol. IV, *Science of Administrative Law* (2010, forthcoming), § 1.2.1.

[61] See C. Starck, *Droits fondamentaux, Etat de droit et principe démocratique en tant que fondement de la procedure administrative non contentieuse*, 5 Eur. Rev. Publ. L. 31 (1993).

[62] L. Ortega, *Principles of Administrative Procedure*, 5 Eur. Rev. Publ. L. 75 (1993).

[63] For this order of concepts, see the seminal article by G. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 61 Am. J. Int. L. 734, 741 (1957); *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in K.H. Nadelmann et al. (eds.) *Twentieth-Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel Y. Yntema* (1961), 65. For a retrospective evaluation of the importance of Merryman's works, see P. Legrand, *John Henry Merryman and comparative legal studies: a dialogue*, 68 Am. J. Comp. L. 3 (1999).

[64] See 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. See also his *Compte rendu sur le fascicule n. 3 des Etudes et documents du Conseil d'Etat* (1950) 470 (arguing that "*l'événement le plus important, et le moins étudié, du droit public français actuel, c'est l'affirmation solennelle part le Conseil d'Etat d'un corps de principes généraux du droit, qui lui servent de référence … et qui'il impose, en toute hypothèse, à l'action de l'exécutif*"). The importance of written and unwritten general principles had already been observed by E. Laferrière (*Traité de la juridiction administrative* (1887), XIII) and M. Hauriou (*Police juridique et fond du droit*, in *Aux sources du droit: le pouvoir, l'ordre, et la liberté* (1933), § 3).

dimension of administrative law is a salient feature, not only in the United States ([65]) but also in Europe. Empirical analysis confirms this. Although only a few national constitutions include procedural due process of law clauses, (notably those of Greece, Portugal and Spain ([66])), an increasing number of countries regulate administrative procedures by way of legislation.

Austria took the first step in this direction in 1925, with a set of statutes drawing a clear-cut distinction between participants and other parties. Only the former may avail themselves of the *audi alteram partem* rule, the right to require an authority to state reasons and the existing legal remedies ([67]). Other central European countries followed suit shortly afterwards: Czechoslovakia and Poland in 1928 and Yugoslavia in 1930. The reasons for this were various and include the desire to strengthen democracy and the need to simplify administrative procedures in composite polities ([68]). When Spain (with its *ley de procedimiento administrativo* – LPA) and Hungary adopted their own legislation in 1958, the political context was so radically altered that procedural fairness was almost considered a surrogate of democracy. The Swedish legislation of 1971 offers another example, showing as it does the influence of the principles of

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[65] See M. Shapiro, *The Supreme Court and Administrative Agencies* (1968) 106 (for the thesis that administrative law is largely procedural) and J. Lever, *Why Procedure is More Important than Substantive Law*, 48 *Int. and Comp. L. Quart.* 285 (1999) (pointing out the importance of procedures, with regard to common law countries). But see also J. Mashaw, *Due Process in the Administrative State*, cit. at 3, 5 (emphasizing the conventionality of the distinction between substance and procedure) and L.H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L. J.* 1065 (1979) (underlining the "*substantive roots of procedural norms*").

[66] See Article 20, § 2, of the Greek Constitution ("The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests") and Articles 268, § 1, of the Portuguese Constitution and 105 of the Spanish Constitution (providing for "the hearing of citizens, directly or through the organizations and associations recognized by the law, in the process of elaborating the administrative decisions which affect them").

[67] See H. Schaffer, *Administrative Procedure in Austria. 80 Years of Codified Procedure Law*, 17 Eur. Rev. Publ. L. 871 (2005).

[68] G. Isaac, *La procédure administrative non contentieuse* (1968), 111. Two interesting collections of national legislations have been edited some years ago by G. Pastori, *La procedura amministrativa* (1964) and C. Wiener, *Vers une codification de la procédure administrative* (1975).

transparency and openness ([69]). The Swedish Act of 1986 (subsequently amended in 1998) then recognized the right of parties to be informed, their right to be afforded an opportunity to make an oral statement during an administrative procedure and the administration's duty to state reasons (though within certain limits).

A very important codification of procedural administrative law had meanwhile taken place in Germany, in 1976. At least two aspects ought to be noted. First, the Act's scope of application is confined to administrative activities governed by public law, more precisely those which give rise to the enactment of an administrative act (*Verwaltungsakt*) or an agreement governed by public law. Second, and more important for our purposes, the Act recognizes to all participants the right to be given "an opportunity of commenting on the facts relevant to the decision" (article 28) ([70]). It also establishes specific procedures for planning approval. Whether the German codification should be taken as a model was widely discussed elsewhere, particularly in Spain, where Article 105 of the Constitution lays down the *audi alteram partem* principle, and Italy, where the Constitution imposes on public authorities only a more generic duty of good administration ([71]). In the latter country, Law no. 241 of 1990 laid down rules on administrative

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[69] See B. Marcusson, *Administrative Law: Sweden*, in IPE, vol. III, *Administrative Law*, § I.21.

[70] Article 13 of the Act identifies four categories of participants: 1) those making and opposing an application, 2) those to whom the authority intends to direct or has directed the administrative act, 3) those with whom the authority intends to conclude or has concluded an agreement under public law, 4) those who have been involved in the procedure as third parties. The Spanish law of 1958, too, was focused on acts, rather than on procedures: see Article 29.V.1 ("*el procedimiento administrativo es el cauce formal de la serie de actos en que se concreta la actuaciòn administrative*").

[71] See O. Mir Puigpelat, *Grundzuge des nationalen Verwaltungsrecht in gemeineuropäischer Perspektive: Spanien*, in IPE, vol. IV, *Science of Administrative Law*, cit. at 1, § 1.2.a) (pointing out the influence of the German conception of the administrative act in the Spanish legal culture). See also J.J. Diez Sanchez, *El procedimiento administrativo comun y la doctrina constitucional* (1994) (distinguishing between "*derecho de audiencia*" and "*derecho de participation*"). For a comparison between the German conception and that of the EC, see J. Schwarze, *Legal Protection by and within the Administrative Procedure. Some Observations on the Legal Situation in German and European Community Law*, in A. Massera (ed.), *Le tutele procedimentali. Profili di diritto comparato* (2007), 53.

procedure and the right of access to files, as well as codifying the duty to state reasons ([72]). Two years later, the Spanish legislation of 1958 (which already provided for intervention in administrative procedures) was amended in a similar vein. A new wave of laws regulating administrative procedures followed the fall of the Berlin Wall in 1989 ([73]). Poland and Hungary, in particular, modified their legislation ([74]). Eventually, France, too, enacted general rules governing the relationship between citizens and public administrations ([75]). These events confirm the thesis advanced some years ago by Sabino Cassese, that a new common tradition has emerged ([76])

Such facts do not imply, however, that legislation is the same everywhere. First, national laws directed at regulating administrative procedures may vary in their scope. For example, whereas the German federal *Verwaltungsverfahrengesetz* codified procedural administrative law, the Italian statute of 1990 only laid down some general principles and rules. Nor does it provide a hearing before administrative officers. Rather, the parties may simply produce written evidence and opinions, unlike in the US ([77]). Third, national statutes may follow different models of

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[72] For further analysis of this Act, see D. Sorace, *Administrative Law*, in U. Mattei & J. Lena (eds.), *Introduction to Italian Law* (2002), 129; M.P. Chiti (ed.), *General principles of administrative action* (2006).

[73] For an overview of democratisation processes and strategies, see S. Rose-Ackerman (ed.), *From Elections to Democracy. Building Accountable Government in Hungary and Poland* (2005).

[74] See R. Arnold, *Procedural law and the rights of the citizens in central and eastern European countries*, in A. Massera (ed.), *Le tutele procedimentali*, cit. at 71, 19.

[75] "*Loi pour ameliorer les relations entre l'administration et les administrés*" (2000). The "immaturity" of French procedures had been observed by G. Isaac, *La procedure administrative non contentieuse*, cit. at 68; J.F. Brisson, *Les principes de la prcédure administrative en droit français*, in M. Fromont (ed.), *La procedure administrative non contentieuse en droit français* (2000), 75. This does not imply, however, that recent legislation left everything unchanged: see J.B. Auby, *Rapport introductif français*, in V. Cerulli Irelli (ed.), *Il procedimento amministrativo* (2008), 57. See, however, P. Gonod, *Grundzuge des nationalen Verwaltungsrecht in gemeineuropäischer Perspektive: Frankreich*, in IPE, vol. IV, *Science of Administrative Law*, cit. at 1, § III (holding that a better administrative democracy has not yet been achieved).

[76] S. Cassese, *Legislative Regulation of Adjudicative Procedures: an Introduction*, 5 Eur. Rev. Publ. L., 15 (1993).

[77] The US model is examined, among others, by K.C. Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956-57).

regulation. While the Austrian statute of 1925 reproduces the judicial model of hearing only the parties directly affected, more recent pieces of legislation, (such as those of Italy and the Netherlands) embrace the idea that the administration must consider all relevant interests ([78]). Fourth, while some statutes are concerned only with adjudication, others regulate planning (particularly in Germany) and other kinds of activities, (see, for example, the Spanish law of 1992). In Sweden, too, public hearings are provided for by special laws, such as the one regulating urban planning. Whether the underlying reason is the legislator's preference for *ad hoc* solutions or a political reluctance to give voice to the people ([79]), is another question. Another possible explanation is more functionally oriented. It focuses on the reluctance of the courts to require agencies to apply due process requirements when administrative procedures affect the interests of a large number of people ([80]).

Although these remarks confirm that administrative law has, in some respects, developed along different lines in the United States and in Europe, the importance of procedures must not be neglected. Due process is, first of all, a powerful instrument for ensuring a concrete protection of the rights recognized by modern constitutions and other bills of rights. This is not simply to repeat the point made in the first IPE volumes regarding fundamental rights. The substance of the present point concerns, rather, the nature of public decisions. Decision-makers are not only obliged to carry out some sort of cost/benefit analysis, in which the cost of a specific solution for the administration has to be weighed against the other interests at stake. They are also obliged to provide those enjoying such interests with some kind of hearing inevitably requiring a more complex judicial review. This

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[78] For further remarks on the Dutch law, see W. Konijnenbelt, *The Administrative Procedure in the New Dutch Code of General Administrative Law*, in L. Torchia (ed.), *Il procedimento amministrativo* (1992), 15.

[79] C. Harlow & R. Rawlings, *Law and Administration* (1999), 2nd ed., 115 (pointing out that "classic separation of powers theory … reserves the policy-making process for the executive branch").

[80] In this sense goes the judgment of the House of Lords in *Bushell v. Secretary of State for the Environment* (1986), quoted by C. Harlow & R. Rawlings, *Law and Administration*, cit. at 79, 519. For an accurate overview of national frameworks concerning procedures affecting a number of people, see L. Casini, *L'inchiesta pubblica*, 55 R. T. D. Publ. 45 (2007).

implies an enhanced role for the courts. Indeed, they are asked to review interest-balancing and the adequacy of participatory measures.

Secondly, while the peoples of Europe have different perceptions of the common good and even of what is morally acceptable, they share at least some common procedural principles. One such principle is the principle of due process of law enshrined in Article 6 of the ECHR. As a consequence and as the European Court of Human Rights held in *Tysiac v. Poland*, when, in the exercise of its autonomy, a State lays down a set of procedural rules, it is obliged to respect them ([81]). An earlier judgment of the Court (in the *Handyside* case), confirms the relationship between procedural values and fundamental rights, while at the same time showing the importance of cross-fertilization ([82]). In the early 1970s, a dispute arose between an English publisher and the UK Government. It concerned freedom of expression and the limitations which may be justified by the need to protect children from pornography. The Court deferred to the policy goals of the UK legislation interfering with such freedom. It did, however, check whether the reasons given by the national authorities to justify the actual "interfering" measures taken were relevant and sufficient. This was clearly the language of proportionality, a German concept elaborated by public law scholars and accepted both by the ECJ and by the ECtHR and, indirectly, by the higher courts of national jurisdictions ([83]). These

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[81] ECHR Court, *Tysiac v. Poland*, application n. 5410/03 (2007) (holding that, if a State has autonomously decided to provide an exception to the general ban on abortion, by way of a specific administrative procedure, such procedure must provide the woman with a reasonable opportunity to be heard). Whether abortion ought to be regulated differently is another question: see K.J. Johnson, *"New Thinking about an Old Issue:" The Abortion Controversy Continues in Russia and Ireland--Could Roe v. Wade Have Been the Better Solution?*, 15 Ind. Int'l & Comp. L. Rev. 83 (2004-5).

[82] ECHR Court, *Handyside v. UK*, application no. 5493/72 (1976). For further analysis, see P. Craig, *The Human Rights Act, Article 6 and Procedural Rights*, 47 Publ. L. 753 (2003) (arguing that the Strasbourg Court's case law promotes procedural justice and principles decisions); G. Anthony, *Positive Obligations and Policing in the House of Lords*, 9 Eur. Human Rights L. Rev. 538 (2009) (calling for an increased interaction of common law principles and those of the ECHR).

[83] For this thesis, see A. Stone Sweet & J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in 47 Col. J. of Transnational L. 98 (2009). Proportionality (*Verhältnismässigkeit*), is affirmed by other legal orders, too, such

facts confirm that the ECHR constitutes a source of common standards ([84]) and that such standards develop especially in the field of procedures ([85]). In other words, some minimum standards must be respected throughout Europe, especially as far as the right to be heard and the duty to give reasons are concerned.

E) From Immunity to Responsibility

The enhanced protection of both individual rights and dialogue between the Courts has become increasingly important in another respect. This regards the consequences of unlawful conduct by public administrators. In the early nineteenth century, this point marked what was probably the most striking difference between civil law and common law countries. Once again, Tocqueville's early comparative analysis is helpful. When visiting the United States, he was struck by the different social, political and legal environment. The State or, better, government lacked many of the privileges and immunities it enjoyed in France and elsewhere on the continent. There was no such thing as a special judge. Nor was there immunity for civil servants. This ensured far greater equality before the law ([86]). Indeed, Dicey emphasized this point in his critique of "*le droit administratif*".

If one examines concrete reality, however, a slightly different picture emerges. In the case of France, this is confirmed by the famous "*arrêt Blanco*". A young girl called Agnès Blanco

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as Austria and Switzerland: see T. Jaag, *Grundzuge des schweizerischen Verwaltungsrecht in gemeineuropäischer Perspektive: Schweiz*, in IPE, vol. IV, *Science of Administrative Law*, cit. at 1, § I.22.

[84] J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: on the conflict of standards and values in the European legal space* (1997), in *The Constitution of Europe*, 1999, 102.

[85] S. Mirate, *Protection of ECHR rights in administrative proceedings,* in R. Caranta (ed.), *Interest Representation in Administrative Proceedings* (2008), 189. For an excellent comparative analysis of the reception of the ECHR in national legal orders, see H. Keller & A. Stone Sweet (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (2008). See also J.P. Costa, *Some Aspects of the Influence of the European Convention on Human Rights on Domestic Law*, in G. Canivet, M. Andenas & D. Faigrieve (eds.), *Comparative Law Before the Courts* (2004), 85 (who distinguishes the institutional influence exercised by the ECHR from that exercised by its Court's case-law).

[86] See P. Chretien, *La science du droit administratif: France*, in IPE, vol. IV, *Science of Administrative Law*, cit. at 1 § 1 a.

had suffered a serious injury caused by the negligence of some public workmen. The *Tribunal de conflits* affirmed that the Civil Code did not apply, since the administration was governed by special rules. The *Conseil d'Etat,* on the other hand, held the administration liable for the damage suffered. A separate regime of liability existed, therefore. In 1905, in a decision annotated by Maurice Hauriou ([87]), the *Conseil d'Etat* went further and laid aside the maxim "the King can do no wrong". Such maxim was frequently invoked in the United Kingdom, although this did not imply that no liability was recognized. What was lacking, rather, was a regime of financial liability. The sole responsibility existing was a political responsibility to Parliament, each minister having to answer for every act of administration ([88]).

In the UK, only after 1947 did the gradual evolution of legal experience lead judges to reject the principle of a generalised immunity. They have affirmed the principle by which the public administration that acts *ultra vires* is liable for the damage it causes in just the same way as any other party within the legal order. Nevertheless, actions for ordinary remedies are subject to certain limitations and exceptions. The courts have excluded the possibility of administrative liability arising in relation to the executive's legitimate exercise of its duly conferred powers (i.e. *intra vires*) where its actions are not vitiated by negligence. They further exclude liability for certain specific kinds of activity, such as those performed by the armed forces ([89]). More recently, the courts have recognized the liability incumbent upon public

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[87] *Tomaso-Greco, Recueil Sirey*, 1903, 113, annotated by M. Hariou. See also G. Vedel & P. Delvolvé, *Administrative Justice in France,* in A. Piras (ed.), *Administrative Law. The Problem of Justice* (1997), vol. III, 429. The idea of immunity, it must be added, was not at all new. Consider, for example, the Edict of Saint-Germain (1641), where it was affirmed that <<*nous avons déclaré que notre dit Parlement de Paeis et toutes les autres courts n'ont été établies que pour rendre la justice à nos sujets: leur faison très express défenses et inhibitions, non seulement de prendre à l'avenir connaissance d'aucune affaire semblable à celles qui sont ci-devant énoncées, mais généralement de toutes celles qui peuvent concerner l'Etat*>>: for further remarks, see L. Neville Brown, J. Bell & J.M. Galabert, *French Administrative Law* (1998), 46. See also D. Lochak, *La justice administrative*, cit. at 6, 9 (pointing out the continuity of the «*refus de laissez juger l'administration par les juges ordinaires*»); J.L. Mestre, *Introduction historique au droit administratif français* (1985).

[88] Sir Ivory Jennings, *The British Constitution* (1954), 152.

[89] *Pearce v. Secretary of State for Defence* (1988).

officials whose task it is to supervise the conduct of parties operating in the securities markets. The House of Lords clarified that "recklessness about the consequences, in the sense of [the public officer's] not caring whether the consequences [of the illegal act] happen or not, will satisfy the test" for misfeasance, without the need to prove intentional wrongdoing ([90]). Interestingly, similar developments may be observed elsewhere, for example in Italy ([91]). The analogy demonstrates that, even in the absence of uniform EC rules, national legal orders often find the same solution to the same problem.

IV. Change, not (necessarily) Progress

A) "Old" and "new" Methods of Administration

The foregoing section, with its strong emphasis on change rather than on the continuity so often noted by eminent scholars in the past, such as Otto Mayer, may create a risk. The risk is to think that the changes undergone by administrative law may be explained by some theory of progress, or at least by the idea of a clear progression from one stage to another ([92]).

Historical analysis is particularly useful in this respect. It reveals a "back and forth" course, particularly with regard to the use of private law. Private-law tools, such as contracts, were a normal feature of public administration during the nineteenth century. At the same time, administrations could exercise their "public" powers, not only in the field of taxation, but also with regard to the expropriation of private property. Indeed, although nineteenth-century constitutions and codes ensured the protection of private property, they allowed expropriation for reasons that

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[90] *Three Rivers District Council* (2001). For a wider-ranging comparison, see J. Bell, *La responsabilità del governo: alcune riflessioni comparate,* in *Verso un'amministrazione responsabile* (2005), 27.

[91] See the Italian Corte di Cassazione, judgement no. 3132 of 3rd May 2001.

[92] Against any attempt to conceive history and particularly history of European law, through the lenses of "evolutionary" theories, see the convincing critique exposed by A. Manuel Hespanha, *Panorama historico da cultura jurìdica europeia* (1999), though this does not necessarily lead to the "medieval horror of *novititates*" noted by R.C. van Caenegem, *European Law in the Present and the Future. Unity and Diversity Over Two Millennia*, cit. at 14, 11. See also, among those who have criticized "evolutionary" theories, G. Vico, *La scienza nuova* (1725) and O. Spengler, *Der Untergang des Abenlandes* (1918), § I.3.

were in the public interest. Such powers may certainly be seen as privileges justified by the supremacy of the State, where the latter is considered a sort of higher entity. A utilitarian (*à la* Bentham) explanation would be equally acceptable, however. Whatever their justification, such powers were enhanced at the end of the century and even more so during the twentieth century, in connection with the ambitious plan to achieve a wide public control in the economic and social sphere. At the end of the 1970s, however, a new trend emerged, as the consequence of both a growing awareness of government overload and increasing financial constraints. While the idea of a counterrevolution should be dismissed, there is evidence of a revival of old doctrines and methods of administration. Thatcherism probably made one of the most advanced efforts to bring back ideas and methods that had become unfamiliar within the public sector ([93]). It liberalised air and rail transport, as well as telecommunications. Interestingly, some of the arguments in favour of this step were exactly the same as those used one century earlier by opponents of nationalization. This is particularly true of the argument that government should not eliminate private enterprises from the market. Other arguments adopted by conservatives, however, had previously been used by those advocating nationalization. One such argument is the need to improve the quality of services. History, therefore, suggests the need for a certain degree of scepticism - what looks "new" may be quite old ([94]).

A similar conclusion is suggested by a cursory analysis of a specific type of administrative organization, namely, agencies. After 1850, the central administration in the United Kingdom consisted essentially of ministries and agencies. Soon after its political unification in 1861, Italy followed the same model. More than one century later, however, agencies had almost disappeared

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[93] A. Gamble, *The Free Economy and the Strong State* (1994), 2nd ed.

[94] On the question of "monism" in administrative law, as regards both substantive and procedural law, there is certainly no lack of studies: a recent collection of studies appeared in volume 12 (2000), n. 2, of the European Review of Public Law. See also the short, but useful volume *La justice administrative en Europe* (2006), available also in English, and M. Fromont, *La place de la justice administrative française en Europe*, 47 Droit administratif 8 (2008) (holding that the German system, rather than the French, is regarded as more suitable to ensure full judicial protection).

from both countries. Further change occurred at the end of the 1970s. When financial difficulties became more evident, old structures were revived. The United Kingdom elaborated and implemented a programme involving "next step" agencies. Many administrative tasks, including the issuing of passports and the administration of social security schemes, are now carried out by agencies enjoying autonomy from political bodies ([95]). To some extent, Italy has followed the same path. It has reintroduced agencies to deal with both one of the oldest functions of the modern State (taxation) and one of the newest (environmental protection). Moreover, various authorities have been set up (with varying degrees of autonomy) to regulate specific fields such as the stock exchange, the media and telecommunications. Such steps had been taken in France some years earlier ([96]). Interestingly, all three countries experienced not only the growing influence of EC law requiring the independence of national regulators ([97]), but also a similar, and old, problem. The creation of agencies was perceived as a loss of political control over administrative processes of decision-making and thus, ultimately, also of accountability.

B) The Persistent Ambivalence of Administrative Law

While the foregoing section calls the concept of administrative innovation into question, it is now necessary to consider whether a "progressive" perspective can provide an adequate frame of reference when analysing administrative law. It is arguable that the progressive perspective is unsatisfactory for

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[95] See G. Jordan, *The British Administrative System* (1994), 27 (distinguishing between delivery and regulatory agencies).

[96] See P. Sadran, *Le système administratif français* (1992), 48; C.A. Colliard & G. Timsit (eds.), *Les autorités administratives independents* (1988); M. Ruffert, *The Transformation of Administrative Law*, cit. at 18, 29 (pointing out that Germany is an exception to this trend).

[97] For a similar remark about Spain, see L. Ortega & C. Plaza, *On the Transformation of Spanish (procedural) Law under the influence of European Law*, in J. Schwarze, *Bestand und Perspektiven fur Europaischen Verwaltungsrechts*, cit. at 47, 139. See P. Sadran, *Le système administratif français* (1992), 48; C.A. Colliard & G. Timsit (eds.), *Les autorités administratives independents* (1988); M. Ruffert, *The Transformation of Administrative Law*, cit. at 3, 29 (pointing out that Germany is an exception to this trend).

three reasons. The first two of these have a historical basis, whereas the third draws on EC law.

Once again, historical analysis proves invaluable. It shows, first, that, while it may be argued that administrative justice through special principles and bodies (such as administrative judges) during the nineteenth century aimed at ensuring a better protection of citizens against the improper use of power by public authorities, such principles and tools were characterized by an authoritative bias ([98]). It shows, second, that change can sometimes be very slow, also that administrative law experiences moments of regression, especially during war or social and economic crisis. For example, both personal freedom and freedom of the press were severely limited in Italy and Spain under authoritarian regimes during the 1920s and the late 1930s, respectively. In France, individual freedoms were curtailed under the Vichy government. Another restriction occurred during the Algerian crisis in the 1950s. Many years later, when seeking to expel citizens of other EC Member States, French administrative judges did not recognize the direct effect of EC law. More recently and in spite of the Human Rights Act, measures aiming at preventing terrorism have encroached upon certain freedoms in the United Kingdom. This example is particularly important because it shows that there is more involved than just a persistent conflict between authority and liberty. Seeing the matter in such limited terms is to miss an important point. Where the prevention of terrorism is concerned, strong measures are needed precisely because what is being protected is a fundamental collective interest (i.e. public security) as well as, more indirectly, all those individual rights that are jeopardised by terrorist attacks ([99]).

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[98] For this remark, see M. Nigro, *Giustizia amministrativa* (1983), 21.

[99] Consider, for example, the recent ruling by the ECJ in Joined Cases C-402/05 P & 415/05, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*. This judgment has been commented in different ways. Some have seen in it a manifestation of a new "*nomos*" concerning procedural constraints on government: see G. della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International foundation v. Council*, 15 Colum. J. Eur. L. 519 (2009). Others have argued "this is the most important judgment ever delivered by the" ECJ with regard to the relationship between EC law and international law: T. Tridimas, *Terrorism and the ECJ: Empowerment and Democracy in the EC legal order*, 5 Eur. L. Rev. 103 (2009). For others, instead, the

Whether such measures are adequate and whether they are accurately and fairly enforced is obviously another question.

A variation of the first argument concerns public services. A hundred years ago, the two most authoritative scholars in France, Maurice Hauriou and Léon Duguit, debated whether authority or the provision of services constituted the central issue in administrative law ([100]). Although it is not appropriate to engage in such a debate here, it is interesting to note that several twentieth-century scholars have emphasised the growing importance of the delivery of goods (including money) and services. There is much concrete evidence that their vision is correct and that this dynamic has positive implications for social welfare. It remains to be seen, however, whether such dynamic implies an attenuation of the authoritarian side to administrative law. On the one hand, historically, the States which took the idea of delivering economic and social goods and services most seriously were Nazi Germany and the USSR, both described by Ludwig von Mises as "omnipotent" States ([101]). What is of interest here is not the evident lack of safeguards in such regimes but the connection between an absolute authority and the delivery of services, whatever their quantity and quality. There is no need to agree with Friedrich von Hayek that social programmes pave the way to serfdom to be aware that the supply of goods and services implies a high degree of paternalism ([102]). It also requires huge financial resources. The latter are provided by taxation, which inevitably impinges on individual choices concerning investments and consumption. The inadequacy of traditional legal safeguards is still another factor that ought not be ignored. But the fact that judicial review is a far better shield against the improper use of authority than it is a control over the services delivered by public

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ECJ jeopardized "the coherence between the international legal system and the promotion of an effective dialogue between international courts and international organizations": A. Gattini, *Comment*, 46 Common Mkt. L. Rev. 213 (2009).

[100] See P. Schiera, *Gemeineuropäische Geschichte und Struktur der Verwaltungsrechtswissenschaft*, in IPE – vol. IV – *Science of Administrative Law*, cit. at 1, (holding that an authoritarian involution occurred after 1900).

[101] See L. von Mises, *Omnipotent Government. The Rise of the Total State and Total War* (1944) and F.A. von Hayek, *Law, Legislation and Liberty* (1982), vol. II, *The Mirage of Social Justice*, § 8.

[102] As emphasized by F.A. von Hayek, *The Road to Serfdom* (1944).

administrations is too well known to require more than a brief mention. It is for this reason that new standards of good governance and other tools of accountability have become so important.

That administrative law is concentrating on the delivery of goods and services, rather than the exercise of authority, is also debatable in the light of EC law. Much ink has been wasted by commentators in an attempt to demonstrate that the achievement of a closer union between the peoples of Europe (Europe's greatest contribution to civilization in the twentieth century) has not implied the creation of a new site of authority. They have argued that EC law has, rather, required Member States to dismantle many of the domestic administrative measures that impinged on individual economic liberties, including quantitative trade restrictions, custom duties and subsidies. It would nevertheless be wrong to infer from this that the sole function of the EC is to restore the nineteenth-century vision of the State as a night watchman. There are two reasons for this.

The first is that the achievement of a closer union between European peoples, as envisaged by the Treaty of Rome, did not and does not depend only on legislative measures enforced by both European and individual Member States' domestic courts. It also requires administrative activities. As noted earlier, the High Authority was set up to regulate the coal and steel markets. Its successor, the Commission, was entrusted with the task of enforcing competition but it is also required to administer complex programs involving public expenditure, particularly in the field of agriculture. Thus, while prohibiting subsidies that alter, or may alter, free competition, the EC administration subsidises agriculture. It would be an oversimplification, of course, to describe this process as the replacement of national sources of authority with new supranational ones. Something new has occurred, but this new machinery of government uses several old administrative techniques and legal concepts, including a good dose of dirigisme.

The second reason is that even EC rules aiming at achieving freedom of circulation and non-discrimination on grounds of nationality recognize the importance of public policy and the salience of authoritative powers. EC law does not prevent national authorities from limiting free trade or the movement of persons

for reasons of public policy. Nor does it impose free circulation of workers with regard to public administrations. Indeed, when interpreting the vague wording "public administrations" contained in article 48 (now 39) of the Treaty of Rome, the ECJ has constantly referred to a twofold requisite. For the purposes of this article, "public administration" is characterized both by its protection of the essential interests of the State and by its exercise of authoritative powers ([103]). In a similar vein, when dealing with disputes concerning the fair and equitable process requirement laid down by article 6 ECHR, the European Court of Human Rights has recognized the existence of a legal framework regulating the exercise of authoritative powers. As a result, it has been careful when interpreting the requisite of civil or political rights as referred to in article 6.

Two conclusions may be drawn from this. Firstly, that there exists an important relationship between public authority and collective interests. Authority is still a salient feature of administrative law ([104]) although it is no longer justified by the service of a king or a class or by ideological reasons (such as the supremacy of the State or *raison d'État*, for example). Nowadays, its justification is functional, notably the need to ensure that collective interests are adequately protected. Since the nineteenth century, however, administrative law has been characterized by an equally important concern with preserving liberties from the improper exercise of discretionary powers i.e. arbitrariness. My second conclusion is, therefore, that administrative law had and still has two faces: it aims both to preserve authority and to protect citizens. Hence its persistent ambivalence ([105]).

This ambivalence may explain, *inter alia*, the trends concerning transparency. It should be said at the outset that, whereas secrecy used to be the norm, the last twenty years, in particular, have witnessed its erosion. Most European legislation imposes duties of disclosure on administrations and, more or less everywhere, the courts have shown a willingness to enforce such

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[103] See, e.g., ECJ, Case C-173/94, *Commission v. Kingdom of Belgium* (1996), § 17.

[104] As observed by M.S. Giannini, *Diritto amministrativo* (1964), in *Scritti*, vol. V (2004), 211-212.

[105] P. Chrétien, *La science du droit administratif: France*, in IPE, vol. 4, *Science of Administrative Law*, cit. at 1, § 1 (pointing out the "fundamental ambiguity" of administrative law).

duties. As a result, although the duty to give reasons is probably <<*the mildest of all constraints*>> ([106]), it may bite, especially if the courts verify not only whether the administration provided reasons, but also whether such reasons were adequate. However, not always does the lack of formal, specific reasons entail the annulment of a contested decision. Indeed, a decision may be regarded as irregular, rather than unlawful ([107]). The underlying idea is that whilst form is a safeguard against arbitrariness, it should not prevail over substance at all costs.

V. Implications for Theories of Administrative Law

A) Towards a more Systematic Branch of Law?

The remarks made thus far regarding the resilience of certain features of administrative law have several implications. First, they are relevant to the question of whether administrative law has followed the example of private law in continental countries, in the sense of becoming more systematic. Second, they are linked to issues regarding the foundations of administrative law or, more precisely, its relationship with democracy. Finally, they beg the question whether the role of comparative analysis has evolved, as suggested initially.

Those studying administrative law during the nineteenth century (particularly those in France) almost inevitably studied private law as well. When comparing the two branches of the law, it was almost impossible to avoid concluding that private law was systematic and administrative law was not ([108]). Several scholars then evaluated this fact critically, arguing that administrative law needed to be more systematic. French authors did their best to bring sophisticated techniques applied to private law into the study of administrative law. Notwithstanding the empirical

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[106] M. Shapiro, *The Giving Reasons Requirement*, U. Chi. Legal F. (1992) 179, 181.

[107] See the German *Verfahrengesetz* of 1976, Article 28, and the Italian Act n. 241 of 1990, Article 21-*octies*. Interestingly, when the latter was modified, a comparative argument used by the advocates of the reform was that such a reform was in line with the German and EC norms: see V. Cerulli Irelli & V. De Lucia (eds.), *L'invalidità amministrativa* (2009).

[108] See P. Gonod, *Grundzuge des nationalen Verwaltungsrecht in gemeineuropäischer Perspektive: Frankreich*, cit. at 75, § II a (pointing out that administrative law is "*un droit non codifié*").

approach followed by administrative judges when exercising control under the concept of *détournement de pouvoir*, they identified at least some general principles. Despite the approach followed by the *Tribunal de conflicts* in the *Blanco* case, a few years later they saw in that decision the confirmation that administrative law was not only governed by general principles, but also had general principles of its own. Those scholars were, therefore, system-builders. This approach was carried to an extreme by German, Austrian and Italian academics. Many of them assumed that, for each and every part of their private-law systems, there had to be a corresponding part in the system of administrative law. For example, heedless of whether civil codes' rules on property were applicable to public administrations, those lawyers elaborated a specific set of theoretical principles ([109]). They did the same with regard to public contracts ([110]). Naturally, some connections did genuinely exist, but private law and public law nevertheless had to be conceived as distinct systems or sub-systems.

This was not a purely continental obsession. For example, Mitchell argued in a famous article that the absence of a systematised public law implied that the common law had failed to develop principles appropriate for the control of public authorities in a modern State ([111]). Several years later, Lord Diplock argued that "the progress towards a comprehensive

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[109] The influence of German concepts in the writings of the (re)founders of administrative law in Italy is particularly evident in the works of Santi Romano and Guido Zanobini: for further analysis, see G. della Cananea, *From public ownership to public use*, in M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?* (2009), 301 (contrasting analytical and synthetic conceptions of public ownership).

[110] On government contracts, see S. Boyron, *The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort*, in M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?*, cit. at 109, 223; G. Napolitano, *Pubblico e privato nel diritto amministrativo* (2003). See also M. Taggart, *The Province of Administrative Law Determined?*, in Taggart (ed.), *The Province of Administrative Law* (1997), 2 (arguing that UK lawyers had failed to appreciate the implications deriving from the rise of the "contracting state", while the courts had failed to "adopt a consistent and principles approach" to those issues).

[111] See D.B. Mitchell, *The Causes and Effects of the Absence of a System of Public Law in the United Kingdom*, 9 Public Law 113 (1965) and, for criticism, C. Harlow & R. Rawlings, *Law and Administration*, cit. at 79, 7.

system of administrative law (…) I regard as having been the greatest achievement of the English courts in my judicial lifetime". According to Martin Loughlin, such progress derives at least partially from European integration. He argues that, since the regulatory policies of the EU are built on the foundation of a civil-law distinction between public law and private law, "this is leading us inexorably to the development of a more formal system of public law" ([112]).

It is certainly possible that such progress is inexorable, but at least some questions should be asked about the validity of private law as a model ([113]). While administrative law is a relatively young branch of law, private law is already more than two thousands years old ([114]). Moreover, when looking at recent trends in private law, it soon becomes evident that the latter has departed from the codifications typical of the nineteenth century. The age of codes was based on "grand designs", whereas the twentieth century has been the age of "decodification" ([115]). In short, even for those who look to private law in continental countries as a model, it should be clear that the model has changed.

Furthermore, if we look at the national administrative frameworks operative during the last fifty years, it soon becomes evident that, with the exception of certain specific fields, such as urban planning or public contracts, administrative law has become increasingly fragmented. Italy is probably an extreme example of this. Be that as it may, fragmentation, with the resulting risk of incoherence and disorder, and complexity are

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[112] M. Loughlin, *The development of public law in the United Kingdom*, 7 D. Pubbl. 626 (1998), , where the words of Lord Diplock are quoted. See also D. Wyatt, *European Community Law and Public Law in the United Kingdom*, in B.S. Markesinis (ed.), *The Gradual Convergence. Foreign Ideas, Foreign Influence and English Law on the Eve of the Twenty-First Century* (1994), 188.

[113] A thoughtful analysis, in this regard, is still that by S.M. Retortillo, *Il diritto civile nella genesi del diritto amministrativo e dei suoi istituti*, 8 R. T. D. Pubbl. 697 (1959). See also E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2004), 2nd ed.

[114] Otto Mayer's observation, according to which "*Unser Verwaltungsrecht ist ein junges Recht*" (*Deutsches Verwaltungsrecht*, cit. at 49, 18), is put into evidence by S. Cassese, *Le trasformazioni del diritto amministrativo dal XIX al XX secolo*, 51 R. T. D. Pubbl., 27, 30 (2002).

[115] For this thesis, see N. Irti, *L'età della decodificazione* (1999), 2nd ed.

becoming evident in several other countries as well ([116]). Hence the attempts to establish some order, at least as far as decision-making procedures are concerned, as it was observed earlier.

In conclusion, while a more systematic administrative law would appear desirable, in the real world fragmentation seems to prevail. Nor can a more systematic structure be ensured by codes. It is ensured by the courts (although only to a certain extent). If this analysis is correct, the main question is not whether the positivist assumptions of the traditional paradigm must be reconsidered, but how. One possibility is that a change of mindset is occurring ([117]). Another one, not necessarily an alternative one, is that European administrative law is growing closer to American administrative law than it once was ([118]). This might have some concrete implications, for example as far as dissenting opinions within higher jurisdictions are concerned.

B)Administrative Law and the Political Constitution

Looking back at the genesis of administrative law also serves the further purpose of considering its relationship with democracy.

As far as continental countries are concerned, the starting point is still that envisaged by Alexis de Tocqueville. Administrative law, he argued, was not a product of the French Revolution. The Revolution altered the political constitution by introducing democracy (which explains the aversion shown at the time by most foreign princes and theorists). The administrative

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[116] On the increasing complexity of administrative law, see F. Burdeau, *La complexité n'est-elle pas inhérente au droit administratif?*, in *Cléfs pour le siècle* (2000), 436.

[117] C. Harlow, *Changing the Mindset: the Place of Theory in English Administrative Law*, 14 Oxford J. Legal Stud. 419 (1994) (pointing out that English administrative law was regarded as atheoretical, though this was a compliment for many national observers).

[118] For the thesis that globalization further reinforces what was already perceived some years ago, by a distinguished English observer, as a "US hegemony", see T. Daintith, *Exchange, response and competition: external perspectives on the United Kingdom Constitution*, 44 Publ. L. 165 (2000). See also W. Wiegand, *The Reception of American Law in Europe*, 39 Am. J. Comp. L. 229 (1991) (arguing that in several fields civil law provides a better protection of individual and collective interests).

constitution was nevertheless left unchanged, although its elements of centralization and uniformity were accentuated.

The question whether administrative law and democracy are necessarily related and whether the two can always travel in the same direction becomes even more complex in the case of Germany. Consider the great *fin de siècle* systematisation elaborated by Otto Mayer (the first edition of his treatise was published in 1895-6) ([119]). He was well acquainted with both French administrative law (of which he gave an elaborate account) ([120]) and French political culture. Indeed, it was from French constitutions that he drew the idea of popular sovereignty. Mayer nevertheless expressed concern over its excesses, or, more precisely, he was aware that popular sovereignty as such could not be fully adapted to the German institutional framework of that time. Anyway, a direct relationship between citizens and administrators was excluded by French constitutions (that of 1791 affirmed that "*les administrateurs n'ont aucun caractére de representation*") and this choice was kept not only by Mayer, but also by one of the major advocates of procedural democracy, Hans Kelsen. Procedural democracy was therefore limited to the political arena ([121]).

At least two more cases merit consideration, namely, those of Hungary and Spain. Hungary is particularly interesting because of its close relationship with Austria, which fact explains the influence of the Austrian codification of 1925. Hungary fell under Soviet rule after 1945, however, and foreign domination became even stronger after 1956. As a result, one might have expected that Western influence would cease altogether. But this was not the case. Indeed, a general Act regulating state administrative

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[119] O. Mayer, *Deutsches Verwaltungsrecht*, cit. at 49. It is interesting to observe that Dicey knew the French translation, though he observed polemically that "the administrative law of France comes nearer than does the *Verwaltungsrecht* of Germany (conf. Otto Mayer, *Le Droit Administratif Allemand* (1906), p. 293), to the rule of law as understood by Englishmen": Dicey, *Introduction to the Study of the Law of the Constitution*, cit. at, 20, ch. 12, fn. 2.

[120] O. Mayer, *Theorie des französischen Verwaltungsrechts* (1886). On the French influence on Mayer's theories, see J.M. Woehrling, *Otto Mayer, un acteur de la coopération interculturelle juridique franco-allemande*, 52 La revue administrative 24 (1999).

[121] See H. Kelsen, *Von Wesen und Wert der Demokratie* (1929), ch. 7. A similar position was expressed in those years by C. Schmitt, *Verfassungslehre* (1928).

procedures was passed in 1957. Of course, a simple explanation might be that legislative regulation of administrative procedures will only be effective if there are independent judges willing to enforce it and this was certainly not the case. However, another possible explanation is that a discredited political regime found it useful to leave some space to the discontents. Yet this does not exclude a further hypothesis, closer to Tocqueville's thesis mentioned earlier, notably that the legal regime of an administration varies only marginally when the political constitution changes. Whether we like it or not, such a hypothesis may be confirmed by what occurred after the fall of the Berlin Wall in 1989. The old procedural framework (which had been amended in 1981) was not changed immediately, but only in 2004 ([122]).

A partly similar situation occurred in Spain, where legislation governing administrative procedures was promulgated in 1958. Since the country was then under Francisco Franco's authoritarian regime ([123]), one may wonder to what extent the content and real effect of that piece of legislation was influenced by the political environment. The limited impact of an authoritarian regime on the content and effect of legislation recognizing individual rights had already emerged in Italy when the civil code was adopted in 1942 under the Fascist regime. In the Spanish case, however, the legislation had a different object since it governed the exercise of power by public authorities. One may therefore wonder whether and to what extent the Spanish

[122] I'm indebted with Andras Jakab for these information. For further remarks, see M. Fazekas, *Changes of Administrative Procedure between 1990 and 2006,* in A. Jakab, P. Takàcs & A.T. Tatham (eds.), *The Transformation of the Hungarian Legal Order 1985-2005. Transition to the Rule of Law and Accession to the European Union* (2007), 127 (pointing out the severe limits suffered initially by judicial review). I'm indebted, too, with Marek Wierzbowski for providing me with a French translation of the Polish Act of 14 June 1960, as modified in 1980. Only a few points of interest may be mentioned here: the emphasis placed on the need to consolidate citizens trust(Article 8), the guarantee of active participation in administrative procedures (Article 10, § 1), and the duty to give reasons (§ 3). Whether that piece of legislation had a real impact on citizens' life, of course, is another question.

[123] On the transition to democracy, see E. Garcia de Enterria, M. Carande & I. Borrajo Injesta, *Spain*, in IPE, vol. III, *Administrative Law* (2010, forthcoming) § 50. On the concept of liberal democracy, see J.R. Pennock & J.W. Chapman (eds.), *Nomos XXV: Liberal Democracy* (1996).

legislation was influenced by *Rechtsstaat* ideals ([124]). It is arguable that at least some elements of the *Rechtsstaat* may be shared by authoritarian political regimes. This line of reasoning might be confirmed by the fact that, although Spain returned to democracy in 1976 and adopted its Constitution (which explicitly provided for due process requirements) in 1978, it did not change the 1958 piece of legislation until 1992 ([125]).

If this line of reasoning is correct, at least two implications would derive from it. The first, more specific, implication regards the legislative regulation of administrative procedures. Such legislative frameworks may, in certain contexts, be shared by countries that, though not being liberal and democratic states, do not fall within the category which Robert Alexy qualifies as *Unrechtsstaat*, that is to say absolutely incompatible with the rule of law ([126]). As a consequence, they could be adapted to those authoritarian countries (such as China) that accept at least some minimal procedural restraints ("some kind of hearing" must, therefore, be provided) ([127]) on their exercise of power, in particular as a necessary part of accession to global regulatory regimes (e.g. the WTO) ([128]). It remains to be seen, however,

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[124] See E. Garcia de Enterria, *The Legal Administrative System in Spain*, in A. Piras (ed.), *Administrative Law. The Problem of Justice*, cit. at 87, II, 787.

[125] On the concept of the rule of law, as seen in the nineteenth century, the standard reference is A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, cit. at 20. See also, for an overview of the existing literature, P. Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, 41 Publ. L. 567 (1997), and, for a philosophical analysis, I. Shapiro (ed.), *Nomos XXXVI: The Rule of Law* (1994). See also M. Shapiro, *Constitutional Judicial Review*, in M. Shapiro & A. Stone Sweet, *On Law, Politics and Judicialization*, cit. at 50, 166 (pointing out that the continental concept is "not identical" to the concept of the rule of law) and J. Habermas, *Tanner Lectures on Human Rights* (1997).

[126] See R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* cit. at 55, § 4.2.1.3 (discussing the controversy between Gustav Radbruch and Herbert Hart concerning unjust legislation).

[127] This expression is borrowed from H.J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

[128] See M.W. Dowdle, *Explaining Accountability in Alien Terrain: Exploring Accountability in the People's Republic of China*, in Dowdle (ed.), *Public Accountability: Design, Dilemmas and Experiences* (2006), 157 (noting that accountability in China and other countries is not centered on courts and arguing that the same broad principles may, consequently, be enforced through different legal tools).

whether the courts or other public agencies will be eager to import public law due process restraints on power and thus to proceduralize at least some relationships between individuals, citizens or foreigners, and public authorities.

The other, broader, implication regards the relationship between procedural administrative law and the political constitution. Democracy undeniably influences administrative procedures. It is particularly important when it favors the access of a plurality of interests to decision-making procedures. This being the case, administrative procedures may become a surrogate political process, not without serious drawbacks. A legal framework for administrative procedures may be built on different institutional premises, however. According to the premises chosen, legislation may provide for certain procedural restraints on governmental powers, such as the duty to give reasons. It may equally provide for some kind of a hearing in order to ensure a minimum level of procedural fairness. As a result of this, the powers exercised by public authorities are not unlimited, as it happened in the situation of "*puissance publique sans bornes*" which Otto Mayer polemically identified with the *Polizeistaat* ([129]).

Whether one might legitimately suppose that if such procedural fairness is ensured, the absence or relative weakness of representative mechanisms would be partly attenuated, is another question. As a consequence of this, it may be observed that administrative law does change, but not necessarily if and when constitutional law changes (instead of the sharper contrast expressed by Mayer's well known phrase "*Verfassungsrecht vergeht, Verwaltungsrecht besteht*") ([130]). Further empirical analysis is, of course, necessary. Possible areas for study include administrative organization (the ministerial system failed to change in Italy after the fall of Fascism in 1944 or in Spain after that of Franco's regime, in 1976) and the rules governing the civil service, especially the administrative *élite*.

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[129] See O. Mayer, *Deutsches Verwaltungsrecht*, cit. at 49, ch. 1. A similar expression, "*pleine potestas eminens*" was used by E. Forsthoff, *Lehrbuch des Verwaltungsrechts* (1961) *Traité de droit administratif allemand* (transl. by M. Fromont) (1969), 65.

[130] O. Mayer, *Deutsches Verwaltungsrecht*, cit. at 49, II; S. Cassese, *Le trasformazioni del diritto amministrativo dal XIX al XX secolo*, cit. at. 113, 28.

C) Comparative Analysis and Administrative Law

The analysis carried out thus far suggests that any paradigm based solely on a notion of the uniqueness of a specific legal culture fails to capture fully the essence of public and administrative law. Indeed, the reality of this area of the law is that it has both distinctive and common features and it is important to take account of both.

This approach owes much to Montesquieu. He was fully aware of how the content of laws may vary, even on two sides of one and the same chain of mountains. Yet Montesquieu was also interested in verifying whether there exist "*lois invariables*" that may be considered to govern public authorities and, more broadly, societies everywhere ([131]). Comparative analyses of this kind are still useful. They hone our understanding of our own laws and institutions. They make us more aware not only of the relative value of many of our legal precepts but also of the moral beliefs underlying them. They strengthen the empirical basis for more solid and comprehensive legal theories, such as those elaborated by the great German scholars between the end of the nineteenth century and the beginning of the twentieth century ([132]).

Studying such theories nowadays also allows a new element illustrating the importance of the comparative method to come to light. The German scholars looked at all those elements that were potentially relevant and useful for elaborating a "grand" theory. But they found nothing in the constitutions or implementing practices they examined that produced legal effects elsewhere. In other words, what they studied was and remained "foreign" law. Any legal effect produced depended either on an individual, unilateral choice made by a State exercising its sovereignty or on the lack of such sovereignty, as in the situations which Jellinek, in his seminal general theory of the State, defined as *co-imperium* ([133]). During the second half of the twentieth

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[131] Montesquieu, *De l'esprit des lois* (1748), § I.2. Recent studies of history of law confirm the importance of the common roots of European laws: see especially R.C. van Caenegem, *European Law in the Present and the Future. Unity and Diversity Over Two Millennia*, cit. at 14, 13 (observing that a supranational law existed, the *jus commune*).

[132] See M. Fromont, *Droit administratif des Etats européens*, cit. at 9, p. 7.

[133] G. Jellinek, *Allgemeine Staatslehre* (1900).

century, comparative legal analysis became increasingly important for another reason, in the context of the new regional institutions. Such institutions override the concept of national borders, thereby reshaping administrative law. For example, the ECJ has affirmed that the right to be heard is a feature of administrative law common to several European countries and is, therefore, a general principle of EC law ([134]). As a result, the question whether X is a general principle of law has not only a descriptive but also a normative valency. In other words, *if* it is possible to affirm that a specific principle of law is both general and recognized by a plurality of legal orders (although not necessarily all), *then* such principle becomes applicable throughout the EC. Furthermore, the ECJ applies general principles of law (such as proportionality) when examining national laws ([135]). Exchanges and transplants are therefore operative in both directions. The principle of equivalence, or mutual recognition of legislation, takes a step further in this direction, operating as it does at the level of administrative rules and decisions.

All this, it is argued, adds a new dimension to the study of administrative law. The comparative method should not be used only to identify the distinctive features of a specific legal order or to elaborate general theories. Comparative legal analysis should also be used to identify those general principles of administrative law that reflect common traditions and may therefore be applied throughout the European legal space, in the absence of explicitly contrary national provisions ([136]). Seen in this light, comparative

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[134] ECJ, Case 17/74, *Transocean Marine Paint Association* v *Commission*, § 15. For further remarks, see J.A. Usher, *General Principles of EC Law* (1998), 77. See also E. Schmidt-Aßmann, *Les influences réciproques entre les droits administratifs nationaux et le droit administratif européen,* in L'actualité juridique – Droit Administratif, special issue, 1996, 146 (emphasizing the connections between national laws and EU law).

[135] See, e.g., the recent judgment of the Italian *Consiglio di Stato*, section V, n. 2087/2006, where the principle of proportionality is enforced in national dispute.

[136] See A. Lefas, *A Comparison of the Concept of Natural Justice in English Administrative Law with the Corresponding General Principles of Law and Rules of Procedure in French Administrative Law*, cit. at 54, 201. On the concept of European legal area, see M.P. Chiti, *Mutazioni del diritto pubblico nello spazio giuridico europeo* (2002). Some interesting implications regard the use of comparative law by the courts: see G. Canivet, M. Andenas & D. Fairgrieve (eds.), *Comparative Law Before the Courts* (2004); R.D. Glensy, *Which Countries*

legal analysis not only fosters cross-fertilization but also, and more importantly, reveals the existence of a common substratum.

Within this perspective, some formerly vexed questions lose all their significance. For example, the question whether comparative analyses of law have only scientific goals or also more pragmatic ones becomes redundant ([137]). Other issues become more important. The theory that while European societies still largely differ, administrative laws are converging, in particular, needs to be tested ([138]). The opposite view, namely, that societies converge in spite of legal differences, may prove more valid ([139]). In any case, not only the distinctive features, but also the similarities require further analysis ([140]). Whether at least some general principles common to European legal orders may be considered as shared by most, if not all, other legal orders, is still another fascinating question ([141]). Indeed, it is one that should not

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Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority, 45 *Virginia Journal of International Law* 358 (2005) (arguing that in the U.S. comparative analysis is hardly a new phenomenon).

[137] See R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Int'l & Comp. L.Q. 5 (1991) and A. Watson, *Legal Transplants*, cit. at 4, respectively. See also M.C. Ponthoreau, *Le droit comparé en question(s). Entre pragmatisme et outil épistémologique*, 66 Rev. Int'l D. Comp. 7, 21 (2005).

[138] See M. Fromont, *Droit administratif des Etats européens*, cit. at 9, 3 (pointing out the «*rapprochement des droits administratifs*»); M. D'Alberti, *Diritto amministrativo comparato*, cit. at 9, 24; A.J. Aman, *Administrative Law in a New Century*, in M. Taggart (ed.), *The Province of Administrative Law*, cit. at 102, 90 (arguing that a "new" administrative law has emerged).

[139] S. Cassese, *La formation du droit administratif. France et Royaume Uni*, cit. at 21, 142. See also R. Caranta, *Learning from our Neighbours: public law remedies harmonization from bottom up*, 4 Maastricht J. Eur. & Comp. L. 220 (1997) (observing that several legal tools are shared by the States by way of mutual learning).

[140] See again M. Fromont, *Droit administratif des Etats européens*, cit. at 9, 3 (arguing that only a better awareness of differences makes it possible to consider approximation of national laws).

[141] I have in mind, in particular, Jeffrey Jowell's question whether and the extent to which the principles of administrative justice are "*universal*": J. Jowell, *The Universality of Administrative Justice?*, in M. Ruffert (id.), *The Transformation of Administrative Law in Europe*, cit. at 18, 62. The question arises, too, whether the idea of general principles of law common to most nations, if not all, is vitiated by Western legal imperialism: see C. Harlow, *Global Administrative Law: the Quest for Principles and Values*, cit. at 13 (arguing that diversity and pluralism are preferable to uniformity); J.Q. Whitman, *Western Legal Imperialism: Thinking About the Deep Historical Roots*, 10 Theor. Inq. L. 305 (2009) (arguing that

only be considered in terms of *Volksgeist* ([142]), but also in the light of the importance of borrowings and cross-fertilization.

Western legal missionizing long predate the twentieth century, and indeed long predate the colonial adventures that began in the sixteenth century); H. Bull, *Foreward*, in G.W. Gong, *The Standard of "Civilization" in International Society* (1984), 1 (arguing that governments aspiring to membership of international society should be able to meet standards (as in the protection of their citizens, standards of honesty and efficiency in administration) similar to these which European States expected of each other and rested not upon ideas of inferior right but on a need for reciprocity").

[142] See R.C. van Caenegem, *European Law in the Present and the Future. Unity and Diversity Over Two Millennia*, cit. at 14, 137 (arguing that "national and regional traditions and feelings are a reality we have to take into account, even though their importance should not be exaggerated"); M. Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 *Tulane Law Rev.* 1103 (2001). But see also, for a different point of view, P. Legrand, *Droit comparé*, cit. at 4, 64 (according to whom "*le comparatiste appréhende une culture juridique d'un lieu qui n'est jamais cette culture juridique meme*").