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French Yearbook *of* Public Law

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Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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The Future of the French Model of Public Law in Europe[1]

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Abstract:

This short contribution explores the evolution and impact of the French historical model of public law on European legal systems. It delves into the origins of this model, highlighting its emergence and development. The contribution also examines the extent to which the French model of public law has transformed due to the influences of European law and globalization. Lastly, it reflects on the contemporary relevance of French public law, pondering whether there are valuable lessons that Europe can still learn from it.

Keywords:

French public law, Legal history, European administrative law

1 This article is an update of the conclusions of the Colloquium organised in Paris on 11 March 2011 by the MADP Chair of Sciences Po, under the patronage of the Council of State, with the support of the Mission de recherche Droit et Justice. It was first published in the review *Droit administratif* 2012, n° 11, special issue, pp. 94-96.

The French model in the European context: the issues

In this short contribution I aim to answer four key questions:

1) How did the French historical model of public law emerge and how has it influenced other European legal systems?

2) How did the concept of a French model of public law emerge?

3) To what extent has the French model of public law changed under the influence of both European law and globalisation, and what is left of the original model?

4) Is there still something for Europe to learn from the French model of public law?

The French historical model of public law

The historical French model of public law was shaped under the influence of both the Old Regime (*Ancien Régime*) and the French Revolution. According to Tocqueville, centralisation and administrative paternalism are a product of the Old Regime,[2] while the Revolution sought to strengthen the power and rights of the public authority.[3]

The key components of the historical model can be summarized as follows:

a. Supremacy of the Constitution and written law more generally. Additionally, the historical model had a very strong nationalist focus, which is to say that public law was considered to be closely linked to national traditions, and hence the historical outcome of each individual nation state. An integration of the French model into other national models was therefore not foreseen;

b. It is also in that context that the term 'étatisme' (statism) should be understood as the preponderance of the role of the state, centralisation, administrative uniformity and a strong control over intermediate powers;

c. Bonapartism: concentration of powers in the executive; extensive regulatory power of the executive; development of a high status of the civil service, centrality of the principles of equality and merit ('la carrière ouverte aux talents') and dismissal protection of civil servants, from which stems the partial subjugation of the administration to judges;

d. Large schools and corporations; central role of the Council of State, which drafts normative texts, performs senior administrative functions and resolves administrative disputes;

e. Separation of public and private law and duality of jurisdictions;

f. Development of the study of public law: constitutional law by Constant and administrative law by Gérando, Cormenin, Macarel and Vivien.

Despite its nationalistic focus, the historical French model of public law did have an influence beyond the French borders: it was imposed and imitated in other countries. With Napoleon it became sort of an export model (but it has also changed a lot: 'ces gouvernements du midi de l'Europe, qui semblent ne s'être emparés de tout que pour laisser tout stérile': Tocqueville[4]).

The historical French model of public law thus expanded internationally - it even became universal.

2 Tocqueville, A., *L'Ancien Régime et la Révolution* (1856-1858), 1986, Paris, Laffont, p. 973.

3 Ibid, p. 964.

4 Ibid, p. 992.

The two paths of the state in the West *'Les deux voies de l'État en Occident'* - Voltaire

One must distinguish between the historical French model of public law and the concept of a French model of public law. The former developed at the beginning of the 19th century, the latter in the second half of the 19th century, as opposed to the English model.

It was in the second half of the 19th century that the idea of an opposition between the French model of public law and the English model of Common Law was established. The former was conceived as a model characterised by the absolute power of the executive, centralisation and the supremacy of the principle of equality over liberty. The English model, on the other hand, was characterised by a liberal tradition, the supremacy of Parliament, *self-government*, and the progress of equality in harmony with liberty and freedom.

The key components of the English model can be summarized as follows:

The absence of a written constitution (i.e. a 'fluid' constitution), the importance of custom and the openness of the model to the outside world;

A stateless society and '*self-government*', i.e. local government entrusted to local authorities;

The central role of liberty and freedom and the central role of Parliament;

Legal monism, in the sense that public law is not recognised, and judicial monism, in the sense that there is only one judge, for both civil law and for administrative law;

The rejection of a legal science applied to the study of the state. The English constitutional law professor Albert Venn Dicey refused in 1885 to translate the expression '*droit administratif*' into English, which goes to show that the very term 'state' is almost unknown in the English system. It can thus be said that the English model is a model of '*droit commun'*. This is not to translate the English expression "*common law*", but only to indicate the absence of a special branch of law to regulate the affairs of the state.

The French model of public law and the English model of 'common law' developed towards convergence in the course of the 20th century. While the French model developed a liberal component, lawyers in the English model had started to recognise the existence of administrative law, mainly because of the rise of the welfare state (one of the first was William A. Robson of the '*London School of Economics*').

The French integrated model

In the course of sixty years of participation in the construction of the European Union, the French model of public law has changed. This transformation is not only due to the fact that the EU imposed certain obligations towards its Member States, but also due to the opening up of the French model itself towards different national legal orders (reciprocal influences) and spontaneous imitation, because European law is a composite law, partly 'Community', partly multi-national. That being said it should be noted that the Union is not completely alien to the French model, because France is part of the Union and plays an important role in the latter.

Further factors for this transformation can be identified. The latter seems to equally stem from globalisation and the development of a globalised administrative law, in which certain rights are universally recognised, such as the right to participate in the decision-making process, transparency or the right to a judge.

The current French model can be described as integrated, modernised and enriched, because new features have been added to the original ones, both because - I repeat - of the French participation in the European Union and due to the influence of globalisation.

The question is therefore how the French public law model has changed concretely and what remains of its original features. The essential components of the integrated French model are as follows:

a. Shared sovereignty, resulting from the supremacy of European law and the opening of the civil service to EU citizens from other Member States, with the consequence of a sort of denationalisation of public law; the administration is henceforth subject to two levels of law: French law and European law, of which the latter is considered supreme; 5 human rights are protected at several levels (Paris - Strasbourg - Luxembourg);

b. New citizens' rights: competition, participation, transparency; certain authorities take up the role of an arbitrator in a trilateral relationship between authorities, producers and consumers, as well as between authorities, managers of public services and users;

c. A certain kind of fusion of the notions of public and private law, as well as a destabilization of the functional identification of the state (e.g. public law bodies): hybridisation between public and private law, penetration of private law into the state and bipolarity of public law; loss of specificity and mutation of public law in general; conventional instruments as a means of public action; diminishing role of administrative privileges;

d. Polycentrism of the state apparatus (ministries, independent administrative authorities, regions) and partial anchoring of the administration in the executive (the government can dispose of the ministerial administration, not of the independent administrative authorities, especially so since several authorities are connected in a European network; the Union contributes to the fact that administrative authorities remain independent; decentralisation: more power to the periphery (regional and local authorities);

e. Reinvention of a national constitutional identity to defend itself, but, at the same time, to allow for a controlled invasion of rights stemming from the supranational level into national law; this confirms the findings of historians: national identities are almost never a given, but rather a construct in constant change; one needs to establish and confirm one's identity when the latter is called into question.

The convergence of European models and the trivialisation of public law have also had led to a scientific result: it was realised that in the past the differences between legal systems had been overestimated because of legal nationalism. It has been recognized that the different systems had in the past been considered alien to each other mainly for cultural reasons. The Europeanisation of law thus led to a loss of specificity of national legal systems.

The future of the French integrated model

Is there anything the European legal orders can learn from the integrated French model?

a. To begin with, we must abandon the contrastive view, such as that between Hauriou, who praised the French model, and Dicey, who strongly defended the rule of law based on the English model. There is now a European legal area in which there has been a strong exchange between national legal systems;

b. One must also take into account that the construction of the European Union has re-

inforced certain traditional features of the French model, in particular statism, the written Constitution and the 'Bonapartist' concentration of powers. Statism: the EU imposes limitations on states' sovereignty, which is to say that they have to share their powers; on the other hand, it equally gives them the opportunity to exercise influence beyond national territories, which in turn puts Member States in competition to one another. The written constitution: it can serve as a dividing line between the national legal order and the two supranational legal orders, European Union and Council of Europe, (the absence of a written constitution in the United Kingdom has in the past raised several problems). Concentration of power: participation in Union institutions requires the Member States to assert their individual strengths as to defend their interests;

c. Thirdly, the dissemination of public law must be recognised as a typical contribution of the French legal system, from which three characteristics emerge. Firstly, a certain degree of homogeneity: in the past, national public law had different scopes, so that what was considered to belong to the branch of public law in one country was not part of public law in another; nowadays these fundamental differences have largely disappeared. Secondly, the concept of public law that has prevailed in Europe consists of multiple components as public law has lost its strict connection to the nation state. Finally, there are shared features across jurisdictions: subsidiarity, proportionality, participation in administrative decision-making processes, duty to state reasons;

d. Fourthly, the French model of senior civil service spread when the European Union required a dialogue between the different legal systems. Cooperation between national political as well as administrative systems – especially in the context of comitology committees - requires a well-selected senior civil service with outstanding management skills;

e. Fifthly, the French model continues to make a substantial contribution to the national laws of other European countries as well as to European law in general in relation to the concepts of public service and public power; these are instrumentalised, transformed, adapted, have endured, and contributed to the progress of law in Europe. For example, the notion of public service has been broadened (universal service, service of general interest), redefined, but have always remained present (*Treaty on the Functioning of the European Union*, art. 14);

f. Sixthly, the French model of public law participates and contributes to the construction of a common European administrative procedural law by developing third generation rights (civil society participation): such as public consultation;

g. Finally, the French model offers an interesting approach to study public law in a way that is not only systematic – following the German model – or simply casuistic – following the English model. This is an important lesson in times when a European space of legal research is emerging.