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French Yearbook *of* Public Law

Issue 1, 2023

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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Conceptual and Linguistic « Surprises » in Comparative Administrative Law[1]

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Abstract:

This paper shares amusing and surprising examples from the world of comparative administrative law. It explores cases of "unexpected asymmetries" where identical legal categories are interpreted differently in various administrative systems. These examples, categorized from linguistic quirks to institutional shifts across borders, offer a glimpse into the playful and intriguing aspects of comparative law.

Keywords:

Comparative administrative law, Comparative methodology, Law and language

1. This paper has no theoretical or methodological ambition. It simply aims to share with its readers a few amusing and/or astonishing examples, stemming from a relatively long experience in the land of comparative administrative law, of what follows: the constant back-and-forth movement practicing comparative administrative law forces oneself to make between "the same" and "the other".

1 This paper, paying tribute to our colleague and friend Jacques Ziller, was published in French in: Jacques Ziller, a European scholar, European University Institute, 2022.

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Comparative law is in many ways a rather profound endeavor: as George Steiner has written somewhere about translation, it makes us feel the universal. It also has its share of playful aspects, akin to the pleasures that physical travel may offer us when we discover delightful places or interesting people.

Among its many surprises, some can be characterized as "unexpected asymmetries", that is, cases in which the very same legal category is defined, analyzed, or practiced differently in two or more administrative systems.

I would like to provide here some examples of these cases, within a rough typology, ranging from linguistic surprises to asymmetries affecting the practice of the law through several conceptual shifts operating when the same institutions transcend national borders.

Just a few examples, a personal list of sorts, which could obviously be extended.

2. Even though they cannot be regarded as the most exciting examples, there are, first of all, some typical linguistic asymmetries, in which the same legal reality is designated by different expressions in various legal traditions, while this difference in wording does not correspond to any perceptible difference in conceptualization.

It seems to me that good examples of this are provided by two rather incomprehensible deviations that French administrative law's vocabulary makes in relation to all neighbouring legal languages without this seeming to reflect any real substantial originality.

While all neighbouring languages employ the term "globalization"—*globalización* in Spanish, *globalizzazione* in Italian, etc.—the doctrinal language of French administrative law often prefers the term "*mondialisation*", and thus "*droit de la mondialisation*", without any identifiable shift in the conceptual backdrop.

Likewise, while neighboring administrative legal systems went in search of the secrets of "*digital*" administrative law—broadly the same adjective in English, Spanish, Italian...—French law is trapped in the national habit of designating these phenomena by the term "*numérique*".

These purely linguistic asymmetries do not, of course, represent the most interesting aspect. They are rather a sort of unpleasant friction, deceiving in the way they suggest false theoretical differences.

3. Without any doubt, the most fascinating cases are those in which a concept can be found in one administrative legal system while it is ignored in another one, even though the same underlying legal realities are present in both legal orders.

a) A first such case is that in which specific legal mechanisms are given a theoretical framework in certain administrative systems, while they are not conceptualized in other legal orders, even though those very same elements are, nevertheless, present. Here are three different examples.

In both Spanish and Italian administrative law, the possibility for the administration to reverse a unilateral act is conceptualized as "self-supervision" ("*autotutela*" in both languages), whose theoretical equivalent cannot be found, for example, in French administrative law. Yet it is indeed a practice common to all these legal systems, which refers to the possibility of modifying, abrogating or withdrawing an administrative decision. But French administrative law treats the question in an essentially practical way, through a set of solutions that concern the application of administrative acts over time. These solutions have been incrementally built up by case law in a pragmatic way, without any the-

orization of a specific administrative power and they are today mostly placed into the *Code des relations entre le public et l'administration* (CRPA), with no further conceptual cover.

A French administrative lawyer can also be estranged by the distinction that Italian law makes between "*procedimento*" and "*provvedimento*". Of course, she would understand the difference between administrative procedure and the administrative act that results from it, but her weak historical interest for the former does not clarify the theoretical link with the latter.

Here is another, very different example. Recently, doctrinal works have emerged—notably at the initiative of Dutch and Spanish colleagues—around the idea that distribution of scarce resources is one of the essential attributes of public administration. This is an original and certainly fruitful approach, which is not—yet—found in neighboring literatures.

b) In other instances, one can point out that certain administrative legal systems propose a specific theorization of instruments which are elsewhere included in broader terminologies, without a distinct intellectual construction. Here are also three examples.

Within the issues that other administrative systems indiscriminately connect to the concept of legality, Italian administrative law distinguishes between "*legittimità*", which concerns the possession of competences, and "*legalità*", which concerns the exercise of power.

The question of how administrations obtain information on society, economy, etc.—by what means, on the basis of what powers, or within what obligations—is today an especially important question. In some administrative legal systems, this function and the corresponding powers are not subject to any particular theorization, but they are specifically analyzed in others: for example, under the notion of "*administrative investigation*" in American administrative law, which relates the issue to the adoption of regulatory acts.

The analysis of discretionary power put forward by Italian administrative lawyers distinguishes a sub-set referred to as "*discrezionalità tecnica*", i.e., the cases in which an administrative authority bases its assessments on technical or scientific knowledge. In other administrative legal systems, this sub-set is not isolated, even if judges give a specific orientation to their review of assessments based on scientific or technical data.

c) We might add here those cases in which a concept, commonly accepted in certain administrative systems, is difficult to transpose due to the influence of different theoretical frameworks.

This is the case with the "*droit de la ville*" (law on/of cities), intended as a composite system of the elements which govern the legal functioning of cities. Although it is easily accepted in certain legal systems, it has difficulty finding its footing into others, for example in French administrative law. The reason can be attributed to the typically positivist vision which permeates French legal scholarship: as long as "city law" is not enshrined in legal texts or in case law, French administrative lawyers will be reluctant to recognize it as a legitimate object of study.

4. In addition to the above, there are cases in which the same concepts and intellectual constructs are found in several administrative systems, but do not have the same meaning and/or scope.

This may arise from the fact that an international concept can be used in a particular administrative system with a meaning that is partly different from the one it has in

other administrative laws. A good example of this is how dominant French scholarship has employed the concept of regulation. Whereas international literature on the subject perceives regulation as a general theory of public intervention, French authors tend to use it to designate new regulatory instruments enacted by independent administrative authorities.

While retaining the same concept and giving it the same meaning *a priori*, in fact, different administrative systems may diverge in the scope attributed to such concepts. Here is an example in the form of an anecdote. Whilst participating in a collective work on the notion of public power, led by a Spanish colleague, I realized that we couldn't quite agree on what to consider an expression of public power. Thus, according to the Spanish authors involved in this project, the development of contractual mechanisms in administrative action is a symptom of the strengthening of public power; whereas, on the contrary, French authors will interpret this trend as a symptom of a tendency by the administration to escape the use of public power instruments.

Sometimes identical legal concepts turn out to be articulated differently due to the way in which statutes or case law implement them. A good illustration of this is provided by judicial review of questions of law and questions of fact in the different administrative traditions. The most astonishing asymmetry can be observed on this issue between judicial practices in Common Law and Civil Law systems. In the former, particularly in the United States, judges adopt a certain self-restraint when dealing with the interpretations of statutory law adopted by administrative authorities; in the latter—as in the French case—judges feel fully capable of verifying the legal bases of administrative decisions, whereas they are more reluctant than their Anglo-Saxon counterparts in checking the matters of fact.

Finally, there are cases in which the same group of mechanisms, broadly conceived in the same way, have a different practical impact in different administrative systems. This can be observed with regards to public enquiries of infrastructural projects in the UK and in France. The procedure is legally organized in a fairly similar way in the two countries, yet its practical importance is quite different: whereas the British public enquiry presents a quasi-judicial character and has significant repercussions on the final decision, the French counterpart is generally rather superficial in its procedure and does not usually have a heavy impact.

*

Comparative law is a Florentine art: its practice requires a kind of determined flexibility in the face of the complexity of reality. One can truly appreciate its charms to the same degree that one is happy with the midst of sophisticated scents of jasmine and honeysuckle wafting over the hill of Fiesole in spring. The very same hill on which the European University Institute had the good idea of settling on. And had another good idea: to entrust its Law Department to the friendly and expert guidance of our friend Jacques Ziller for a long period of time.