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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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Issue 1, 2023

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A Comparative Research on the Common Core of Administrative Laws in Europe[1]

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Abstract:

Some decades ago, dissatisfaction with the state of comparative studies in the field of private law induced a group of scholars, in the context of the seminars organized by the Cornell Law School, to elaborate an innovative methodology – a 'factual analysis', based on hypothetical cases – in order to ascertain whether among some of the major legal systems of the world there were not only differences, but also some shared and connecting elements; that is, a common core. A research project of this kind, designed to analyse both common and distinctive traits between European administrative laws, was initiated by the author of this article some years ago. The present article, first, explains the purposes to be served by the new comparative research and its subject; that is, administrative procedure, as distinct from judicial review of administrative action. Second, it discusses some issues concerning both the methods employed and the choices made with regard to the legal systems selected. Third, it illustrates the main lines of research developed and their results, both expected and unexpected.

Keywords:

European administrative law, Comparative administrative procedure, History of administrative law

1 The comparative research that is presented here has been funded by the advanced grant awarded by the European Research Council (CoCEAL, n. 694697).

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I. Introduction

It is self-evident that administrative law in Europe has been transformed over time and that it has become increasingly important outside of any particular legal system.[2] Understanding the nature of this transformation is more difficult, for various reasons. Some primary sources are not easily accessible, for example the archives of some national courts as regards 19th century cases. Moreover, there is variety of opinion about its nature and purpose. While some focus mainly on the legal control of government power,[3] others devote attention to the study of organizational aspects; that is, the types of public bodies and relations between them.[4]

Another difficulty is that, as has been argued elsewhere,[5] the comparative study of administrative law is in an unsatisfactory condition. First, to the extent to which traditional approaches focus either on analogies between legal systems or on their differences, their validity is questionable, descriptively and prescriptively. Second, there is a persistent tendency to juxtapose the solutions adopted by two or some legal systems, without really comparing them.[6] Thirdly, other scholarly works, often with the contribution of a plurality of authors, look at public law, broadly intended, and thus fail to devote attention to the more specific questions concerning administrative law; that is, how should administrative decision-making processes be regulated, whether public officers should be subject to the ordinary processes of law in the same manner as private bodies, and the like. Likewise, often comparative studies do not pay specific attention to the European area, either because they focus on another part of the world, for example the Commonwealth,[7] or because they adopt some type of broader or 'global' perspective.[8] There is, of course, nothing wrong in this choice, so long as it is clear and coherent. However, it can be argued that a focus on Europe is justified,[9] on the one hand, in light of the processes of cross-fertilization that have characterized this part of the globe and, on the other hand, of closer integration within the European Community (EC) and now the European Union (EU). The question that thus arises, on grounds of methodology, is whether the same methodology that can be used, for example, for comparing the US and Ethiopia is adequate and fruitful for Europe.[10]

2 P. Craig, 'Comparative Administrative Law and Political Structure', Oxford J. Leg. St., 2017 (37), 1.

3 See, for example, G. Vedel and P. Delvolvé, *Le système français de protection des administrés contre l'administration* (Sirey, 1991).

4 See, for example, D. Sorace, *Diritto delle pubbliche amministrazioni* (Il Mulino, 2009).

5 G della Cananea and M Bussani, 'The Common Core of European Administrative Laws: A Framework for Analysis', Maastricht J. Eur. & Comp. L. (23), 2017, 221.

6 See M Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press, 1981), vii (arguing that "comparative law has been a somewhat disappointing field") and M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002). See also RB Schlesinger, 'Introduction', in Id. (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), 3.

7 See S. Rose-Akermann and P. Lindseth (eds.), *Comparative Administrative Law* (Elgar, 2013).

8 See, for example, M Hertogh, R Kirkam, R Thomas and J Tomlinson (eds.), *The Oxford Handbook of Administrative Justice* (OUP, 2022).

9 See M. Fromont, *Droit administratif des Etats membres de l'Union européenne* (PUF, 2006) and R Caranta, 'Pleading for European Comparative Administrative Law', 2 Rev. of Eur. Administrative L. 155 (2009).

10 S Cassese, 'Beyond Legal Comparison', in M Bussani and L Heckendorn (eds.), *Comparisons in Legal*

Some decades ago, dissatisfaction with the state of comparative studies in the field of private law induced a group of scholars, in the context of the seminars organized by the Cornell Law School, to elaborate an innovative methodology – a 'factual analysis', based on hypothetical cases – in order to ascertain whether among some of the major legal systems of the world there were not only differences, but also some "shared and connecting elements"; that is, a common core.[11] A research project of this kind, designed to analyse both common and distinctive traits between European administrative laws, was initiated by the author of this article some years ago.[12] The intent of the article is precisely to examine some of the questions which arise when a comparative inquiry is undertaken, with a view to ascertaining, in an important area of administrative law, that of administrative procedures, whether and to what extent there exists a common ground or a "common core" of European administrative laws, which can be formulated in legal terms, in the guise of standards of conduct for public authorities and mechanisms for their application.

The paper is divided into four sections. The first illustrates the main choices facing the comparative study that is presented here. The second section discusses some issues in methodology. The last two section illustrate the research's results concerning methodology and the analysis of the common core, respectively.

II. The salient features of the new research

At the beginning of the new comparative inquiry, its main features have been illustrated.[13] There is no need, therefore, to do so again. Few words, however, can be helpful to shed light on three salient features: its purposes, subject, and methodology.

A. The purposes

The purposes of the new research, first, should be clarified. Some comparative studies assert that there is a fundamental difference between the theoretical and practical purposes. The former place considerable emphasis on the satisfaction of a "need for knowledge".[14] The latter point out the persistent interest of both foreign law and comparative law in view of the reform of national legal institutions.[15]

Two quick remarks are appropriate. First, there are good reasons for examining national legal institutions, with a view to defining higher standards of administrative con-

Development. The Impact of Foreign and International Law on National Systems (Schulthess, 2016), 227.

11 See RB Schlesinger, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study', in K Nadelmann, A von Mehren and J Hazard (eds.), *Twentieth Century Comparative and Conflicts Law-Legal Essays in Honor of Hessel E. Yntema* (Sijthoff, 1961), 65.

12 The research group, chaired with professor Mauro Bussani, includes professors Mads Andenas, Jean-Bernard Auby, Roberto Caranta, Martina Conticelli, Angela Ferrari Zumbini, and Marta Infantino. The contribution of three post-doc researchers - Laura Muzi, Paola Monaco, and Leonardo Parona – is gratefully acknowledged.

13 See della Cananea and Bussani, note 4, and G della Cananea, *Organiser la pluralité: le fonds commun des droits administratifs en Europe*, in Association française pour la recherche en droit administratif, *Les méthodes en droit administrative* (Dalloz, 2018), 135.

14 See R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law I', Am J Comp L (39), 1991 1.

15 A. Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1993, 2nd edition) 9.

duct, because these are preferable to lower standards. There are, however, difficulties with this approach, because the descriptive validity of a comparative study aiming at selecting an "optimal" set of rules is itself dependent upon the "correctness" of a number of questionable claims.[16] Space precludes a thorough discussion of this issue.

Second, recent comparative projects have variably combined descriptive and normative elements. Clearly, if a project supports more or less directly the making of new rules, it will pay less attention to legal processes and doctrines. However, we are not assuming that practical considerations must be totally ruled out in favour of "pure" research. They can be considered in a sort of continuum. At one extreme is the view that a comparative research can be instrumental to defining or refining legal rules. At the other extreme is the view that a comparison serves to gather and check data in order to ensure the validity of legal analysis, similarly to other social sciences. There are also intermediate positions, which are legitimate and helpful depending on the main purposes of each researcher or group of researchers.

There is still another purpose, of more practical importance. It is well illustrated by the book written by Jean-Marie Auby and Michel Fromont on the judicial systems of the six founders of the EC.[17] As the authors observed in their *Preface*, and as an English reviewer of the book later confirmed, one reason of their comparative attempt was that firms and individuals doing business within the Six needed to know what were the possibilities of challenge: a practical concern, thus, though their study had a theoretical interest.[18] Thus, for example, they pointed out both the diversity of national institutions (for example, Germany's solution concerning actions brought against regulations) and their commonality (in particular, the principles underlying judicial review).

Delineating a continuum, instead of clear-cut boundaries, helps us to clarify that the goal of our research is to have more and better knowledge than it is presently available, though such research is susceptible to have some practical implications, among other things, for teaching administrative law.

B. Choice of subject

As regards the subject, two opposite risks had to be avoided. The first is the risk of over-inclusiveness. The opposite risk is that of under-inclusiveness, which was neatly pointed out by Schlesinger. He observed that often the topic chosen for comparative exploration was "too narrow to permit the discovery, within each of the legal systems selected, of the functional and systematic interrelationships among a large number of precepts and concepts".[19] The topic he chose, the legal framework concerning offer and acceptance, was relatively narrow. In the same years, in the field of administrative law, comparative studies still focused mainly, though not only, on judicial review of administration.[20] There was more than one reason why it was so. All legal systems have to decide

16 O Pfersmann, *Le droit comparé comme interpretation et comme théorie du droit*, 53 Rev. int. dr. comp. 275 (2001) (criticizing the idea of assembling the best practices).

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

18 See D.B. Mitchell, *Review of J.M. Auby and M. Fromont, Les recours* contre les actes administratifs dans les pays de la Communauté économique européenne, 21 Int. & Comp. L. Q 193 (1972).

19 Schlesinger, note 5, 3.

20 See Auby and M. Fromont, note 16 and A. Piras (ed.), *Il controllo giurisdizionale della pubblica amministrazione*

on the conceptual and institutional foundations of judicial review. Once actions involving public bodies are admitted, there are issues concerning reviewable acts and the intensity of judicial control. The importance of this (now diminishingly important) strand in public law must not be neglected, at least because of the appeal that a paradigm exerts.

The topic chosen here is, instead, administrative procedure. Various reasons support this choice. First, it is not too narrow to permit us to identify, within the legal systems selected, of a variety of "functional and systematic interrelationships" among some central structures of administrative law, including the range and typology of interests recognized and protected by the legal order, the interaction between the various units of the executive branch of government, and citizens' participation. Second, a focus on procedure allows us to understand what administrative authorities do and how they do it, including the interaction between the various units of government and citizens' participation. To the contrary, the traditional emphasis on judicial review of administration is affected by a sort of perspective distortion, because it implies the use of a sort of indirect vision of the organization and functioning of public authorities. As observed by Paul Craig, "public law is not solely concerned with judicial review".[21] The adoption of general procedural codes, which regulate process rights across a variety of subject matter areas, in several European countries is the third reason.[22] It is increasingly accepted, therefore, that – to borrow the words of Schmidt-Aßmann - the 'idea of procedure constitutes basic expression of a common European administrative law'.[23]

These remarks do not exclude, though, that an eye must be kept on judicial review of administration. On the one hand, the concepts of procedural impropriety and unfairness are helpful for understanding the relevance and significance of the principles and rules that an administrative agency must respect before issuing or refusing an authorization to the applicant and the techniques that must be used in order to set new tariffs for public utilities. On the other hand, it is interesting to confront the result of our inquiry with those of previous comparative studies, focusing on the structure of judicial systems.

C. History and legal comparison

As indicated initially, the conjecture that lies at the basis of the research is that be-

(UTET, 1971). See also B. Schwartz, French Administrative Law and the Common-Law World (NYU Press, 1954), which did not "consider administrative law in the broadest sense but [wa]s limited to a discussion of judicial control over administrative action", as observed by A. von Mehren in his *Review* of that book, 102 Un. Pennsylvania L. Rev. 698 (1954). The same remark can be made with regard to the comparative analysis coordinated by Aldo Piras in the early 1990s: *Administrative Law: The Problem of Justice – Western Democracies* (Giuffrè, 1995-1997, four volumes).

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

22 See JB Auby (ed.), *The Codification of Administrative Procedure* (Bruylant, 2014).

23 E Schmidt-Aßmann 'Structures and Functions of Administrative Procedures in German, European and International Law' in J Barnes (ed), *Transforming Administrative Procedure* (Global Law Press 2008), 66. See also N Walker, '*Review of Dennis J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures*' Modern L. Rev. (62), 1999, 962 (for the remark that administrative procedure is "a concept at the heart of administrative law").

tween European administrative laws, together with numerous and significant distinctive traits, there are some shared and connecting elements, which relate not only to generic idealities that can be found in every civilized legal system in one way or another to generic ideals, such as the pursuit of justice, but also to some precise requirements of administrative fairness and propriety. These are regarded as empirically testable hypotheses, which are subject to verification. This can be attempted in two ways. One of them is to attempt historical reconstruction that pays attention to validity of empirical evidence in relation to specified hypotheses. Another is to use legal comparison, which for this purpose can be viewed as a "substitute for the experimental method" used in other scientific domains.[24] Accordingly, two types of comparison will be used, synchronic and diachronic. Conventional as these terms are, they communicate something about the nature of the work to be done, in the sense that the diachronic comparison provides a retrospective while the synchronic comparison focuses on administrative systems of our epoch.

Both general and specific reasons support the choice of a diachronic comparison. From a general point of view, as Gino Gorla observed rephrasing Maitland's opinion that "history involves comparison",[25] "comparison involves history".[26] , it is impossible to understand the deep structures of administrative law with "only the vaguest idea of how its subject-matter has evolved".[27] History also shows that not only ideas and theories about public law have been largely transnational, but that often legal principles and institutions originating in one nation have been influential elsewhere. During the nineteenth century, French administrative courts and the underlying conception of separation of powers have been very influential in many corners of Europe.[28] During the last century, Austrian ideas about administrative procedure have spread within its neighbors and subsequently elsewhere. A dynamic approach, which takes several decades into account, is much to be preferred to a static one, because it permits a better understanding of the respective significance of commonality and diversity.[29]

D. A 'factual analysis'

As regards the synchronic comparison, the growth of administrative procedure legislation suggests that its study may provide interesting insights. However, this would not suffice for understanding the interplay between commonality and diversity between European laws. There are, again, both general and specific reasons why it would not do so. The main methodological novelty of Schlesinger's study of the common core is precisely this: instead of seeking to describe national institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved.

24 M Shapiro, *Courts*, cit., vii. For similar remarks, see O Kahn-Freund, 'Review of RB Schlesinger (ed.), Formation of Contracts. A Study of the Common Core of Legal Systems', Am. J. Comp. L. (18), 1970, 429, at 431.

25 FW Maitland, 'Why the History of English Law Was not Written', in R Livingston (ed.), *Frederic William Maitland Historian. Selection from his Writings* (Schuyler, 1960), 132 (affirming that "History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history" and that "an isolated system cannot explain itself").

26 G Gorla, *Diritto comparato e diritto comune europeo* (Giuffrè, 1981), 39.

27 P. Craig, *Administrative Law* (Sweet and Maxwell, 2003, 5th ed.) 47.

28 See J Rivero, *Cours de droit administratif compare* (Les cours de droit 1956-57), 27.

29 Cassese, *note 5*, 19.

Concretely, this implied that, drawing on the materials concerning some legal systems, Schlesinger formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected. His method, therefore, must not be confounded with the mere consideration of judge-made law and it turned out that those cases were formulated in terms that were understandable in all such legal systems. The adequacy and fruitfulness of this methodology has subsequently been confirmed in the framework of the Trento project on the common core of European law.[30]

In the field of administrative law, this type of approach is particularly appealing for two reasons. First, administrative law has emerged and developed without any legislative framework that was comparable to the solid and wide-ranging architecture provided by civil codes. As a result of this, its principles are largely jurisprudential, not only in Britain, but also in France and elsewhere. Second, in addition to legislation and judicial decisions, governmental practices are very important.[31] Not surprisingly, as early as in the 1940s, some of the few scholars who devoted attention to the comparative study of European administrative laws showed awareness that for a better understanding of their common and distinctive traits it would be much better to build hypothetical cases and confront the solutions that would be given.[32]

This innovative suggestion for tackling the problem that concerns us here was not used, however. In the following decade, when a new legal journal launched a comparative research concerning administrative law, it elaborated a well-structured questionnaire, but it was based on legislative design.[33] After Schlesinger's research was published, it was found that the same methodology could be applied, among other things, to the control of the legality of administrative decisions.[34] However, there was no systematic use of such methodology.

Arguably, a factual analysis can provide interesting insights. Consider, for example, the following case, which will be familiar to French readers, because it was of the first cases in which the Conseil d'Etat expressly formulated the theory of general principles.[35] A public authority decides to withdraw the license for selling a certain type of products, such as journals or pharmaceuticals, on grounds that certain prescriptions specified by the

30 See M Bussani and U Mattei, 'The Common Core Approach to European Private Law' [1997-1998] 3 Colum J Eur L 339.

31 See J Bell, 'The Argumentative Status of Foreign Legal Arguments' [2012] 8 Utrecht L Rev 7, at 9 (pointing out the existence of competing versions of what the law is on a given matter).

32 F Morstein Marx, 'Comparative Administrative Law: a Note on Review of Discretion', Un. Pennsylvania L. Rev. (89), 1939, 955.

33 See the questionnaire published on the International and Comparative Law Quarterly. Three reports were published, those regarding Germany, Italy and the Nordic legal systems: see N Herlitz. 'Swedish Administrative Law', Int'l & Comp. L. Q. (2), 1953, 231; O Bachof, 'German Administrative Law with Special reference to the Latest Developments in the System of Legal Protection', ivi, 368; G Miele, 'Italian Administrative Law', Int'l & Comp. L.Q. (3), 1954, 421.

34 Kahn-Freund, note 23, 430.

35 Conseil d'Etat, 5 May 1944, *Dame veuve Trompier-Gravier*. For further remarks on general principles, see B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative* (Sirey, 1954). In his *Review* of this book, Georges Langrod observed that it would have been surprising if such book would not have prompted discussion elsewhere. Interestingly, it did so in Italy, where Norberto Bobbio's entry on general principles extensively referred to it: *Principi generali di diritto*, in Novissimo Digesto Italiano (UTET, 1966), XIII, 945. It would be interesting to understand whether the book had any influence in other legal systems, such as those of Belgium and Germany.

license have not been respected. The licensee claims that the withdrawal of the license without a "hearing" on the facts that are alleged by the public authority constitutes a deprivation of benefits that is in contrast with due process of law. What matters is not simply whether the licensee's claim is likely to be successful before a court. It is also which arguments would be relevant, including constitutional provisions and those of general and particular statutes, and how they would be interpreted by the courts, for instance whether what is required is a hearing before the withdrawal is formally decided or at some stage after the decision. It is important to understand whether the principal gateway is that of natural justice or a set of beliefs about public law and, if so, whether it is partially common to various legal systems, and whether the courts admit similar process rights and justify them similarly even when statutes did not accord such rights.

III. Issues in methodology

The choices just illustrated are not without controversial issues. Some of them, which can be of general interest because they concern methodology, will be discussed within this section: first, the choice of legal systems; second, the focus on what can be regarded as "general administrative law"; last but least, the use of a factual analysis in the sense indicated earlier.

A. Choice of legal systems

For every comparative research, the choice of the legal systems to be considered is a crucial issue. While the choice of Europe was at the heart of the research project and was justified by various reasons, including the historical relationships between European legal systems and the establishment of regional organizations, such as the Council of Europe and the EU, three choices have been made. The first is to focus not only on the traditional two or three 'major' legal systems – Britain, France, and Germany – but to consider others, which a widespread but unfounded opinion would regard as 'minor' legal systems, such as Belgium and Austria.[36] Both have been involved in the processes of borrowing and legal transplants, as will be seen in the following section.

The second choice is to consider not only the legal systems which are included within the EU, but also others, in order to ascertain whether therein similar standards of administrative conduct exist. As a result, although no research project escapes from limits of budget and workforce, an effort has been made to cover a sufficiently large number of legal systems. There are, however, some exclusions which should be justified. They concern Belarus, Russia and Turkey. The reason is not their cultural specificity,[37] but the fact that, in the last ten years or so, all these countries have undergone deep political and legal changes in the direction of authoritarian governments.[38] As a consequence, it is uncertain whether researchers might find it difficult to tell the truth about the solutions given

36 The remarks made in the text only concern exclusions, while in other cases a legal system has been included in the comparative inquiry, but for various reasons the expert has been unable to deliver the national report.

37 Among historians, there has been discussion as to whether Russia should be not be regarded as part of the West: see A. Toynbee, *The World and the West* (Oxford UP, 1953) 15.

38 In the case of Russia, the unjustified invasion of Ukraine has led the Council of Europe to cease its membership: CoE, Council of Ministers, Resolution 2002(2) on the cessation of the membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022. The ECHR has ceased to be binding in Russia six months later.

by their legal system to the problems selected for analysis or whether they might be exposed to risk, precisely because they tell the truth. If things change in the other way, further research might be possible.

A third choice concerns the EU. There are two sides of the coin. On the one hand, the EU regulates – through its treaties and other sources – the conduct of public authorities within its Member States. Consider, for example, the duties of notice and comment that EU directives on national regulators of electronic communications impose on national regulatory authorities.[39] On the other hand, there is the law that applies to the institutions and agencies of the EU, that is, the European administration narrowly intended.[40] Its existence is a powerful counterweight to the idea that nothing has changed since the advent of the positive State. It challenges the idea according to which administrative law is consubstantial to the State. It shows the difficulties which beset the traditional idea according to which administrative law simply reflects national legal traditions. It is important to bear in mind the particularity of the European administration, in the sense that implementation is often left to national authorities. However, it can be interesting to consider whether the standards that are defined are similar to those that are followed by domestic legal systems.

B. Choice of experts

What has just been said about experts does not exhaust the issues concerning them. Two other aspects, at least, must be considered; that is, the choice of national experts and what might be called the subjective factor in the elaboration of national reports.

There are two felt necessities for both the diachronic and synchronic analysis. First, it is self-evident that it is necessary to have at least one national expert for each legal system selected for our comparative experiment. However, this is a necessary condition, but not a sufficient one. Indeed, if it is true that a lawyer can really be an expert only of the legal system(s) of which he or she has a constant and direct experience, it is equally true that without any idea about how other legal systems work it might be very hard to engage in a fruitful comparative inquiry, as opposed to a mere juxtaposition of national reports. The importance of this issue cannot be neglected. But fortunately, while in the past comparative exchanges were limited to few scholars, in the last decades several formal and informal networks have emerged. Some of them are binational networks (for example, the Italian-Spanish seminars of administrative law, which begun in 1964, the German-Italian workshops of public law which begun in 1971, and the Franco-German workshops of administrative law), while other include three legal systems (such as the RDE, a network created ten years ago) and still others are multi-national networks, such as the European Group of Public Law (1991), the *Societas Iuris Publici Europaei* (2003), and ReNEUAL (2006). There are, therefore, increasingly public lawyers with an experience of comparative experiments. Concretely, roughly one hundred and twenty experts (mostly professors and researchers, but also judges and lawyers) from thirty-four countries have

39 See Article 24 of EU Directive n. 21/2002 ("framework directive"). For further discussion, see Caranta, note 8, 158 (noting that the same EU rules raise different legal issues within the Member States).

40 The first systematic work is J. Schwarze, *Europaisches Verwaltungsrecht* (Nomos, 1986), later translated into French and English. See also P. Craig, *EU Administrative Law* (Oxford University Press, 2012, 2nd ed.) and C. Harlow, P. Leino & G. della Cananea (eds.), *Research Handbook on EU Administrative Law* (Elgar, 2017).

been involved in the workshops organized in the course of seven years.

The involvement of numerous experts is important also for the 'subjectivity' issue. As observed initially, there is variety of views about the nature and purpose of administrative law. This is not surprising, because public law has a strong political dimension.[41] Several issues are technical in nature, but are not neutral. As a result, some experts believe that existing norms and uses point in favour of one solution, while other experts deem that an alternative solution is preferable. Although the subjectivity of human perception is inevitable, there are various ways to keep it within certain limits and thus avoid bias. One way is to ask experts to verify the solutions of hypothetical cases on the background of all legal formants, as well as to consider both the standard solution and that which is suggested by the minority of jurists and judges. Another way is to review findings with peers. For example, some hypothetical cases, concerning fundamental standards of administrative fairness and propriety such as the right to be heard and the duty to give reasons, have been examined in more than a workshop. And it has turned out that the solutions given by different experts are very similar, if not the same. Finally, the comparative essays elaborated on the basis of national reports have checked the solutions contained therein.

C. Level of analysis

The third issue of general relevance regards the level of analysis. Some European legal cultures have a consolidated distinction between what may be called "general" administrative law, which pertains to the fundamental principles and mechanisms of law in this field (how decision-making processes are shaped, how external controls are carried out, which type of responsibility follows from disregard of standards of conduct) and sector specific legal frameworks *(droit administratif spécial, Besonderes Verwaltungsrecht)*, including urban planning and the regulation of public utilities, and thus provide specialized courses for them.[42] Other cultures, whilst not having such a consolidated distinction, recognize the importance of the administrative law that applies to a variety of sectors. An instructive example is the Dutch "general administrative law act", adopted in 1994. In the UK, where there is no such thing as an APA, there is nevertheless a helpful distinction between horizontal or general rules, such as those governing judicial review of administration, and the vertical rules; that is, the legislative and regulatory provisions applicable to a particular area. Even where there is customary or written rule by virtue of which sector specific norms prevail on general ones, it is often the case that the former are either incomplete in some respects or deviate from the latter in some way that the courts deem undesirable.

From the perspective of administrative procedure, the distinction between the general and specific levels of analysis is particularly relevant. The reason is that, while legislative and judicial powers are exercised through a limited set of processes, administrative

41 See M. Loughlin, *Public Law and Political Theory* (Clarendon, 1992), and S Cassese, *Culture et politique du droit administratif* (Dalloz, 2018).

42 The distinction between general and specific courses is traditional, in particular, in France, Belgium and and Germany: see D Renders, *Droit administratif general* (Larcier, 2022, 4th ed.); E. Schmidt-Aßmann, *Besonderes Verwaltungsrecht* (de Gruyter, 2008). It is not completely unknown, though, to US lawyers: see S.A. Shapiro, *Reflections on Teaching Administrative Law*, 43 Admin. L. Rev. 501, at 505 (1991).

action must face "through its varied and commodious channels, the torrents of demand pressing against the dam of the State" and is, therefore, highly differentiated.[43] Accordingly, there are innumerable types of administrative procedures. It is precisely for this reason that some legal systems have defined general standards, while others have gone further, through the definition of general model or prototype of administrative procedure. Italy and Spain, among others, exemplify these patterns.

In light of this, it has been deemed appropriate to develop different lines of research. The first concerns the main forms of administrative action; that is, administrative action and rule-making. The second line of research concerns some particular manifestations of administrative power that have traditionally been both relevant and significant. They include, on the one hand, expropriation and other administrative limitations of private property and, on the other hand, urban planning. Thirdly, the relationship between general and sector specific has been examined.

D. Limits of factual analysis

Last but by no means least of all, the choice of a factual analysis raises the question whether the conclusions can be generalized outside the specific cases that are examined. This is a challenging question. To borrow De Smith's words, 'to prophesy the view that a court will take of the powers or duties of an administrative authority in a particular case must inevitably remain a hazardous undertaking'.[44] The question has thus been discussed in a series of seminars and workshops including, among others, one of the annual meetings of the French association of administrative lawyers *(Association pour la recherche en droit administratif)*,[45] one of the biannual meetings of the German-Italian group of public law,[46] a panel within the annual conference of the European Group of Public Law and two seminars organized by the Institute of Advanced Legal Studies of London.[47]

Two answers can be given. The first is that administrative procedure legislation is relevant in itself and must, therefore, be examined. Interestingly, many European legal systems have adopted one type or another of administrative procedure legislation, but not all. However, this does not imply that the solutions adopted by these legal systems inevitably differ from those chosen by the others, where such legislation exists. Comparing life with and without a code of administrative procedure or a legislative framework of another type is, therefore, both interesting and important.[48]

The second answer is that there are certain factors that may enhance the added value of a factual analysis. All hypothetical cases have been built with some factual circumstances. The underlying idea is that it is only by considering concrete circumstances that

43 L.J. Jaffe, *Administrative Procedure Re-Examined: the Benjamin Report*, 5 Harvard L. Rev. 704 (1943). See also R.B Stewart, 'The Reformation of American Administrative Law', 88. Harv. L. Rev. 1667, at 1669 (1974-75) and, for a comparative analysis, J.B. Auby (ed.), *Droit comparé de la procédure administrative* (Bruylant, 2015).

44 S. De Smith, 'The Right to a Hearing in English Administrative Law', (1955) 68 Harvard L. Rev. 570.

45 See della Cananea, note 12.

46 G. della Cananea, *Una ricerca sul "fondo comune" dei diritti amministrativi in Europa*, in L. De Lucia e F. Wollenschlager (eds.), *Sfide e innovazioni nel diritto pubblico. Herausforden und Innovationen im Offentlichen* Recht (Nomos Verlag, 2019), 101.

47 These seminars have been organized by Carol Harlow, to whom I owe full gratitude.

48 JB Auby, 'Introduction', in id. (ed.), *The Codification of Administrative Procedure* (Bruylant, 2014).

one can 'bring to consciousness the assumptions secreted within the structures' of each legal system.[49] Moreover, national experts have not been asked only to indicate the solution that is more likely to be provided by jurists in their respective legal orders, but have also been encouraged to reflect on the underlying institutional and cultural reasons, including the role played by legal formants, as theorized by Rodolfo Sacco. He usefully developed the concept of 'legal formants', in order to describe that many elements that are relevant in the living law, including legislative and regulatory provisions, judicial decisions, scholarly works and, in our case, governmental practice.[50] Even when legal requirements cannot be extracted from the cases or these constitute unsafe guides, discussing background theories can be helpful to understand how procedural values are balanced with other values.

IV. Research's results

Obviously, it is for the reader to judge the findings of the comparative inquiry on European administrative laws. However, it can be helpful to say few words about the lines of research that have been developed, and the positive and negative results gathered with respect to the conjecture illustrated initially.

A. Three main lines of research

As observed initially, at the basis of the new comparative research there was a twofold conjecture. First, it was conjectured that between European administrative laws there were not only the differences highlighted by numerous previous studies, but also some shared and connecting elements, which could be formulated not only in terms of values, such as justice or fairness, but also in terms of standards of administrative conduct. Second, it was conjectured that, precisely for this purpose, it was necessary to go beyond the traditional approach founded on *legislation comparée* in a twofold sense: to combine history and legal comparison and, with regard to the latter, to use a factual analysis.

Coherently with these choices, three main lines of research have been developed, involving a large group of researchers and including articles published in legal journals, monographs and edited books. Such lines of research include the diachronic comparison and the synchronic comparison, the latter viewed from two perspectives that are related but distinct: the examination of administrative procedure legislation and the factual analysis.

From a diachronic perspective, three areas of interest have been considered. The first is the development of judicial standards for reviewing administrative action in the years 1890-1910, which is under-studied but important, because it was characterized by the existence of both ordinary and administrative courts.[51] In all the legal systems included in our comparison (Belgium, England, France, Italy and the Habsburg and German empires), the courts defined and refined the standards of administrative action virtually in the absence of legislative rules. The second area is the Austrian codification of adminis-

49 Loughlin, note 40, 35.

50 R Sacco, note 13, 1.

51 G della Cananea and S Mannoni (eds.), *Administrative Justice: Fin de Siècle. Early Judicial Standards of Administrative Conduct in Europe* (1980-1910) (OUP, 2021).

trative procedure (1925), viewed both in itself and for its impact on the other countries of Central and Eastern Europe which adopted general legislation on administrative procedure in the following decade.[52] Similarly, the Spanish administrative procedure legislation of 1958 has been considered in its relationship with the previous framework, as well as in its connection with the laws that were adopted by several countries of Latin America in the following years.[53]

The emergence of administrative procedure legislation constitutes the object of another line of research. It has been considered both in its development[54] and in its current shape, with a focus on commonality and diversity.[55] This has showed the existence of a vast area of agreement between legal systems analyzed, as far as administrative adjudication is concerned. Since only few legal systems also define general norms on rule-making, the question that arises is whether the latter is characterized by an area of disagreement.

The third line of research, notably the factual analysis, serves precisely to seek to answer to this type of questions. For the reasons illustrated earlier, the sub-topics that have been selected seek to strike a balance between a general level of analysis and a sector specific one. As regards the former, included in our comparative enquiry there are both traditional topics, such as judicial review of administration and government liability,[56] and others that are less frequently examined, such as rule-making and planning.[57] A more specific analysis has concerned expropriation, including both its traditional form and what is increasingly called 'indirect' or 'regulatory' expropriation.[58]

Since the beginning of the comparative inquiry, it was clear that the diachronic and synchronic comparison have both common and distinctive aspects. The former differs from the latter, as it pays attention to the development of legal institutions and does not include hypothetical cases. However, this type of research, too, involves the testing of hypotheses. An empirical analysis has thus been conducted on judicial decisions concerning administrative action in the years 1890-1910. This analysis is different in nature from the usual analysis based on the works of eminent scholars and the data collected are indicated both in the book and on the research's website, which allows readers to assess the reliability of the research's findings.

52 G della Cananea, A Ferrari Zumbini and O Pfersmann (eds.), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion* (OUP, 2023, forthcoming). See also A Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo: il modello austriaco* (Editoriale scientifica, 2020).

53 In this respect, a first workshop has been convened in 2022 and the papers are being collected. They will be included in a book to be edited with professor Allan Brewer-Carias.

54 G della Cananea, *The Regulation of Administrative Procedure in Europe: A Historical and Comparative Perspective, European Review of Public Law* (32), 2020, n. 1, 223.

55 G della Cananea and L Parona, *Administrative Procedure Acts in Europe: An Emerging "Common Core"?, American Journal of Comparative Law*, 2023 (forthcoming).

56 G della Cananea and M Andenas (eds.), *Judicial Review of Administration in Europe. Procedural Fairness and Propriety* (OUP, 2021); G della Cananea and R Caranta (eds.), *Tort Liability of Public Authorities in European Laws* (OUP, 2020).

57 A workshop has been convened in 2021 and the papers are being collected for publication.

58 See M Conticelli and T Perroud (eds.), *Procedural Requirements for Administrative Limits to Property Rights* (OUP, 2022).

As regards the synchronic comparison, it required problems to be stated in factual terms, in order to discern the areas of agreement inductively rather than deductively. It has turned out, first, that those cases were formulated in terms that were understandable in all the legal systems included in our comparison. Sometimes, a hypothetical case has been adjusted because, for example, some legal systems use concessions or licenses for the use of public beaches while others only use these instruments for the waterfront. In other cases, the factual elements given initially have been reformulated in a more ambitious manner, in order to ascertain whether the area of agreement between legal systems could be said to exist not only at the level of general standards of conduct but also at that of operational rules. It was then possible to delineate the areas of agreement and disagreement with legal systems with a greater level of specificity. It is not unreasonable, therefore, to hope that the method employed in this comparative inquiry will be found useful in other attempts either of the same nature or of a similar one, though – as Schlesinger himself warned – the factual method is no panacea for the problems of comparative research.[59]

B. Positive results

In one way or another, the conjecture has been tested both diachronically and synchronically. As observed earlier, it is for the reader to assess the results, but it can be interesting to observe that, while some of them could be reasonably expected, others were unexpected.

In our diachronic comparison, it has been found that the area of agreement between legal systems was much wider than was expected. Within all the legal systems examined the courts defined and refined the standards of administrative action. Action that infringed such standards, for example with regard to the intervention of affected parties and the statement of reasons, was regarded as unlawful. From a common law viewpoint, of course, there is nothing odd about a set of variable and invariable standards elaborated by the courts. From a continental viewpoint, this marks a profound difference with private law and calls into question the existence of a divide between common and civil law systems. The problem with the idea of a 'great divide' is not, therefore, that it was still said to exist in the 1970's and even later, but that even a century earlier the area of disagreement was much less significant than it was believed. The fact that administrative law did not merely have an autochthone nature has been confirmed by the inquiry concerning the codification of administrative procedure in Austria. There was a diffusion of Austrian ideas and norms, within some of the nations that had been included in the old Habsburg Empire. Similarly, after the 1950's, most Latin America nations did not simply follow the model of Spain in the sense that they adopted general legislation on administrative procedure, but they also largely drew on its legislative framework. Incidentally, the research's findings have confirmed the legal relevance and significance of some legal systems that are, erroneously, regarded as less important that the alleged 'major' systems. As the Belgium system of administrative justice was regarded elsewhere, by both scholars and reformers, as a model or prototype, so the two codifications of administrative procedure – in Austria and Spain – were at the heart of legal transplants.

59 Schlesinger, note 5, 38.

Turning to the synchronic comparison, the research has found a vast area of agreement between European administrative laws where more or less all learned commentators would expect the existence of a common core; that is, in the area of administrative adjudication. In this area, there are not only common values, but also "shared and connecting elements", including general principles of law, such as legality, due process, and transparency and mid-level standards such as the right to be heard, the duty to gather all elements of fact that are relevant for the final decision, and the duty to give reasons. That those general principles were applied by supranational courts was already known. What was less known is that the "shared and connecting elements" also include some minimum standards of procedural fairness and propriety. These standards of administrative conduct, which are a truly significant factor in the distinguishing legal from illegal behavior, thus constitute a common core that is not made of mere idealities.

Whether similar findings could be reached in another area of administrative law which is of increasing importance, that of rule-making, was doubtful for two reasons. This is an area that, in Europe, is seldom governed by general legislation on administrative procedure, unlike the US, where since 1946 there is both legislation of this type governing federal administrative procedure and a Model State Administrative Procedure Act. It is, moreover, an area that is rarely examined comparatively, unlike adjudication. However, an unexpected areas of agreement has emerged. Included among the shared and connecting elements there are, again, standards of administrative conduct concerning fairness and openness, such as the duty to consult users before a policy change and that to publish rules that are not merely internal, but impinge on interests recognized and protected by modern legal systems.

C. Negative results

Thus far, the positive results of our comparative research considered, that is, those that support the initial hypothesis and verify it. But these are not the only ones that matter from the scholarly point of view for two reasons, one of a general nature and the other more specifically concerning our enquiry into the 'common core' of European administrative laws. The negative results, which do not support the initial conjecture and in some sense disprove it, provide a better understanding of the topic because they limit and qualify the relevance and significance of the positive results. Moreover, they provide a better understanding of common trends.

Administrative procedure legislation provides an instructive example. As observed earlier, the codification adopted by Austria was regarded as a model by some of its close neighbours, including Czechoslovakia, Yugoslavia and Poland. It was not so for another nation which had been included in the old Habsburg Empire; that is, Hungary. Nor was a codification adopted by the UK, coherently with its established tradition, and by the principal administrative systems of Continental Europe in the first half of the twentieth century; that is, those of France, Germany, and Italy. These legal systems thus provide an interesting contrast to the *Mitteleuropean* countries. The contrast is all the more interesting because their private law was codified at that time. Moreover, and more importantly, they have adopted general administrative procedure legislation at a later stage, though in different periods and in different ways. The diachronic comparison thus shows that the area of disagreement has been considerably narrowed throughout the years, though some differences persist.

Government tortuous liability furnishes another example. In the past, this area was regarded as the main substantive area of disagreement between the legal systems of Europe, because in England the liability of government officers was subject to the ordinary law of the land, while in France the courts excluded that the rules of the Civil Code could be applied to public authorities discharging administrative powers. With the passing of time and the better availability of information, there was increasing awareness that the criteria followed by the French administrative courts were very similar to those that were applied to disputes between individuals. The factual analysis has confirmed that the area of disagreement has been reduced by the greater similarity between the standards defined and refined by the courts, also in light of European integration, for example in the area of administrative contract. The existence of persisting differences is both interesting and important, first and foremost, because one of the distinctive features of this comparative inquiry is that commonality must not be emphasized more strongly than diversity and, secondly, because the latter can be explained by background theories about public law and the State, rather than by constitutional and legislative provisions.

D. The 'common core': concept and evolution

What are the consequences of our comparative enquiry for the hypothesis set out at the beginning of this essay, namely that there is a common core and that it is increasingly relevant and significant from a legal viewpoint? Obviously, it is not sufficient to intone the expression 'common core', as if it provided a self-evident answer. For some, the existence of the common core should be taken for granted, while others are skeptical about it. There may be agreement that there is indeed a legacy from the past, from *ius commune*, yet this does not necessarily imply that there is anything more than a set of shared general, if not generic, ideas, such as 'justice' and even due process of law.[60] There may be agreement that, after seven decades during which 'regional' organizations have defined standards of administrative conduct, the common core that initially existed has changed. However, national traditions persist and must be respected. Moreover, and more importantly, even if a common core exists, its contours must be fixed. Schlesinger, who provided a vital part of the methodological apparatus necessary to go beyond traditional juxtaposition of national reports, observed that while the existence of 'some kind of 'common core' [was] hardly challenged', there arose questions 'as to its *nature* and *extent*'.[61] Others added 'the extent to which the common core can be used as a working tool'.[62] Our comparative inquiry suggests some answers to those questions.

First and foremost, as regards the nature of the common core, it does not consist merely in ideals, such as justice, which can be said to exist in every legal system, including the non-liberal polities which John Rawls included within well-ordered polities.[63] Nor is its relevance and significance susceptible to be fully appreciated at the level of the 'values' upon which the Council of Europe is founded, including the respect for the rule of law and for

60 For a Kantian understanding of due process, see EL Pincoffs, 'Due Process, Fraternity, and a Kantian Injunction', in JR Pennock and JW Chapman (eds.), *Due Process*, Nomos XVIII (NYU Press, 1977) 172.J. Rawls, *The Law of Peoples* (Harvard UP, 1999) 5.

61 Schlesinger, note 10, 65 (emphasis in the original).

62 Kahn-Freund (n 23) 429.

63 J. Rawls, *The Law of Peoples* (Harvard UP, 1999) 5.

fundamental rights. At this very abstract level, virtually all legal systems can be said to respect certain background principles and many courses of action, though not all, may appear to be justified. However, as soon as we move away from such value and very general principles to mid-level but still general standards that serve to promote good governance as well as the respect for rule of law, such as judicial independence or equality of arms, certain action taken by certain national authorities finds little justification or none at all.

The use of the term 'standard' is not without issues. In legal theory, standards can be – as Hart puts it – both variable and invariable.[64] The former translate mid-level but still general principles into legal standards that decisionmakers apply to particular cases and facts, while the latter constrain exercises of power more rigidly. Thus, for example, it has been found that the maxim *audi alteram partem*, is respected by all legal systems in many of our hypothetical cases, including the issuing and withdrawal of licenses and the imposition of pecuniary sanctions. However, the hearing can take more than one form and may even be postponed if a public interest so requires, for example collective security. On the other hand, a requirement to give reasons for every decision that adversely affects an individual represents an invariable standard and at the same time a procedural requirement, as distinct from a requirement to give reasons that are adequate or even sound. For the sake of clarity, these principles and mid-level standards are those that are shared by some states with a certain understanding of the rule of law and fundamental rights, but do not necessarily apply beyond those states.[65]

What characterizes the common core of European administrative laws is precisely this: in addition to the commonality that exists at the level of values and very general principles of public law, there is a set of mid-level standards of administrative action. It is precisely because such standards are closely linked with those values and very general principles that they are included within the 'core' that is related to what the French call '*le fond du droit*' and that is common to a variety of legal systems, which differ in several other respects, such as the existence of general legislation on administrative procedure and the nature of internal appeals and judicial mechanisms. In brief, what forms part of the 'common core', thus intended, is what matters more for the fairness and propriety of administrative decision-making.[66]

Second, it is precisely because one of the distinctive traits of the comparative enquiry, whose results are discussed in this essay, is a strong awareness of history, an evolutionary view of the common core is necessary. If there is one thing that emerges from the literature on due process, it is that 'tradition evolves'.[67] However, an adequate understanding that history does not follow a linear and progressive path is equally necessary. Two consequences follow from this. On the one hand, it is clear that the 'common core' that ex-

64 For this distinction, see LA Hart, *The Concept of Law* (Clarendon 1964) 133.

65 Some of the principles and standards considered in the text have something in common with those that may be included in a theory of natural law of process such as that of Lon Fuller, *The Morality of Law* (Yale UP, 1969 2nd ed.), but here there is no attempt to argue that without such principles and standards a legal system may not be viewed as such.

66 For further remarks, see G. della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023, forthcoming) 210.

67 For a similar remark, from a historical perspective, see J Le Goff, *L'Europe est-elle* née au *Moyen Age?* (Seuil 2003) 3 (arguing that the past does not dispose).

ists today, after seven decades of integration within the Council of Europe, the European Communities and now the EU, differs from that which existed during the *Belle époque* or after WW1. Treaties granting rights to individuals, who can enforce them in their own name before domestic courts, and creating supranational courts acting as guardians of those rights, have entailed a new form of social ordering.[68]

On the other hand, the growth of regional organizations and the jurisprudence of supranational courts has generated the expectation that the developments they have either caused or facilitated are 'here to stay', but it is not necessarily so. The UK case, with Brexit, is instructive, but so is the crisis of the rule of law in Hungary. The upshot of all this is that the concept of the common core provides us with a helpful vector for thinking about various issues concerning administrative law, but its contours cannot be regarded as fixed and immutable. They can, and will probably, change in the future.

V. Conclusion

The choice to combine history and comparison, as well as that to use a factual analysis for the latter has proven to be fertile. The inquiry has shown that, although most European legal systems have adopted one type or another of administrative procedure legislation, but not all, there is a vast area of agreement between legal systems as far as the standards of administrative adjudication are concerned. Moreover, although administrative procedure legislation governs rule-making only in few cases, there is an increasing area of agreement concerning consultation and transparency. The question that arises is whether the extent of the common core should be further tested in other areas. Both the use of coercion by public authorities, which touches on the less recent understanding of administrative law as related to the dimension of power, and the management of welfare benefits (such as, for example, those regarding unemployment), which emphasizes the bureaucratic or managerial character of administration,[69] could be targeted for such further testing.

68 See A Stone Sweet, *The Judicial Construction of Europe* (OUP 2004).

69 See J Mashaw, *Bureaucratic Justice. Managing Social Disability Claims* (Yale UP, 1983).

fypl french yearbook *of* public law