THE OWL OF ATHENA: THE DIFFUSION OF ADMINISTRATIVE PROCEDURE LEGISLATION IN *MITTELEUROPA*

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TABLE OF CONTENTS

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1. Prologue

I am very grateful to all the commentators for the trouble they have taken in the realization of our book. Responding to them will, I hope, help me clarify various aspects of what we were trying to achieve and do justice to the intellectual exchanges we had not only with all the contributors but also with other scholars – including Mauro Bussani, Roberto Caranta, Sabino Cassese, Martina Conticelli, Paul Craig, Marco Mazzamuto and Jacques Ziller – who participated as discussants in the two workshops that were held before the book was published (it is the fifth in the series that Oxford University Press has devoted to research on the common core of administrative laws in Europe)[1]. It will also help me to better explain how our focus on the Austrian codification of administrative procedure allowed me to walk a new path in the discussion on commonality and diversity in public law.

2. Reply to commentators

2.1. A fertile diversity of views

It has never been easy to describe the transformation of administrative law. All those involved in the field of public law, I think, would agree with the modest assertion that administrative law is a distinct legal field, one that has emerged relatively recently, several centuries after private law and criminal law. However, there is disagreement as to whether, historically speaking, administrative law was a product of the *ancien régime*, as Tocqueville called it, or the fruit of democratization, which spread

[1] The first attempt to carry out what we called a synchronic comparison concerned one of the areas in which, according to Albert V. Dicey, diversity among national laws was most striking; that is, what many Continental lawyers still call the "non-contractual liability" of public authorities: see G. della Cananea & R. Caranta (eds), *Tort Liability of Public Authorities in European Laws* (2020). This was followed by a comparative study concerning the other area that Dicey regarded as a manifestation of profound diversity, namely judicial review of administration: see G. della Cananea & M. Andenas (eds), *Judicial Review of Administration in Europe. Procedural Fairness and Propriety* (2021). Meanwhile, the other line of research, concerning diachronic comparison, began with an inquiry into the emergence of general principles of administrative law: see G. della Cananea & S. Mannoni (eds), *Administrative Justice Fin de siècle. Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (2021). Another line of research developing synchronic comparison concerned the classic subject of expropriation: M. Conticelli & T. Perroud (eds), *Administrative Limitations of Property Rights* (2022).

throughout almost all corners of Europe after the French Revolution[2]. There is also no shortage of disaccord surrounding the nature and purpose of administrative law and its relationship with private law.

With regard to the last issue, both Bernardo Sordi and Leonardo Ferrara conceive the distinction between private law and public law in ways that differ from mine[3]. I am, therefore, particularly grateful to both for inviting us to discuss our book on the Austrian codification. This is but a further demonstration that diversity of thought in no way constitutes an obstacle to debate. Quite the contrary, diverse ways of thinking encourage discussion and debate, which stimulates the mind and helps to envisage new solutions to problems or identify new difficulties.

Before responding to Sordi and Ferrara's thought-provoking comments, we explore the idea that comparative research on the common core of European administrative laws sprang from dissatisfaction with a number of *idées reçues*, but it greatly benefited from fresh connections between ideas and methodologies outside the field of administrative law. This exploration will be followed by an analysis of the comments we received on the book on Austrian law. The subsequent section will address the various ways in which commonality and diversity interact.

2.2. Shifting the focus and methodology of comparative inquiries

As is often the case, the new research grew from discontent. There was dissatisfaction with the (perhaps now less prevalent) opinion that administrative law is, even more than other fields of law, inextricably linked to the State, with each State being a product of a *Volksgeist* (the spirit of the people). There was some frustration with the persistent focus on judicial review of administration, and, more importantly, there was discontent with the traditional approach to what is termed "comparative administrative law". The first two aspects will be illustrated more thoroughly in the next sections.

Meanwhile, it may be helpful to explain in what sense our comparative enquiry is an original combination of ideas. Generally speaking, when people hear about something being a new idea,

[2] A. de Tocqueville, *L'Ancien régime et la Révolution* (1856; 1967).

[3] See B. Sordi, *Diritto pubblico e diritto privato. Una genealogia storica* (2020); L. Ferrara, *Lezioni di giustizia amministrativa* (2024).

such as an original analysis of a legal principle or an unconventional state-of-the-art concept, many tend to assume that it is entirely novel, never before conceived or thought about. This is seldom the case, however. Few thinkers propose entirely new ideas, though Santi Romano was perhaps an exception when he developed his conception of the legal order in terms similar to, but distinct from, Maurice Hauriou's institutional theory. But there is another method of generating new ideas. It involves forming new and unexpected connections between existing ideas. Although this may go unnoticed, most of our ideas are inspired by concepts from the past. In other words, new ideas are the result of innovative combinations of what has come before, allowing us to develop a new idea.

More specifically, there was no 'starting from scratch' in our case. Rather than using the conventional approaches to administrative and public law, we attempted to pick up threads from the past and use them as hypotheses to be tested. There were, essentially, three basic lines of thought: a) The realization that it was high time we questioned the prevailing focus on the judicial review of administration as distinct from administrative action in itself, b) That in this respect, the role of general principles might be even more important than it is in private law due to the lack of codification, and c) That greater attention to administrative procedure legislation was required, as a small number of comparative scholars had suggested in the past[4].

How to go about testing these hypotheses was quite another matter. Rudolf Schlesinger observed six decades ago that all too often in the field of private law, scholars merely juxtaposed national reports without progressing to the subsequent and crucial stage of genuine comparison[5]. The same observation could be applied to administrative law. It was both interesting and important, therefore, to look for inspiration elsewhere, and it came from the methodology adopted by Schlesinger and his colleagues during the Cornell law seminars of the 1960s, subsequently refined by Mauro Bussani, Ugo Mattei, and other scholars[6]. Essentially, this

[4] G Pastori (ed.), *La procedura amministrativa* (1965); G. Isaac, *La procedure administrative non contentieuse* (1968), 109.
[5] R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (1968), 5.
[6] M. Bussani and U. Mattei, *The Common Core Approach to the European Private Law,* 3 Columbia J. Eur. Law (1997), 339.

methodology unfolds in three steps. The first step is to prepare hypothetical cases to be submitted to a group of national experts in order to determine whether they are suitable for all the legal systems selected for comparison. Ours is therefore a factual analysis. Once the suitability of those hypotheticals has been confirmed, the experts are asked to provide solutions according to the operational rules of their legal systems, as well as background theories. Lastly, the solutions are compared. One more fundamental source of inspiration remains to be mentioned: Gino Gorla's idea that history and legal comparison are closely intertwined[7].

All in all, our rethinking of administrative law has been inspired by various ideas from the past. Through the innovative combination of pre-existing elements, we have sought to shed light on how the same issues are addressed and resolved across diverse legal systems. This approach has allowed us to discuss not so much whether a common core exists despite the many differences among these legal systems, but also to discern the nature of this common core[8].

2.3. The owl of Athena: the spread of Austrian ideas

The Austrian codification of administrative procedure, as depicted in some old treatises and commentaries, has raised some interesting inquiries. Why was a codification– in itself a complex cultural and political change – adopted following the collapse of the Habsburg Empire in 1919? And why did the newly formed nations embark on a similar, if not identical trajectory? Why was there no such reform initiative in France, which had pioneered the *Conseil d'Etat*, the prototype of the institution entrusted with both judicial and advisory roles?

Concerning the first question, it would seem straightforward to reply that Vienna had been at the crossroads of European cultures, trading routes (suffice it to mention the Danube), and

[7] See G. Gorla, *Diritto comparato e diritto comune europeo* (1981) and R.B. Schlesinger *The Common Core of Legal Systems: an Emerging Subject of Comparative Study*, in K. Nadelmann, A.T. von Mehren, J.N. Hazard (eds.), *Twentieth Century Comparative and Conflicts. Law, Legal Essays in Honor of Hessel E. Yntema* (1961), 65 (observing that the concept of common core derived plausibility from historical studies, concerning the common roots of legal institutions).

[8] G. della Cananea & M. Bussani, *The Common Core of European Administrative Laws: A Framework for Analysis*, 26 Maastricht J. Eur. & Comp. L. 217 (2019).

power relationships for centuries[9]. The cultural dimension, too, should not be overlooked. Between 1890 and 1915, Vienna had witnessed cultural advancements in the spheres of philosophy, literature, art, and architecture, spearheaded by – among others – Ludwig Wittgenstein, Sigmund Freud, Joseph Kafka, Stefan Zweig, Gustav Klimt, Alfred Loos, and Walter Gropius. One possible answer to the first two questions could thus be that once a certain level of civilization had been reached, some kind of codification became necessary, especially within a multinational polity, although it would not be adopted until after the dissolution of the centuries-old Empire.

This explanation owes much to the idea that culture comes to understand a particular way of life just as it fades away. This concept was eloquently articulated by Hegel in his *Philosophy of Right* as follows:

"Philosophy, as the thought of the world, does not appear until reality has completed its formative process, and made itself ready. History thus corroborates the teaching of the conception that only in the maturity of reality does the ideal appear as counterpart to the real, apprehends the real world in its substance, and shapes it into an intellectual kingdom. When philosophy paints its grey in grey, one form of life has become old, and by means of grey it cannot be rejuvenated, but only known. The owl of Minerva takes its flight only when the shades of night are gathering."[10]

The underlying assumption is that philosophy appears only with the "maturity of reality". As a variation on this theme, it might be said that the codification of administrative procedure was preceded by significant cultural advancements. One was internal to administrative law, exemplified by Friedrich Tezner's work on developing standards of administrative conduct. Another area of progress concerned public law in more general terms. Hans Kelsen and his colleagues and followers, in particular Adolf Merkl, did not only define an innovative and systematic legal theory, known as the "gradual construction of law" (*Stufenbau*); they also contributed to shaping the new Austrian institutions. Kelsen was the architect of

[9] On the institutional history of the Empire, see J. Bryce, *The Holy Roman Empire* (1871, 3rd ed.).

[10] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts. Naturrecht und Staatswissenschaft im Grundrisse Erstdruck* (1820), Engl. transl. by S.W. Dide, *Philosophy of Right* (1896).

the Austrian Constitutional Court, the first in Europe, and he himself served as one of its first judges.

Bernardo Sordi agreed with our assessment of the importance of the intellectual foundations of the codification of administrative procedure. He also credited us with presenting a complementary explanation, an argument rooted in the more concrete international pressure exerted on Austria after WWI[11]. This is, in itself, a point of general interest, since it shows that the institutional design of democracies is not immune from external influences, a point to which I will return later.

2.4. Procedural administrative justice: Austria, France, and Italy

Culture and history also provide some answers to the other two questions raised at the start of the previous section. There are various reasons why Czechoslovakia, Yugoslavia, and Poland adopted administrative procedure legislation in the years following 1925. They can be summarized as follows. First of all, they shared the same problem of how to regulate administrative behaviour in a new social and legal environment. Secondly, there was a common legal culture, as most administrative officials and judges in the new nations had previously served in Austrian institutions. There may also have been a shared belief that the standards of administrative conduct defined and refined by the Administrative Court subsequently adapted by lawmakers, were in the "nature of things", so to speak. I will return to this explanation later too.

At the same time, it might be said that the reasons why neither France nor Italy adopted a codification of administrative procedure are, to some degree, similar, although they differ in other respects. They are similar as far as the role of the administrative court is concerned, one that not only adjudicates disputes between citizens and public authorities, but is also the latter's general advisor. They are similar also with regard to a more general reluctance to consider Austrian and German institutions after WWI. The legacy of that long and bloody conflict marked, therefore, a profound cultural separation. That gap between legal cultures was filled only some decades later, after another conflict. This, therefore, is partly a historical question. However, it may be

[11] B. Sordi, *Towards an Important Centenary. The Austrian Law on Administrative Action under Scrutiny in Research on the Common Core of European Administrative Laws*, in this Issue.

so only in part, in the sense that there might be an underlying theoretical question. Throughout our comparative investigation, Otto Pfersmann repeatedly called for greater attention to the differing conceptions of the *Rechtsstaat Prinzip* in Austria and Germany. Austria's emphasis on procedural justice and Germany's reluctance to embrace it might explain why Austria adopted general legislation on administrative procedure as early as 1925, while Germany did so five decades later, in 1976[12].

The historical and philosophical dimensions of procedural justice can also help provide an answer to the comments by Sordi and Ferrara. Sordi expressed his comment positively. He agreed with our decision to shed new light on the Austrian codification of administrative procedure, not least because it had been the subject of much intellectual interest among Italian public lawyers – such as Feliciano Benvenuti and Giorgio Pastori - in the 1960s. Ferrara, too, agreed with this choice. However, he added a critical remark. He noted that we had neglected to vindicate the importance of an old legislative provision of 1865, established soon after the political unification of Italy[13]. He observed, however, that this legislation had never been enforced and, significantly, Sordi expressed the same view[14]. In some sense, he did my job for me by offering both a description of the provision and an analysis of its potential.

This is precisely the point. What distinguishes the two different legal realities we are concerned with, Italy and Austria, is the disparity between two levels in the evolution of political and administrative institutions: the level of potential development and the level of actual development. There is clearly a gulf between them. It is not fortuitous, once again, that Mario Chiti, the author of the chapter in our book concerning the Italian legal order, is one of the few scholars to have studied the less recent legislative provisions concerning citizen participation in administrative procedure. In a previous and insightful work, he reached the conclusion that those provisions could be interpreted as establishing the legal foundations for a robust conception of participation but were not interpreted in this way[15]. This is the decisive point.

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[12] B. Sordi, *Towards an Important Centenary,* cit. at 11.
[13] L. Ferrara, *Some Little Notes on Administrative Justice*, in this Issue.
[14] B. Sordi, Ibid.
[15] M.P. Chiti, *Partecipazione popolare e pubblica amministrazione* (1977).

2.5. A gloss on administrative jurisdictions

Ferrara made another remark to which some serious thought must be given. When he laid the groundwork for his comments concerning the adoption of general legislation on administrative procedure, he did not simply reiterate from another perspective the critical remarks he had made in previous works about the evolution of administrative jurisdictions in Italy – or its involution. He put those remarks into a broader perspective, observing that, unlike Italy, other countries from the same legal tradition – Spain in particular – have not strayed from the conception of unitary jurisdiction, albeit enriching it with judicial specialization[16]. He also made a reference to the German legal system, where administrative jurisdiction is integrated into the same system as civil or ordinary courts. These remarks cannot be left unanswered, for they can help us to better understand commonality and diversity in public law.

Two remarks are called for at this juncture. The first is a variant of the one we made in the previous paragraph. Ferrara and I are in full agreement that one of the most serious constitutional issues concerning the Italian Council of State is the persistence of the executive branch's power to appoint a certain number of judges, not unlike what in France is known as the '*tour extérieur*'. We do not agree, though, on the importance of legal experience. Ferrara maintains that the fundamental reform of administrative justice was established in 1865 and that the subsequent changes distorted or even "perverted" it. I would not subscribe to a blind empiricist vision – *à la* Burke – of our administrative jurisdiction. However, once liberated from a certain discardable conception of what is "natural", empiricism can provide us with a non-negligible understanding of what is legally relevant and significant. Moreover, I think that it is incumbent on anyone who reflects on our institutions, for whatever purpose, to have a theory to incorporate their constitutional foundations. And the Constitution did not subscribe to the view that the civil jurisdiction – headed by the Court of Cassation – was at the same time the 'ordinary' jurisdiction for disputes between citizens and public authorities. Quite the contrary, it retained both the Council of State and the Court of Auditors as judges. This seems to me to raise no issue regarding the existence of an adequate constitutional foundation

[16] L. Ferrara, *Some Little Notes on Administrative Justice*, cit. at 13.

for these institutions, though their behaviour is open to criticism in more than one respect, as Ferrara has often observed.

A word or two is in order concerning judicial specialization. Ferrara is too good a *connoisseur* of administrative justice not to be aware that, for all the importance of the competence of the special panels established in both Spain and the UK, it is equally relevant whether the judges that sit in those panels are called to adjudicate only disputes between citizens and public authorities or other disputes too, such as between citizens or businesses. Interestingly, the third panel of the Spanish Supreme Court adjudicates both administrative and tax law disputes. In the UK, where the Administrative Court was established within the High Court of Justice precisely to solve disputes between individuals and public authorities, its judges no longer rotate with those of the Commercial Court. The trend is, therefore, towards both an organizational and functional distinction, though this is unlikely to give rise to separation, as we see in France. Interestingly, the same trend is discernible in another common law system, perhaps the one most similar to that of England and Wales: New Zealand[17]. A final remark concerns Germany, where the Basic Law deviated from the national tradition in that it established several jurisdictions, each with its own system. It might be said, therefore, that the German judicial system is characterized by institutional pluralism. This is confirmed by a circumstance that should not be ignored. At the top of the system is a single body responsible for resolving disputes between the various jurisdictions; it is formed by judges from each of those jurisdictions. Quite the contrary, in Italy it is the Court of Cassation that resolves this type of conflict. This solution differs not only from that adopted in Germany but also from the French one, where the *Tribunal des Conflits* includes judges from both the *Conseil d'Etat* and the *Cour de Cassation* on an equal basis. This confirms that there is no 'natural' solution to the problems concerning administrative justice and suggests some further reflections from the comparative standpoint.

[17] See S.H. Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (1990), 43-83.

3. Understanding the diffusion of administrative procedure legislation

Our analysis of the spread of Austrian ideas and institutions has shown the emergence of a new trend, namely a movement for administrative procedure legislation. In recent decades, especially after 1989, the spread of procedural legislation has reconfigured how administrative law is seen and practised in various nations around the world. It would be an exaggeration to assert that procedural legislation has led administrative law to lose one of its distinctive features, namely that it is a non-codified law. It would be equally an exaggeration to say that "*plus ça change, plus c'est la même chose*" (that is, the more it changes, the more it stays the same). Procedural legislation has shown considerable variety across a broad range of issues, including not only procedural rules for the exercise of administrative powers and access to documents but also general principles of public law. For some, at the turn of the 21st century, adopting general legislation was the "form par excellence of administrative procedure"[18]. In a similar vein, others argue that a sort of *ius commune* of administrative procedure has emerged on both sides of the Atlantic[19].

We will examine this phenomenon from a specific angle. What concerns us is the transnational diffusion of administrative law. Through our comparative enquiry into administrative procedure legislation in Europe and our subsequent studies on Latin America, we are trying to open up an avenue of research in an area of legal significance that has been largely overlooked. In so doing, we will consider a variety of relationships between legal systems – some symmetric, others asymmetric. This comes as no surprise to comparative lawyers because the transnational diffusion of law often reveals asymmetries of power and expertise. But, as our focus on Austria has shown, the channels of diffusion amply differ from those of private law. Moreover, some relationships are bilateral, while others involve a plurality of legal systems. Again, this is not surprising. Nonetheless, it is both

[18] G.A. Bermann, *Foreward*, in J.B. Auby (ed.), *Codification of Administrative Procedure* (2014), See also J. Barnès, *Towards a third generation of administrative procedure*, in S. Rose-Ackermann & P. Lindseth (eds), *Comparative Administrative Law* (2010), 337.

[19] E. Garcia de Enterria, *Prologo*, in A. Brewer-Carias, *Principios del procedimiento administrativo. Estudio de derecho administrative comparado* (1990).

interesting and important to take stock of the processes that lead to the creation of shared values and institutions.

3.1. Administrative law: not a national *enclave*

The starting point can be stated very simply. For almost a century, public law was dominated by two received ideas. The first was the idea that law, in particular public law, was inextricably tied in with the history and culture of each people, with its own *Volksgeist*, or 'spirit of the people'[20]. The second, which was partly a consequence of the former, was the Diceyan idea that administrative law was not a product of the State, but of some States, that is, only those in continental Europe, while it did not, and could not, exist in England or other common law systems adhering to the postulates of the rule of law[21]. The difference between civil law and common law systems was not, therefore, limited to the field of private law. It is fair to say that Dicey was not isolated in this belief. For example, one of the most distinguished comparative lawyers of the last century, René David, emphasized the absence of administrative law in England in the distinction between the two Western legal families[22] and even one of the most influential public lawyers in continental Europe, Massimo Severo Giannini, echoed Dicey's views[23].

Our comparative enquiry shows that soon after some nations regained independence and made different choices concerning, for example, form of government, they opted for a very similar type of administrative procedure legislation, which was actually the same in some respects, including the choice of general legislation and some general principles, such as the individual's right to be heard and the duty to give reasons. A focus on administrative procedure legislation also shows that, well before the last edition of Dicey's successful treatise on constitutional law (1954), the US adopted the federal Administrative Procedure Act (1946), which became one of the most important statutes. There was, therefore, no divide

[20] F.K. Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1815).
[21] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1894; 1954, 10th ed.) 330.
[22] R. David, *Le droit anglais* (1965), 92 («*la notion d'un droit administratif…est inconnue en Angleterre*»).
[23] M.S. Giannini, *Istituzioni di diritto amministrativo* (1981) 8-9.

between common law and civil law systems. What emerged was, rather, a difference that cut across these 'legal families'.

3.2. Coercion: colonial administrative law and post-war constitutions

Although we may not like to think of the law in this manner, the transnational diffusion of law, including administrative law, is not devoid of coercion[24]. This can be demonstrated very simply by referring to colonial administrative law and post-WWII constitutions. Colonial administration involved a large part of the world in the eighteenth, nineteenth, and early twentieth centuries. The significant difference between the British and French empires is well known. The British tended to export domestic institutions, while the latter was based on indirect rule[25]. What is less known is that there were instances of borrowing and transplant also among colonial powers. For example, at the end of the nineteenth century, the German officers who had to devise the institutions for the new colonies largely drew on the British experience[26]. There was also debate surrounding the existence and extent of international standards of colonial administration[27].

While this cultural environment disappeared with decolonization, the consequences of post-war constitution-making linger on. Scholars have debated, in particular, whether the 1948 Japanese Constitution was essentially a transplant of Western values and principles[28]. Interestingly, a Japanese scholar observed that there was a rapid change in what Dicey called legislative public opinion, in the sense that the new constitutional framework was

[24] See A. Kocourek, *Factors in the Reception of Law*, 10 Tulane L. Rev. 209 (1935) (distinguishing accord from conflict and assimilation from imposition).
[25] P.G. Magri, *Colonialismo e istituzioni consuetudinarie nell'Africa sub-sahariana* (1984). On the British indirect rule, see Lord Lugard, *Colonial Administration*, Economica, n. 41, 1933, 12 (who, however, disliked the concept).
[26] J. Zollmann, *German Colonial Law and Comparative Law, 1884–1919*, in T. Duve (ed.), *Entanglements in Legal History. Conceptual Approaches* (2016), 253.
[27] F. M. van Asbeck, *International Law and Colonial Administration*, 39 Transactions of the Grotius Society 5 (1953). On the relationship between colonialism and international law, see M. Craven, *The Decolonization of International Law* (2009).
[28] See R.E. Ward, *The Origins of the Present Japanese Constitution*, 50 American Political Science Review 980 (1956) (for the thesis that the US exerted a decisive influence).

viewed as a break with the authoritarian tradition, and that most legal scholars accepted it[29].

One of the most innovative parts of the new Japanese Constitution was the recognition and protection of a number of fundamental rights. These rights were protected, among other things, by Article 31, establishing that "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law". It would be interesting to consider how this provision has been enforced in the field of administrative law by the Administrative Procedure Act of 1993. Certainly, the influence exerted by Austrian institutions differs from that exerted by the US on the adoption of Article 31, since there was no coercion involved but rather a voluntary choice. The question that thus arises is what led to a similar choice in differing contexts.

3.3. Parallel developments and the 'nature of things'

A possible explanation for the adoption of administrative procedure legislation by Czechoslovakia, Yugoslavia, and Poland between 1925 and 1930 can be based on what one of the most distinguished public lawyers of the last century, Jean Rivero, called "*parallélisme des solutions*"[30].Underlying this explanation is the view that when legal systems are faced with the same problems, they tend to adopt similar, if not the same, solutions.

This way of looking at administrative law is clearly opposed to the approach that emphasizes the uniqueness of law as a product of each social group or nation. It rests on a concept whose fortune preceded the emergence of the latter approach, namely, the "nature of things". This concept does not refer simply to the usual and expected characteristics of things. It represents something broader and more profound than such a merely empiricist remark. It has a deep normative dimension in a twofold sense. There is, first, a rejection of the excess of emphasis (allegedly) placed on the observation of the innumerable differences that can easily be found on the surface of various legal systems. Following this line of

[29] This is the conclusion reached by T. Hideo, *The Conflict between Two Legal Traditions in Making the Constitution of Japan*, in R.E. Ward & Y. Sakamoto (eds), *Democratizing Japan. The Allied Occupation* (1987) 133-134. See also Y. Okudaira, *Forty Years of the Constitution and its Various Influences: Japanese, European, and American*, 53 Law and Contemporary Problems 48-50 (1990).

[30] J Rivero, *Cours de droit administratif comparé* (1956-57) 27.

reasoning, what really matters is to consider 'things in themselves', as opposed to how things are presented within certain 'perspectives' or 'frames of reference'. There is, perhaps, more than an echo of American realism in this.

There is, secondly, a belief, expressed by Montesquieu in the opening statement of the *Esprit des Lois*, that laws do not simply reflect geography and climate. For him, "*les lois sont les rapports nécessaires qui dérivent de la nature des choses*" ("laws are the necessary relations resulting from the nature of things")[31]. This may be interpreted as implying that justice exists as an objective rule. However, Montesquieu himself observed that "society is far from being so well governed as the physical". It follows from this that there is no single way to fully realize objective justice. In reality, there are various ways, some of which are factually better than others. Thus, for example, a democracy should be based on respect for laws and acting in accordance with them[32]. It is not surprising, therefore, that a new democracy such as Austria adopted general legislation on administrative procedure and was followed in this by other nations.

In our case, however, there are some difficulties with respect to this view. When Yugoslavia adopted its first APA, in 1930, it was under an authoritarian government, a sort of royal dictatorship[33]. Additionally, the general legislation on administrative procedure adopted there, like in Czechoslovakia and Poland, continued to be used in some way after all these countries came under Soviet rule after 1945. There is still another development to consider, namely the adoption of this type of legislation by Hungary after the repression of the 1956 revolt against foreign oppression. Few years later, general legislation on administrative procedure was adopted in Spain under Franco's authoritarian regime. Which appears to suggest that this type of legislation is not – to borrow again from Montesquieu's world – necessarily associated with democratic government but, rather, with a certain degree of development in administration in the functional sense, and with the reluctance of rulers to rely only on executive rulemaking, unlike – for instance –

[31] Montesquieu, *L'esprit des lois* (1756), book I, chapter 1, Engl. transl. by T. Nugent, *The Spirit of the Laws* (1949).
[32] Id., III, 3; IV, 5; V, 2.
[33] M.J. Calic, *History of Yugoslavia* (2019) 105.

in the USSR and the Russian Federation. This relationship, therefore, requires further verification[34].

3.4. Diffusion: *Mitteleuropa* and Latin America

The spread of administrative procedure legislation in the territory of the former Habsburg Empire provides fertile ground for discussing another explanation. It was, in fact, a matter of diffusion. In this respect, three remarks need to be made. The first is of a theoretical nature. The concept of 'influence' is often employed in comparative studies[35]. However, this concept does not tell us much about two fundamental features of the spread of ideas and institutions: whether the reception of legal ideas and institutions is voluntary or coerced and whether 'imported' ideas and institutions supplement domestic law by filling *lacunae* or give rise to profound changes in the importing system[36]. For this reason, some scholars observe that simple concepts such as influence are meaningless and prefer others, such as 'reception'. However, this concept, too, is used in more than one way, including the dissemination of Roman law in Germany and other parts of Europe at the time of *jus commune*[37]. The concept of diffusion appears preferable because it conveys the sense of the spread of something across space[38]. It may thus be used as a working hypothesis.

In our case, the hypothesis was tested successfully, because there were both positive outcomes (Czechoslovakia, Yugoslavia and Poland, plus Liechtenstein) and negative outcomes (Hungary until 1956, as well as the German and Italian territories that had formerly been under authority of the Habsburg Empire). Moreover, we were able to test the significance of Austrian ideas not only at

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[34] See G. della Cananea, *The Common Core of European Administrative Laws. Retrospective and Prospective* (2023).

[35] See, for example, J.M. Galabert, *The Influence of the French Conseil d'Etat outside France*, 49 Int. 6 Comp. L. Q. 700 (2000).

[36] See W. Twining, *Social Science and the Diffusion of Law*, 32 J. of Law & Soc. 203, at 205 (2005) (distinguishing the attempts to modernize domestic law as distinct from those to fill gaps).

[37] F Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 Boston College Int. & Comp. L Rev. 257 at 270 (1981). On administrative law, R.B. Seidman, *Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law*, 5 Law & Society Review 161 (1970).

[38] See S. Farran, J. Gallen, J. Hendry, C. Rautenbach (eds), *The Diffusion of Law. The Movement on Laws and Norms Around the World* (2016).

the level of administrative procedure legislation, but also at the level of judicial doctrines, which were used for enforcement. It will be interesting to compare these outcomes with those of the new line of comparative research, which concerns the diffusion of Spanish administrative procedure legislation in Latin America after 1958.

4. Epilogue

As observed at the outset, the approach we have chosen is both historical and comparative. It is historical insofar as it examines how administrative institutions have evolved over time. It is comparative in the sense that we examine the solutions that various legal systems have developed for similar problems. The underlying idea is that both commonality and diversity are important and thus deserve adequate attention. More attention is also required, from the public law perspective, to legal systems that differ – such as those of Austria and Spain – from those that are usually the object of comparison, such as Britain, France and Germany. Conventional views concerning the relationships between administrative laws must, therefore, be reconsidered.