

ADMINISTRATIVE LAW SYSTEMS
AROUND THE WORLD: (INCREASINGLY)
SIMILAR BUT (STILL) DIFFERENT

ABSTRACT: *Comparative legal studies show increasing convergence between administrative law systems. This is the outcome of ever tighter international and supranational constraints, as well of lateral opening of legal orders, which make transplants and imitations among jurisdictions much easier. This paper, however, sheds light on achievements and limits of legal harmonization; provides some alternative explanations of convergence, beyond transplants and imitations theories; argues that relevant differences among administrative law systems do remain. Final remarks suggest a multi-layered architecture of administrative law.*

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1. Introduction

Convergence in administrative law has become a new mantra. Comparative legal studies show increasing convergence between administrative law systems.¹ This is the outcome of ever tighter international and supranational constraints, as well of lateral opening of legal orders, which make transplants and imitations among jurisdictions much easier. This paper, however, sheds light on achievements and limits of

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1 S. ROSE ACKERMAN – P.L. LINDSETH – B. EMERSON, *Comparative Administrative Law*, Cheltenham-Northampton, 2017; J.S. BELL, *Comparative administrative Law*, in M. REIMANN – R. ZIMMERMANN, *Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 1261-1286; F. BIGNAMI, *Comparative Administrative Law*, in *The Cambridge Companion to Comparative Law*, Cambridge, 2012, pp. 145-170; J. BOUGHEY, *Administrative Law: The Next Frontier for Comparative Law*, in *International and Comparative Law Quarterly*, 6, 1, 2013, pp. 55-95.

legal harmonization (part. 2); provides some alternative explanations of convergence, beyond transplants and imitations theories (part. 3); argues that relevant differences among administrative law systems do (and will) remain (part. 4). Final remarks suggest a multi-layered architecture of administrative law (part. 5).

2. Achievements and limits of legal harmonization

In the last thirty years, the ever-growing emergence of regional and global public goods, which cannot be managed by governments at the national level, explained the move towards an increasing supranational and international regulatory cooperation in many fields, in market, as well as in non-market areas. The European internal market became larger and much more deeply integrated. With the Maastricht Treaty and Lisbon Treaty, the European Union gained additional competences in other fundamental areas. At the global level, a World Trade Organization was established. Other international institutions, such as the World Bank, pushed recently democratized and countries to adopt administrative law institutions and regulations in order to protect private parties and international investors. International treaties and conventions in non-market fields, like the Aarhus Convention on the protection of the environment, further developed institutional integration, even in public law governance and accountability.²

The legal harmonization taking place within Europe and on a global level, through different forms of international regulatory cooperation, represented a powerful and often compulsory tool for approaching domestic administrative law systems. International organizations were established and national administrations were integrated in regional and global networks. International and supranational rules and standards started to be applied directly in the relationships between organizations, governments, and private actors. At the same time, those rules and standards transformed several areas, both substantial and procedural, of domestic administrative laws.

First, new principles of administrative organization and action, such as transparency and proportionality, and fundamental rights, such as the right to good administration and protection of legitimate expectation, were affirmed. Second, new rather

2 These changing patterns of contemporary administrative Law were signaled at the beginning of the new century, R.B. STEWART, *Administrative Law in the 21st Century*, in *New York University Law Review*, 2, 2003, pp. 437-460, and still are the heart of his reflection on the subject (R.B. STEWART, *State Regulatory Capacity and Administrative Law and Governance Under Globalization*, in N.R. PARRILLO, *Administrative Law from the Inside Out*, Cambridge, 2017). I tried to analyze their impact on the transformations of comparative administrative Law, in a broader and partially different version of this article, in G. NAPOLITANO, *The Transformations of Comparative administrative Law*, in *Rivista Trimestrale di Diritto Pubblico*, 4, 2017, pp. 997-1033.

similar regulatory institutions were established almost everywhere. The development of independent authorities, of course, has country-specific origins in every jurisdiction.

However, its expansion has been greatly favoured by EU law approximation directives, especially in network utilities regulation and financial markets oversight. As a matter of fact, these directives require the establishment of independent authorities and design commissioners' appointment requirements, financial autonomy, regulatory and supervisory powers.

Third, administrative procedure rules were increasingly harmonized by international and European rules impose standards to follow regarding notice and comments in rule-making and due process in adjudication, in many relevant areas of administrative law. Fourth, notwithstanding the formal respect for procedural autonomy of nation-states, administrative justice and judicial review were deeply affected by supranational rules, as the example of the EU "Remedies" Directive in public procurement clearly shows.

All these achievements explain the enormous success gained by new academic fields, such as European Administrative Law and Global Administrative Law.

The forerunner of European Administrative law was a German scholar, Jürgen Schwarz, who published in 1988 the first edition of his book on *Europäisches Verwaltungsrecht*.³ The fundamental idea at the basis of this new legal field was that the European integration process had been built around a community of administrative law.⁴ The entire legitimacy of the European integration process was said to lay fundamentally in the positive outcomes it granted, ensuring the efficient delivery of immaterial goods and services, like peace, market integration, and consumers' welfare. Even when the centrality of administrative law was eroded by the relevance gained by typical constitutional law, international law and fundamental rights issues, the literature on the topic

3 J. SCHWARZ, *Europäisches Verwaltungsrecht*, Baden-Baden, 1988. Translated into English in 1992, its revised version was published in 2006, after the enlargement of the EU to Eastern Europe countries.

4 The idea is embraced by comparative private lawyers (e.g. V. ZENO-ZENCOVICH – N. VARDI, *European Union as a Legal System in the Comparative Perspective*, in *European Business Law Review*, 2008, pp. 243-265) and US scholars too: P.L. LINDSETH, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, *Columbia Law Review*, 99, 1999, p. 628; ID., *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, 2010.

continued to grow, with reference to specific sectors and in broader general terms.⁵ Global Administrative Law was inaugurated at a conference held in 2004 held at the New York University Law School. This movement assumed that a large part of the institutions ensuring a global governance could be understood as (public, hybrid or private) administrations, and that such administrations were organized and shaped in their action by principles of an administrative law character.⁶ As a consequence, the Global Administrative Law scholarship – also previous study and research in international administrative law which date back to the second half of the Nineteenth century – started to refer to the structures, procedures and normative standards for regulatory decision-making – including transparency, participation, and review – that are applicable to international organizations; to informal intergovernmental regulatory networks; to regulatory decisions of national governments framed by an international or an intergovernmental regime; and to hybrid public-private or private transnational bodies.⁷ Even the classic public-private divide was revised in the context of global regimes.⁸ From a supranational legal harmonization perspective, differences among domestic systems of administrative law were neglected or underestimated, because merely transitional. If

5 Among the most outstanding textbooks, P. CRAIG, *EU administrative Law*, Oxford, 2006 and 2012; H.C.H. HOFMANN – G.C. ROWE – A.H. TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011; C. HARLOW – P. LEINO – G. DELLA CANANEA, *Research Handbook on European Administrative Law*, Cheltenham-Northampton, 2017; J.P. SCHNEIDER, *Europäisches Verwaltungsrecht*, Berlin - Heidelberg, 2018. In the Italian literature, M.P. CHITI, *Diritto amministrativo europeo*, Milano, 1999, (updated editions in 2004 and 2008; a collective book edited by M.P. CHITI was published in 2012). The close relationship between EU constitutional and administrative Law is stressed by M. RUFFERT, *The constitutional basis of EU administrative Law*, in *Comparative Administrative Law*, pp. 667-679 and P.L. LINDSETH, *What's in a label? The EU as "administrative" and "constitutional"*, in *Comparative Administrative Law*, pp. 680-697. On the transformations of the European administrative system induced by the crisis, E. CHITI, *In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum*, in *Cambridge Yearbook of European Legal Studies*, 17, 2015, pp. 311-333.

6 The inaugural paper was delivered by B. KINGSBURY – N. KRISCH – R.B. STEWART – J. WIENER, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 68, 3 – 4, 2005, pp. 15-61. From a European perspective, S. CASSESE, *Administrative Law without the State. The Challenge of Global Regulation*, in *New York University Journal of International Law & Policy*, 37, 2004, p. 663; C. HARLOW, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 17, 1, pp. 187-214.

7 An assessment of the achievements of the Global administrative Law scholarship in R.B. STEWART, *The normative dimensions and performance of global administrative Law*, in *International Journal of Constitutional Law*, 13, 2, 2015, pp. 499-506; an up to date and enlarged perspective in S. CASSESE, *Research Handbook on Global Administrative Law*, Cheltenham-Northampton, 2016 (with specific reference to the different academic paths, L. CASINI, *Global Administrative Law scholarship*, pp. 548 -571).

8 From different perspectives, M. GOLDMANN, *A matter of perspective: Global Governance and the Distinction Between Public and Private Authority (and not Law)*, in *Global Constitutionalism*, 5, 1, 2016, pp. 48-84; L. CASINI, "Down the rabbit-hole": *The Projection of the Public/Private Distinction Beyond the State*, in *International Journal of Constitutional Law*, 12, 2, 2014, pp. 402-428; I.J. SAND, *Globalization and the Transcendence of the Public/Private Divide — What is Public Law under Conditions of Globalization?*, in C. MAC AMHLAIGH C. MICHELON – N. WALKER, *After Public Law*, Oxford, 2013.

serious and relevant, relevant, these differences were deemed mostly as a failure in integration and regulatory cooperation, to address through proper enforcement measures and, when needed, to sanction following specific infringement procedures.

The political premise of global or regional legal harmonization, however, turned out to be to be delusional. Worldwide, especially after the eruption in 2008 of the financial crisis, popular confidence in the virtues of economic and technological globalization greatly decreased. In the meantime, some of the most important negotiations in multilateral free-trade agreements at the international and the macro-regional level failed. A new strategy based on purely bilateral deals and treaties emerged. In some cases, governments and political leaders announced their commitment to restore national borders. Even the European integration process entered into a phase of great uncertainty: above all, because of the sovereign debt crisis started in 2010 and of the migrants' human flow, which greatly increased since 2015. As a consequence, the citizens' satisfaction and trust towards the EU institutions and policies fell. In 2016, for the first time, a Member State decided to leave the Union. Even if fragmented inside and externally weakened, national governments tried to occupy again the centre stage and to play a relevant role on the international scene.⁹

In such a difficult context, it became very clear that even the most intense degree of legal harmonization, as the one prevailing in some areas of EU law, could push for convergence and increasing similarities, but it would be unable to generate homogeneity. Directives, including the most detailed ones, always leave room for different choices by Member States. Even when Member States simply translate the European into their own languages, or adopt the same institutional options, implementation and outcomes remain significantly different, as the example of public procurement shows.¹⁰ These issues cannot be addressed through the opening of infringement procedures.

9 A nuanced view in M. SEYOUR, *The Fate of Nation-state*, Montreal, 2004. The financial crisis brought a re-launch of the role of national governments: G. NAPOLITANO, *The Two Ways of Global Governance After the Financial Crisis: Multilateralism Versus Cooperation Among Governments*, in *International Journal of Constitutional Law*, 9, 2, 2011, pp. 310-339; with specific reference to the Eurozone, F. FABBRINI, *States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination*, in *Cambridge Yearbook of European Legal Studies*, 17, 2015, pp. 3-35; S. RANGONE, *Managing the Euro Crisis, National EU Policy Coordination in the Debtor Countries*, Oxford, forthcoming 2018.

10 On this sector, see A. SANCHEZ-GRAELLS, *Against the Grain? – Member State Interests and EU Procurement Law*, in M. VARJU, *Between Compliance and Particularism: Member State Interests and European Union Law*, Berlin-Heidelberg, forthcoming 2018.

3. Beyond legal transplants: some alternative explanations of convergence in administrative law

Moving from a purely national to a transnational or “beyond the border” approach, the attention must be focused on the overarching logic which explains why, to a relevant extent, administrative law systems are increasingly similar. The very significant role played by legal harmonization and its limits were already discussed earlier.

Another warning is now required with reference to the widespread idea of legal transplants, and related concepts such as imitation, (voluntary, imposed, explicit or crypto) reception, solicited imposition, and inoculation.¹¹ Strong criticism against this conceptual framework has already been expressed in comparative law theory. In its most radical expression, legal transplants were said to be even impossible.¹² Undoubtedly, the transplants’ conceptual framework reveals how deep the legacy is of nationalism (and even colonialism). In addition, that framework is often delusional, being based on two wrong implicit assumptions. The first one is that there is a leading country which is able to influence other countries’ legal and institutional choices; or, at least, a best-performer country which other countries assume as a source of inspiration to achieve the same desirable outcomes. The second one is that legal systems are compact and coherent entities and that the scientific knowledge about them is based on the logic of non-contradiction.¹³

Not surprisingly, in recent years, the terminology of legal transplants was superseded by a colourful vocabulary, which highlights a more nuanced vision of choice, mobility and influence of legal institutions. As a consequence, comparative law theory embraced the use of other words and metaphors, such as grafting, implantation, repotting, cross-fertilisation, cross-pollination, engulfment, emulation, infiltration, infusion, digestion, salad bowl, melting pot and transposition, which evoke different conceptual frameworks and alternative explanation based on ideas such as collective colonisation, con-

11 A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

12 This is the position assumed by P. LEGRAND, *The Impossibility of Legal Transplants*, in *Maastricht Journal of European and Comparative Law*, 4, 2, 1998, pp. 111-124.

13 As a consequence, legal systems are considered “pure” and not hybrid/multi-layered structure. On this criticism see H.P. GLENN, *Quel droit comparé?*, in *Revue de droit de l’Université de Sherbrooke*, 43, 1, 2013, pp. 23-46.

taminants, legal irritants, layered law, hyphenated law and competition of legal systems.¹⁴

When the legal transplants' approach is not abandoned, the existing literature offers a more problematic conceptual framework, which accounts for the competing positive (transplanted rules and institutions work in the same way as at home), skeptical (they are largely irrelevant), negative (they are often harmful), and differentiated views (they function in a modified way).¹⁵ The latter approach, in particular, provides a detailed map to discover standard case and variants of legal transplants with reference to the most relevant topics, such as source-destination, levels, pathways, formal or informal, objects, agency, timing, power and prestige, change in object, relation to pre-existing law, diffusion perspective, impact.¹⁶ Furthermore, ideas and actors of legal transplants do change in a considerable way in relation to space (Europe, North and South America, colonial world, Middle East, and East Asia) and time (cultural transplants were probably more relevant than legislative ones in the nineteenth century until the mid-twentieth century; since the Second World War and even more after the fall of communism, the United States supplanted the European countries and the Americanisation of law spread worldwide; in the last twenty years, globalization and the end of the American order created a much more "multilateral" system of legal influences).¹⁷ If one accepts this fine-tuned re-conceptualization of the theory, it can be easily acknowledged that legal transplants did exist and play a significant role in approaching one to the other the domestic rules and institutions of administrative law too. However, especially in this area of law, such an explanation does not reveal the whole truth.

Other relevant phenomena, like independent parallel invention, natural convergence and creative adaptation must be adequately considered in order to understand why domestic and supranational administrative law systems are becoming increasingly similar.

To this purpose, at least four factors must be taken into account: historical evo-

14 See for a more complete list, E. ÖRÜCÜ, *A Theoretical Framework for Transfrontier Mobility of Law*, in *Transfrontier Mobility of Law*, in R. JAGTENBERG – E. ÖRÜCÜ – A. DE ROO, *Transfrontier Mobility of Law*, The Hague, 1995, p. 5.

15 M. SIEMS, *Comparative Law*, Cambridge, 2014, pp. 195-200

16 W. TWINING, *Globalisation and Comparative Law*, in E. ÖRÜCÜ – D. NELKEN, *Comparative Law: A Handbook*, Oxford, 2007, pp. 69-89, in particular pp. 86-87, as re-framed by M. SIEMS, *Comparative Law*, 2014, pp. 200-201.

17 M. SIEMS, *Comparative Law*, 2014, pp. 201-214.

lution, economic and institutional efficiency ratios, public values discourse and human rights approach, major trends in policy-making as a response to social problems. Historical evolution makes clear the (parallel) independent invention and development, in every jurisdiction, of a complex bureaucratic machinery at the service of modern states and international organizations and the foundation of an always more complex system of administrative law. The growth of apparatus is the outcome of ever-increasing public tasks, which require delegation, specialization and expertise, both at the national and the supranational level.¹⁸ Legal structures of government, agencies, public law entities, independent regulatory authorities, and state-owned corporations circulated and flourished all around the world.¹⁹ Their survival through continuous adaptations shows that Darwinism can be applied to the study of bureaucratic organization and action too. Successful administrative institutions, such as independent agencies exercising rule-making and adjudication functions, can prevail even over venerated constitutional principles, such as separation of powers.²⁰ Economic and institutional efficiency ratios explain why governments everywhere receive from administrative law tasks, powers and prerogatives, which are deemed necessary to correct market failures in an appropriate way. In all jurisdictions, potential inefficiencies arising from the existence of public goods, externalities, market power, information asymmetries, macro-economic imbalances are addressed through the assignment to the government and related agencies of the duty to accomplish specific functions and through the conferral of authoritative powers in order to overcome non-cooperative behaviours of private actors.²¹

At the same time, administrative law regulations and dispute resolution mechanisms aim to prevent or correct government failures, which arise from the specific nature of public administrations as agents at the service of multiple principals (citizens,

18 An explanation based on economic efficiency in J.L. MASHAW, *Prodelegation: Why Administrators Should Make Political Decisions*, in *Journal of Law, Economics, and Organization*, 1, 1985, pp. 81-100.

19 One of the most well-known case is that of independent agencies: a comparative overview in D. HALBERSTAM, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, pp. 139-150; M. SHAPIRO, *A Comparison of US and European Independent Commissions*, pp. 234-250, both in S. ROSE-ACKERMAN – P. L. LINDSETH, *Comparative Administrative Law*, Cheltenham, 2010.

20 As brilliantly pointed out by B. ACKERMAN, *Good-bye, Montesquieu*, *Comparative Administrative Law*, 2010, pp. 38-43.

21 J. STIGLITZ – J.K. ROSENGARD, *Economics of the Public Sector*, New York, 2015

groups, elected officials, and international organizations), often competing and conflicting one against the others.²² All of this explains the diffusion at every latitude of substantial limits to administrative discretion made of general principles, such as proportionality and reasonableness, as well as objective standards, criteria and thresholds; the development of procedural constraints, based on participation and access to public information; and the establishment of sophisticated judicial review institutions.²³

The intimate structure of administrative law is deeply influenced by public values, which guide the legitimate exercise of the authority by the state and the accomplishment of missions of general interest.²⁴ In every jurisdiction, public administrations are required to serve the people, to be impartial and to not discriminate, to be “good” and efficient, to be open and transparent, to be subject to effective judicial review.²⁵ Public administrations are also required to respect the fundamental rights of the individuals in the exercise of the public authority and to ensure the satisfaction of the population’s basic needs through the provision of goods and services. As a consequence, power is limited and even duties to purchase or to directly produce those goods and services are often established. In many cases, national constitutions strengthen governmental obligations and ensure the respect of individual rights. In addition, administrative law is everywhere more and more affected by the human rights approach, which is inherently universal and is often backed by international conventions.²⁶ A powerful

22 D.A. FARBER – P.P. FRICKEY, *Law and Public Choice. A Critical Introduction*, Chicago, 1991; M.J. HORN, *The Political Economy of Public Administration*, Cambridge, 1995; J.L. MASHAW, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, New Haven, 1997; R.D. COOTER, *The Strategic Constitution*, Princeton, 2000; M. MCCUBBINS – R. NOLL – B. WEINGAST, *The Political Economy of Law*, in A.M. POLINSKY – S. SHAVELL, *Handbook of Law and Economics*, Amsterdam, 2007, II, pp. 1651-1738.

23 F. BIGNAMI, *Comparative Administrative Law*, in M. BUSSANI – U. MATTEI, *The Cambridge Companion to Comparative Law*, Cambridge, 2013, pp. 154-160; G. NAPOLITANO, *Administrative Law*, in *Encyclopedia of Law and Economics*, Heidelberg - New York, 2014, ad vocem.

24 On the values underpinning public Law, M. LOUGHLIN, *The idea of public Law*, Oxford, 2004, pp. 25- 29.

25 P. DALY, *Administrative Law: A Values-Based Approach*, in J. BELL – M. ELLIOT – J. VARUHAS – P. MURRAY, in *Public Law Adjudication in Common Law Systems: Process and Substance*, Oxford, 2015; with specific reference to the problems emerging in case of privatization, L. DICKINSON, *Public Law Values in a Privatized World*, in *Yale Journal of International Law*, 31, 2006, pp. 383-426; M. TIRARD, *Privatization and Public Law Values: A View from France*, in *Indiana Journal of Global Legal Studies*, 15, 1, 2008, pp. 285-304; J.B. AUBY, *Contracting Out and “Public Values”: A Theoretical and Comparative Approach*, in *Comparative Administrative Law*, 2010, pp. 511-523.

26 The relevance of constitutional values and fundamental rights for administrative Law at every latitude is stressed by J.S. BELL, *Comparative administrative Law*, in M. REIMANN – R. ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford, 2006, pp. 1271-1274.

factor of natural convergence is then in action. Major trends in policy making spreading across countries play a relevant role too. Big government theory and practice pushed for an ever-continuing expansion of the role of the public sector in the first thirty years of the twentieth century and even more after Second World War. In the last two decades of the twentieth century, on the contrary, liberal ideas and government failures theories favoured a rolling back of the state and inspired market based reforms.²⁷ Post 2008-crisis recipes are now influencing recovery strategies, based on a more nuanced and blurred mix of public and private tools.²⁸ Much more than in the past, reinventing government initiatives are not insulated on a national level, since, in such a digitally connected world, policy making, even when is local, takes place under the world's eyes.

Administrative reforms, of course, are a very fertile ground for voluntary imitations and for prescribed or recommended transplants. However, convergence, whether natural or encouraged, is only partial. The dominant strategy is adaptation, which is often rather creative. In addition, late comer countries can take advantage of their alleged delay, correcting failures emerging from implementation in forerunners jurisdictions, and adopting rules and institutions in which the latest software updates have already been installed.

All these factors explain why not only legal harmonization and transplants, but also parallel independent inventions, evolutions, and adaptations bring administrative law systems closer and closer across jurisdictions at regional level and even worldwide. Opening up to international regulatory cooperation, governmental empowerment, delegation to experts, contracting out, regulatory rationalism, participation in decision making, transparency, and judicial review are the fundamental pillars of administrative law at every latitude. All jurisdictions have to face similar problems and challenges. And, by so doing, they must comply more and more with international and supra-

27 D. OSBORNE – T. GAEBLER, *Reinventing government: How the Entrepreneurial Spirit is Transforming Government*, Reading Mass. Addison Wesley Public Comp., in *The Journal of Sociology & Social Welfare*, 21, 1, 1992; S. STRANGE, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge, 1997; S. CASSESE, *The Age of Administrative Reforms*, in J. HAYWARD – A. MENON, *Governing Europe*, Oxford, 2003, pp. 128-138.

28 S. KUHLMANN – H. WOLLMANN, *Introduction to Comparative Public Administration: Administrative Systems and Reforms in Europe*, Cheltenham-Northampton, 2014; G. NAPOLITANO, *Looking for a Smarter Government (and Administrative Law) in the Age of Uncertainty*, in S. ROSE-ACKERMAN – P. LINDSETH, *Comparative Administrative Law*, 2017, pp. 352-369.

national regulations and with common constitutional traditions. This is a very fertile ground for the further development of significant research projects. In 2006, a group of European scholars promoted an ambitious project aiming to discover the common roots and developments of the *ius publicum europaeum*, in the areas of both constitutional and administrative law.²⁹ More recently, other scholars announced their intention to extend the common core approach applied in the field of EU private law to the area of administrative law.³⁰ Finally, the idea of a cosmopolitan administrative law was evoked.³¹

4. The context matters: why administrative law systems still differ

Even if increasingly similar, domestic, regional and global systems of administrative law still partially differ, both in design and in implementation. The walls erected by legal nationalism fell. But the context matters, in particular in public law.³² As a consequence, specific interdisciplinary efforts and investments are needed: history, politics, economy, society, and culture must be taken into account to understand the causes of existing differences, to make legal harmonization effective, and to avoid the rejection of transplants.³³ All these contextual factors are extremely relevant in administrative law.

The first, history, is fundamental to understand the distinctive features of sta-

29 The project was developed in six books published in German language: P. M. HUBER – A. VON BOGDANDY, *Handbuch Ius Publicum Europaeum*, Frankfurt am Main, 2007-2016. The English version is under publication with Oxford University Press.

30 The Common Core of European Administrative Law (CoCEAL) project, coordinated by M. Bussani and G. Della Cananea, and funded by the European Research Council (ERC) under the Horizon 2020 Research and Innovation Programme, was presented in a conference held in Trieste, May 18-19, 2017.

31 G. NAPOLITANO, *Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law?*, pp. 484-485. A broader cosmopolitan vision of public Law emerges in H.P. GLENN, *The Cosmopolitan State*, Oxford, 2013; and A. SOMER, *The Cosmopolitan Constitution*, Oxford, 2014.

32 The relevance of the context, especially in the field of public Law, is stressed by U. KISCHEL, *Rechtsvergleichung*, München, 2015, pp. 35-41, 164 and p. 243.

33 From a general comparative Law perspective, M. REINMANN, *Comparative Law and Neighbouring Disciplines*, in *The Cambridge Companion to Comparative Law*, pp. 13-34; The quest for “*cross-disciplinary insights*” is very clear in S. ROSE-ACKERMAN – P. LINDSETH – B. EMERSON, *Introduction*, in *Comparative Administrative Law*, 2017.

tehood and sovereignty in different jurisdictions.³⁴ As a matter of fact, the specific path of each nation building process has a direct effect on the role of the bureaucracy, its status and the subsequent regulations, and even performances.³⁵ Ancient states, like France and China, traditionally have strong and highly qualified bureaucracies, which often constitute the fundamental structure of government. Hierarchy more than rules ensures the proper working of the command and control chain. This is especially true in authoritarian governments. More recent states, on the contrary, usually have a weaker bureaucratic structure. Rules aiming at constraining it can be even extremely detailed, but are often poorly enforced. Institutional and political instability, of course, further weakens the rule of law and the administrative capacity. The well-functioning of democratic and representative institutions can be fundamental in ensuring the proper delivery of goods and service to the people and the satisfaction of their ever-changing needs. A second factor is the constitutional and political system. This factor is here more relevant than in other fields, because “administrative law cannot avoid confrontations with politics.”³⁶ As a matter of fact, different constitutional and political constraints deeply affect the way in which bureaucracies exercise their tasks and provide good and services to citizens. This explains why administrative law is everywhere at the centre of conflicts and strategies between different political, economic, and social players.³⁷

As a consequence, critical comparative law and positive political theory, which contests the established division between law and politics, can be extremely fruitful in administrative law. Political or ideological factors can be used, on one hand, to explain similarities and differences between jurisdictions and legal systems; on the other hand,

34 In general terms, J. GORDLEY, *Comparative Law and Legal History*, in M. REIMANN – R. ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 753. With specific reference to comparative administrative Law, B. SORDI, *Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law*, in *Comparative Administrative Law*, 2017, pp. 23-37. Even the notion of State and its perception change across jurisdictions: O. BEAUD, *Conceptions of the State*, in M. ROSENFELD – A. SAJÓ, *The Oxford handbook of comparative constitutional Law*, Oxford, 2012.

35 A general overview in S. CASSESE, *The rise of the administrative state in Europe*, in *Rivista trimestrale di diritto pubblico*, 4, 2010, pp. 981-1008.

36 The point is made by S. ROSE-ACKERMAN – P.L. LINDSETH, *Comparative Administrative Law: Outlining a Field of Study*, in *Windsor Yearbook of Access to Justice*, 28, 2, 2010, pp. 435-449.

37 As explained by US political scientists show since the mid-Eighties of the twentieth century. More recently, with reference to agencies' strategies, Y. GIVATI, *Game Theory and the Structure of Administrative Law*, in *The University of Chicago Law Review*, 81, 2014, pp. 481-518; a broader view in G. NAPOLITANO, *Conflicts and Strategies in Administrative Law*, in *International Journal of Constitutional Law*, 12, 2, 2014, pp. 357-369.

in a more normative way, to foster institutional and social change.³⁸ Few examples make this point very clear. The existence of a presidential (in the United States and in Latin America) or a parliamentary system (in many European countries and in Japan) does affect the role of administrative law and its distinctive features. In the first one, the President and the Congress compete to guide and control the bureaucracy. To this purpose, the President mainly uses executive orders. At the same time, the Congress tries to shape administrative action through detailed statutes and oversight on the exercise of delegated powers.³⁹ In a parliamentary system, on the contrary, the political preferences of Government and Parliament are usually aligned. As a consequence, they develop a cooperative strategy under which the first asks the second to legislate only when this is more advantageous for political or institutional reasons. Parliaments less involved in the legislative crafting of administrative law rules and in the *ex ante* guidance of the bureaucracy, however, play a greater role in *ex post* supervision and performance review.⁴⁰ Another relevant constitutional feature, which affects the nature of administrative law, is the vertical separation of powers. In a federal state, administrative law can be extremely diversified and fragmented, differently from a centralized state, where administrative law is much more homogeneous. Finally, when individual rights are protected by the Constitution and shape the political process, administrative law also is deeply affected by the nature of those rights (depending on whether they only protect fundamental liberties or social rights as well).⁴¹

38 A general overview in D. KENNEDY, *Political ideology and comparative Law*, in *The Cambridge Companion to Comparative Law*, pp. 35-56.

39 The idea that “*differences between parliamentary and presidential systems have important implications for administrative governance*” has been recently reaffirmed by P.L. STRAUSS, *Politics and Agencies in the Administrative State: the U.S. Case*, in *Comparative Administrative Law*, 2017, pp. 44-59.

40 D.C. MUELLER, *Constitutional Democracy*, Oxford, 1996; S. ROSE-ACKERMAN, *Policymaking Accountability: Parliamentary versus Presidential Systems*, in D. LEVI-FAUR, *Handbook on the Politics of Regulation*, Cheltenham-Northampton, 2011, pp. 171-184. Relevant differences could emerge on the side of judicial review too, even if the usefulness of positive political theory’ explanations should not be overrated: M.E. MAGILL – D.R. ORTIZ, *Comparative Positive Political Theory and Empirics*, in *Comparative Administrative Law*, 2017, pp. 71-84.

41 More, in general, however, while constitutions serve as “*symbols*”, administrative Law systems provide “*the effective legal regulation of government*”: T. GINSBURG, *Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law*, in *Comparative Administrative Law*, 2017, pp. 60-70. As a consequence, systemic administration based on its general supervisory role should be considered as a relevant part of constitutional Law: G.E. METZGER, *The Constitutional Duty to Supervise*, in *Yale Law Journal*, 6, 2015, pp. 1836-2201.

A third factor is the degree of economic development (and the nature of the market system). This is usually considered a relevant issue for legal comparison especially in the field of private, financial and company law. Comparative law and economics, in particular, investigates the impact of laws and regulations on the behaviour of groups and individuals and the relative advantages of rules in terms of efficiency and social welfare, suggesting imitations and transplants from one legal order to the other.⁴² According to the prevailing literature, which however fell under strong criticism after the eruption of the 2008 crisis, Common Law provides more adequate and flexible institutions for financial markets and business transactions. Civil law, on the contrary, presupposes a greater role for detailed rule-making and state intervention, which are considered detrimental to economic freedom and market efficiency. Even though it was greatly underestimated for a long time, economics is very relevant for administrative law too.⁴³

An advanced market economy, driven by competition and technological innovation, pushes for a well-functioning administrative system, an impartial, open, and efficient bureaucracy, and the proper enforcement of a clear set of rules. The opposite is true too. A well designed administrative (and administrative law) system drives economic growth and market vitality: a virtuous circle is then established.⁴⁴ Unfortunately, however, top-down reforms are not always successful. This explains why exporting universal principles of good governance and open market sometimes risks being an abstract operation. Less dynamic economic systems, on the contrary, often live together with a more closed bureaucratic structure and an opaque legal system. Especially when state-owned corporations play a relevant role, political distortion of market mechanisms is frequent. However, privatization can be intended in different ways and it is not always the best option, in particular when capitalism is underdeveloped or

42 A general overview in N. GAROUPA – T. GINSBURG, *Economic Analysis and Comparative Law*, in *The Cambridge Companion to Comparative Law*, pp. 57-72.

43 As it clearly emerges from the papers collected in S. ROSE-ACKERMAM, *Economics of administrative Law*, Cheltenham-Northampton, 2011. See also S. ROSE-ACKERMAN, *The Economic Analysis of Public Law*, in *European Journal of Law and Economics*, 1, 1994, pp. 53-70; in the Italian literature, G. NAPOLITANO – M. ABRESCIA, *Analisi economica del diritto pubblico*, Bologna, 2009.

44 D. RODRIK – A. SUBRAMANIAN – F. TREBBI, *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, in *Journal of Economic Growth*, 9, 2, 2004, pp. 131-165.

looks for rent-seeking more than for risk and innovation.⁴⁵ Fourthly, also the different relationships between society and government – in terms of strict integration or, on the contrary, stark separation – and the robustness of civic traditions deeply influence the development of administrative law. The point emerges very clearly with reference to participation and civil society involvement.⁴⁶ Participation in the decision-making process by industry, consumers, and environment protection groups and popular control on public authorities, such as historically developed in the US, can be truly effective when groups and individuals feel themselves responsible for the day-by-day management of the community.⁴⁷ In jurisdictions where civil society is less involved in public-decision making, on the contrary, those rights are weaker or are exercised by a smaller class of people, often in their own interest.

In many European countries, an alternative way to ensure civil society involvement is the direct participation of interest groups representatives (trade unions included) at the governing bodies of public administrations and other public law entities. Stakeholders' groups play a relevant role at the EU level too. Many regulations give them an advisory function in the European decision-making process. Finally, in many sectors of general economic interest, the self-production of goods and services is encouraged. Fifthly, the role exercised by legal culture must not be disregarded. This is very relevant in every field of legal comparison. However, especially in the area of administrative law, the legal culture, dominated by nationalism, was highly influential in developing the idea of very different domestic systems: the purpose was erecting and protecting the identity of the state and of its institutions. In addition, it must be considered that, at every latitude, to a great extent, administrative law grew and still develops through the work of law professors, judges, and lawyers defending cases before courts.

They often receive a similar education and share common values, which are clo-

45 On the ever-changing dimensions and outcomes of privatization from an administrative Law perspective, D. BARAK-EREZ, *Three Questions of Privatization, in Comparative Administrative Law*, 2017, pp. 533-551, J. FREEMAN – M. MINOW, *Government by Contract. Outsourcing and American Democracy*, Cambridge and London, 2009; M. TAGGART, *The Province of Administrative Law*, Oxford, 1997.

46 S. ROSE-ACKERMAN, *Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy, in Comparative Administrative Law*, 2017, pp. 251-267, (stressing the different meanings and loci of participation); F. BIGNAMI, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 2011, pp. 887-894.

47 The role played by professors and judges in the development of administrative Law is put in evidence by J.S. BELL, *Comparative Administrative Law*, pp. 1284-1285.

sely linked to the more general cultural background of any national community . This explains why some jurisdictions prefer the use of formal institutions, often based on hard law, detailed regulations, compulsory enforcement, adversarial litigation before courts. Other jurisdictions (such as in UK and East Asia), on the contrary, privilege soft law tools, administrative guidance, negotiations and alternative dispute resolution mechanisms.⁴⁸

5. Conclusion: the complex and multilayer architecture of administrative law

The interaction between factors of homogeneity and factors of differentiation explains why the design of administrative law emerging from a transnational legal comparison is based on a complex and multilayer architecture. There are some common pillars of administrative law across jurisdictions that can be found at the regional level and even worldwide. The buildings erected over those pillars, the cut of apartments and rooms, and even the furnishings, however, differ. This is why domestic administrative law systems still matter and why their repeated interactions with regional and global administrative law must be put at the centre of the stage. However, doors are often open, courtyards and lifts are crowded, designers are always at work, as collective needs and preferences are ever-changing and new problems and challenges continuously arise. A functional and contextual approach from a transnational perspective is therefore needed. The attention devoted to statutes and regulations must be complemented with the analysis of how bureaucracies implement policies and comply with legal constraints. Specific reference to the case law in the context of each jurisdiction and from a comparative perspective could very useful too.

⁴⁸ Some significant examples of different cultural approaches in W. BISHOP, *A Theory of Administrative Law*, in *The Journal of Legal Studies*, 19, 2, 1990, pp. 489-530.