

**THE PRESENT SITUATION OF COMPARATIVE  
ADMINISTRATIVE LAW IN ITALY**

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**1. SOME HISTORY**

A deeply rooted misconception has it that administrative law is the result of the specific ways the government of any State is organised. As such, comparison between the administrative law of different States would not be possible.

This stance implies that the different ways the government of different States is organised cannot be compared. The opposite is obviously true: comparative constitutional

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law focuses among other things on the different forms of government. Moreover, modern western democracies are close enough to make comparison not only possible, but quite meaningful with a view to seek best practices for possible imitation and transplant.

Actually, the readiness to learn from our neighbours was one of the key features in the formative era of Italian administrative law. When the Parliament of new Italy debated the reform of judicial review which was to become law in 1865, constant reference was had to the experiences of other European countries, notably France and Belgium<sup>1</sup>. French administrative law was generally well known in Italy during all the second half of the XIX century. And as a leading scholar as Federico Cammeo was interested to US administrative law<sup>2</sup>.

To try and understand how the misconception declaring administrative law not comparable arose, one could assume that it was one of the consequences of the Fascist dictatorship. Indeed, under the dictatorship, Italy broke up with the tradition of the western democracies. Filo-fascist scholars underlined the (assumed) superiority of the new institutional arrangement over democratic institutions. This is by itself a comparative assessment, but is chauvinist in nature and in no way encourages scientific comparison (which could easily dismiss the accuracy of the assessment).

Even then, Italian scholars stayed true to the teachings of Vittorio Emanuele Orlando and kept alive their interest for German scholarly works. This however falls well short of true legal comparison. The aim was to build purer and purer legal theories which in

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<sup>1</sup> See A. ANGELETTI, *Le origini del sistema di giustizia amministrativa*, in R. CARANTA (dir.), *Il nuovo processo amministrativo*, Torino, Zanichelli, 2011, 25 ss.

<sup>2</sup> F. CAMMEO, *Il diritto amministrativo degli Stati Uniti d'America*, in *Giur. it.*, 1895, IV, c. 81.

principle should hold true everywhere and in any time. In time, even this very limited opening to the outside world closed shut<sup>3</sup>.

One could wonder why a misconception born in a very specific institutional environment survived well after the demise of the dictatorship. One reason is probably the inherent traditionalism of an academic system based on schools, where the younger generation sees as its duty to walk the footsteps of the older one. An even stronger reason might have been the strongly conceptual approach which characterised until recently Italian administrative law: such an approach is facts insensitive and does not investigate the law in action. This of course dims interest on how law is in different jurisdictions.

The point is that until the '80s of the past century comparative research was very marginal in Italian administrative law. However, the strengthening of European integration made cultural insulation impossible.

This first report is devoted to investigate the paths, the themes and the works of Italian comparative administrative law.

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<sup>3</sup> With a few relevant exceptions, such as A. MASUCCI, *Trasformazione dell'amministrazione e moduli convenzionali : il contratto di diritto pubblico*, Napoli, Jovene, 1988; ID., *La legge tedesca sul processo amministrativo*, Milano, Giuffrè, 1991 (dello stesso Autore anche *Il processo amministrativo in Francia*, Milano, Giuffrè, 1995); S. COGNETTI, *La tutela delle situazioni soggettive tra procedimento e processo : le esperienze di pianificazione urbanistica in Italia e in Germania*, Napoli, ESI, 1987; ID., *Profili sostanziali della legalità amministrativa : indeterminazione della norma e limiti della discrezionalità*, Milano, Giuffrè, 1993; ID., *Principio di proporzionalità : profili di teoria generale e di analisi sistematica*, Torino, Giappichelli, 2011; D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padova, CEDAM, 1995.

## 2. PATHS

Comparison is better achieved through networks.

The *Association internationale de droit comparé*, made up by full and associate members, is by far the largest and widest network for comparative law. The *Association* is an umbrella association made up of national associations (the *Associazione italiana di diritto comparato* – AIDC in Italy). The *Association* meets every four years for a week long conference held in a different country. Each conference covers about twenty different themes, some of them quite general, the rest pertaining to different branches of law, with two facets of administrative law being normally addressed. For each theme, a *rapporteur général* is named well in advance, usually from among the full members of the *Association*. He/she drafts a questionnaire which is sent to the national reporters, who are chosen by the national associations. Proceedings are either in French or in English. Finally, the *Association* organises comparative law seminars for students.

During the past decades, a fair number of Italian administrative law scholars has participated to the conferences. Unlike the French, however, and unlike Italian private lawyers, the role of the Italian administrative lawyers is somewhat marginal, both in the ranks of the *Association*, in its boards and in those of the AIDC, and as general reporters.

This may be due to different reasons, among them the delay in embracing comparative law which was discussed above<sup>4</sup>.

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<sup>4</sup> As J. RIVERO ‘Vers un droit commun européen: nouvelles perspectives en droit administratif’ in M. CAPPELLETTI *New Perspectives for a Common Law in Europe – Nouvelles perspectives d’un droit commun en Europe* (Leyden et al., Sijthoff et al, 1978), 391, remarked «Il faut reconnoître que le droit administrative a fait longtemps figure de parent pauvre dans le monde du droit comparé, et que les spécialistes du droit privé ont occupé, et occupant encore, le devant de la scène».

However, being marginal does not help in building commitment. Italian administrative lawyers may draft the report, but rarely show up at the international conference. This form of involvement hardly can be classed as doing comparative law. It is more drafting a report on Italian law in French or English.

More in general, there are questions on whether the structure of the *Association* is still optimal. It is very much a post-Westphalian type of organisation. The conferences see participants from all over the world, but the actual provenance of the national reporters for any given theme is left to the hazard, depending on whether there is a reporter available in any given jurisdiction: thematic workshops may see quite disparate participants; moreover, the regional dimension so relevant in today world (think of the EU) is simply missing. Too often the *rapporteurs généraux* struggle to chair meaningful comparative discussions going beyond the mere addition of information from more or less distant legal traditions to find out the paths of legal transplants and discuss best practices deserving imitation<sup>5</sup>.

The *Association Capitant des Amis de la Culture Juridique Française* has similar limits even if taking part to the conferences it organises has the additional bonus of giving the chance to meet member of the *Conseil d'Etat*.

Inevitably, Italian administrative law scholars interested in comparison follow different paths beyond or rather instead taking parts to events organised by the two *Associations* mentioned.

Comparative research interests may be pursued on individual basis, possibly through participation to small informal ad hoc groups pursuing a common research interests. A few networks are however more structured, taking together scholars interested

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<sup>5</sup> It is fair to say that at times time *rapporteur général* manages to collect the National reports in a good comparative law book: e.g. M. PAQUES (ed.), *Le principe de précaution en droit administratif. The Precautionary Principle and Administrative Law*, Bruxelles, Bruylant, 2007.

on comparative law and the effects of European integration upon national administrative law.

Among this, the PRIN research network led by Giandomenico Falcon from Trento University and seeing the participation of colleagues from other Universities, which organises conferences every two-three years and has to date published a number of comparative works<sup>6</sup>.

A similar effort has been led by Guido Greco from Milan University on remedies in public procurements<sup>7</sup>.

At European level the *European Public Law Organisation – EPLO* led by Spyridon Flogaitis from Athens brings together every year academics and high level practitioners at the end of the Spetzes summer school to investigate one or two relevant topics. Among its publications is a multilingual journal<sup>8</sup>.

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<sup>6</sup> Among them G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2010; G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2008; G. FALCON (cur.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali*, Padova, CEDAM, 2005; R. CARANTA and A. GERBRANDY (eds), *Tradition and Change in European Administrative Law*, Groningen, Europa Law Publishing, 2011; A. MASSERA (cur.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi. Nel diritto italiano, comunitario e comparato*, Padova, CEDAM, 2010; D. CORLETTI (cur.), *Procedimenti di secondo grado e tutela dell'affidamento in Europa*, Padova, CEDAM, 2007.

<sup>7</sup> G. GRECO (cur.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano, Giuffè, 2010.

<sup>8</sup> www.eplo.eu

More focused on publishing an *opus maior* on public law in Europe is *Jus Publicum Europaeum*; most participants to the network come from Italy and Germany<sup>9</sup>.

Three bilateral administrative law groups have Italian and, respectively, German, French, and Spanish members. In principle each group meets every two years, rotating between Italy and the corresponding country, to discuss one or more topics of common interest, besides providing information on the evolution of national administrative law. The proceedings of each group are bilingual, which nowadays gives rise to some difficulties within the Italian-German group.

The *Dornburg Research Group on New Administrative Law* led by Matthias Ruffert from Jena University has a German, French and English core, and scholars from other countries, Italy included, take part to its meetings held every two years. The working language today is English only<sup>10</sup>.

A number of thematic networks see the participation of many Italian scholars: among them *Public Contracts in Legal Globalization (PCLG) - Contrats Publics dans la Globalisation Juridique (CPGJ)*, led by French and German scholars but working in French and English; it meets every twice a year to work on different topics which are end up in a

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<sup>9</sup> A. VON BOGDANDY, S. CASSESE, P.M. HUBER (hrg), *Handbuch Jus Publicum Europ(a)eum*, Band III, Müller, Heidelberg, 2010.

<sup>10</sup> See the proceedings: M. RUFFERT (ED), *Legitimacy in European Administrative Law: Reform and Reconstruction*, Groningen, Europa Law Publishing, 2011; M. RUFFERT (ED), *The Public-Private Law Divide: Potential for Transformation?*, London, BIICL, 2009; M. RUFFERT (ED), *The Transformation of Administrative Law in Europe / La mutation du droit administratif en Europe*, München Sellier, 2007.

number of volumes<sup>11</sup>. On the same subject the *Procurement Law Academic Network* is more devoted to the organisation of large conferences and as an informal contact point<sup>12</sup>.

*Jus Publicum* complements the above mentioned initiatives as a network of networks with a 360 degrees coverage of the different facets of administrative law; it also acts as a network of thematic journals.

The European stage is no more the only one relevant for Italian academics working in administrative law. Every year in Viterbo an important international seminar is organised by *Global Administrative Law – GAL* group. The seminar follows the modern international scholarly standard procedure based on calls for papers and panel discussions. GAL is linked to the *Global Administrative Law Project* of the New York University, which in turn organises further meetings<sup>13</sup>.

Also global but not necessarily comparative is the much older *International Institute of Administrative Sciences – Institut International des Sciences Administratives*. It is a quite structured organisation, whose mandate goes beyond law and extends to all sciences studying public administration. Inevitably quite often it ends up doing comparative law research<sup>14</sup>.

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<sup>11</sup> <http://public-contracts.eu> ; già pubblicato R. NOGUELLOU U. – STELKENS (eds.) *Droit comparé des contrats publics. Comparative Law on Public Contracts*, Bruxelles, Bruylant, 2010.

<sup>12</sup> [www.planpublicprocurement.org](http://www.planpublicprocurement.org)

<sup>13</sup> <http://www.iilj.org/GAL/default.asp>

<sup>14</sup> [www.iias-iisa.org](http://www.iias-iisa.org)



### 3. THEMES

The above analysis has somewhat anticipated the themes of comparative research. However many more themes are thought to have benefited from some comparative analysis in this or that event, which is impossible to say missing a database of the initiatives in the country.

All administrative law may indeed benefit from comparative analysis, including the more general topics, such as the organisation (for which the contribution from other administrative sciences is relevant too), and judicial review and remedies, including tort liability. The same holds true with modern topics such as markets regulation and independent administrative authorities<sup>15</sup>.

The evolution of European integration has helped focusing the research on topics such as the role of public administrations in implementing and executing EU law, the administrative proceedings involving both national and EU authorities, and public contracts<sup>16</sup>.

### 4. WORKS

The comparative administrative law works published in Italy of by Italian scholars are very much linked to the research interests of their authors; they are often linked to the

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<sup>15</sup> P. CHIRULLI e R. MICCÙ (cur.), *Il modello europeo di regolazione. Atti della giornata di studio in memoria di Salvatore Cattaneo*, Napoli, Jovene, 2011.

<sup>16</sup> Ad es. B. MARCHETTI (cur.), *L'amministrazione comunitaria. Caratteri, accountability e sindacato giurisdizionale*, Padova, CEDAM, 2009; E. FERRARI, M. RAMAJOLI, M. SICA (cur.), *Il ruolo del giudice di fronte alle decisioni amministrative per il funzionamento dei mercati*, Torino, Giappichelli, 2006.

participation to some of the networks mentioned. Here it is enough to recall some of the works having a wider scope.

First deserving mentioning is the series *Studi di diritto pubblico comparato* edited by Franco Levi with UTET from 1971 to 1979; among the books which were published three focuses on administrative law: *La tutela del paesaggio*, edited by Levi himself (1979), *La responsabilità della pubblica amministrazione*, edited by Eugenio Cannada Bartoli (1976), and *Il controllo giurisdizionale della pubblica amministrazione*, edited by Aldo Piras (1971).

The series was probably very advanced for the times and was cut short by the untimely death of one of the less conventional among the leading figures in Turin administrative law.

More than a decade went by before Marco D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia*, was published by Il Mulino in 1992 (but never reprinted). The two already recalled books by Alfonso Masucci from the same period represent the beginning of a work on comparative administrative judicial review<sup>17</sup>.

In 2007 Giulio Napolitano edited *Diritto amministrativo comparato* as a volume in the series *Corso di diritto amministrativo* edited by Sabino Cassese with the Giuffrè publishing house; the book is divided in seven chapters: *I grandi sistemi del diritto amministrativo*, written by the editor, *L'organizzazione*, by Lorenzo Casini and Edoardo Chiti, *Il procedimento*, by Stefano Battini, Bernardo Giorgio Mattarella and Aldo Sandulli, *L'attività contrattuale*, by Alberto Massera, *La responsabilità della pubblica amministrazione*, by Luisa Torchia, *La giustizia amministrativa*, by Daria De Pretis, and *I fattori sovranazionali e internazionali di convergenza*, by Giacinto della Cananea.

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<sup>17</sup> Above fn. 3.

Foreign law is also at the centre of books which are either comparative in the sense that a number of jurisdictions are covered, Italy normally included,<sup>18</sup>, or focuses on a country different from Italy<sup>19</sup>.

A number of Italian administrative or public law journals also publish comparative articles and other contributions analysing foreign law: among them the *Rivista trimestrale di diritto pubblico* and *Diritto pubblico*; others journals do the same on a more exceptional base; *Diritto pubblico comparato ed europeo*, published by Giappichelli, has comparative law as one of its main focuses<sup>20</sup>.

Some of the most recent major works on Italian administrative law have comparative chapters. *Giustizia amministrativa* by Mario Nigro, published by Il Mulino and having gone through a number of editions has a chapter on “Le varie esperienze di giustizia amministrativa” (Different approaches to the judicial review of administrative action). *Diritto amministrativo generale*, the first two tomes of *Trattato di diritto amministrativo* edited by Sabino Cassese and published by Giuffrè (the 2nd edition was published in 2003), begins with a long comparative chapter penned by the editor on “La

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<sup>18</sup> Examples are numerous and quite disparate, sometimes focusing on the case law, other on the statutory provisions, other again on the general structure of the legal system investigated; among them, the first coming to my mind are S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell’Uomo. L’altro diritto europeo in Italia, Francia e Inghilterra*, Napoli, Jovine, 2007; R. CARANTA, *La responsabilità extracontrattuale della pubblica amministrazione. Sistemi e tecniche*, Milano, Giuffrè, 2003, R. FERRARA, *Contributo allo studio della tutela del consumatore. Profili pubblicistici*, Milano, Giuffrè, 1983.

<sup>19</sup> Here again there are numerous instances: among them B. MARCHETTI, *Pubblica amministrazione e corti negli Stati Uniti. Il Judicial Review sulle Administrative Agencies*, CEDAM, Padova, 2005, and P. CHIRULLI, *Attività amministrativa e sindacato giurisdizionale in Gran Bretagna. Dal locus standi alla justiciability*, Torino, Giappichelli, 1996.

<sup>20</sup> www.dpce.it

ricostruzione del diritto amministrativo: Francia e Regno unito” (Building administrative law: France and United Kingdom).

Translations help in spreading the knowledge of and the interest in administrative law beyond our borders. The series “Civiltà del diritto” (The Civilisation of Law) again published by Giuffrè included a large number of translations, among them the *Diritto pubblico* by C.F. Gerber (1971). More recently, a number of works have been translated in the newer series by the same publisher “Giuristi stranieri di oggi” (Foreign Modern Legal Thinkers) (e.g. E. GARCÍA DE ENTERRÍA, *Le trasformazioni della giustizia amministrativa*, 2010; D.J. GALLIGAN, *La discrezionalità amministrativa*, 1999). Here again however civil and constitutional law books much outnumber administrative law ones.

More translations are published outside these series, including books, such as recently J.L. SILICANI, *Libro bianco sull'avvenire dei funzionari pubblici : per la Francia del domani*, with preface to the Italian edition and translation by Roberto Cavallo Perin and Barbara Gagliardi and notes by Barbara Gagliardi e Barbara Pallisco<sup>21</sup>.

## 5. CONCLUSIONS

Comparative administrative law in Italy has much grown in a relatively short timeframe. It is however doubtful whether the comparative approach has been fully accepted as a research method on the same standing as dogmatic works investigating the Italian scholarly tradition.

In the meantime, at least in Europe the context has much changed. The potential relevance of the knowledge of foreign law is no more limited to a purely cultural dimension or to the search for best practices. Comparative law is instrumental in building law in

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<sup>21</sup> Napoli, Jovene, 2011.

Europe, both within the European Union and with reference to the European Convention of Human Law<sup>22</sup>.

In this framework, one initiative which sees the active involvement of many academics from Turin University is the *European Procurement Law Group*, which meets once every year and whose proceedings are regularly published<sup>23</sup>.

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<sup>22</sup> See, besides S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo*, cit., R. CARANTA, *Pleading for European Comparative Administrative Law: What is the Place for Comparative Law in Europe?*, in K.J. DE GRAAF, J.H. JANS, A. PRECHAL, R.J.G.M. WIDDERSHOVEN (eds.) *European Administrative Law: Top-Down and Bottom-Up*, Groningen, Europa Law Publishing, 2009, 155; M.E. COMBA, *L'esecuzione delle opere pubbliche, con cenni di diritto comparato*, in F.G. SCOCA, F.A. ROVERSI MONACO, G. MORBIDELLI, *Sistema del diritto amministrativo italiano*, Torino, Giappichelli, 2011,

<sup>23</sup> See S. TREUMER – F. LICHÈRE (eds) *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJØF, 2011; R. CARANTA and M. TRYBUS (eds.) *The Law of Green and Social Procurements in Europe*, Copenhagen, DJØF, 2010; M. COMBA and S. TREUMER (eds.), *The In-House Providing in European Law*, Copenhagen, DJØF, 2010.