

From ‘comparative administrative law’ to common constitutional traditions

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I. Course outline and aims

This course introduces you to comparative administrative law and shows that it has been considered in very different ways across time. It introduces you to the different approaches and theories. Methodologically, it is based on the discussion of cases and materials, previously circulated, including treaty provisions and judicial decisions. Together with these cases and materials, for each lesson there is one piece that should be read by all students before the lesson; those who wish to know more find other references within the syllabus. Moreover, the course has a strong focus on the European legal area, even though some of the materials will cross the boundaries between national, European and international law. Students are expected to reflect on the complexity of the relations between these levels. Precisely for this reason, students will be encouraged not only to actively participate to the debate, but also to make reference to their own national principles concerning, for example, legality, due process of law and the privilege against self-incrimination. The aim of the course, ultimately, is to encourage reflection and discussion.

II. Structure of the course

1. Introduction

- A) A quick look at the argument: administrative law as “*une des formes de l’etat nouveau du monde*”; necessity to distinguish between comparative approaches in their general terms and those concerning the European legal area
- B) Legal theories
 - i. Montesquieu: similarity within diversity
 - ii. Dicey: incommensurability of national laws
 - iii. Hegel: separation of internal and external public law
 - iv. Rivero: commonality of public law in Europe
- C) Legal realities: judicial decisions and international treaties

Preliminary reading:

R. Schlesinger, *Research on the general principles of law recognized by civilized nations*, AJCL, 1957

Cases and materials

- French *Conseil d’Etat, Blanco* (1872)
- US Supreme Court, *Lawrence v Texas* (2003), excerpt
- Statute of the permanent court of international justice (1920), article 38
- Statute of the International court of justice (1948), article 38
- Statute of London establishing the Council of Europe (1949), article 3
- Treaty of Rome (1957), articles 173 and 215

Further reading

- A. de Tocqueville, *L'ancien régime et la Révolution* (1856; Eng. transl.; excerpt)
- Montesquieu, *L'esprit des lois* (1748; Engl. transl.; excerpt)
- J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif* (1980)
- S. Cassese, *Une des formes de l'état nouveau du monde: réflexions sur le droit administratif français* (1994)
- S. Rose-Ackermann & P. Lindseth, *Comparative Administrative Law* (2012, 2nd ed.)
- G. della Cananea, *Il nucleo comune dei diritti amministrativi in Europa. Un'introduzione* (2019, monograph in Italian, available at: <http://www.coceal.it/pdf/della%20cananea%20Libro.pdf>)

2. The comparative study of administrative law within and outside the OECD: diversity, parallel developments and legal transplants

- A) A caveat on 'best practices'
- B) Diversity: judicial independence and judicial review
- C) Parallelism: administrative due process of law in *fin de siècle* Europe (1890-1910); Administrative Procedure Acts in Europe (1925-2020)
- D) Legal transplants: the grounds of judicial review in France, Italy and the EEC; the aftermath of the Austrian Administrative Procedure Act (1925)

Preliminary reading

G. della Cananea, *The Regulation of Administrative Procedures in Europe: a Historical and Comparative Perspective*, ERPL (2020)

Cases and materials

- French *Conseil d'Etat*, concept of *detournement de pouvoir*
- Article 3, Italian law of 1889
- Article 173 of the Treaty of Rome
- AG Lagrange, Opinion in Case 3/1954, *Assider*
- Administrative Procedure Acts of Italy, the Netherlands and Sweden (excerpts)

Further reading

- Sabino Cassese, *The legislative regulation of administrative procedure* (1992)
- P. Craig, *Judicial Review and Questions of Law: A Comparative Perspective* (2009)
- G. della Cananea & S. Mannoni (eds), *Administrative Justice: fin de siècle (1890-1910)* (OUP, 2021)
- S. Rose-Ackermann & P. Lindseth, *Comparative Administrative Law. Outlining a Field of Study* (2012)
- Tom Ginsburg, *Comparative Administrative Procedure: Evidence from Northeast Asia* (2002)
- G. Zhu (ed.), *Deference to the Administration in Judicial Review. Comparative Perspectives* (2019)

3. Commonality (I) General principles of law common to a plurality of legal orders: the legality of administrative action
- A) Variety of views about the rule of law
 - B) The rule of law in Europe: the treaties establishing the Council of Europe and the European Union
 - C) Legality and the withdrawal of unlawful administrative acts: the European Court of Justice's ruling in *Algera*

Preliminary reading

T. Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 am. J. Comp. L. 493, 494 (1991)

Cases and materials

- Statute of London, establishing the Council of Europe
- ECJ, Joined cases 7/56, 3/57 to 7/57, *Algera et al. v Common Assembly of the ECSC*
- AG Lagrange, opinion in Joined cases 7/56, 3/57 to 7/57, *Algera et al. v Common Assembly of the ECSC*

Further reading

- P. Craig, *Formal and substantive conceptions of the rule of law: an analytical framework*, PL (2005)
- M. Letourner and R Drago, *The Rule of Law as Understood in France*, AJCL, 1958
- J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice des Communautés européennes*, AFDI 1958
- J. Schwarze, *The Convergence of the Administrative Laws of the EU Member States*, EPL 1991

4. Commonality (II) General principles of law common to a plurality of legal orders: administrative due process of law
- A) Variations on a given theme: Seneca's *Medea* and its reception in England
 - B) Due process as a general principle of law of the European Community
 - C) Due process in the US

Preliminary reading

G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (OUP, 2016), ch. 9

Cases and materials

- Seneca's *Medea* (excerpt)
- Opinion of the AG Lagrange in case 32/62, *Alvis v. Council*

- US Constitution, Fifth amendment
- US Supreme Court, *Boumediene v. Bush* (2008)

Further reading

- P. Craig, *The HRA, Article 6 and Procedural Rights*, PL (2003)
- T.M. Scanlon, *Due Process* (1977), ch. 3

5. Commonality (III). Common constitutional traditions: *nemo tenetur se detegere*
- A) *Miranda* and the privilege against self-incrimination
 - B) “Common constitutional traditions”: judicial decisions and treaty provisions
 - C) The right to be silent within administrative procedure in the EU: the Italian Constitutional Court’s preliminary reference to the ECJ and the opinion of the AG

Preliminary reading

S. Cassese, *Common Constitutional Traditions in the EU*, RTDP, 2017

Cases and materials

- US Supreme Court, *Miranda v. Arizona* (1966)
- Italian Constitutional Court’s preliminary reference to the ECJ (2019)
- Opinion of AG Pikamae, Case C-481/19, *DB v Consob*

Further reading

- G. della Cananea, *Common constitutional traditions taken seriously: process rights*, ERPL 2020
- A. Stone Sweet & C. Ryan, *A Cosmopolitan Legal Order. Kant, Constitutional Justice and the European Convention on Human Rights* (OUP, 2018)

III. Assessment

The course is a research-led one, without a textbook (but those who wish to use one can look at Lindeth and Rose-Ackermann). It will be assessed using coursework only. There will be an assessment based on a take-home exam; that is, a 1.500/2.000 words essay on one of the topics selected by the teacher. This will provide students with an opportunity to develop their own research and writing skills and obtain feedback thereon.