

THE NEED FOR COMPARATIVE ADMINISTRATIVE LAW STUDIES IN LATIN AMERICA

HÉCTOR A. MAIREL*

“La Poesia non è di chi la scrive,
è di chi gli serve” (Il Postino)

INTRODUCTION

During most of the 20th Century comparative law was concerned primarily with private law, to the extent that, in spite of its ancient roots, it could be queried whether comparative public law should be called a “neglected discipline”¹. Important contributions in the field of public law existed, partly as a result of the interest of common law jurists in French administrative law², but the principal focus of comparative lawyers remained fixed on private law³.

The last decades have seen, however, a growing interest in comparative public law. This happened, first, in the field of constitutional law due to the development of

* Professor of Law, National Univ. of Buenos Aires; MCL, Southern Methodist Univ.; Visiting Scholar, Harvard Univ.; Visiting Scholar, Cambridge Univ.; Fellow, Advance Leadership Initiative, Harvard Univ. (2015).

¹ See G. F. Ferrari, “Le origini storiche della comparazione pubblicistica” (2012) 1 *Diritto Pubblico Comparato ed Europeo* 3; A. Harding, “Comparative Public Law: A Neglected Discipline?” in I. Edge (ed), *Comparative Law in Global Perspective* (2000) 101.

² Their positions varied from the disparagement, subsequently toned down, of A.V. Dicey (*An Introduction to the Study of the Law of the Constitution*, 8th edn 1915) to the more sympathetic analysis of F. J. Goodnow (*Comparative Administrative Law*, 1903) and, half a century later, of B. Schwartz (*French Administrative Law and the Common Law World*, 1954). The casebook of Arthur von Mehren and James R Gordley (*The Civil Law System*, 2nd edn, 1977) also had important sections on French public law. See G. A Bermann, “Comparative Law in Administrative Law”, in *Mélanges en l’honneur du Guy Braibant* (1996) 29, at 31-32.

³ F. Werro, “Comparative Studies in Private Law”, in M. Bussani & U. Mattei (eds), *The Cambridge Companion to Comparative Law* (2012) 117. The International Congress of Comparative Law held in Paris in 1900, where the French jurist R. Saleilles was the key figure, dealt with private law issues. Most comparative law authors (such as Rabel, Gutteridge, Gorla and Zweigert) also worked in that field: see J. Bell, “La comparaison en droit public”, in *Mélanges en l’honneur de Denis Tallon* (1999) 33 at 34.

constitutional courts in several European countries after the Second World War⁴. Subsequently, the enactment of new constitutions in Eastern European countries after the fall of the Iron Curtain gave additional impetus to comparative studies in the field⁵. A significant amount of books and articles now exist on the subject⁶.

Widespread interest on comparative administrative law is a more recent arrival. The creation of the European Union, and the resulting growth of its administrative law, has required EU courts to construct rules from the laws of the member States, thus forcing a comparative analysis of those laws⁷. Also, due to the growing impact of community administrative law on the national laws of the member States, it has been said that in order to know the administrative law of any European country, it is now necessary to learn also about the administrative laws of the other States⁸. Finally, reference should also be made to the growing importance of the so-called “global administrative law”⁹, that brings about the issue of comparative administrative law putting into the forefront the topics analyzed in this paper. Several books and other works in the field of comparative administrative law have recently been published¹⁰.

⁴ See Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989) 185-89.

⁵ K. Lane Scheppelle, “Administrative state socialism and its constitutional aftermath”, in S. Rose-Ackerman & P. L. Linseth (eds), *Comparative Administrative Law* (2010).

⁶ See, eg V. C. Jackson & M. Tushnet, *Comparative Constitutional Law* (3rd edn, 2014); M. Rosenfeld & A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012); M. Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2014) and the bibliography cited therein. There is a long standing work of comparative constitutional law in Italy: G. de Vergottini, *Diritto Costituzionale Comparato* (6th edn, 2004). France also has a long tradition of comparative constitutional law, from the work of A. Esmein (*Elements de Droit Constitutionnel Français et Comparé*, 6th edn, 1914) to more modern works such as F. Hamon, M. Troper & G. Burdeau, *Droit Constitutionnel* (27th edn, 2001). An International Journal of Constitutional Law has been published since 2003.

⁷ See J. Schwarze, *European Administrative Law* (1992) 4; P. Craig, *EU Administrative Law* (2006), 264. See also V. Zeno-Zencovich & N. Vardi, “European Union Law as a Legal System in a Comparative Perspective”, *European Business Law Review* (2008) 243, making the point that “EU law is dominantly administrative law” (at 250, 262).

⁸ See D. Sorace, “L’insegnamento del Diritto Amministrativo”, *Diritto Pubblico* (2001) 1119.

⁹ See ex-multis S. Cassese et al (eds), *Global Administrative Law: The Casebook* (3rd ed), IRPA 2012 (downloadable at <http://www.irpa.eu/gal-section/global-administrative-law-the-casebook-2/>); B Kingsbury, N Krisch, RB Stewart, “The Emergence of Global Administrative Law”, 68 L & Cont. Prob. 15 (2005).

¹⁰ See *Comparative Administrative Law* (n 5); G. Napolitano (ed), *Diritto Amministrativo Comparato* (2007), (vol 4 of the *Corso di Diritto Amministrativo*, S. Cassese dir, 2d edn, 2006); JGH Seerden (ed), *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis* (3rd edn, 2012). See also the chapters on administrative law in several “handbooks” on comparative law, such as those written by J. S. Bell in *The Oxford Handbook of Comparative Law* (M. Reimann & R. Zimmermann eds, 2006) 1259; by J. Bell in *Comparative Law – A Handbook* (E. Orucu & D. Nelken, eds, 2007) 287; and by F. Bignami in *Cambridge Companion* (n 3) 145. See also E. Schmidt-Aßmann, “Administrative Law in Europe: Between Common Principles and National Traditions”, in M. Ruffert (ed.), *Administrative Law*

This paper will argue that a similar strong need for comparative administrative law studies exists in Latin America¹¹, although for a different reason: While the importance of those studies in Europe stems from the need to extract common principles from the different national laws, in Latin America the first issue that presents itself is the consistency of the different sources of each of the national laws and the resulting need to take due account of the differences among all the donor systems in order to better understand one's own law.

Because of the multiplicity of such sources, Latin America's reception of foreign legal rules has been called eclectic and even "kaleidoscopic"¹². This eclecticism has been criticized as "wild" and lacking reflection, giving rise to a "comparatist's dream"¹³. The need for comparative law studies in Latin America arises from that eclecticism: "the fact that so much Latin-American legislation has foreign origins explains why comparative law is of paramount practical importance"¹⁴. These comments, generally made with respect to private law, are also true for public law. Indeed, Latin American law has been described as "a patchwork of French civil code, U.S. and Spanish constitutional texts, Italian criminal law, German administrative law, and the like"¹⁵.

Legal transplants, that is, the "moving of a rule or a system of law from one country to another"¹⁶, are thus rampant in Latin America. In some countries, even indirect transplants exist, as is the case of German administrative law doctrines imported into Latin America, not directly from Germany, but through Spanish authors¹⁷.

in Europe: Between Common Principles and National Traditions (2013) 5, 9: "Nowadays there is no need to lament a perceived inferiority of administrative legal comparison with respect to private law".

¹¹ In this paper, the term "Latin America" will be employed in the usual sense of comprising all the countries of the Western Hemisphere that were once colonies of Spain or Portugal, but not of other European countries. "Iberoamerican" would be a more correct term, but it is less used. For possible different meanings of this term, see J. O. Frosini & L. Pegoraro, "Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?" (2008) 3 (2) *J Comparative Law* 39 at 40.

¹² A. Gambaro & R. Sacco, *Sistemi Giuridici Comparati* (part of the *Trattato di Diritto Comparato*, 1996) 401.

¹³ See J. Kleinheisterkamp, "Development of Comparative Law in Latin America", in *Oxford Handbook of Comparative Law* (n 10) 261, 282, 293-95, 300.

¹⁴ E. Hernández Bretón, cited by Kleinheisterkamp (n 13).

¹⁵ See J. L Esquirol, "The Failed law of Latin America", 56 *American J Comparative L* (2008) 75, 96.

¹⁶ A. Watson, *Legal Transplants: an approach to Comparative Law* (2nd edn, 1993) 21.

¹⁷ See Chapter I, Section 1 (b) below with respect to the German doctrine of "relations of special subjection".

Due to the aforementioned eclecticism in its reception of foreign laws, the key issue of comparative administrative law in Latin America is how to deal with the problems that arise when a host legal regime borrows rules from donor systems that show fundamental differences among themselves. Incompatibility is an obvious consequence¹⁸, but examples of distortion and exaggeration of foreign doctrines also exist. With this perception as a basis, the method and scope of a comparative administrative law course for the region can be explored.

Chapter I of this paper will thus endeavor to make the case for *the need of* comparative law studies in Latin America in the field of administrative law. In its first section, the situation in Argentina will be explained: The adoption of the United States constitutional model and the subsequent reception of Continental European administrative law will be described, and examples of the different situations that result from the diversity of the imported legal rules will be given, thus making evident the uses, and purposes, for comparative law studies in this field in Argentina. In the second

¹⁸ This paper answers Professor Miller's characterization of my legal writings (which criticize the wholesale importation of French administrative law into the Argentine constitutional system that follows the U.S. model, as an "entrepreneurial transplant" (J. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", 51 Am J Comp L 839 (2003)). Miller, who has studied in great depth the importation of the US constitutional model by Argentina, analyzes, *inter alia*, a type of legal transplants which he calls "entrepreneurial" defining it as that one proposed by individuals "who reap benefits from investing their energy in learning and encouraging local adoption of a foreign legal model". Thus, "foreign degrees and expertise, and international networks, are used to build positions at home", and those involved in proposing such transplants expect "concrete payoffs" (not necessarily pecuniary). Entrepreneurial transplants generate "unproductive academic battles" because each practitioner fights "to preserve his own comparative advantage".

Miller's argument implies that, for Argentina, the choice between a transplant from the US legal system, or from French public law (as defended by the other Argentine author he mentions), is equally defensible. I believe, instead, and try to prove in this paper, that when a country has chosen a given organizational model (the US Constitution in the case of Argentina) it should not then import public law institutions from incompatible models. Regardless of the "sociological factors" that Miller describes (eg where the local lawyers have conducted their studies abroad) there is a logic in the chosen model that should be respected.

Miller does not take into account the different times at which transplants can be proposed and defended. In a country that is building its public law system anew, as it may have happened recently in Eastern Europe, perceived benefits arising from a given source of the transplant may be an important motivation for those who propose it, and thus the "entrepreneurial" type of transplant may be observed. But when the transplant has already taken place (a century and a half ago, as in the case of Argentina's Constitution), the situation changes: I hope to show in the present work that the need for consistency in the importation of foreign rules overrules the expertise of the practitioner, or the languages he speaks. Also, the pre-existence of the imported foreign model may well determine the country where to conduct further legal studies that is chosen by practitioners willing to specialize in a given field.

section of this first chapter, I will argue that a similar, but less serious, situation exists in other Latin American countries. Examples of possible uses of comparative administrative law for the region, some general, and others more topical, will be provided. Chapter II will deal with the *teaching* of comparative law in Latin America. Its first section will draw on the previous description of the diversity of legal sources, in order to suggest how a course of comparative administrative law that provides useful insights for the region, could be structured. The second section will describe a post graduate introductory course on comparative administrative law taught by the present writer in the National University of Buenos Aires for the last twenty years. A general conclusion will be offered at the end.

I. THE CASE FOR COMPARATIVE LAW STUDIES IN LATIN AMERICA

1. THE CASE FOR ARGENTINA

a) The background

i) The constitutional organization

Argentina became independent in the years 1810 to 1816. After several decades of civil war, the country was organized in the middle of the 19th Century. At that time, the influence of the constitutional system of the United States, the first republic of the continent, was very strong in Latin America¹⁹, and that was the model followed by Argentina.²⁰

Pursuant to its 1853 Constitution, the fourth oldest constitution still in force, (as amended)²¹, Argentina is a federal country, with three sharply defined and separated powers: the Executive (called “President”) elected directly by the people for a fixed term of office that does not depend on the continuous support of the legislators (i.e. the system is presidential and not parliamentary); a bicameral Congress that includes a Lower House, whose representatives are elected by the different electoral districts on the basis of their population, and a Senate where each State (“Province”) has the same

¹⁹ R. David, *L'Originalité des Droits de l'Amérique Latine* (1950) 8; K. L. Karst & K. S. Rosen, *Law and Development in Latin America* (1975) 4; Kleinheisterkamp (n 13) 268, 285; H. Fix-Fierro & P. Salazar-Ugarte, “Presidentialism”, in *Oxford Handbook of Comparative Constitutional Law* (n 6) 628, at 634-36.

²⁰ See M. J. García Mansilla & R. Ramírez Calvo, *Las Fuentes de la Constitución Nacional* (2006) 3-14; C. F. Rosenkrantz, “Against borrowings and other non-authoritative uses of foreign law”, 1 *International J Constitutional L* (2003) 269, 270 (quoting J. Benjamín Gorostiaga, one of the drafters of the 1853 Constitution, who said that it was “cast in the mold of the Constitution of the United States”).

²¹ Amendments that are still in force were introduced in 1860, 1866, 1898, 1957 and 1994.

number of representatives regardless of its population; and a Judicial Power governed by constitutional rules that are mainly a translation of Article III of the United States Constitution. Although the Argentine Constitution does not provide so expressly, the Judiciary has the acknowledged power to declare congressional statutes unconstitutional and Executive decisions illegal or unconstitutional, as the case may be²². No administrative tribunals with general jurisdiction exist and, according to the jurisprudence of the Argentine Supreme Court, the constitutional guarantee of due process requires that decisions of the few such tribunals that have been created with specialized competence (e.g. the Tax Court) be subject to judicial review²³.

Recognizing the importance of the United States constitutional model does not negate the more limited influence of other constitutions, such as the Spanish Constitution of 1812 (“the Cadiz Constitution”)²⁴, from which we took the express grant to the Executive of the power to issue the regulations needed to implement Congressional statutes²⁵. Another important difference with the United States model is that, although the federal government and each province has its own administrative and procedure law, common law (in the U.S. sense, e.g. civil and commercial law) is of national scope²⁶.

However, the structure of the three powers and the bill of rights of the 1853 Constitution follow closely its main model. Thus, from the first years of its creation in 1863, the Argentine Supreme Court has cited precedents of the U.S. Supreme Court as authority, and continues to do so at this date, albeit with less frequency²⁷.

ii) The reception of Continental European administrative law

²² Argentine Federal Supreme Court (SCJN) *Ríos, Gómez y Ríos*, Fallos de la Corte Suprema de Justicia de la Nación (Fallos) 1-32 (1863), *Tomkinson*, Fallos 1-64 (1864), both with respect to Executive decisions; *Municipalidad c Elortondo*, Fallos 33-162 (1888) with respect to a Congressional statute.

²³ The leading case is SCJN, *Fernández Arias c Poggio*, Fallos 247-646 (1960).

²⁴ For a proper appraisal of the influence of the Cadiz Constitution, that has been exaggerated by some, see García Mansilla & Ramírez Calvo (n 20) 107-37.

²⁵ Argentine Constitution, art 99, para 2. Traditionally, this power has been construed narrowly to encompass only the rules that must be applied by government officers in order to implement the law: see A. Gordillo, 1 *Tratado de Derecho Administrativo* (10th edn, 2009) VII-40.

²⁶ Argentine Constitution, art 75, para 12.

²⁷ See J. M. Miller, “The Authority of a Foreign Talisman: A study of US Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith”, 46 *American Univ L Rev* (1997) 1483; and “Judicial Review and Constitutional Stability: a Sociology of the US Model and its Collapse in Argentina”, 21 *Hastings Int & Comp LR* (1997) 839.

In the second half of the 19th Century, once Argentina had been organized, its elite turned its eyes towards France, that was then the cultural center for Latin countries. As Jorge Luis Borges wrote, “Apart from blood and language... France influenced us more than any other country”.²⁸

In the legal field, this was first noticeable in civil law, where the influence of the Code Napoleon and its commentators was intensely felt²⁹. Later, by the end of the 19th Century, French administrative law became the focus of attention, at a time when U.S. administrative law was still considered undeveloped. Ferreyra, an Argentine author, wrote in those years that “there is nothing to learn in this field from the United States”³⁰. Instead, French authors such as Edouard de Laferrière³¹ and, already in the 20th Century, Leon Duguit³², Maurice Hauriou³³ and Gaston Jèze³⁴, were avidly read and thus the doctrines of the *école du service public* became influential in Argentina³⁵.

Spanish and Italian administrative law writers were also read in those same years, such as the Spaniards Manuel Colmeiro³⁶ and, in the 20th Century, Carlos García Oviedo³⁷ and Recaredo Fernández de Velasco³⁸; as well as the Italians Vittorio Orlando³⁹, Santi Romano⁴⁰, Oreste Ranelletti⁴¹ and Guido Zanolini⁴². The *contencioso-administrativo*

²⁸ From his “Prólogo de prólogos”.

²⁹ See David (n 19) 15; R. Salvat – V. N. Romero del Prado, 1 *Derecho Civil Argentino, Parte General* (10th edn, 1954) 122-23.

³⁰ See E. Zimmermann, “Circulación internacional de saberes jurídicos y formación del estado: Argentina 1860-1930” presented in the Ciclo de Debates en Historia del Derecho, Porto Alegre, November 3-5, 2011.

³¹ *Traité de la Juridiction Administrative* (1888-96).

³² *Traité de Droit Constitutionnel* (1911).

³³ *Précis de Droit Administratif et de Droit Public Général* (1900-01).

³⁴ *Les Principes Généraux du Droit Administratif*, translated into Spanish as *Los Principios Generales del Derecho Administrativo* (1948). See A. Jacquemet-Gauche, “Gaston Jèze et les droits étrangers”, *Rev Française de Droit Administratif* (2012) 153, 157 (mentioning the conferences given by Jèze in Argentina).

³⁵ The report on the concession of public services approved by the 4th National Conference of Lawyers held in 1936 in Tucuman (published in JA 61, Sección Doctrina 90, 1938) was a faithful rendering of Jèze’s writings and remains to this day the best description of Argentine law on the subject.

³⁶ *Derecho Administrativo Español* (2nd edn, 1876).

³⁷ *Derecho Administrativo* (1943).

³⁸ *Los contratos administrativos* (1927); *El acto administrativo* (1929); and *Resumen de Derecho Administrativo y de Ciencia de la Administración* (1930-31).

³⁹ *Principi di Diritto Amministrativo* (1891).

⁴⁰ *Corso di Diritto Amministrativo* (1937).

⁴¹ *Teoria degli atti amministrativi speciali* (7th edn, 1945); *Corso di Istituzioni di Diritto Pubblico* (1946).

⁴² *Corso di Diritto Amministrativo* (8th edn 1958).

regime that Spain had put in place with the Santamaría de Paredes and Maura laws⁴³, although less advanced than the French system, because it only allowed for the protection of rights but not of interests, was imitated by some Argentine provinces that enacted *contencioso-administrativo* codes of procedure, thus resorting to the Spanish denomination⁴⁴. Other provinces subsequently enacted similar codes but added the protection of interests with an action, similar to the French *recours pour excès de pouvoir*⁴⁵. None of these provincial laws created a special system of courts but, instead, allocated competence on *contencioso-administrativo* matters to the provincial Supreme Court⁴⁶.

In the middle of the 20th Century, a new branch of the federal courts, also called *contencioso-administrativo* as in Spain, was created, and to it all competence on administrative laws matters, previously exercised by the federal courts with competence on civil and criminal matters, was gradually allocated⁴⁷. Its members were, and still are, appointed by the same process as all other federal judges and have the same constitutional protections. The subsequent growth of the “administrative State” made these courts the main forum for trying cases against the federal government. The existence of this new branch, that imitates the Spanish system of a specialized judiciary (which fulfilled Colmeiro’s wish to “free the administration from the yoke of the ordinary courts”⁴⁸), helped the expansion of an administrative law that followed continental European models. However, the federal Argentine Supreme Court has never been separated in chambers (as, instead, the Spanish *Tribunal Supremo* is⁴⁹), and thus exercises its jurisdiction, that concerns mainly constitutional and federal law matters (including appeals from the *contencioso-administrativo* and other federal courts), as a single court.

Spanish influence grew stronger with the enactment in 1972 of the Argentine Administrative Procedure Law⁵⁰, that took some rules from that country, most noticeably the general need to exhaust administrative remedies within a term of days, in order to

⁴³ These laws were passed in 1888 and 1904, respectively.

⁴⁴ See the *contencioso-administrativo* codes of the Provinces of Buenos Aires (1905) and Salta (1908).

⁴⁵ See the *contencioso-administrativo* codes of the Provinces of Cordoba (1941) and Santa Fe (1951).

⁴⁶ See in M. J. Argañaraz, *Tratado de lo Contencioso-Administrativo* (1955) the list of all the provincial constitutional rules existing at the time that so provided.

⁴⁷ Laws 12,967 (1947) and 13,278 (1948). Today, in many of the Argentine provinces, a single federal judge may have competence on all matters (civil, criminal and administrative).

⁴⁸ *Derecho Administrativo Español* (n 36) 359-360.

⁴⁹ Spanish Constitution, art 123, para 1; Organic Law of the Judicial Power, arts 55-61 (but see art 61 with reference to the composition of the *Tribunal Supremo* to decide *recursos de revisión* against decisions of its *Contencioso-Administrativo* Chamber).

⁵⁰ Law 19,549 (enacted by a *de facto* government) (hereinafter “APL”).

keep the right to judicial review. Spanish authors such as Fernando Garrido Falla, Eduardo García de Enterría and Tomás-Ramón Fernández, who wrote throughout the second half of the 20th Century, were, and still are, widely read and cited in Argentina⁵¹.

German administrative law also became known in Argentina from translations into Spanish or French of Otto Mayer and Forsthoff⁵², and also from the reception by Spanish authors of German doctrines such as that of special relations of subjection, about which more below.

The sources for this importation of European administrative law were traditionally limited to treatises and, in some cases, text books. All the complexities of French administrative law, as reflected in the carefully crafted decisions of the *Conseil d'État*, and explained in the opinions of the *commissaires du gouvernement*⁵³, and in articles published in law journals, could not be apprehended from works that must sacrifice nuances for the sake of didactic clarity. A characteristic that is shared by other countries of the region also contributed to this loss of meaning: it has been remarked, generally, that Latin American professors show a “scornful attitude... towards the analysis of judicial or administrative decisions, which they dismiss as an inferior reasoning or as mere casuistry.”⁵⁴ Thus, in one of the volumes of the most authoritative Argentine administrative law treatise, almost one thousand citations of French authors can be found, against only two mentions of *arrêts* of the *Conseil d'État*⁵⁵. Doing research thirty years ago, the present writer could not find available in Argentina a single set of Lebon, the collection of decisions of the *Conseil d'État*.

However, the criticism becomes muted when the context is considered. At the time when the classic works of Argentine administrative law were written (i.e. the forty years between the 1920's and the 1960's) there was little travel between Europe and

⁵¹ F. Garrido Falla, *Tratado de Derecho Administrativo* (1958); and E. García de Enterría & Tomás-Ramón Fernández, *Curso de Derecho Administrativo* (1974).

⁵² O. Mayer's main work was translated into French as *Le Droit Administratif Allemand* (1904) and subsequently into Spanish as *Derecho Administrativo Alemán* (1982); while E. Forsthoff's was translated into Spanish as *Tratado de Derecho Administrativo* (1958). In *Carman de Cantón c Gobierno Nacional* (Fallos 175-368, 1936), the Argentine Supreme Court adopted Mayer's definition of the administrative act.

⁵³ Called “*rapporteurs publics*” since 2009.

⁵⁴ B. Kozolchyk, cited by Karst & Rosen (n 19) 67-68. It must be acknowledged, also, that the classic Italian and Spanish administrative law works which Argentine writers followed, had few, if any, citations of cases and preferred citations from other doctrinal works: see, eg, Zanobini, *Corso di diritto amministrativo* (n 42) *passim*; see also S. Alvarez-Gendín, 1 *Tratado General de Derecho Administrativo* (1958) 240-44, negating that Spanish court precedents may constitute even a subsidiary source of the law.

⁵⁵ See M. S. Marienhoff, 3-A *Tratado de Derecho Administrativo* (1965) *passim*.

South America except for the very wealthy (or the immigrants), and few law professors, if any, had conducted studies abroad. Thus, local works were written on the basis of readings of European law books, without direct contact with the European legal milieu. Argentine professors built their personal libraries of foreign law books at their own expense and quoted widely from them. As law libraries open to the public were scarce and carried few, if any, foreign law books or journals, everyone else had to take those citations at face value and was, thus, effectively limited to commenting on the writings of the Argentine professors without being able to check their sources.

Two features of this importation are worth noting. First, the promiscuous adoption of foreign legal rules and doctrines, without great reflection on their compatibility with the public law system into which they sought to be incorporated⁵⁶. Argentine administrative law treatises quote European authors from their first pages without offering any general description of the public law systems from where those citations are taken. In Constantinesco's terms, no attention was, or even today is, given to determinant factors⁵⁷. Thus, all foreign rules are considered fungible and equally applicable. Citations from French, Italian and Spanish authors abound, but also from Portuguese⁵⁸ and, from translations into French or Spanish, from German⁵⁹ and even Greek works⁶⁰. There are also cross references to other Latin American administrative law professors who work with the same European materials⁶¹. As a contrast, almost no citations from the United States or other common law systems can be found in Argentine administrative law books.

The differences between systems of single and double jurisdiction are normally ignored, as are the effects of the French jurisdictional system on its substantive administrative law. An anecdote, which the present author witnessed, constitutes an eloquent example of this attitude: In a conference on administrative contracts held in Argentina in 1978, where André de Laubadère was the guest of honor, Guglielmo

⁵⁶ See Héctor A Mairal, "Algunas reflexiones sobre la utilización del derecho extranjero en el derecho público argentino", in Javier Urrutigoity (coord), *Estudios de Derecho Administrativo II* (2000) 41.

⁵⁷ L.-J. Constantinesco, 1 *Traité de Droit Comparé* (1972) 206-21.

⁵⁸ M. Caetano (*Manual de Direito Administrativo*, 3rd edn, 1951) was the Portuguese author most cited.

⁵⁹ See n 52.

⁶⁰ Eg the *Traité des Actes Administratifs* by Michel Stassinopoulos (1954).

⁶¹ The classic treatise of the Uruguayan author E. Sayagués Laso (*Tratado de Derecho Administrativo*, 1963) cites the same European authors that can be found in Argentine books of that period, and he himself is cited by Argentine authors: see Marienhoff, 1 *Tratado* (n 55) Bibliography.

Roehrssen di Cammaratta, at that time a member of the Italian Constitutional Court, who was also invited, was asked why Italy did not follow the doctrine of the *contrat administratif*. No one remarked that his answer —“because controversies arising from the performance of government contracts involve subjective rights which in Italy are tried before the judicial courts”— applied equally to Argentina where, in spite of the absence of an administrative jurisdiction, the doctrine of the administrative contract enjoys widespread acceptance.

In Argentina, constitutional law and administrative law are taught as totally separate subjects, each one with its own professors who cite, in the first case, U.S. legal precedents and, in the second case, European doctrines⁶². Thus, for many years Executive emergency decrees with the force of law were considered unconstitutional in the former course (which could cite the United States case of *Youngstown Sheet* ⁶³ as authority), but accepted by administrative law writers with citations from continental European authors⁶⁴. The administrative position prevailed and emergency decrees with the force of law were expressly accepted by the Supreme Court in *Peralta*⁶⁵ and finally incorporated in the 1994 Constitutional Amendment⁶⁶, leaving to a subsequent Congressional statute the task to rule on their effects⁶⁷. The existence of the administrative law doctrine in favor of emergency decrees thus paved the way for the constituent assembly to ignore the obvious question: does granting to the Executive the

⁶² When the present author began his teaching career in the National University of Buenos Aires, proficiency in a foreign language was required: English was accepted if one was to teach constitutional law but, in order to teach administrative law, French, Italian or German was demanded.

⁶³ *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952). See S. V. Linares Quintana, 9 *Tratado de la Ciencia del Derecho Constitucional Argentino y Comparado* (2nd edn, 1987) 691.

⁶⁴ See B. Villegas Basavilbaso, 1 *Derecho Administrativo* (1950) 292; M. M. Diez, 1 *Derecho Administrativo* (1963) 446-59.

⁶⁵ SCJN, *Peralta, Luis v Estado Nacional*, Fallos 313-1513 (1990). See D. Fernández Rubio & M. Goretti, “When the President Governs Alone: The *Decretazo* in Argentina”, in J. M. Carey & M. Soberg Shugart (eds), *Executive Decree Authority* (1998) 33.

⁶⁶ Argentine Constitution, art 99, para 3: “In no case shall the Executive Power be able, under sanction of absolute and incurable voidness, to issue rules of a legislative nature. Only when exceptional circumstances make it impossible to follow the ordinary procedures provided by this Constitution for the enactment of laws, and provided no criminal, tax, electoral or political parties matters are involved, may (the Executive) issue decrees for reasons of necessity and urgency...”

⁶⁷ As it could have been expected, when the prevalent political party enjoyed a comfortable legislative majority, Congress passed a statute (Law 26,122 of 2006) that effectively treats an emergency decree as a law since it only ceases to exist if both Houses of Congress decide to repeal it, such repeal to lack retroactive effect. If the constitutionality of this law is eventually upheld by the Supreme Court, the President will be able effectively to legislate with the support of only one of the Houses of Congress.

power to issue decrees with the force of law in the parliamentary regimes used as models to introduce this rule (i.e. Italy and Spain), where the Executive may be removed by a simple vote of no confidence, have the same legal and political consequences in a presidential regime where the removal of the President requires the more exceptional and cumbersome method of impeachment that can only be decided by special majorities in Congress⁶⁸ so that no easy check to presidential abuses exists? The outcome could be predicted: In the period between 1994 and 2011, more than one thousand emergency decrees were issued by different Presidents⁶⁹.

The second feature was the lack of awareness of European political developments and of their influence on administrative law. The period covered by the years before the Second World War was one of political upheaval in Europe, with some countries being under authoritarian regimes during part of it, a situation that could not fail to impact their public laws as a whole. Yet Argentine authors took European legal writings of the time as if they were free from any political influences, just as if they referred to mathematics and not to the main branch of the law that reflects the tension between freedom and authority.

For example, Miguel Marienhoff, the then leading Argentine author, wrote in the 1960's that – as a rule and thus without any need for a law to provide so expressly – the administration can enforce its own decisions by itself, without need to resort to the courts for that purpose (the so called principle of *autotutela* or *ejecutoriedad*)⁷⁰. In order to support his statement he provided a citation of an Italian author who was of the same opinion⁷¹. But what the Argentine author did not say, and no one could find out without reading that Italian book, was that the foreign author gave as sole support for his own opinion the 1931 Italian law on public security, a statute thus of questionable political

⁶⁸ In Argentina, two thirds of the members of each Chamber present at the session: Constitution, arts 53 and 59.

⁶⁹ Nueva Mayoría, Report of May 2011. Compare this with the 34 emergencies declared in the United States between 1976 and 2007 pursuant to legislation authorizing the Executive to issue rules in cases of emergency, ie the 1976 National Emergency Act and the 1977 International Emergency Economic Powers Act: see C. Binder & A. Reinisch, "Economic Emergency Powers: a Comparative Law Perspective", in S. W. Schill (ed), *International Investment Law and Comparative Law* (2010) 503, at 529-38, esp fn 164.

⁷⁰ Marienhoff, 2 *Tratado* (n 55), 375-77. There is some confusion in the terminology: In Spain and in Italy, *autotutela* can mean both the power of the administration to revoke its own acts for reasons of illegality (*autotutela declarativa*) and to enforce them without the need for court assistance (*autotutela ejecutiva*). In this paper we will use the term "*autotutela*" in this last sense only.

⁷¹ O. Ranelletti, *Teoria degli Atti Amministrativi Speciali* (n 41) 126-27. See Mairal (n 56) (this example has been subsequently used by other Argentine writers).

origin that was subsequently declared partially unconstitutional under the 1948 Italian Constitution⁷². While other Italian authors supported the rule of the *autotutela* without reference to that specific statute⁷³, the mere mention of that statute should have alerted Marienhoff to the possible negative political connotations of the doctrine. However, that opinion of the Argentine author, categorically stated, was decisive in including *autotutela* as a rule (albeit with exceptions) in the Argentine Administrative Procedure Law of 1972⁷⁴. This rule remains in force today, while in Italy the opposite rule was defended by other authors until it was expressly introduced by statute in 1990⁷⁵.

A phenomenon similar to what, it has been argued, happened in Italy in the first decades of the 20th Century⁷⁶, took place in Argentina several decades later. Our classic administrative law authors of the second third of that Century had liberal democratic ideas but “idolized the State” and thus were prodigal in granting powers to the administration. When authoritarian regimes governed later, they did not need to enact special laws granting them extraordinary powers, but simply used the tools that those authors had patriotically, but naively, created⁷⁷.

b) The need for comparative studies in administrative law in Argentina

⁷² M di Raimondo, *Testo Unico della Leggi di Pubblica Sicurezza* (1997) 88, 114-16. In his article on “Autotutela” in the *Enciclopedia del Diritto* (1959), Feliciano Benvenuti considers this law as setting an authoritarian basis for the doctrine.

⁷³ Eg Zanobini, 1 *Corso di Diritto Amministrativo* (n 42) 293 ff.

⁷⁴ APL, art 12, para (a). Spain has the same rule: see Ley del Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (law 30/1992 of Nov 26, as amended) (Régimen Jurídico), art 95; see Miguel Sánchez Morón, *Derecho Administrativo – Parte General* (2012) 555.

⁷⁵ See Law 241/1990 as amended, art 21-ter: *autotutela* exists only when expressly provided by law. Some Italian authors were previously of this same opinion: A. Sandulli, 1 *Manuale di Diritto Amministrativo* (15th edn, 1989) 615; and S. Cassese, *Le Basi del Diritto Amministrativo* (4th edn, 1997) 340. This is the same rule that prevails in US federal law (L Harold Levinson, “Enforcement of Administrative Decisions in the United States and in France”, 23 *Emory LJ* (1974) 11. In France, since the *arrêt St Just* of 1902 (*Recueil Lebon* 713) *autotutela* is allowed only in exceptional cases.

⁷⁶ See the Introduction by G. Lombardi to Alberto Aquarone’s book *L’Organizzazione dello Stato Totalitario* (1965).

⁷⁷ Thus, the National Expropriation Law, that a *de facto* government enacted in 1977, followed Marienhoff’s ideas and granted the government – *inter alia* – the power to obtain immediate control of private assets, without any compensation, when an urgent need requires the temporary occupation of the asset (Law 21,499, arts 51-59). As explained by Marienhoff in his classes at the time, this power was granted in order to allow the administration to take immediate action when so required by an emergency, such as using private cars, after a car crash, to carry the injured persons to the hospital. However, the rule is worded so broadly that it was invoked in 2012 by the national Executive, to obtain immediate control of YPF SA, the main Argentine oil company, from Repsol, its then controlling shareholder without paying any prior compensation thus violating art 17 of the Argentine Constitution.

Such a well-intentioned but promiscuous accumulation of foreign legal rules has resulted in an administrative law system that, in certain cases, is —arguably— incompatible with the Argentine Constitution. In other cases, the received rules and doctrines are either unnecessary or exaggerated when compared to the original model. Thus the need for comparative law studies in this field: to understand better our own rules and, ideally, to improve them or even to reject them when they contradict constitutional principles, while, at the same time, giving adequate weight to foreign legal doctrines, not all of which are relevant for our legal system or lead to correct conclusions when applied locally.

For example, Argentine authors have adopted the Italian distinction between subjective rights and legitimate interests, as well as the criteria proposed in Italy to distinguish the two concepts, such as Guicciardi's distinction between norms of relation and norms of action⁷⁸. However, the Italian concept of legitimate interest (*interesse legittimo*) includes situations that in Argentina should be classified as subjective rights, as would be the case, for example, of the illegitimate revocation of an administrative permit, or of an illegitimate administrative decision that includes a given property within the land subject to expropriation pursuant to a law declaring such land to be needed for a public use⁷⁹. To hold that these relationships involve only a legitimate interest merely implies, in Italy, that the administrative tribunals have jurisdiction with respect to the entailing controversies. To reach the same conclusion in Argentina, under the traditional rule that the federal courts only protect rights and not interests⁸⁰, is tantamount to depriving the private party affected by the illegitimate administrative act, of all jurisdictional protection.

Thus, in one case, a federal court of appeals refused to hear a complaint brought by a private bus company whose permit had been cancelled by an allegedly illegitimate administrative decision, on the grounds, that could have been supported by erudite citations from Italian law, that plaintiff was alleging only a legitimate interest⁸¹. Compare,

⁷⁸ E. Guicciardi, *La giustizia amministrativa* (3rd edn, 1954) 33-ff. In Argentina, Marienhoff follows this position: *Tratado del Dominio Público* (1960) 443.

⁷⁹ Cf R. Caranta, "Cultural Traditions and Policy Preferences in Italian Administrative Law", in M. Ruffert (ed), *Europe: Between Common Principles and National Traditions* (2013) 69, 71, 73 ("... the doctrine of *interessi legittimi* is much linked to the peculiar Italian jurisdictional arrangement and is not something for export").

⁸⁰ R. Bielsa, 5 *Derecho Administrativo* (5th edn, 1957) 174-76. Given that the 1994 Argentine Constitutional Amendment now protects certain "diffuse rights", eg to a healthy environment, it is not clear whether the former tripartite classification of subjective rights, legitimate interests and simple interests, is still valid in Argentina.

⁸¹ Federal Contencioso-Administrativo Appeal's Court (FCAAC), Chamber III, *Línea 20 SA LIVESA c SETOP*, March 24, 1981.

then, this subservience to foreign doctrines (often used to decide in favor of the government), with the efforts of the United States federal courts to devise a concept of standing broad enough to encompass all situations deemed worthy of judicial protections (e.g. competitors, neighbors, bidders in government tenders for contracts, etc.), without heeding theories from other legal systems⁸².

Turning now to incompatibility, this results not only from grafting some doctrines of continental European law onto a constitutional regime modeled after that of the United States, but also from the adoption of theories taken from authoritarian periods of European law. In Argentina, government decisions, no matter how seriously defective (i.e. whether merely voidable or absolutely void) must be obeyed and are effective unless their effects are suspended by the administration (something that hardly ever happens) or by a court of law, because Argentina follows the Spanish rule of refusing automatic staying effects to judicial appeals against administrative acts unless a specific law provides otherwise.⁸³ Moreover, such decisions become firm and unchallengeable if not administratively appealed within 15 business days from receiving official notice thereof⁸⁴. These rules apply whether the decision affects legitimate interests

⁸² The leading case on standing is still *Association of Data Processing Service Organizations v Camp*, 397 US 150 (1970). More recent cases are *Lujan v Defenders of Wildlife*, 504 US 555 (1992) and *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007). See the historical evolution of the concept of standing in R. J. Pierce Jr, 3 *Administrative Law Treatise* (4th edn, 2002) 112-21.

⁸³ APL, art 12, para (a). The two degrees of voidness are regulated by APL, arts 14, 15. In Spain, the rule that refuses staying effects to appeals results from the principle of immediate effects of administrative decisions (Régimen Jurídico, arts 56, 57, 94, 95), the lack of staying effects of administrative appeals (Régimen Jurídico, art 111, para 1) and the need to obtain a court injunction to suspend the enforcement of the decision (Ley de la Jurisdicción Contencioso Administrativa, art 129): see P. Sala Sánchez, J. A. Xiol Ríos & R. Fernández Montalvo, 6 *Derecho Procesal Administrativo* (2013) 657. For a comparison between the French rule, similar to that of Spain, and the contrary German rule, see L. Garrido, "L'effet non suspensif des recours devant le juge administratif français à l'épreuve de l'argument de droit comparé", in F. Melleray, (dir), *L'Argument de Droit Comparé en Droit Administratif Français* (2007) 321, 325.

⁸⁴ APL Regulation (Decree 1759 of 12972) art 90. These short terms, normally stated in administrative law in business days, called "*plazos de caducidad*" ("lapsing terms" could be an approximate translation) prevail over the terms of the general statute of limitations that are normally stated in years. The federal courts apply lapsing terms also to challenges of absolutely void acts on the grounds that the law does not distinguish between the different categories of defective administrative acts: FCAAC, Chamber III, *Giménez Vega c Comité Federal de Radiodifusión*, ED 97-283 (1981). Lapsing terms provided by the APL and its Regulation do not apply against the government: APL, art 27. In theory, the government is subject to the general statute of limitations' terms but the Supreme Court has held that not even these terms apply to the government's action challenging an administrative act as absolutely void: see SCJN, *Empresa Constructora PH Schmidt SA c Provincia de Mendoza*, Fallos 179-249 (1937).

or subjective rights. They also apply not only to decisions rendered after an administrative procedure where the private party's due process rights have been respected (in which case a short appeal period would be understandable) but also to any administrative decision notified to the private party after it has been adopted without any prior intervention of said party, and even if such intervention was legally required⁸⁵.

The problem is compounded by the very broad definition of what constitutes an administrative act. In Italy and Spain the presence of a specific legal power (*potestad*) is considered an indispensable basis for the issuance of a valid decision that pretends —vis-à-vis a private party— the obligatory character of an administrative act⁸⁶. Not all administrative decisions constitute administrative acts, but only those that imply the exercise of such a specific legal power. In Argentina, instead, the prevailing definition of an “administrative act” simply requires a declaration made in the exercise of an “administrative function” that produces legal effects⁸⁷. As everything a public official does can be held to constitute such exercise, any official utterance (for example, to take a real case, the denial by an official bank to pay a guarantee given by it to a private party) can be construed to constitute an administrative act, and as such become final and unchallengeable if not appealed within 15 days. The circular reasoning is obvious: this legal effect results from the utterance being considered an administrative act, and it is so considered because it produces such a legal effect.

Thus, the requirement to exhaust administrative remedies as a precondition for judicial review (a rule common to the laws of the United States and Spain), in Argentina

⁸⁵ This is due to the frequent acceptance, by the Supreme Court, of the doctrine of *subsanación* (correction) that validates decisions taken by the administration without respecting the due process rights of the affected private party, when the latter may exercise her due process rights during the judicial review stage: CSJN, *Almagro de Somoza v INSSJP*, Fallos 306-467 (1984). See Fabián Canda, “La Teoría de la Subsanación en el Procedimiento Administrativo” in Guido S Tawil et al (dirs), *2 Procedimiento Administrativo* (2012) 677.

⁸⁶ See the discussion in García de Enterría-Fernández, *1 Curso*, (n 51) 550. These authors follow the definition of Zanobini, *1 Corso di Diritto Amministrativo* (n 42) 243. The rule is the same in the United States: “The imposition of administratively determined sanctions on private persons must be authorized by the legislature through rules that control agency action. This principle reflects the view that administrative officials possess no inherent powers over private liberty or property, and that official intrusions into such interests must be duly authorized by the legislature as the institutionalized mechanism of popular consent in representative government” (Stephen Breyer et al, *Administrative Law and Regulatory Policy*, 7th edn, 2011, 18).

⁸⁷ The classic definition was that drafted by A. Gordillo before the enactment of the APL when the exhaustion of administrative appeals did not have a time limit other than the normal statute of limitations; but on the basis of the above observations this author, in a recent edition (*3 Tratado de Derecho Administrativo*, 10th edn, 2011, IV-31/32) has restricted the definition to “declarations that are able to produce an effect”.

effectively shields most government decisions with a 15 day statute of limitations⁸⁸. The net result of these rules is to equate any pronouncement of a government officer, even if grievously unlawful (e.g. because it lacks legal basis or violates the applicable law or the due process rights of the private party), with the judgment of a judicial tribunal: they both become firm and uncontestable, thereby acquiring *res indicata* effect, if not appealed within a matter of days: five or ten for a judicial decision, and 15 for an administrative one. This outcome can be said to violate the principle of separation of powers. It also contradicts Article 19 of the Constitution, according to which no one is required to do what the law does not command nor prevented from doing what the law does not forbid, “law” being understood in this context to mean a congressional statute⁸⁹. It can be said to change a government of laws into a government of men.

Another example of incompatibility is the old German doctrine of relations of special subjection that we have received through Spanish authors⁹⁰. This doctrine arose in Germany in the 19th Century, when the respective powers of the Crown and the Legislature were still being defined. According to it, certain persons were in such “intimate” contact with the administration that their status could be regulated by the Executive without need for a parliamentary statute⁹¹. These relations could either arise voluntarily, as in the case of military and government officers, or involuntarily as in the case of conscripts and convicts held prisoners. In Germany, it is currently debated whether this doctrine is still valid after the sanction of Bonn’s Basic Law and a 1972 decision of the Federal Constitutional Court⁹², but even those who consider it applicable, agree that its effects have been severely curtailed by the need to respect the human rights of those affected by the doctrine⁹³.

⁸⁸ For Spain see n 171 below. In the US, pursuant to section 704 of the APA, exhaustion is mandatory when so required by law or by a regulation of the relevant agency, provided, in this last case, that the administrative appeal has staying effect: see *Darby v Cisneros*, 509 US 137 (1993); Pierce, 2 *Administrative Law Treatise*, n 82, 982-85.

⁸⁹ M. A. Ekmekdjian, 2 *Tratado de Derecho Constitucional* (1994) 477-78 (arguing that otherwise the rule would express a tautology: no one is bound to do what the authority does not require).

⁹⁰ For Spain, see A. Gallego Anabitarte, “Las relaciones especiales de sujeción y el principio de legalidad de la Administración”, *Revista de Administración Pública (RAP)* 1961, 34; Mariano López Benítez, *Naturaleza y Presupuestos Constitucionales de las Relaciones Especiales de Sujeción* (1994).

⁹¹ O. Mayer, 2 *Derecho Administrativo Alemán* (n 52) 144-45.

⁹² BVerfGE 33, 1 (prisoner’s mail case).

⁹³ Cf H. Maurer, Spanish translation of the 17th edn of his *Allgemeines Verwaltungsrecht* (2011) 209.

Again, this doctrine clearly contradicts the already mentioned rule of Article 19 of the Argentine Constitution⁹⁴. To make the situation even more bizarre, both in Spain and in Argentina the doctrine is currently applied to private companies for the mere reason of their being regulated by the government (a surprising extension of the original German doctrine)⁹⁵, with the added irony, for Argentina, that, contrary to what happens in Europe, legal persons are not considered protected by the Human Rights Convention⁹⁶.

Turning now to unnecessary doctrines, an example could be that of the *voie de fait* that we have taken from French law, translating it as *vía de hecho*⁹⁷. Article 9 of the Argentine Administrative Procedure Law provides that “The Administration shall abstain from ... physical action (*comportamientos materiales*) that constitute administrative *vías de hecho* that impair a constitutional right or guarantee...” From reading this rule, students might conclude that, until it was enacted in 1972, the government could violate constitutional rights through physical conduct (e.g. by sending a bulldozer to demolish a private construction that infringes municipal regulations) without need for a court order. They could also think that such behavior is legally possible in countries, such as Italy and the United States, that lack the *voie de fait* doctrine.

Comparative law can correct this perception by showing the reasons for the adoption of the rule in its country of origin. In France, this doctrine was created in the second half of the 19th Century in order to strengthen the jurisdictional protection afforded to private parties⁹⁸. According to it, the administration loses its privilege to be judged by the administrative tribunal when it commits a gross legal violation which is thus deemed to “denaturalize” its conduct, depriving it of its administrative character. In

⁹⁴ English and French law have the related doctrine of “inherent powers”: John Bell, “Administrative Law in a Comparative Perspective”, in E. Orucu & D. Nelken (n 10) 287, 291. In Argentina, although the Executive has inherent (ie unrelated to a specific law) powers such as, in domestic matters, those to “administer” the country and to appoint and dismiss government officers, which would include –*inter alia*– the power to enter into contracts, they do not include the power to impose obligations on private parties (except in extraordinary situations where the issuance of an emergency decree is authorized: see Argentine Constitution, art 99).

⁹⁵ For Spanish examples see L. Benítez (n 90) 222-35. For Argentine examples, see FCAAC, *en banc*, *Multicambio SA c Banco Central*, LL 1985-E-263; SCJN, *Isaac Kolton Inmobiliaria SACIF c Banco Central*, Fallos 326-4341 (2003).

⁹⁶ According to Art 1, para 2 of the American Convention on Human Rights of 1969, a “person” is a “human being”. See Report 39 of March 11, 1999 of the Interamerican Human Rights Commission *in re Mevopal SA*. In Europe the rights of legal persons are protected under the Human Rights Convention due to an Addenda introduced in 1952.

⁹⁷ *Voie de fait* has been translated into English as “flagrant irregularity”: L Neville Brown & JF Garner, *French Administrative Law* (3rd edn, 1983) 86.

⁹⁸ C. Debbasch, *Contentieux Administratif* (3rd edn, 1981) 94-ff; J. Puisoye, *La voie de fait administrative* (1962) 53.

such a case, the affected private party can obtain redress from the judicial courts. Because of the acknowledged independence of administrative courts in modern times, it has been queried whether this doctrine is still necessary in France.⁹⁹

Now, it can be asked what is the use of this doctrine in a system —such as Argentina’s— in which all complaints against the administration are brought before the judicial courts. The mere fact that the federal courts have, as already explained, a branch specialized in administrative law matters, does not justify the doctrine, since that branch is manned by judges who are appointed in the same manner, and enjoy the same constitutional protections, than the other federal judges. The reasons for the creation of the doctrine in France, at a time when the impartiality of the administrative courts could have been open to question, do not exist in Argentina. But the incongruity does not end there, since the same Administrative Procedure Law requires that the judicial appeal against a *voie de fait* be brought within 90 business days from the date when the affected party knew of the incorrect administrative conduct¹⁰⁰, while in France it would appear that the affected party is not subject to short terms when challenging a *voie de fait* before the judicial courts or an *acte inexistant* (a related concept) before the administrative courts¹⁰¹.

In addition to the extremely broad concept of an administrative act, the Argentine version of the French doctrine of the *contrat administratif* is another good example of the exaggeration of European doctrines. First, the concept of what constitutes an administrative contract is much broader than in France, as it includes any contract that pursues a “public purpose”¹⁰², a feature that can be predicated of all government contracts, unless entered into for improper purposes. A lease of a privately owned building to house a government office, that has been traditionally considered a

⁹⁹ C. Leclerc, “Le déclin de la voie de fait”, *Revue de Droit Public* 1963, 657. However, the doctrine is still applied at present, although with a reduced scope: see P. Delvolvé, “Voie de fait: limitation et fondements”, *Revue Française de Droit Administratif* 2013, 1041 (commenting the *arrêts Boussadar*, 23 Oct 2000, Recueil Lebon 775, and *Bergoend c Société ERDF Annecy Leman*, 17 June 2013, Recueil Lebon 370, of the *Tribunal des Conflits* and arguing that the doctrine is currently based on the constitutional principles that grant to the judicial courts the role of protectors of individual freedom and private property rights).

¹⁰⁰ APL, art 25, para (d).

¹⁰¹ See A. de Laubadère, 1 *Traité de Droit Administratif* (12th edn, 1992) 423; C. Debbasch, *Droit Administratif* (6th edn, 2002) 668. See also Conseil d’Etat (CE), *Rosan Girard*, Recueil Lebon 1957, 355; *Zemma*, CE 1980, Rec 1980. Comparing the *voie de fait* with the *acte inexistant* see P. Le Mire, “Inexistence et voie de fait”, *Revue de Droit Public* 1978, 1219.

¹⁰² SCJN, *Cinplast IAPSA c ENTel*, Fallos 316-212 (1993). Compare this definition with the one that results from the jurisprudence of the Conseil d’Etat starting with *Epoux Bertin* (CE 1956, Recueil Lebon 167) that requires a close relationship between the contract and a *service public*: de Laubadère (n 101) 661-62.

private contract in France, constitutes an administrative contract in Argentina¹⁰³. The consequences of classifying a government contract as administrative, are also, in Argentina, more drastic than in France since, according to the prevailing doctrine, now embodied in a regulation with the force of law¹⁰⁴, any aspect of the contract can be amended, and not only its object, in order to make it conform to public needs¹⁰⁵. And, finally, in Argentina the modification or termination of an administrative contract for reasons of public convenience, even when not contemplated in the text of the contract, does not give rise to a claim for loss of profits.¹⁰⁶

A comparative law analysis thus allows the conclusion that Argentine administrative law can be characterized as an exaggeration of European administrative law. It resorts to concepts that are much broader, and then extracts consequences that are more extreme, than those used and applied by the laws it has taken as models. It also shows a parallel erosion of sensitivity to the violation of basic constitutional principles.

2. THE CASE FOR LATIN AMERICA

a) The background

While obviously there is not such a thing as “Latin American law”, commonalities among the laws of the different countries in the area exist.¹⁰⁷ All of them, except Brazil, share a common language and a common history of colonization by Spain¹⁰⁸. Together with Brazil, they share a common majoritarian religion and, to a certain extent, similar cultures and social values. All their legal systems have been classified —albeit from the point of view of private law— as belonging to the “Roman-Germanic family”¹⁰⁹. The sharing of many legal institutions supports the affirmation that “for some analytical

¹⁰³ For Argentina, see 3-A Marienhoff (n 55) 120-21. For France, see André de Laubadère et al, 1 *Traité des Contrats Administratifs* (2nd edn, 1983-84) 341-42.

¹⁰⁴ Delegated decree 1023 of 2001, art 12.

¹⁰⁵ In France, the financial clauses of the contract cannot be amended: 2 de Laubadère (n 103, 406-07); L. Richer, *Droit des Contrats Administratifs* (8th edn, 2012) 278-79.

¹⁰⁶ See Delegated decree 1023 of 2001, art 12. In France, loss of profits is normally —but not always— awarded in these situations: see J. F. Oum Oum, *La Responsabilité Contractuelle en Droit Administratif* (2014) 508-14; 2 de Laubadère (n 103) 668-71; Richer (n 105) 269-70.

¹⁰⁷ Esquirol (n 15).

¹⁰⁸ See R. Pérez Perdomo, “Notes for a Social History of Latin American Law: The Relationship Between Legal Practices and Principles”, in Angel R Oquendo, *Latin American Law* (2006) 66.

¹⁰⁹ R. David – C. Jauffret-Spinosi, *Les Grands Systemes de Droits Contemporains* (11th edn, 2002) 25.

purposes Latin America can usefully be treated as an entity”¹¹⁰. This is reaffirmed by books that provide an overview of the main legal systems of the region¹¹¹.

Another common feature is the “context of reception” that prevails in the region, arising from the observed fact that “Latin America is a weak member of the civil law tradition (French, German, Spanish, and Italian law, in particular)”¹¹². In words written for Italy but which apply even more to Latin America, there is a tendency “to search for legal innovation abroad”¹¹³. This attitude contrasts with the strong (but diminishing?) resistance observed in France and in the United States to the use of foreign laws and precedents as models¹¹⁴.

Common features are particularly evident in the field of administrative law. First, most Latin American countries share a concept of the law as a tool for gradual social improvement but not as a rule for immediate and general application and enforcement. Law is seen as “a pure, marvelous collective ideal, but finally remote and inapplicable”¹¹⁵, an aspect that is crucially relevant in the realm of administrative laws and regulations that receive, as all laws, a merely “rhetorical support”¹¹⁶.

Also, the same influence of European administrative law has been experienced throughout the region: French, Spanish and, to a lesser extent, other Continental European administrative law authors were, and are, cited, and their doctrines followed, in most countries of the region¹¹⁷. The first Brazilian administrative law book, written in the middle of the 19th Century, was a comparison between Brazilian and French law¹¹⁸. As

¹¹⁰ Karst & Rosen (n 19) 3.

¹¹¹ Karst & Rosen (n 19); Oquendo (n 108).

¹¹² D. Bonilla Maldonado, “Toward a Constitutionalism of the Global South”, in D. Bonilla Maldonado, ed, *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa and Colombia* (2013) 5.

¹¹³ E. Grande, “Development of Comparative Law in Italy”, in *Oxford Handbook of Comparative Law* (n 10) 107,108.

¹¹⁴ For France, see B. Favarque-Cosson, “Development of Comparative Law in France”, in *Oxford Handbook of Comparative Law* (n 10) 35, 49. For the United States, see R. Bader Ginsburg, “‘A decent respect to the opinions of [human]kind’: The value of a comparative perspective in constitutional adjudication”, 64 *Cambridge LJ* (2005) 575. For a comparison of US and French reluctance to resort to foreign laws, see B. Markesinis & J. Fedke, *Engaging with Foreign Law* (2009) 187-ff.

¹¹⁵ M. Grondona, *La Corrupción* (3rd edn, 1993) 73.

¹¹⁶ E. Garzón Valdés, “Acerca del concepto de corrupción”, in M. Carbonell & R. Vázquez (coords), *Poder, Derecho y Corrupción* (2003) 28.

¹¹⁷ See eg 2 *Veinte años de doctrina de la Procuración General de la República 1962-1981* (Venezuela 1984) 418, 448 (citing de Laubadère and Jèze as well as Spanish and Argentine authors).

¹¹⁸ O. Medauar, “Un aperçu du droit administratif brésilien”, in *Mélanges Morand-Deville* (2007) 437. Examples for other countries are copious. See, eg, J. Fernández Ruiz, “Evolución y Situación Actual del Derecho Administrativo en México”, in V. Hernández-Mendible (coord),

already mentioned, the foreign bibliography cited by the most authoritative Uruguayan author is very similar to that of Argentine writers: many works from continental Europe and almost none from common law countries¹¹⁹. Specific comparative law studies in the field of administrative law also exist in the region, such as those of Allan Brewer Carías in Venezuela¹²⁰, Enrique Silva Cimma in Chile¹²¹, and the present writer in Argentina¹²².

Works of a single author describing the administrative laws of the different countries exist in Latin America¹²³ as they do in Europe¹²⁴, but the Latin American surveys show a more marked degree of similarity than the parallel European studies. Similarly, in these last years, studies in this field written by several authors and covering the “Iberian-American” region, comprising Spain, Portugal and all of Latin America, have been published¹²⁵. These works highlight the common features shared by the administrative law of these countries as well as the importance of comparative law for the region.

The examples provided in Section 1 above have referred to Argentine administrative law. However, those observations, to a certain degree, may be extrapolated to other Latin American countries. Similar problems to those described for Argentina with the abuse of emergency decrees, can be found in Brazil¹²⁶, Peru¹²⁷ and Venezuela¹²⁸.

1 *Derecho Administrativo Iberoamericano*, (2007) 35, 54 (stating the preeminence of the *école de service public* in Mexico during the first half of the XX Century); O. Rodríguez Huertas, “Derecho Dominicano y Principios Generales”, in V. Hernández Mendible, (coord), 1 *Desafíos del Derecho Administrativo Contemporáneo* (2009) 141 (citing French authors Rivero and Vedel when discussing the concept of the administrative act); L. Rodríguez Rodríguez, “La *potestas variandi* dans les contrats administratifs”, in *Melanges Hostiou* (2008) 485 (describing the powers of the administration in administrative contracts in Colombia along the lines of the French doctrine, with citations also from French, Spanish and Argentine writers). For a description of Spanish influence on Latin American administrative procedure laws, see Jesús González Pérez, “La Ley Chilena de Procedimiento Administrativo”, *Revista de la Administración Pública* (Spain) (“RAP”) 162 (2003) 359.

¹¹⁹ See n 62.

¹²⁰ *Études de Droit Comparé* (2001).

¹²¹ *Derecho Administrativo Chileno y Comparado* (1st edn, 1954).

¹²² H. A Mairal, *Control Judicial de la Administración Pública* (1984).

¹²³ See A. R Brewer Carías, *Principios del Procedimiento Administrativo en América Latina* (2003); J. González Pérez, *Derecho Procesal Administrativo Hispanoamericano* (1985); F. Campolieti, “Los principios del procedimiento administrativo en los ordenamientos jurídicos latinoamericanos”, in 2 *Derecho Administrativo Iberoamericano* (n 118) 949.

¹²⁴ Such as Schwartz’s *European Administrative Law* (n 7).

¹²⁵ See *El Derecho Administrativo Iberoamericano*, Santiago Varas Ibáñez (ed) (2005) 21; and the two collective works coordinated by Victor Hernández-Mendible cited in n 118.

¹²⁶ See T. J. Power, “The Pen is Mightier than the Congress: Presidential Decree Power in Brazil”, in *Executive Decree Authority* (n 65) 197. The source for the inclusion of this power in Art 62 of the 1988 Brazilian Constitution was Art 77 of the Italian 1948 Constitution, and, as it has happened in Italy, Brazilian Presidents then re-issued these decrees (called *Medidas Provisorias*) after their initial validity term –30 days in Brazil– had expired without

Not only in Argentina, but also in other countries of the region, a tension exists between a constitutional law modeled after that of the United States and an administrative law that follows the French system¹²⁹. As we can read in a recent edition of the classic Mexican work on administrative law, a still unresolved issue arises in that country from a fundamentally Anglo-Saxon constitutional framework and concepts, such as that of the *service public*, taken from French administrative law¹³⁰. A similar juxtaposition can be said to exist in Brazil, whose constitutional law has been influenced by that of the United States, but whose administrative law follows French doctrines¹³¹. Michel Fromont describes Brazilian administrative law even today as “the result of an original synthesis of the laws of the United States and of France”¹³². In Venezuela it has been said that the influence of French administrative law has been predominant although the historical reasons that gave birth to that branch of law in France never existed in Venezuela where, following the principles of the United States Revolution, control of the Executive has always been vested on the judicial courts¹³³. However, this tension is not present in all the region. It appears not to exist in Colombia where the Constitution provides for a separate administrative jurisdiction headed by the *Consejo de Estado*, an organ that was first established in that country by Simon Bolivar in 1817 imitating Napoleon’s earlier creation

Congressional ratification. The Constitutional Amendment of September 11, 2001, restricted re-issuance and, effectively, extended the term of validity of *Medidas Provisorias* up to 120 days from publication after which they lapse if not ratified by Congress. See also V. Della Sala & A. Kreppel, “Dancing Without a Lead – Legislative Decrees in Italy”, in *Executive Decree Authority* (n 65) 175 (describing the Italian practice of reiterating emergency decrees).

¹²⁷ See G. Schmidt, “Presidential Usurpation or Congressional Preference? The Evolution of Executive Decree authority in Peru”, in *Executive Decree Authority* (n 65) 104.

¹²⁸ See B. F. Crisp, “Presidential Decree Authority in Venezuela”, in *Executive Decree Authority* (n 65) 142.

¹²⁹ Karst & Rosen (n 19) 43; D. López Medina, “The Latin American and Caribbean Legal Tradition”, *Cambridge Companion* (n 3) 344.

¹³⁰ See the conference of A. Carrillo Flores on the life and works of Gabino Fraga, in G. Fraga, *Derecho Administrativo* (43rd edn updated by Manuel Fraga, 2003) 475.

¹³¹ For constitutional law, see J. Dolinger, “The influence of American Constitutional Laws on the Brazilian Legal System”, 38 *American J Comparative L* (1990) 803 (citing Brazilian cases that quote from US Supreme Court precedents and constitutional law writers). For administrative law see Medauar (n 118) and also the texts of modern Brazilian administrative law authors that continue to follow French doctrines, such as H. Lopez Meirelles, *Direito Administrativo Brasileiro* (34th edn, 2008). Dolinger (this note, 804, 837) mentions US law as the main source for Brazilian administrative law, but this influence appears more noticeable in the field of public administration than in administrative law proper.

¹³² M. Fromont, “La Place du Droit Français parmi les Droits d’Europe et d’Amérique”, in Michel Fromont et al (eds), *Droit Français et Droit Brésilien* (2012) 41.

¹³³ J. I. Hernández G, “Una Mirada al Derecho Administrativo en el Centenario de su Enseñanza”, in 1 *Cien años de la Enseñanza del Derecho Administrativo en Venezuela 1909-2009* (2011) 38.

in France¹³⁴. In fact, Colombian administrative law has been described as “an almost perfect example of the successful exportation and introduction” of the French legal system in a foreign country.¹³⁵

Also, as Argentine administrative law is probably —so far— the one with the highest output of books and articles on the subject in the region, it is often cited as authority in other South American countries, such as Brazil, Colombia, Ecuador and Mexico¹³⁶. Reciprocally, Argentine writers frequently cite other Latin American authors¹³⁷. Exaggerations similar to those described for Argentina are found —to a lesser extent— in other countries of the area, as evidenced by the definitions of the administrative act included in different Latin American laws¹³⁸, as well as the broad concept of the *contrat administratif* offered by some authors in Brazil¹³⁹ and the generalization of exorbitant government prerogatives to all government contracts provided by a recent Venezuelan law.¹⁴⁰ A similar use (or misuse?) of foreign doctrines can be found in arbitration cases where Latin American governments, in the end unsuccessfully, tried to use the doctrine of the *contrat administratif* to justify the treatment of their counterparties¹⁴¹.

b) The uses for comparative administrative law in Latin America

¹³⁴ J. Pérez Escobar, *Derecho Constitucional Colombiano* (8th edn, 2010). See also M. Pochard & W. Zambrano Cetina, *Le Conseil d'Etat en Colombie et en France* (2009).

¹³⁵ J. G. Rincón Salcedo, “Les recours juridictionnels en matière contractuelle. Analyse comparé des droits français et colombien”, *Revue Française de Droit Administratif* (2008) 391.

¹³⁶ The writer of this paper has been called to provide opinions on Argentine administrative law in litigation and arbitration carried out in Colombia and in Ecuador subject to local laws. For Mexico, see eg citations to Argentine authors in J. R. Ramírez García, “Contratos Administrativos”, in F. Hamdan Amad & J. F. Franco Gonzalez Salas (coords), *Derecho Administrativo* (2012) 249; for Brazil, see Lopes Meirelles (n 131) *passim*.

¹³⁷ T. Brandao Cavalcanti (*Tratado de direito administrativo*, 1948) from Brazil; G. Fraga (n 130) from Mexico; and Enrique Sayagués Laso (n 61) from Uruguay, were traditionally among the most cited.

¹³⁸ See the different definitions of the administrative act contained in the laws of Colombia, Peru, Uruguay and Venezuela, in Brewer Carías, *Principios* (n 123) 184-85.

¹³⁹ López Meirelles, (n 131), 214; M. S. Zanella di Pietro, *Direito Administrativo* (25th edn, 2012) 259. For a similar broad definition in Guatemalan law, citing Argentine and Mexican authors for support, see J. M. Castillo González, *Derecho Administrativo Guatemalteco* (17th edn, 2006) 422.

¹⁴⁰ See J. I. Hernández G, “El Contrato Administrativo en la Ley de Contrataciones Públicas Venezolana”, *RAP* 176 (2008) 363, commenting Decree-law 5929 of March 14, 2008.

¹⁴¹ Compare *Azurix Corp v The Argentine Republic*, ICSID case ARB/01/12, award of July 14, 2006 (Tribunal’s acceptance of the *exceptio non adimpleti contractus* alleged by the private contractor, although it is a rule generally rejected in administrative contracts); with *Autopista Concesionada de Venezuela (AUCOVEN) v Bolivarian Republic of Venezuela*, ICSID Case ARB/00/5, award of Sept 23, 2003 (Tribunal’s acceptance of termination of contract by the private party in spite of respondent’s argument that in an administrative contract the contractor cannot terminate the contract *per se* without judicial intervention).

The need for comparative administrative law studies in Latin American thus arises from a similar situation to that observed in Argentina, i.e. the generous reception of foreign doctrines from different countries and the risk that such doctrines not only be —sometimes— incompatible with the host system but also that they be applied in an exaggerated or distorted manner. This writer cannot conclude whether legal practice in other Latin American countries shows a similar extreme application of administrative law concepts as that described above for Argentina. Some of these countries have imported the foreign doctrines with more restrained features: Uruguay, for example, appears to have now rejected the power of the administration to unilaterally amend or terminate administrative contracts for reasons of convenience¹⁴². A Central American author correctly rules out the application, in Costa Rica, of the French *voie de fait* doctrine due to the differences in the respective jurisdictional regimes¹⁴³, and a similar observation has been made in Venezuela¹⁴⁴. Nevertheless, in many countries the traditional concepts remain there to be used and abused if the occasion arises. Comparative law studies could thus allow a more discriminating analysis of the different doctrines that have inspired Latin American administrative law¹⁴⁵.

Particularly, resorting to comparative law could produce a general up-dating of the administrative law doctrines followed in the region. The main Latin American works in this field were written by the middle of the 20th Century and were thus partially based on doctrines that may have now become outdated in Europe. But while those Latin American authors worked in an almost vacuum of local doctrine, legislation and precedents, and thus had to rely heavily on foreign materials, that vacuum has now disappeared and an abundant local literature, as well as legislation and precedents, exist, so modern authors do not refer so often to foreign sources¹⁴⁶. This would be, *per se*, a healthy development if —on occasions— it did not take, as a starting point, those outdated doctrines.

¹⁴² See R. Flores-Dapkevicius, “Teoría General de los Contratos Administrativos en la República Oriental del Uruguay”, in Asociación Peruana de Derecho Administrativo (ed), *Modernizando el Estado para un país mejor* (2010) 817, 830-31.

¹⁴³ E. Jinesta Lobo, 1 *Tratado de Derecho Administrativo* (2nd edn, 2009) 378-ff.

¹⁴⁴ J. I. Hernández G, “Vías de Hecho y Contencioso-administrativo”, in 2 *Derecho Administrativo Iberoamericano* (n 118) 1291, 1313.

¹⁴⁵ Cf H. B. León, “El Derecho Administrativo Comparado”, in 1 *Cien Años* (n 133) 287.

¹⁴⁶ See, eg two recent works defining the concept of *service public* in Uruguay and in Brazil without major references to foreign doctrines but mainly to local constitutional and legal norms, and to local authors: J. P. Cajaraville Peluffo, “La noción de ‘servicio público’ en la Constitución Uruguaya”, and F. Herren Aguillar, “Serviços Públicos no Direito Brasileiro”, both in 2 *Desafíos* (n 118) 735, 771 respectively.

The scope of comparative studies of Latin American administrative law must start being national and not regional. Common problems for the region may be identified, but the analysis should be—in the first instance—specific to each country, as each of them has its own blend of different sources as it has a different history and different political and social forces at play. Thus, each country should consider whether—and, if so, how—to resolve the already mentioned tension between an U.S. based constitutional law and a European inspired administrative law. A call for greater unity in public law, integrating constitutional and administrative laws, has been recently made in a multinational context¹⁴⁷. Thus, in each country the following query should be posed: would such integration produce any beneficial consequences for its public law?

Looking at the whole region, as it tries to accelerate its economic development, other more immediate and practical uses of comparative administrative law can be proposed.

The study of comparative law, at a micro-comparison level, permits a choice of systems when a country wishes to privatize its State-owned public utilities. In this context, two possible models may be considered: the classic French *concession de service public* and the United States regime of regulated public utilities. This choice, that surfaced in Argentine during the wave of privatizations of the 1990's¹⁴⁸, has become relevant in other Latin American countries such as Brazil,¹⁴⁹ and particularly Colombia, where an administrative law author observes the abandonment of the French model in favor of regulatory agencies in the United States style¹⁵⁰.

¹⁴⁷ See S. Cassese, G. Napolitano & L. Casini, "Toward multipolar administrative law: A theoretical perspective", 12 Int'l J Const L (2014) 354.

¹⁴⁸ See H. A Mairal, "La ideología del Servicio Público", in 14 Revista de Derecho Administrativo (1993) 359.

¹⁴⁹ See G. R Loss, "Contribuições a Teoria do Regulação no Brasil: Fundamentos, Princípios e Limites do Poder Regulatório das Agencias", in Alexandre Santos de Aragao (coord), *O Poder Normativo das Agencias Reguladoras* (2006) 143.

¹⁵⁰ J. Vidal Perdomo, "La Evolución del Derecho Administrativo Colombiano durante el Siglo XX", in 1 *Derecho Administrativo Iberoamericano* (n 118) 11, 25. Although France has also adopted the model of independent agencies (see 52 EDCE, 2001, 257 ff; M. A. Le Mestre, "L'Argument de Droit Comparé et les Autorités Administratives Indépendantes", in *L'Argument de Droit Comparé en Droit Administratif Français* (n 83) 133) a difference remains in that the French model often involves a concession with a fixed term, while in the United States public utilities are often operated on the basis of a franchise without a time limit or renewable. For a Peruvian criticism of the US model of regulatory agencies, see C. A Herrera Guerra, "Entes reguladores independientes y credibilidad institucional. Insuficiencia y peligros para la democracia latino-americana advertidos desde el sistema norteamericano que los creó", RAP 181 (2010) 373.

Pursuant to both models, the State enjoys the power to keep the service being rendered always attuned to changing public needs¹⁵¹. However, the French regime adds a feature that normally does not exist in the United States and which may be considered indispensable, or dangerous, depending on the government policies pursued at the time: the power of the administration to terminate the concession at any time invoking reasons of public convenience¹⁵². Nevertheless, the use of the concession system does not necessarily require the inclusion of this last feature: Chile has built many kilometers of highways granting concessions of public works pursuant to a law that does not provide for termination by the Government for reasons of public convenience¹⁵³. The exclusion of this power should be express, since otherwise the French theory of implied exorbitant clauses can be subsequently brought up to defend the existence of such power in favor of the government.

Another mechanism where the choice of models may have importance is that of public/private partnerships (PPPs). This system of contracting for public infrastructure works depends heavily on the strength and firmness of the contract with the government. In common law systems, the right of the government to amend the agreement for reasons of public convenience, as a rule, must be spelled out in the contract, whether expressly or incorporated by reference. Under the French doctrine of the *contrat administratif*, it exists as a matter of right, again as an implied power, whether or not provided for in the contract¹⁵⁴. The use of this amendment power may have

¹⁵¹ For the United States, see Charles F Phillips, Jr, *The Regulation of Public Utilities* (1993) 553–ff. For France, A. de Laubadère, 2 *Traité des Contrats Administratifs* (n 103) 409–ff; two famous cases are cited in this respect: *Compagnie nouvelle du gaz de Deville-lès-Rouen*, CE, Jan 10, 1908 (Recueil Lebon 5); and *Compagnie Générale Française des Tramways*, CE, March 11, 1910 (Recueil Lebon 216); a more recent case upholding the power of the administration to introduce changes in the performance of the *service public* is *Union des transports publics urbains et régionaux*, CE, Feb 2, 1983 (Recueil Lebon 33).

¹⁵² De Laubadère (n 101) at 688–89. For an Argentine evaluation of this power, see Oscar R Aguilar Valdez, “La extinción anticipada en materia de infraestructura y servicios públicos”, in 3 *Derecho Administrativo Iberoamericano* (n 118) 2265.

¹⁵³ E. Silva Cimma, *Derecho Administrativo Chileno y Comparado, Actos, Contratos y Bienes* (1995) 170–73.

¹⁵⁴ See a comparative analysis of the PPP system in different countries in F. Lichère, “Les Partenariats Publics Privés”, in K. B Brown & D. V Snyder (eds), *General Reports of the XVIII Congress of the International Academy of Comparative Law* (2012) 589. While the French rules that govern this type of contracts require that the conditions subject to which the prerogatives of the administration will be exercised be spelled out in the contract, it has been queried whether the limits thus imposed on said prerogatives violate the classic rules of French administrative law: F. Brenet, “L’argument de droit comparé et les contrats de partenariat de

important consequences for the banks that provide the financing, as it may increase the cost and/or delay the commissioning of the works. There is a trade-off here between the powers that the government may wish to retain, and the attraction of investors' interest in the project. This choice should be made clear to those who have to decide how to structure the project. The better the reputation of the government of a given Latin American country in respecting its commitments, the more it will be able to retain contractual powers, and vice-versa.

II. TEACHING COMPARATIVE ADMINISTRATIVE LAW IN LATIN AMERICA

1. THE STRUCTURE OF A COURSE ON COMPARATIVE ADMINISTRATIVE LAW

How to teach comparative law depends to a great extent on the purposes sought by such teaching. The subject may be taught, for example, in order to complete basic legal instruction avoiding a purely “provincial” point of view, or as a tool to enable the students to subsequently carry out research into foreign laws in their special fields of interest. Alternatively, the teaching may focus on the laws of a given country that has been the source of local law in order to understand the latter better, or to change and improve one's own law and thus bring it into line with systems perceived as more advanced, or to work on projects of harmonization and unification of different national laws.¹⁵⁵

It has been observed that comparative law has different “clients”¹⁵⁶, such as courts asked to apply the law of another jurisdiction, or arbitration tribunals that must decide whether a given doctrine constitutes “a general principle of law recognized by civilized nations” in the terms of Article 38 (1) (c) of the Statute of the International Court of Justice¹⁵⁷.

l'ordonnance du 17 juin 2004”, in *L'Argument de Droit Comparé en Droit Administratif Français*, n 83, 111 at 131.

¹⁵⁵ See Fabrice Cazaban, “Jean Rivero, comparatiste”, *Revue Française de Droit Administratif* (2008) 1068, 1074 (citing Charles Hamson's view that the first goal of comparative studies is not to learn about foreign laws but to better understand one's own law, and Jean Rivero on the possibility of improving national administrative laws by borrowing from foreign laws).

¹⁵⁶ J. Basedow, “Comparative Law and its Clients”, 62 *American J Comparative L* (2014) 821.

¹⁵⁷ See B. León (n 145) 293; see also H. A Mairal, “The doctrine of the administrative contract in international investment arbitration”, in *Liber Amicorum in Honor of Professor Don Wallace* (2014) (citing cases where it was discussed whether the French doctrine of the *contrat administratif* was a general principle of law).

In view of the multiple sources of administrative law in Latin America, and the way this law has developed over the years, it would appear that an important purpose of a comparative law course in this field could be, first, to identify the different public law sources that have influenced the law of the host country, study them separately, and identify possible inconsistencies among them. Once this level is reached, the reception into local law of the different sources should be considered and the resulting legal rules analyzed to determine if they can be improved or updated.

In this context, it would be important to emphasize the relationship between the jurisdictional system imposed by the country's Constitution and its substantive administrative law. Take, for example, the issue whether the validity of an administrative act depends also on its "convenience" (*merito*). This might be true in Italy when the broad jurisdictional control of convenience (*giurisdizione di merito*) is provided against that particular act¹⁵⁸. The same opinion has been voiced in France when the administrative tribunal controls the balance of costs and benefits resulting from the challenged decision¹⁵⁹. But to hold that same opinion in a country where there are no administrative courts with general jurisdiction, and where the principle of separation of powers prevents the judicial courts from controlling the convenience of administrative decisions, would allow the government to declare any of its acts invalid for reasons of inconvenience, without such declaration being subject to any jurisdictional control.

The course being proposed should be categorized as "applied comparative law" and not as "theoretical comparative law".¹⁶⁰ It would fall short of the academic ideal that seeks to take into account "all the possible interactions between the primary sources, be they official or unofficial, as well as any unofficial fact, including those of a geopolitical nature, able to affect the convictions and the legal culture of the rule-setters, the decision-makers and the law users"¹⁶¹. Query, however, whether that ideal can be achieved in a broad spectrum of issues and yet allow the materials to be comprised within one university course. Query, also, whether such depth is necessary in the

¹⁵⁸ This is a special remedy that is admissible in very few instances: see A. Pajno, "La Giurisdizione", in A. Sandulli (dir), *Diritto Processuale Amministrativo* (vol 7 of the *Corso di Diritto Amministrativo*, S. Cassese [dir] 2nd edn, 2013) 78-79; F. Caringella, 2 *Corso di Diritto Amministrativo* (6th edn 2011) 1438-39.

¹⁵⁹ See P. Serrand, "Le contrôle juridictionnel du pouvoir discrétionnaire de l'administration a travers de la jurisprudence récente", *Revue de Droit Public* 2012, 901.

¹⁶⁰ Harding (n 1) 101, 103.

¹⁶¹ M. Bussani, U. Mattei, "Diapositives versus movies — the inner dynamics of the law and its comparative account", in *Cambridge Companion* (n 3) 3.

instruction of lawyers as “operating jurists”¹⁶² or should be reserved for those seeking the highest university degree.

If the program of the relevant Law School allows students to specialize during the studies leading to the basic law diploma, the option towards public law could include a comparative course in administrative law. Otherwise, such a course could be taught to those pursuing an intermediate post-graduate diploma (e.g. a masters degree). Once interest has been developed in the subject, students who wish to pursue the highest academic degree in this field (i.e. a doctorate) might be induced to study in depth some of the parallel institutions that exist in the different administrative laws that have influenced the host country’s legal system. For example, the French doctrine of the *service public* and the U.S. concept of public utilities offer themselves to an interesting comparison.

As Latin American universities grow in stature at a pace with the improvement of their countries’ social and economic indicators, the region could give birth to important comparative law work that would be not only academically noticeable, but also immediately relevant from the point of view of the further development and improvement of the national laws.

¹⁶² Sorace (n 8) 1122.

2. A COURSE OF COMPARATIVE ADMINISTRATIVE LAW IN ARGENTINA

The course taught by the present writer in the National University of Buenos Aires is a required course for those seeking a *maestría* (masters) degree in administrative law. It consists of 12 two hour weekly classes, i.e. the time allotted to a two credit course in a law school in the United States.

Given the situation described in the first Chapter, the “clients” to which the course is directed and the time allocated to it, the course must be limited to describing the systems that have influenced Argentine administrative law and their basic legal concepts, and drawing, where appropriate, relevant comparative conclusions. A pure macro-comparison approach would not be useful, and even less a level of discussion that assumes an adequate knowledge of those systems by the students.

The first class is devoted to a presentation of comparative law. It starts with a brief historical review, highlighting the authors who contributed, from different points of view, to the comparative analysis in the field of public law: Montesquieu, Tocqueville, Dicey and Otto Mayer and, in the 20th Century, Bernard Schwartz. Some basic concepts are then explained, such as Constantinesco’s determinant and fungible factors, macro- and micro comparison, and crypto-types¹⁶³. The classic caveats of comparative law such as translation problems, and law in action versus law in the books, are noted.

The second class deals with the general features of Western public law systems: federal or unitary, presidential or parliamentary, single or double jurisdiction, diffuse or centralized review of the constitutionality of laws. The impact of these classifications on administrative law is explained and queries are raised. The case of emergency decrees, already discussed in Chapter I, confirms Kahn-Freund’s observation concerning the constant underestimation of the differences between presidential and parliamentary types of government¹⁶⁴. As an additional example, the relevance of the French concept of the *acte de gouvernement* may also be analyzed in a comparative law context. Following what Paul Duez wrote many years ago¹⁶⁵, it can be queried whether the unreviewability of the *acte de gouvernement* can be defended in a country where the courts may declare

¹⁶³ Gambaro & Sacco (n 12) 8.

¹⁶⁴ O. Kahn-Freund, “On uses and misuses of comparative law” 37 Modern LR (1974) 1, 12.

¹⁶⁵ P. Duez, “Le contrôle juridictionnel de la constitutionnalité des lois en France”, in *Mélanges Hauriou* (1929).

congressional statutes unconstitutional, as it happens in Argentina¹⁶⁶. Does this doctrine produce similar or different results than the political question doctrine developed by the U.S. Supreme Court and accepted by its Argentine counterpart?¹⁶⁷

The next four classes are devoted to describing, in very broad lines, the four public law systems that have been the main influence for Argentina, i.e. those of the United States, France, Italy and Spain. In this connection, some basic historical information must also be provided, since, for example, not many Argentine students today know what the French Third Republic was. The emphasis of this part of the course is to show aspects of each of the systems studied that differ substantially from Argentine law, thus cautioning the students against the temptation of considering all foreign laws similar to local ones. Thus, the limited matters on which the French Assembly may legislate compared with the broad power of the French Executive to issue regulations¹⁶⁸, contrasts with the inherent powers of the Argentine Congress¹⁶⁹. Another difference between apparently similar institutions is the lack of independence of Argentine regulatory agencies compared to their United States counterparts¹⁷⁰.

The remaining six classes are devoted to the micro-comparison of the main institutions of administrative law: the administrative act, government contracts, public services, government's tort liability, administrative procedure and jurisdictional control of administrative action.

Throughout all the classes the more interesting features of the foreign regimes, from the point of view of comparative law, are highlighted, and comparisons with the Argentine system are provided. This is done in order to show —as discussed in Chapter I

¹⁶⁶ This consideration did not prevent the doctrine of the *act de gouvernement* being taught in Argentine administrative law courses and the use of this concept in provincial *contencioso-administrativo* codes such as those of Córdoba and Santa Fé (n 45).

¹⁶⁷ See a comparison of these doctrines from the point of view of Argentine law, in Mairal, 1 *Control Judicial* (n 122) 461 ff.

¹⁶⁸ French Constitution, Arts 34 and 37, para 1. However, the “revolution” brought about by these rules that altered the historical relationship between the *loi* and the *règlement*, has been effectively curtailed by constitutional jurisprudence and practice: see Michel Lascombe, *Le Droit Constitutionnel de la Ve République* (10th edn, 2009) 243-ff.

¹⁶⁹ Argentine Constitution, Art 75, para 32.

¹⁷⁰ See M. Oteiza, “La intervención administrativa en entes reguladores. ¿Control efectivo u oportunismo gubernamental?”, *Revista de la Administración Pública* (Argentina) 337 (2006) 141; L. F Debono, “Las tarifas de los servicios públicos”, LL 2009-E-851. Compare these descriptions with the practice of the US Congress to “disperse” power delegating it in favor of independent agencies and not of the Executive, and the warnings of US authors against a too direct control of the President over said agencies: see P. L Strauss, “Presidential Rulemaking”, 72 *Chicago Kent LR* (1997) 965, 984-86; and his paper *Rulemaking and the American Constitution* (2010).

above— which of the foreign rules being discussed are relevant, irrelevant or outright incompatible with our system, or note where Argentine law's imitation of a foreign model deviates from, or exaggerates, the original.

This comparative law analysis should allow students to better understand the proper scope of the imported rules. It should also permit them to be aware of the advances in this field that make some of the European doctrines imported into Argentina many years ago outdated. When the new rules are not incompatible with our constitutional principles, their importation should be considered. Thus, Spain has recently relaxed, when the administrative decision is seriously voided (*nulo de pleno derecho*), its previous rule on the extinction of rights due to the failure to exhaust administrative remedies in a very short period¹⁷¹. Argentine federal courts, instead, refuse to waive the rule in the face of an absolutely void act on the grounds that the APL does not distinguish—in this respect— between different categories of nullities¹⁷², so adopting the new Spanish rule would be a significant improvement in the defense of private rights before the Argentine administration.

Likewise, when confronting administrative silence in the face of a request for an authorization filed by the private party, when the law requires such a permit to carry out a certain conduct, the importation of the Italian rule that treats as consent¹⁷³ (and not as denial, as is the case in Argentina¹⁷⁴), could be an important means to fight inordinate administrative delays (and the concomitant corruption). The short time limit (four months) for the revocation of administrative acts in France imposed by the recent

¹⁷¹ Régimen Jurídico (supra n 74) arts 102 and 62, para (1). The Spanish system appears complex: while the administration must consider the late administrative challenge, and its subsequent decision to reject said challenge may be appealed to the courts, it is not clear if the judicial decision that annuls such rejection can also annul the original administrative act or can only order the administration to reconsider: see Sánchez Morón (n 74) 569-72.

¹⁷² See the *Giménez Vega* decision (n 84).

¹⁷³ The principle of *silenzio-assenso* was established by Law 241/1990, art 20; subsequently amended by Decree-law 35/2005, converted into law 80/2005; decree-law 125/2010 converted and modified as law 163/2010. See V. Parisio, "Procédure administrative et silence de l'administration in Italie: à la recherche d'un difficile équilibre entre célérité et légalité", in *Mélanges Morand-Deville* (n 118) 497. France has recently adopted a similar rule: see law of Nov 12, 2013, art 1; see the chapter "Le silence de l'administration" with works from Bertrand Seiller and Pascale Gonod, in *Revue Française de Droit Administratif*, 2014-1, 5-46.

¹⁷⁴ APL, art 10.

jurisprudence of the *Conseil d'État*¹⁷⁵ would also be a worthy example to follow, as well as the move in several countries towards regulation by consent and not by imposition¹⁷⁶.

Also, in a country like Argentina, where regulations, often copied from those of more developed countries without regard to the possibility of their general local enforcement, are suddenly sprang on private parties and become immediately effective, the rules of the U.S. federal Administrative Procedure Act on rulemaking, requiring prior notice and, at least, a “paper hearing”, as well as the jurisprudence developed there concerning judicial review of regulations¹⁷⁷, are salutary examples of how things can be done differently.

Because of the large amount of information that must be imparted in the course, depth must be sacrificed to breadth. That same circumstance, as well as the language barrier experienced by almost all students, prevents the use of first hand sources. No books in Spanish describing the administrative laws of European countries and the United States, such as those (written in English) used in European and U.S. universities to teach comparative administrative law, appear to exist¹⁷⁸ although valuable Spanish comparative studies of specific administrative law topics are available¹⁷⁹. One is left therefore, to class instruction of the type disparaged in the United States as “spoon feeding”, and to the few translations of foreign administrative law works into Spanish that exist. Among these, Spanish translations of the works of Francis-Paul Benoit¹⁸⁰ and Gaston Jèze¹⁸¹, and of *Les grands arrêts de la jurisprudence administrative*, from France, and of Renato Alessi¹⁸² and Sabino Cassese¹⁸³ from Italy, can be mentioned, but no important administrative law works from the United States translated into Spanish have come, so far, to the present writer’s knowledge¹⁸⁴.

¹⁷⁵ *Arrêt Ternon*, CE 2001, Recueil Lebon 497.

¹⁷⁶ See for the United States, the Negotiated Rulemaking Act of 1990, amended in 1996, codified as 5 USC, 561-570 and its discussion in Breyer et al (n 86) 608-11; for France, Conseil d’Etat, Rapport Public 2011, *Consulter autrement – Participer effectivement*.

¹⁷⁷ Administrative Procedure Act, 5 USC 553. See C. H Koch, Jr, 1 *Administrative Law and Practice* (2010) 301 (“... rulemaking that does not comply with the required procedures is invalid”) and also at vol 3, 485.

¹⁷⁸ See Seerden (n 10); HB Jacobini, *An Introduction to Comparative Administrative Law* (1991).

¹⁷⁹ *El procedimiento administrativo en el derecho comparado*, and *La justicia administrativa en el derecho comparado*, Javier Barnes Vázquez (coord) (1993).

¹⁸⁰ *El derecho administrativo francés* (1977).

¹⁸¹ See n 34.

¹⁸² *Instituciones de Derecho Administrativo* (1970).

¹⁸³ *Las Bases del Derecho Administrativo* (1994).

¹⁸⁴ J. Pérez Alonso comments on the lack of interest, in Spain, in translating US administrative law works: “El ocaso de Chevron? Auge y fracaso de la doctrina de la deferencia judicial hacia el Ejecutivo”, RAP 186 (2011) 328.

A more recent problem is presented by the rapid changes introduced by legislation in European administrative law during these last years, a phenomenon that has been described as “legalistic inflation” and criticized for the resulting instability of the texts and the degradation of the legal rule¹⁸⁵. Thus Spain, that had enacted a government’s contracts law in 1965 and changed it thirty years after, has had since then several statutes successively replacing one another on this same field¹⁸⁶. For foreign analysts, while it is nowadays generally possible to be alert, mainly through the internet, to legislative changes in other countries, it is more and more difficult to remain updated.

Comparative law presupposes a prior knowledge of the laws being compared. But it would be unrealistic to expect, at least in Argentina, that candidates for a masters degree arrive to the course having previously learned French, Italian, Spanish and U.S. administrative laws. So it could be said that two thirds of the course must be devoted to teaching foreign laws and only one third to comparative law.

However, it takes a long time to understand properly a given system of foreign law. This requires more than simply reading the laws, the precedents and the legal doctrines applied by that system. Sometimes solutions exist outside the categories where one would expect to find them. Thus, the United States Federal Torts Claims Act would seem unduly restrictive in the remedies it affords to private parties prejudiced by unlawful administrative conduct, since it excludes, *inter alia*, damages caused by discretionary acts¹⁸⁷. However, in order to have a complete picture of the remedies afforded by the U.S. federal system, it is necessary to take into account several other factors: the more than 40 statutes that allow suits against the federal government in specific subjects; other remedies that may exist that are not of a judicial nature, such as private bills passed by Congress to compensate parties who would not be entitled to a judicial award of damages under said Act¹⁸⁸; the constitutional doctrine of regulatory takings that requires compensation when the restriction imposed by the State on private

¹⁸⁵ See Conseil d’Etat, “Sécurité Juridique et Complexité du Droit”, 57 EDCE 223 (2006); Jean-P. Camby, “Le désordre normatif”, in *Mélanges Morand-Deville* (n 118) 227; P. Brunet, “Les normes législatives et administratives”, in P. Gonod, F. Melleray & P. Yolka (dirs) 1 *Traité de Droit Administratif* (2011) 494-98.

¹⁸⁶ The last law is the *Texto Refundido de la Ley de Contratos del Sector Público*, Real Decreto Legislativo 3/2011 of 14 Nov.

¹⁸⁷ Federal Tort Claims Act, 1946. The specific rule is codified as 28 USC 2680 (a). The leading case on this issue is *Dalehite v United States* 346 US 15 (1953).

¹⁸⁸ This solution has been criticized: see P. H Schuck, *Suing Government* (1983) 41.

property is so significant as to constitute an appropriation for public use¹⁸⁹; and the classification of situations as giving rise to contractual liability of the government that in other systems might be considered of a tort nature or would not give rise to State liability¹⁹⁰. Also, the amounts of the damage awards are important, as well as the high percentage of cases that get settled without going to court¹⁹¹, since generous theories may be significantly offset by skimpy or late awards. According to the functional method, each legal system, in each field of the law, merits an in depth analysis of all the factors that influence the outcome, if one is to reach comparative conclusions.

It may therefore seem presumptuous to attempt to explain not one, but four foreign administrative laws (albeit their basic concepts) in one short course, more so nowadays that, even within each of the national systems, professors despair that “administrative law has become too complex at the point of being ‘unteachable’”¹⁹².

The course thus described can be termed over ambitious, and the instruction imparted shallow, but doesn’t all comparative law risk being superficial?¹⁹³ After all, the legal transplants that shape Argentine administrative law were introduced decades ago with much less circumspection. The course is, thus, necessary if one wishes to pursue further work on Argentine administrative law. When a legal system, like that of Argentina, has been constructed with heterogeneous materials, it is necessary to try to understand —no matter how imperfectly— the rationale for the different rules in their countries of origin, if some sense is going to be made of the national system. In an ideal world, one would start from scratch and develop a totally consistent legal system. The

¹⁸⁹ In *Pennsylvania Coal v Mahon* (260 US 393, 1922) Justice Holmes said “if regulation goes too far it will be recognized as a taking” (at 413). For the current state of the doctrine see J. G Laitos, *Law of Property Rights Protection – Limitation on Governmental Powers* (loose leaf, last update 2015). For the relationship between the takings doctrine and tort law, see R. A Epstein, *Takings: Private Property and the Right of Eminent Domain* (1985) 35-56. For the view that “takings” in the US sense, are, in Germany, “part of the wider issue of state liability for covering damages deriving from state activities”, see C.-H. David, “Compensation Aspects of the “Takings Issue” in German and American Law: A Comparative View”, in D. L Callies (dir), *Takings – Land Development Conditions and Regulatory Takings after Dolan and Lucas* (1996) 315.

¹⁹⁰ See eg, *United States v Winstar Corp et al*, 518 US 839 (1996), allowing compensation for breach of contract when a subsequent Congressional statute forbade certain financial institutions from computing goodwill towards capital reserve requirements, contrary to the prior agreement of the regulatory agency to allow such computation in order to encourage the take-over of failing institution by healthy ones.

¹⁹¹ See P. Figley, *A Guide to the Federal Tort Claims Act* (2012) 47 (writing that a majority of the tort claims are settled at the administrative level).

¹⁹² P. Gonod, “La réforme du droit administratif: bref aperçu du système juridique français”, in M. Ruffert (ed), *The Transformation of Administrative Law in Europe* (2007) 67.

¹⁹³ Watson (n 16) 10.

real world does not allow such utopias: one must accept the existing system with all its virtues and blemishes, and work from there, accepting the restrictions imposed by reality.

The words of Jürgen Basedow are pertinent here: “Misleading as it may appear, an incomplete comparison is nonetheless better than the exclusion of all information on foreign law, which is most likely to lead the student into a provincial view of the world.”¹⁹⁴ The examples given in this paper evidence, in my opinion, that, in the field of Argentine administrative law, even an “incomplete comparison” is useful not only to avoid such a “provincial” view but also to reach a better understanding of our own law.

Given its “clients” and their need for guidance in foreign administrative law, the course thus fills a gap in Argentine legal education. It should lead to deeper comparative studies in public law, and also to make students aware of the pit-falls of an indiscriminate resort to foreign laws and doctrines without a prior analysis of their compatibility with the local constitutional system, encouraging them to analyze more deeply the foreign sources which have inspired the classic national authors as well as any other sources from which they wish to draw their own inspiration.

CONCLUSION

Even if one accepts the possibility of legal transplants¹⁹⁵, it must be acknowledged that they seldom produce the same legal outcomes than in their countries of origin. Local culture, historical tradition, social values and political trends cannot fail to influence such outcomes. In some cases, transplants, even if imperfect, bring about a marked improvement in the host legal system. In the opposite case, when introduced in a medium that lacks the checks that exist in the exporting country, they can become hypertrophic and degenerate until they become a caricature of the original model. Comparative legal studies are needed to correct this deviation.

In today’s global world, more and more attention is being devoted everywhere to foreign models: thus, the adoption of the French and Italian system of administrative tribunals has been put forward as a subject for discussion in the United States¹⁹⁶. As Basedow says:

¹⁹⁴ Basedow (n 156) 839.

¹⁹⁵ See the discussion between Watson (n 16), and P. Legrand, “The Impossibility of ‘Legal Transplants’”, 4 *Maastricht J European & Comparative L* (1997) 111. Cf also, Kahn-Freund (n 164) *passim*. On the problems of transplants in administrative law, see M. Asimow, “Five Models of Administrative Adjudication” (2015) 63 *American J of Comparative Law* 3, at 27-31.

¹⁹⁶ Breyer *et al* (n 86) 427.

“globalization renders comparative enquiries not only necessary but inevitable”¹⁹⁷. Moreover, reviewing how different rules work in other countries is a necessary exercise before proposing them for local use. Thus, what have been, so far, the results in Italy of adopting the rule of affirmative silence (*silenziio assenso*) is a relevant fact in deciding whether to abandon the opposite rule.

In this spirit, comparative dialogues between Latin America and what is being called “the Global North” (i.e. mainly Europe and the United States) should be continued and, if possible, increased. Our region would certainly benefit from the diffusion of modern legal developments in the individual countries and in the European Union. As part of this dialogue, emphasizing the real scope of French administrative law doctrines would be particularly welcomed as an antidote to some of the distortions described in the first Chapter hereof.

It should be acknowledged, however, that a traditional discussion in Latin America, in law as well as in other cultural fields, has pitted those who advocate different foreign models, either from continental Europe or from the United States, against those who prefer an inward look, directed towards our historical roots or more modern locally originated doctrines.

The problem is that there is no other starting point for Latin American administrative law than the doctrine expounded by our classic authors of the middle of the 20th Century. The “cosmopolitan” approach, whether in its European or United States version, may be derided, but going back to the colonial Hispanic or to the original local cultures, no matter how romantic or patriotic this may sound, will not provide any answers to today's administrative law issues. So the end result is treating as “indigenous” what is nothing but somewhat outdated European doctrines from politically suspect periods that were once imported but are now so ingrained that their foreign origins have been forgotten.

This does not negate that, in deciding which foreign doctrines and rules are worth importing or should be rejected, local characteristics should be taken into account. For example, the following queries may be posed: Can French administrative law—and the omnipresence of the State that it implies— be applied in Latin America without the talented and honest bureaucracy that is the product of the *Grandes Ecoles* in France? Likewise, are the resources of Latin American governments sufficient to manage the

¹⁹⁷ See n 156, 837.

great amounts of information that may result from the U.S. notice and comment procedure required for the issuance of regulations?

The preceding conclusion does not negate, either, that what some may consider “mis-readings” of foreign laws, others may construe as the production of new and original rules¹⁹⁸. Thus, for example, Brazil’s importation of the U.S. class action has been hailed, due to its deviation from the model, as a welcomed innovation in the protection of universally shared interests¹⁹⁹. Likewise, in Argentina, side by side with the oppressive rules described in the first Chapter and that are normally applied to private business companies, a separate body of law and precedents has arisen protecting private individuals from the violation of their rights to a healthy environment or as consumers, and even—in some extraordinary cases it should be acknowledged—enforcing their new constitutional rights to adequate housing or to proper public education that the 1994 Constitutional Amendment has recognized by the indirect way of granting constitutional status to human rights treaties.²⁰⁰

Therefore, although the discussion normally focuses on Latin American reception of laws and doctrines from the Global North, it is important that the region reinforces inter Latin-American comparisons of administrative law solutions to our common problems. Several Latin American countries, such as Brazil, Chile, Colombia, Peru and Uruguay, have been consistently following rational policies in the last decades and can thus show a continuous increase in their social and economic metrics. To a greater or lesser degree, these countries are abandoning the stereotyped (but, previously, significantly correct) description of Latin American law as too formalistic and divorced from reality. The basis is thus set for the introduction of modern administrative law rules that will promote, and not hinder, further social and economic development. However, any inter Latin American comparative studies in administrative law will require a prior understanding and evaluation of our present doctrines and their sources if we do not want to be saddled with outdated or distorted foreign theories.

¹⁹⁸ D. López Medina, *Comparative Jurisprudence – Reception and Misreading of Transnational Legal Theory in Latin America* (SJD Dissertation, Harvard Law Library, 2001) 18-19.

¹⁹⁹ A. R Oquendo, “Upping the Ante: Collective Litigation in Latin America”, 47 *Columbia J Transnational L* (2009) 248.

²⁰⁰ Argentine Constitution, Arts 41, 42 and 75, para 22. See L. S Grosman, *Escasez e Igualdad – Los derechos sociales en la Constitución* (2008). For a similar evaluation with respect to Argentina and other Latin American countries, see Oquendo (n 108) 324-ff, 932-ff.

A true autochthonous administrative law will take a long time to be developed and will require inter-disciplinary work²⁰¹ to address not only the different legal issues, but also the local social needs and political values, as well as the economic constraints imposed by reality. Comparative law studies, both with respect to the traditional foreign models, as well as to the growing body of Latin American original creations, may contribute to such development.

²⁰¹ On the values, but difficulties, of empirical and interdisciplinary work for comparative administrative law, see Bell, *Oxford Handbook* (n 10) 1269-71.