

European Administrative Law: A Project and Its Methodological Roots

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Abstract

The 'Common Core of European Administrative Law' project, launched six years ago and still ongoing, applies the ground-breaking methodology underpinning the longstanding 'Common Core of European Private Law' research. The basic aim of the 'new' initiative is that of testing, in action, whether and to what extent the comparative legal method successfully developed under the private law-centred project can be applied to the field of administrative law. This paper highlights the scientific premises and methodological roots of the European administrative law research, as well as its promises and challenges.

I. Straddling Public and Private Law: The Birth of a Project

A few years ago, professor Giacinto della Cananea and I started a series of scholarly discussions about current and prospective interactions across private and administrative laws in the European legal framework. In particular, the asymmetry between the private and the administrative law communities in the comparative law approaches and methodologies came as no surprise, driving us to imagine a gap-bridging scholarly initiative. We then developed the idea of applying the groundbreaking methodology underpinning the 'Common Core of European Private Law' project¹ to administrative law. Well aware of the mass of people and resources necessary to parallel the longstanding private law initiative, we applied for a European grant. We launched 'CoCEAL – The Common Core of European Administrative Law' research project. The project was appreciated by the most prestigious European research institution, the European Research Council. It generously funded our project with an 'Advanced Grant' for 'Excellent Science',² allowing us to start our in-depth investigations.

One of the aims of the project is that of testing whether, and to what extent, the comparative legal methodology successfully developed under the private law-centred initiative can be applied to the field of administrative law. Accordingly,

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¹ See below, sections II to V.

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this paper highlights the scientific premises and methodological roots of the European administrative law project. It will start by briefly describing the overall architecture (no II), and the methodology (nos III-IV) underlying ‘The Common Core of European Private Law’ research. After reviewing and dismissing a few critiques that have through time been moved to the ‘Common Core’ enterprise (no V), the paper will end by sketching the promises and challenges that the adoption of the ‘Common Core’ methodology entails for the comparative research on European administrative law (nos VI-VII).

II. The Experience of ‘The Common Core of European Private Law’ Project

‘The Common Core of European Private Law’ project was initiated in 1993 by professor Ugo Mattei and the author of this paper,³ and has since then received quite a substantial attention in the comparative law literature.⁴ During its life,

³ For a more extensive and complete presentation of the project, see M. Bussani, “‘The Common Core of European Private Law’ Project Two Decades After: A New Beginning’ 15(3) *The European Lawyer Journal*, 9 (2015); M. Bussani and U. Mattei, ‘The Common Core Approach to European Private Law’ 3 *Columbia Journal of European Law*, 339 (1997-1998); M. Bussani, M. Infantino and F. Werro, ‘The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law’ 20 *King’s Law Journal*, 239 (2009).

⁴ Among the many scholarly papers that have discussed the Common Core methodology and results, see, eg, H. Kötz, ‘The Common Core of European Private Law’ 21 *Hastings International and Comparative Law Review*, 785 (1998); O. Lando, ‘The Common Core of European Private Law and the Principles of European Contract Law’ 21 *Hastings International and Comparative Law Review*, 809 (1998); E. Hondius, ‘The Common Core of European Private Law, Trento, 15-17 July 1999’ 8 *European Review of Private Law*, 249 (2000); X. Blanc-Jouvan, ‘Reflection on “The Common Core of European Private Law” Project’ 1 *Global Jurist Frontiers*, No 1, Article 2 (2001); N. Kasirer, ‘The Common Core of European Private Law in Boxes and Bundles’ 10 *European Review of Private Law*, 417 (2002); W. Wurmnest, ‘Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftsgruppen zur Privatrechtsvereinheitlichung in Europa’ *Zeitschrift für Europäisches Privatrecht*, 714 (2003); D.J. Gerber, ‘The Common Core of European Private Law: the Project and its Books’ 52 *American Journal of Comparative Law*, 995 (2004); A. Lopez-Rodriguez, ‘Towards a European Civil Code Without a Common Legal Culture? The Link between Law, Language and Culture’ 29 *Brooklyn Journal of International Law*, 1195 (2004); A.L. Kjaer, ‘A Common Legal Language in Europe?’, in M. Van Hoecke ed, *Epistemology and Methodology of Comparative Law*, Oxford-Portland (Oxford and Portland, Oregon: Hart Publishing, 2004), 377; N. Jansen, ‘Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht’ *Zeitschrift für Europäisches Privatrecht*, 750 (2005); A. Colombi Ciacchi, ‘Non-Legislative Harmonisation: Protection from Unfair Suretyships’, in S. Vogenauer and S. Weatherill eds, *The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice* (London: Hart, 2006), 197-198; J.M. Smits, ‘Convergence of Private Law in Europe: Towards a New Ius Commune?’, in E. Özücü and D. Nelken eds, *Comparative Law: A Handbook* (Oxford-Portland: Hart, 2007), 219, 231; F.J. Infante Ruiz, ‘Entre lo político y lo académico: un Common Frame of Reference de derecho privado europeo’, in *Indret Privado. Revista para el Análisis del Derecho*, 14, 22 (2008); S. Nadaud, *Codifier le droit civil européen* (Bruxelles: Larcier, 2008), 137; A. Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009), 20; N.J. De Boer, ‘Theoretical Foundations of the Common Core of European Private Law Project: A Critical Appraisal’ 17 *European Review of Private*

the Common Core project has been involving more than three hundred scholars, mostly from Europe and the United States.⁵

In very simple terms, the Common Core project is seeking to unearth the common core of the bulk of European private law within the general categories of contract, tort, and property.⁶ The goal is to search for existing commonalities and divergences in the different private laws of Europe (including the United

Law, 84 (2009); L. Antonioli and F. Fiorentini eds, *A Factual Assessment of the Draft Common Frame of Reference* (Munich: Otto Schmidt/De Gruyter, 2010); L. Miller, 'The Notion of a European Private Law and a softer side to harmonisation', in M. Lobban and J. Moses eds, *The Impact of Ideas on Legal Development* (Cambridge: Cambridge University Press, 2012), 265, 274; T. Tajti, 'The unfathomable nature and future of the European private law project' 2 *China-EU Law Journal*, 69-77 (2013); D. Cabrelli and M. Siems, 'A Case-Based Approach to Comparative Company Law', in *Iid, Comparative Company Law: A Case-Based Approach* (Oxford-Portland: Hart, 2013), 1, 16-18; D. Nikolic, *Увод у систем грађанског права (Introduction to the System of Civil Law)* (Novi Sad: University of Novi Sad, Faculty of Law, 16th ed, 2020), 70-71; J. Basedow, 'Comparative Law and Its Clients' 62 *American Journal of Comparative Law*, 821, 829 (2014); F. Fiorentini, 'Un progetto scientifico che stimola e affascina l'Europa: "The Common Core of European Private Law"' *Annuario di diritto comparato*, 275 (2014); M. Siems, *Comparative Law* (Cambridge (UK), New York, Melbourne, New Delhi, Singapore: Cambridge University Press, 2018), 31; C. Valcke, *Comparing Law Comparative Law as Reconstruction of Collective Commitments* (Cambridge (UK), New York, New Delhi, Singapore: Cambridge University Press, 2018), 6. See also M. Bussani and U. Mattei eds, *Opening Up European Private Law* (Berne-Münich-Durham (N.C.): Stämpfli, 2007); *Iid* eds, *The Common Core of European Private Law. Essays on the Project* (The Hague: Kluwer, 2003); *Iid* eds, *Making European Law. Essays on the 'Common Core' Project* (Trento: Quaderni del Dipartimento di Scienze Giuridiche, 2000). A few anthropological studies have been devoted to the Common Core: see A. Schreiner, 'The Common Core of Trento. A Socio-Legal Analysis of a Research Project on European Private Law', in A. Jettinghoff and H. Schepel eds, *In Lawyers' Circles. Lawyers and European Legal Integration* (The Hague: Elsevier, 2004), 125; G. Frankenberg, 'How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core', in M. Bussani e U. Mattei eds, *Opening Up European Law* n 4 above, 17.

⁵ The research carried out under the Common Core flag is published in a dedicated series of volumes by Cambridge University Press (until 2018) and by Intersentia (from 2019 onwards). The CUP series comprises sixteen volumes: *Causation in European Tort Law* (M. Infantino and E. Zervogianni eds, 2017); *Protection of Immovables in European Legal Systems* (S. Martin Santisteban ed, 2015); *The Recovery of Non-Pecuniary Loss in European Contract Law* (V.V. Palmer ed, 2015); *European Condominium Law* (C. van der Merwe ed, 2015); *Unexpected Circumstances in Contract Law* (E. Hondius and H.C. Grigoleit eds, 2014); *Time-Limited Interests in Land* (C. van der Merwe and A.-L. Verbeke eds, 2012); *Personality Rights in European Tort Law* (G. Brüggemeier, A. Colombi Ciacchi, P. O'Callaghan eds, 2010); *Environmental Liability and Ecological Damage in European Law* (M. Hinteregger ed, 2008); *Precontractual Liability in European Private Law* (J. Cartwright and M. Hesselink eds, 2008); *The Enforcement of Competition Law in Europe* (T.M.J. Möllers and A.B. Heinemann eds, 2008); *Commercial Trusts in European Private Law* (M. Graziadei, U. Mattei and L. Smith eds, 2005); *Mistake, Fraud and Duties to Inform in European Contract Law* (Sefton-Green ed, 2005); *Security Interests in Movable Property* (E.-M. Kieninger ed, 2004); *Pure Economic Loss in Europe* (M. Bussani and V.V. Palmer eds, 2003); *The Enforceability of Promises in European Contract Law* (J. Gordley ed, 2001); *Good Faith in European Contract Law* (R. Zimmermann and S. Whittaker eds, 2000). Some books were published by Stämpfli and Carolina Academic Press: see *Property and Environment* (B. Pozzo ed, 2007); *The Boundaries of Strict Liability in European Tort Law* (F. Werro and V.V. Palmer eds, 2004).

⁶ For a discussion on the content and scientific legitimacy of such categories, see A. Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' 40 *American Journal of Comparative Law*, 683 (1992).

Kingdom) – which, as it is well known, originate not only from the civil law and the common law heritages, but also from a number of other Western legal traditions or sub-traditions, depending on the taxonomy adopted.⁷

The project's aim is to draft the outlines of a reliable map of European private law.⁸ The future use of this map is of no concern to the cartographers who are drafting it. However, if reliable, the map may be indispensable for whomever is entrusted with drafting legislation or pursuing legal harmonization at the European level. Indeed, for the transnational lawyer, the present European situation is comparable to the one of a traveller compelled to use a number of different local maps, each containing misleading information. The Common Core project wishes to correct this misleading information. It does not wish to force the actual diverse reality of the law into one single map to attain uniformity. The project is not concerned with drafting a city plan in order to affect change or predict future developments. Rather, the Common Core project seeks only to analyze the present complex situation in a reliable way. While a fundamental assumption of the Common Core project is that cultural diversity in the law is an asset, the project neither takes a preservationist approach nor does it push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core project and the other remarkable 'integrative' private law enterprises which have been carried out in Europe in the last forty years with the aim of undertaking city planning rather than 'mere' cartographic drafting.⁹

⁷ For instance, Scandinavian systems are considered a tradition per se by Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, T. Weir trans, 3rd ed, 1998). Scotland, Malta, and Cyprus are generally considered mixed legal systems. See E. Reid, 'Scotland', in V.V. Palmer ed, *Mixed Jurisdictions Worldwide. The Third Legal Family* (Cheltenham: Cambridge University Press, 2nd ed, 2014), 216; B. Andò, K. Aquilina, J. Scerri-Diacono, D. Zammit, 'Malta', in V.V. Palmer ed, *Mixed Jurisdictions Worldwide* n 7 above, 528; N. Hatzimihail, 'Cyprus as a Mixed Legal System' 6 *Journal of Civil Law Studies*, 38 (2013).

⁸ These features bring the 'Common Core' project near to the 'Ius Commune Casebook for the Common Law of Europe' project, an initiative launched in 1994 by the late Professor van Gerven with the aim – in the short term – to produce a collection of casebooks covering the main fields of European law, and – in the long term – to 'uncover common general principles which are already present in the living law of the European countries' (W. van Gerven, 'Casebooks for the Common Law of Europe: Presentation of the Project' 4 *European Review of Private Law*, 67, 68 (1996)). However, what differentiates the two studies lies in their targets and their methods. The Common Core project is aimed at scholars, while the Casebooks project is for teaching purposes. Ultimately, the latter's goal is to provide students with a grasp of foreign law whilst educating them as common European lawyers, even though the casebooks mainly concentrate on the English, French and German systems, including materials from other European systems only if they provide original solutions. The Common Core project, too, may provide some useful materials for teaching purposes, but this is not its primary task. It investigates more specific areas of law, delving deeply into technical problems. Moreover, it focuses on all European legal systems, avoiding – as with the other project – placing an emphasis on systems that are, or could be, considered to be 'leading' or 'paradigmatic' ones.

⁹ In the field of contract law, suffice it to think of the *Académie des giusprivatistes européens* and its draft 'Code Européen des Contrats' (G. Gandolfi ed, *Code Européen des Contrats. Avant-projet, Livre premier* (Milano: Giuffrè, 2001), of the so-called Lando Commission and its 'Principles of European Contract Law' (O. Lando and H. Beale eds, *Principles of European Contract Law, Parts I*

III. The Parents of the ‘Common Core’ Project

Let us go into some details of the ‘Common Core’ project, starting from its scholarly roots. The ‘Common Core’ project has two cultural parents: the experience of the Cornell project directed by Professor Schlesinger in the 1960s (a) and the dynamic comparative law methodology as principally developed by Rodolfo Sacco over the last forty years¹⁰ (b).

(a) At Cornell, Schlesinger launched his collective comparative research project on the ‘Formation of Contracts’ in 1957, which resulted in the publication under his general editorship of two monumental volumes in 1968.¹¹

The fundamental problem that Schlesinger had to resolve in his worldwide comparative study was how to obtain comparable answers to the questions he wished to pose about different legal systems. The answers had to refer to identical

and II, Combined and Revised (The Hague: Kluwer Law International, 2000)); O. Lando, E. Clive, A. Prüm and R. Zimmermann eds, *Principles of European Contract Law, Part III*, (The Hague: Kluwer Law International, 2003), of the so-called ‘Insurance Group’ and its ‘Principles of European Insurance Contract Law’ (J. Basedow et al, *Principles of European Insurance Contract Law* (Köln: Sellier, 2nd ed, 2016), as well as of the so-called ‘Acquis-Group’ and its ‘Acquis-Principles’ (Research Group on the Existing EC Private Law ed, *Principles of Existing EC Contract Law (Acquis Principles), Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich: Sellier, 2007); Id, *Contract II. Performance, Non-Performance, Remedies* (Munich: Sellier, 2008). The European Group of Tort Law published its ‘Principles of European Tort Law’ in 2005 (European Group on Tort Law, *Principles of European Tort Law* (Wien/New York: Springer, 2005), while the Commission of European Family Law has worked out three sets of ‘Principles of European Family Law’ (K. Boele-Woelki et al, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp: Intersentia, 2004); K. Boele-Woelki et al, *Principles of European Family Law Regarding Parental Responsibilities* (Antwerp: Intersentia, 2007); K. Boele-Woelki et al, *Principles of European Family Law Regarding Property Relations between Spouses* (Antwerp: Intersentia, 2013); K. Boele-Woelki et al, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in De Facto Unions* (Antwerp: Intersentia, 2019). The efforts of the ‘Study Group on a European Civil Code’ covered the whole field of the law of obligations, plus certain aspects of the law of movable property, publishing eleven volumes of ‘Principles of European Law’ (the entire list of volumes is available at <https://tinyurl.com/yc6a8ap9> (last visited 30 June 2022)).

But for the professor Gandolfi’s initiative, all the projects mentioned above in this note have been relentlessly trying to set a compromise between the common law and the civil law rules to be adopted in the given context (see M. Bussani, ‘Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé’ *Revue Internationale de Droit Comparé*, 7 (2010)). Far from this approach, and focused on the civil law tradition only, is the ‘Code européen des affaires/European Business Code’ project promoted by the Association H. Capitant. See the main references at <https://www.codeeuropeendesaffaires.eu/>.

¹⁰ See R.B. Schlesinger ed, *Formation of Contracts: A Study of the Common Core of Legal Systems*, 2 vols, (New York, London: Ocean publications/Stevens & Sons, 1968); R. Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law, Installment I’ 39 *American Journal of Comparative Law*, 1 (1991).

¹¹ R.B. Schlesinger (ed), *Formation of Contracts* n 10 above. For a discussion of Schlesinger’s (as well as Sacco’s) fundamental contributions to comparative law research, see U. Mattei, ‘The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence’, in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 238-256.

questions interpreted as similarly as possible by all those replying. Additionally, the answers had to be self-sufficient, needing no additional explanations and, hence, had to be on par with the most detailed rules. Thus, how to formulate each question in a uniform way to an Indian, a Spaniard, an Italian, a Pole, a German, a Norwegian, and so forth? How to obtain consistency?

These concerns led to working out one of the most critical, and significant methodological features of the research. Each question presented a case that asked the respondents about the results that would be reached under those circumstances, instead of asking about a doctrinal system. Each question was formulated with the aim of taking into account, for every legal system under review, any relevant factor affecting the answer, so as to guarantee that these factors would be considered in, and would therefore be comparable with the analysis of every other system. Thereby, another important objective was achieved. Often, the factors that operate explicitly and officially in one system are officially ignored and considered irrelevant in another system. These factors may still operate secretly, slipping silently in between the formulation of the rule and its application by the courts. For instance, it is well known among private law comparativists that there is a wide area of disagreement between legal systems in which offers are normally irrevocable, and legal systems in which offers are normally revocable. Yet, if one takes into consideration not only rules concerning revocability, but also the related rules dealing with the time when acceptance becomes effective, it becomes evident that courts in systems where offers are revocable are sensitive to the same policy concerns that in other jurisdictions make offers irrevocable.¹²

The work done at Cornell made it clear that, in order to have complete knowledge of a legal system, one cannot trust entirely what the jurists usually say, for there may be wide gaps between operative rules and the rules as commonly stated and described. This is why the Cornell methodology compelled jurists to think explicitly about all the factors that matter, regardless of whether they operate explicitly or implicitly, by forcing them to answer identically formulated questions. As a result, the respondents gave a very different picture of the law than did the monographs, handbooks or casebooks circulating in their own legal systems.

(b) The lesson learned from the Cornell Project was taken on and developed by Rodolfo Sacco. The core of his comparative law methodology is by now well known, having been translated into many languages.¹³

To sum up Sacco's theory,¹⁴ a list, even an exhaustive one, of all the reasons given for the decisions made by the courts is not the entire law. The statutes are not the entire law nor are the definitions of legal doctrines given by scholars. In

¹² R.B. Schlesinger, 'Formation of Contracts – A Study of the Common Core of Legal Systems: Introduction' 2 *Cornell International Law Journal*, 1, 49-50 (1969).

¹³ See R. Sacco, 'Legal Formants' n 10 above; R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris: Presses Universitaires d'Aix-Marseille, 1991), 33.

¹⁴ For the following remarks, see R. Sacco, 'Legal Formants' n 10 above, 21-27.

order to know what the law is, it is necessary to analyze the entire complex relationship between what Professor Sacco calls the ‘legal formants’ of a system, those formative elements that make up any given rule of law. Legal formants include statutes, general propositions, particular definitions, reasons, holdings, and so forth. All of these formative elements are not necessarily consistent within each system – only domestic jurists assume such coherence. To the contrary, legal formants usually conflict and may be in a competitive relationship with one another.

From this perspective, we must know not only how courts act, but we must also consider the influences to which the judges are subject. Such influences may have a variety of origins. They may arise because scholars gave wide support to a doctrinal innovation, or because of a judge’s individual background. A judge appointed from an academic position will tend to emphasize scholarly opinion more than a judge who was a practitioner. Taking into account the contribution of different legal formants allows one to understand the reasons why similar rules in different legal systems are subject to different applications and interpretations,¹⁵ or why different rules in two systems give rise to largely similar outcomes.¹⁶ By delving into what the legal formants are, and how they relate to each other, we may ascertain the factors that affect operative outcomes, making clear the weight that interpretive practices and rhetoric (grounded in scholarly writings, legal debate aroused by previous judicial decision, etc) have in moulding those solutions. Herein lies the importance of distinguishing between the rule announced by the court and the rule as it is actually applied, or, as a common lawyer would say, between the court’s statement of the rule and the holding of the case, the facts on which the court based its result.

All the above makes it clear that the notion of legal formant is more than an esoteric neologism for the traditional distinction between ‘loi’, ‘jurisprudence’ and ‘doctrine’, ie, between enacted law, case law, and scholarly writings. Within a given legal system, a legal rule is not uniform, in part because one rule may be given by case law, one by scholars, and one by statutes. Within each of these sources, there are formants competing with one another. This complex dynamic may change considerably from one legal system to another as well as from one area of the law to another. In particular, each legal system has certain legal formants that are clearly leading to different directions. Differences in formant

¹⁵ One might think, for instance, of vicarious liability of parents for the harms caused by their children, which is enforced much more strictly in France than it is in Italy, despite similar code provisions (see Art 1242(4) of the Code civil – former Art 1384(4) in the original version of the Code – and Art 2048 of the Italian Civil Code): see F. Werro and V.V. Palmer eds, *The Boundaries of Strict Liability* (Durham, NC: Carolina Academic Press, 2004), 399-400; on this point see also M. Bussani, *La colpa soggettiva* (Padua: CEDAM, 1991), esp 16, 180.

¹⁶ A good example is compensation for pure economic loss in Germany and Austria: see M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), 148-154.

leadership are particularly clear in the distinction between common law and civil law. Awareness of those differences and of how they work in practice explains why the exploitation of a ripe factual approach in the 'Common Core' project is much more than a mere collection of decided cases.

IV. How to Do Projects with Details: The Framework of the Research

As in the Cornell project, the key tool of the 'Common Core' project is the questionnaire. The three principal areas of property, tort and contract, are divided into a number of topics. Each participant, when charged with the responsibility of editing a particular topic volume, is first required to draft a factual questionnaire and to discuss it at the topical sessions during the general meetings that take place every year. Editors of each project are required to follow the general guideline of drafting the questionnaires to a sufficient degree of specificity, so as to require the reporters to answer them in such a way that all of the circumstances affecting the law in his or her system are addressed, including circumstances that may not have any official role but have a practical impact on the operative rules.¹⁷ This method also guarantees that rules formulated in an identical way (eg, by using an identical code provision), but which may produce different applications, will not be regarded as identical.

In answering the questionnaire, every contributor is asked to set her/his answers up on three levels, labeled 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants'. The level dealing with 'Operative Rules' is designed to be a concise summary of the basic applicable rules to the case and the likely outcome that would be reached under the law of the legal system concerned. Reporters are also asked to indicate whether that outcome would be considered clear and undisputed or doubtful and problematic.

The level called 'Descriptive Formants' has a twofold goal. On the one hand, its aim is to reveal the reasons which lawyers feel obliged to give in support of the operative rule presented under the previous heading, and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with general principles (traditional as well as emerging ones). The reporter is therefore obliged to make clear whether the solution to the hypothetical case is endorsed by the other legal formants; whether all formants are concordant, both from an internal point of view (the source of disaccord may be minority doctrines, including dissenting opinions in leading cases, opposite opinions in scholarly writings, etc), and from a diachronic point of

¹⁷ To make the simplest example, one could think of the impact of the presence/absence of a comprehensive health insurance system on the cases concerning damages for personal injury: for all, see D. Jutras, 'Alternative compensation schemes from a comparative perspective', in M. Bussani and A.J. Sebok eds, *Comparative Tort Law. Global Perspectives* (Cheltenham: Elgar, 2nd ed, 2021), 140, 143-152.

view (whether the various solutions are recent achievements or were identical in the past). On the other hand, the goal at this ‘descriptive’ level is to understand whether the solution depends on legal rules and/or institutions outside private law, such as procedural rules (including rules of evidence), administrative or constitutional provisions.

Finally, the level called ‘Metalegal Formants’ asks for a clear picture of the other elements that may affect the operative and descriptive patterns, such as policy considerations, economic factors, social context and values, as well as the structure of the legal process (eg, organization and competence of courts). From the ‘Common Core’ perspective, these are data a researcher can never leave out whenever the aim is to understand what the law is.

A further note on the reporters is necessary. For the purpose of comparative scholarship, a domestic lawyer is not necessarily the best reporter on his or her own system. A comparative knowledge of the law is of a different nature than an internal knowledge of it. The former is inherently theoretical, and the latter is practical (legal scholars acting within a legal system can themselves be seen as legal formants since they ‘make’ the law, though indirectly). Hence, a nationally-trained lawyer may control more information about the system than a comparative law-trained (or a foreign) one. Yet, lawyers who have not been exposed to legal cultures other than their own, may be less well-equipped to detect the hidden data and the rhetorical attitude of the system because they are misled by automatic assumptions. This is why the participants in the ‘Common Core’ project usually are comparativists, and, as comparativists, are asked to deal with the questionnaires as if they had to describe their own law.

That being said, each questionnaire, edited by one or more co-editors, is the embryo of a topical volume and is discussed within one of the three general areas in which the ‘Common Core’ project is organized, ie, property, contract or tort.¹⁸ The responsibility of setting forth the organization and the agenda of the property, contract and tort areas is allocated to three Chairpersons, who coordinate the progress of the project under their supervision.¹⁹ Scholars participating in one of the three areas work together, discussing the newly proposed

¹⁸ Some questions have arisen regarding the cultural legitimacy of using the labels of property, contract and tort whose meanings themselves differ among legal systems. It is argued that these categories are not homogeneous among legal systems, and therefore, boundary issues may exist. For example, it is indeed easy to observe that ‘nuisance’ is classified as a tort in common law while ‘troubles de voisinage’ is classified as property in France (P. Catala and T. Weir, ‘Delicts and Torts: A Study in Parallel. Part II’ 38 *Tulane Law Review*, 221, 230-236, 243-248 (1964)). Yet, it is sufficient, however, to take a problem-solving approach to see that these two legal categories describe the same problem of boundaries between property rights. An objection to this tripartite scheme seems, therefore, rather formalistic. In this project, contract, tort and property are not used in any positivistic legal sense. Their role, besides that of labels useful to detect the areas of general expertise of the contributors, is to serve as meta-legal containers of problems that are fairly easy to locate on operational grounds.

¹⁹ Current Chairpersons for the three groups of property, contract and tort are, respectively, Filippo Valguarnera (Stockholm University), Aurelia Colombi Ciacchi (University of Groningen), Marta Infantino (University of Trieste).

questionnaires to help the editors reach the required level of facticity and the proper semantic level given the nature of each topic. The tentative answers and the progress status of the topical volumes are publicly analysed and discussed during the project's general meetings. Once responses to a questionnaire are complete, the editors of the project proceed to comparatively assess the national reports, and subsequently collect them in a volume, to be published in the dedicated series mentioned above.

V. Caveats

The 'Common Core of European Private Law' project has so far enjoyed a remarkable success, as demonstrated not only by the long list of scientific outputs and by the recognition it received in academic debates, but also by the fact that it is today the most long-standing and largest academic network dealing with European private law.²⁰ Needless to say, through time, the project has been challenged by a series of critiques that it is helpful to address here, in order to both clarify what the project is about, and clear the ground from possible misunderstandings.

First of all, the title of the project might easily misguide superficial observers – and actually misguided some of them²¹ –, suggesting that the reference to 'the common core' of European private law means only, or foremost, a search for commonalities. However, nothing could be farther from the spirit of the project, whose title emphasizes commonalities over differences (not as much as for the sake of brevity) as a tribute to Schlesinger's path-breaking work.²² Other misunderstandings have given rise to more substantial critiques. For instance, some commentators have stressed that the Common Core project, insofar as it relies upon Schlesinger's and Sacco's theories, as refined and revised by the project's editors, implies a methodological monism that provides too strict a framework for comparative research.²³ Others have challenged the project's methodological reliance on factual questionnaires, either because the factual focus of the questionnaire would allegedly over-emphasize judge-made law,²⁴

²⁰ This is noted, for instance, by L. Miller, 'The Notion of a European Private Law' n 4 above, 274.

²¹ For this observation, see F. Fiorentini, 'Un progetto scientifico' n 4 above, 277-278. Even less superficial observers might fall in the same trap: G. Frankenberg, 'How to Do Projects' n 4 above, 35 ('Ultimately they intend nothing less than to seek unity [...] and to build a common European legal culture'); M. Reimann, 'Of Products and Process. The First Six Trento Volumes and Their Making', in M. Bussani and U. Mattei eds, *Opening Up* n 4 above, 83, 85-88; O. Lando, *The Common Core of European Private Law* n 4 above, 809.

²² See above, no 3 (a).

²³ F. Fiorentini, 'Un progetto scientifico' n 4 above, 300; G. Frankenberg, 'How to Do Projects' n 4 above, 34-36.

²⁴ P. Legrand, 'Paradoxically Derrida: For a Comparative Legal Studies' 27 *Cardozo Law Review*, 631, fn 159 (2005) (calling the Common Core volumes 'snippety compilations' accumulating 'selected titbits extracted largely from legislative texts and appellate judicial decisions').

or because the discretionary choices made by specific projects' editors when drafting the factual cases composing the questionnaire would implicitly and inevitably channel national reporters' answers in pre-determined, largely convergent directions.²⁵ Still others have contested the naïveté of the Common Core project's claim to carry out a 'neutral' and 'purely descriptive' research, noting that this claim not only seems to be based on the over-simplistic assumption that there is something like a 'truth' of legal phenomena that can be described in objective terms by 'neutral' observers,²⁶ but also it aims at de-politicizing – more or less consciously – the project and its possible outcomes.²⁷

Insofar as they refer to the unavoidable limitation of any collective and comparative enterprise – that of compressing individual creativity, biases and ideologies to put them at the service of guaranteeing the comprehensibility and comparability of the results –, these critiques are fully acceptable. As to the rest, the above critiques largely miss the mark. True, the project's methodological guidelines, as well as the ways in which questionnaires are framed and the instruction for a (as much as possible) neutral and descriptive approach, constrain national reporters in their own legal lingo. Yet, it holds equally true that none of these constraints can suppress reporters' subjective and cultural understanding of the factual cases, and their views on how their legal system would handle these cases. When writing their responses, national reporters convey not only their picture of the legal systems they represent, but also their own commitment to given schools of thought, methodological style, deeply embedded beliefs, hopes, and self-narratives. While this might limit, to a certain extent, the heuristic value of the substance of their answers²⁸ (could it be different?), it also enriches the scientific output of the project with meta-legal information that are usually out of the reach of comparative research activities. In other words, the balance struck by the Common Core project between methodological monism and pluralism, neutrality and political transparency, as questionable as it might be, always serves the project's final aim: getting more, and deeper knowledge.

²⁵ G. Frankenberg, 'How to Do Projects' n 4 above, 40-47; along the same lines, see also D. Cabrelli and M. Siems, 'A Case-Based Approach' n 4 above, 17-18. On the institutional rather than methodological levels, others have noted that the choice of the themes on which Common Core questionnaires focus could be less fragmented and more coordinated in light of the project's final cartographic aim: M. Reimann, 'Of Products and Process' n 21 above, 83, 92-93.

²⁶ G. Frankenberg, 'How to Do Projects with Comparative Law' n 4 above, 27, 36.

²⁷ See for instance D. Kennedy, 'The Politics and Methods of Comparative Law', in M. Bussani and U. Mattei eds, *The Common Core* n 4 above, 131, 175; V. Grosswald Curran, 'On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project' 11 *European Journal of Private Law*, 66 (2003); G. Frankenberg, 'How to Do Projects' n 4 above, 35 ('the Trentinos reveal their desire to move from archaeological and cartographic work to a colonizing project with political implications for legal science and education').

²⁸ This is emphasized, for instance, by N. Jansen, 'Dogmatik' n 4 above, 750-773.

VI. From Comparative Private Law to Comparative Administrative Laws

With that aim in mind, our current CoCEAL project started from the assumption that, like in the private law field, any comparative study of administrative law should not limit itself to a comparison between different institutions and rules, but should also entail the understanding of the (technical, political, social, and cultural) factors affecting the daily life of these institutions and rules.²⁹ The comparative research looks at administrative law in its actual making and re-making over time, as the by-product of many processes – from innovation to imitation and adaptation, to local frameworks and needs. Comparing administrative law institutions as they actually work in two or more jurisdictions, however, may not be enough. This kind of synchronic comparison should go hand in hand with the so-called diachronic comparison, that is, with the study of how institutions and rules changed through time.³⁰ In the field of administrative law too, comparative knowledge cannot but be historical knowledge, and more precisely knowledge of comparative history.³¹

The principal questions underlying legal comparative research on administrative law – besides those pertaining to the specific topics of the research, on which I will dwell in the next section – therefore are: how can we carry out a

²⁹ One can appreciate the results achieved so far by the project perusing the volumes already published by Oxford University press in a series devoted to the project and edited by Mauro Bussani and Giacinto della Cananea: G. della Cananea and R. Caranta eds, *Tort Liability of Public Authorities in European Laws*, (Oxford: Oxford University Press, 2020); G. della Cananea and M. Andenas eds, *Judicial Review of Administration in Europe* (Oxford: Oxford University Press, 2021); M. Conticelli and TH. Perroud eds, *Procedural Requirements for Administrative Limits to Property Rights* (Oxford: Oxford University Press, 2022). See also the following note, as well as M. Bussani and G. della Cananea eds, *La responsabilità civile delle autorità pubbliche in Europa. Alla ricerca di un nucleo comune* (Napoli: Editoriale Scientifica, 2022).

The project's website is <http://www.coceal.it>, and therein one can find further references to the ongoing research activities.

³⁰ R. Sacco, 'Legal Formants' n 10 above, 24-26. Indeed, a parallel (and, as such, distinct) avenue of our research is the study of some critical features of the evolution of administrative law in Europe. The underlying (and, to comparativists, obvious) idea is that synchronic comparison should go hand in hand with the diachronic comparison, that is, with the study of how institutions and rules have changed through time. For instance, the influence of the Austrian legislation on administrative procedure in other European countries in a period of the history of Europe (1924-1958) that is generally neglected in the 'standard' accounts of public law can enrich our understanding of how legal cultures interact notwithstanding important political changes and differences. In this respect, one can see some offspring of our research as presented in G. della Cananea, A. Ferrari Zumbini and O. Pfersmann eds, *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920-1970)* (Oxford: Oxford University Press, forthcoming 2023); G. della Cananea and S. Mannoni eds, *Administrative Justice Fin de siècle. Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (Oxford: Oxford University Press, 2021); A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo. Il modello austriaco* (Napoli: Editoriale Scientifica, 2020); Ead, 'Judicial Review of Administrative Action in the Austro-Hungarian Empire. The Formative Years (1890-1910)' 10 *Italian Journal of Public Law*, 9 (2018).

³¹ S. Cassese, 'L'étude comparée du droit administratif en Italie' 41 *Revue de droit international et de droit comparé*, 879, 886 (1989).

comparative study of differences and similarities between legal systems? How can we draw comparisons? How can we get comparable information, given that every legal system has its own history, its own internal dynamics, its own approach to law, to the State, to the relations between public powers and citizens, as well as its own legal structures, rules and vocabulary?

The answer to these questions comes from the working methodology.

VII. Adjusting the ‘Common Core’ Methodology for the Comparative Study of Administrative Law

If our CoCEAL project aims at analysing in depth specific administrative law areas, we are well aware that administrative law, as a living, multifaceted legal discipline, expresses most of its characteristic features in the particular sub-systems/domains composing it.

This is why the main topic chosen for this comparative enterprise is administrative procedure. There are two reasons that justify this. First, the emergence of administrative procedures has characterized more or less all European legal systems. Second, the concept of administrative procedure is not neutral, because there is not a single underlying rationale, but a variety of rationales. From this perspective, the question to be addressed is not simply whether national systems of public law subscribe to the same standards of administrative law, such as the duty upon the public administration to give reasons, the duty to hear the addressees of its decisions, and to allow these addressees to have access to the files concerning them. It is also whether, that being the case, similarities are limited to the broad formulations of general principles or do they extend to certain mechanisms, in particular to administrative procedure, viewed as a central element of modern systems of public law.

The CoCEAL project therefore focuses on technical issues within the domain of administrative procedures. For each of the sub-topics, chosen by the general editors as worthy of a full-fledged analysis, one or more volume-editors draft a factual questionnaire. Once approved by the research group selected by the general editors, the questionnaire is answered by (comparative) lawyers for each of the legal systems under examination.³² The methodological reliance on factual questionnaires enables the editors within this project to avoid any reference to dogmatic concepts that might give rise to diverging interpretations, or that might

³² We have thought that a study in the field of public law in Europe could benefit from a consideration of EU law, with the *caveat* that we are less interested, in this respect, in the law that the EU applies to its Member States than to the law that applies to its institutions. What characterizes the EU legal order is not just the kind of distinction between public and private law that was drawn from civil law systems. It is also the fact that since the beginning the EU had its own administration and its own administrative law. This may challenge the idea according to which administrative law is consubstantial to the State, but it certainly raises interesting issues about the origins and adaptations of the principles and rules that govern the conduct of EU institutions.

have little (or no) meaning for some reporters. Moreover, the recourse to factual cases facilitates editors' subsequent process of comparing the answers received.

In their answers, reporters describe how each case would be solved under the law of the legal system they are concerned with. Following the Common Core style, reporters are also required, when outlining the possible outcomes, to explain which legal formants – statutes, doctrinal opinions, judicial trends, bureaucratic practices, and so on – are responsible for those outcomes, and to what extent. In other words, reporters have to go beyond conventional wisdom and rhetoric, in order to unveil the factors that, officially or not, have an impact on their legal system's law and outcomes.

Reporters are also asked to highlight any meta-legal factor – be it economic, social, institutional – that might influence the final result. Relevant meta-legal factors might be, for instance: the cost for accessing a given service, the dominant way of conceiving the relationship between citizens, civil society, and the administration, the cultural and sociological milieu of the administrative personnel, the organizational structure of courts, and the model of recruitment and selection of high- and low-ranking public employees. By offering such insights on the legal and meta-legal factors affecting the probable outcome of each case, answers to the questionnaires are expected to shed light on the characteristic features of legal systems, including the plurality of rules co-existing (and conflicting with one another) within them.

To illustrate, answers might provide precious information about the role played, in a legal system, by constitutional and fundamental rights litigation, or about the relationships, in the same legal systems, between the domestic legal order and supra-national ones. Further, answers might delineate the legislative and judicial approach to administrative law, the authority enjoyed by legal science, the contribution given by practitioners (from politicians, to high-ranking officials, to bureaucrats) to the daily law-making of administrative rules, and the way in which administrative law practice and science are perceived by the legal community and society as a whole. Good answers might also enlighten the scope of administrative law in the legal systems under review (especially vis-à-vis sovereign/political acts on the one hand, and other branches of law on the other hand), the structure and composition of the administration, the regime and classification of administrative acts, the principles (if any) informing the administrative procedure and administrative adjudication, as well as the models that are taken as a reference standard for comparison. It is therefore crucial that, when drafting the questionnaires, editors think about the issues and the problems that they want to deal with thoroughly. The selected issues and problems should be understandable by all reporters, and should be instrumental to unveil the (similar and diverging) characteristic features of the legal systems studied.

Questionnaires are made up of ten or eleven cases each, and should cover all the main issues and problems that are at the core of the legal area under

investigation. The cases in the questionnaire should be drafted as short plausible stories, whose ending always poses the same questions: how would this hypothetical case be solved under the concerned legal system? What legal rules would be applicable to the case? What legal remedy, if any, can be pursued by the characters of the story to obtain justice? Which meta- or extra-legal factors are important in determining the final outcome?

As far as we know, this is the first time that a collective effort of this sort is made in the field of administrative law.