Reflecting Rationales

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The Germanic Tradition of Comparative Administrative Law

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A. Introduction

There is still a widespread view among legal comparatists that administrative law belongs to those fields of law where national peculiarity is most pronounced.[1] This opinion casts doubts on the purpose of any comparison

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1 See Ulrich Scheuner, 'Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung', Die Öffentliche Verwaltung 16 (1963), 714-719; Helmut Strebel, 'Vergleichung und vergleichende Methode im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 405, 409, 428; for a similar perspective see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', The Modern Law Review 37 (1974), 1, 17 ('All rules which organise constitutional, legislative, administrative or judicial institutions and procedures, are designed to allocate power, rule making, decision making, above all, policy making power. These are the rules which are closest to the „organic" end of our continuum, they are the ones most resistant to transplantations.'); Sabino Cassese, 'La costruzione del diritto amministrativo: Francia e Regno Unito' in: Sabino Cassese (ed.), *Trattato di diritto amministrativo* (Giuffrè 2000), 1, 3 (one of the characteristics of administrative law is 'suo legame con le tradizioni nazionali'); Eberhard Schmidt-Aßmann and Stéphanie Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007) 395, 396 (with reference to Cassese and Auby). Already in the nineteenth century, Lorenz von Stein underlined that the individual differences of the States reflect 'the true, inexhaustible wealth of life in the world […] which is nowhere greater than in the field of public administration and its law', see Lorenz von Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts* (Cotta 1870), 13.

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of different administrative law systems that goes beyond an academic interest in identifying differences and similarities. By contrast, the comparison of private law has always been considered to be of utmost practical importance because transboundary social and commercial relations require a legal framing and entail, from the perspective of contracting parties, the necessity of choosing the applicable law.[2] A rational choice can only be made if those who choose have enough knowledge of the relevant foreign law and of the advantages and disadvantages that different legal solutions offer for the resolution of conflicts.

However, comparison of public law has been gaining increasing importance in recent decades. The greater role that comparative constitutional law and comparative administrative law nowadays play even in the context of legal practice is not only attributable to the fact that the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) have made legal comparison an integral part of their hermeneutic approach to European law and have thus drawn the attention of practising lawyers to comparative aspects.[3] A need for common substantive principles and inter-operable administrative structures pushes academics and practitioners to investigate and study public law of other European countries,[4] and more and more frequently also of systems outside Europe. Often, the identification of the preconditions that must be met if a legal regulation is to be compatible with vertical and horizontal co-operation in the European Union (EU) results from an exchange and a collaboration between academics and practitioners. And increasingly, national legislators take inspiration from foreign laws identified by comparative studies.

Although the diversification of epistemic and practical interests of comparative public law[5] can be perceived as a phenomenon associated with

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2 Cf. Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015), 12.

3 For the ECtHR see Marten Breuer, ‘Verfassungsgerichte und Verfassungsvergleichung: Die Perspektive des Europäischen Gerichtshofs für Menschenrechte’, Journal für Rechtspolitik 18 (2010), 223 ff., for the ECJ Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015), 217 ff.

4 See Karl-Peter Sommermann, ‘Objectives and Methods of a Transnational Science of Administrative Law’ in: Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer 2016), 552-553.

5 See Karl-Peter Sommermann, ‘Erkenntnisinteressen der Rechtsvergleichung im Verwaltungsrecht’ in: Anna Gamper and Bea Verschraegen (eds), *Rechtsvergleichung als juristische Auslegungsmethode* (Sramek 2013), 195-210.

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the processes of Europeanization and globalization, a look back into legal history reveals that essential elements of modern comparative law can already be seen much earlier. In the Germanic tradition, as in the traditions of other European countries, comparative approaches to public law in the eighteenth and nineteenth century are of special interest. It was then that rationalism and, later, legal positivism gave rise to the first forms of 'universalist' and 'culturalist' approaches to legal comparison. While universalist approaches focus on generic legal and institutional problems of political communities and, therefore, look for common solutions, culturalist approaches emphasize the historical and cultural imprint of the law and consequently remain suspicious of universal solutions.

B. Governance as a Subject of Comparative Studies in the Era of Enlightenment

Legal thinking in the era of the Enlightenment is characterized by new approaches to the epistemic sources of the law. Religion as the primary source of natural law, which, in turn, should give orientation to the positive law was progressively replaced by legal principles derived from rational reasoning. Recourse to reason soon led to questioning of the political order as well, which was no longer deemed to be set in stone. Political philosophers and legal scholars now perceived more clearly and critically differences between the existing political and legal cultures, taking their insights as the starting point for the development of general principles of legal rationality.

1. Growing Interest in the Comparison of Political and Administrative Cultures

A key work for the development of legal and political thinking in Europe and in North America in the eighteenth century was 'The Spirit of the Laws' written by Montesquieu and deliberately published in Geneva (i.e. outside of absolutist France) in 1748.[6] It exercised an important influence on German authors. Three aspects have to be highlighted: First, Mont-

6 Charles de Secondat Montesquieu, *De l'esprit des loix ou du rapport que les loix doivent avoir avec la constitution de chaque gouvernement, les mœurs, le climat, la religion, le commerce*, *etc*., vol. 2 (Barillot & Fils 1748).

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esquieu discussed prominent ancient statesmen and political philosophers such as Solon, Plato, Aristotle, and Cicero, thus paying respect to an old European tradition; second, although starting from classical typologies, he systematically developed a culturalist approach for the comparison of governments and laws, pointing out their relationship with climatic and geographic circumstances and cultural particularities; and third, he utilized the description of foreign political and legal systems for an implicit criticism of the situation in his own country, in particular by describing the government and laws of England in an idealizing manner, leaving the intended comparison with France to the reader.

One of the German-speaking authors strongly influenced by Montesquieu was Johann Heinrich Gottlob von Justi (1720-71) who, in 1762, published his work *Comparison between the European and the Asian and other allegedly barbarian governments*.[7] Notably, Justi focuses his gaze on countries of other continents, in particular on China and Peru, and criticizes the arrogance of Europeans towards so-called 'barbarian cultures'. Their governments, institutions, and laws including, for instance, their tax law systems, are then analysed, on the basis of reports given by missionaries and explorers, and described as more developed and humane in some respects than those of European states. Seventy years later, the insight that the political and legal order of a country has to be seen in its cultural context was prominently exposed in the study by Friedrich Murhard (1779-1853) on 'The right of nations to strive for political constitutions that are modern and appropriate to their degree of cultural development'.[8] Murhard, a representative of liberal thinking and, like other liberals, highly interested in political ideas originating from England, took a special interest in the constitutional arrangements, put in place after the Glorious Revolution, and their further development. He underlined that the English constitution could not be understood without considering the social and political reality

7 Johann Heinrich Gottlob von Justi, *Vergleichungen der Europäischen mit den Asiatischen und anders vermeintlich Barbarischen Regierungen* (Verlag Johann Heinrich Rüdigers 1762).

8 Friedrich Murhard, *Das Recht der Nationen zur Erstrebung zeitgemäßer, ihrem Kulturgrade angemessener Staatsverfassungen* (Joh. Christ. Hermann'sche Buchhandlung 1832). The adaptation of the form of government to the development of a nation is also pointed out by Gustav von Struve, *Grundzüge der Staatswissenschaft*, vol. I: Von dem Wesen des Staats oder allgemeines Staatsrecht (self-published 1847), 16.

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which, over time, had moved away from original constitutional objectives and changed the function of the institutions considerably.[9]

2. Universalism versus Culturalism

However, it would be premature to conclude that already in the eighteenth and early nineteenth centuries, a culturalist view on the political and administrative systems was the dominating comparative approach. During this period, 'General State Law' (*Allgemeines Staatsrecht*), also called 'Natural State Law' (*Natürliches Staatsrecht*), became a prominent scientific subject, sometimes embedded in works on 'General Science of the State' (*Allgemeine Staatswissenschaft*).[10] Suffused with the idea that reason will lead all societies to similar principles relating to the organization and the tasks of government, Heinrich Gottfried Scheidemantel (1739-88), for instance, defined General State Law as 'the laws that are common to all civil societies because they originate in the very nature and essence of the State'.[11] His reflections on the role and organization of government, the economic order and social life are primarily based on political philosophy of the seventeenth and eighteenth centuries as well as ancient political thinkers. Brief examples of historical developments or institutions in different states are given in order to confirm general principles.[12]

For several decades, books on General State Law remained an important academic literary genre. Thus, the Swiss scholar Caspar David Bluntschli (1808-81), at that time professor in Munich, published his renowned work

9 Murhard (n. 8), 335-355; for a further analysis see Günter Lottes, 'Hegels Schrift über die Reformbill im Kontext des deutschen Diskurses über Englands Verfassung im 19. Jahrhundert' in: Christoph Jamme and Elisabeth Weisser-Lohmann (eds), *Politik und Geschichte – Zu den Intentionen von Hegels 'Reformbill'-Schrift* (Bouvier 2016), 151, 161; see also Roland Ludwig, *Die Rezeption der Englischen Revolution im deutschen politischen Denken und in der deutschen Historiographie im 18. und 19. Jahrhundert* (Leipziger Universitätsverlag 2003), 225-227.

10 See, e.g., Christian Daniel Voß, *Handbuch der allgemeinen Staatswissenschaft nach Schlözers Grundriß bearbeitet, Second Part* (Weidmann 1796), 261 ff.; von Struve (n. 8).

11 Heinrich Gottfried Scheidemantel, *Das allgemeine Staatsrecht überhaupt und nach der Regierungsform* (Joh. Rudolph Cröckers 1775), 4; the same definition is given by the Austrian Karl Anton Freiherr von Martini, *Erklärung der Lehrsätze über das allgemeine Staats- und Völkerrecht, Part I - Allgemeines Staatsrecht* (self-published 1791), 54 (§ 45).

12 Scheidemantel (n. 11), 34 f., 402 ff.

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on the state in the year 1852 under this title[13] and even some later publications were so titled.[14] However, the perspective had changed and was influenced by the evolving positivism in legal theory as well as by the emerging new social sciences. Bluntschli clearly distinguished between general and special State Law[15] and put more emphasis on the respective historical developments of the individual states.[16] Soon, the *General State Law* was succeeded by the 'General Theory of the State' (*Allgemeine Staatslehre*); Bluntschli renamed the fifth edition of his work, published in 1875, accordingly.[17] The General Theory of the State was intended to capture the notion and essence of the state as a whole by opening up the epistemological foundations to approaches of other scientific disciplines.[18] In this way, Georg Jellinek (1851-1911) included in his 'General Theory of the State', published in 1900, a substantive part dealing with empirical aspects, thus transcending the limits of the then-prevailing legal positivism. He distinguishes between the '*Allgemeine Soziallehre des Staates*' (General Social Theory of the State, which integrated knowledge of the evolving modern social sciences) and the '*Allgemeine Staatsrechtslehre*' (General Legal Theory of the State, which focused on legal phenomena).[19] Jellinek can also be seen a predecessor of slightly younger authors who paved the way for a later conceptualization of the law as a living instrument linked to societal development[20] and for a focus on the 'law in action'.[21] Not from a

13 Johann Caspar Bluntschli, *Allgemeines Staatsrecht* (Verlag der literarisch-artistischen Anstalt 1852).

14 Cf. Julius Hatschek, *Allgemeines Staatsrecht auf rechtsvergleichender Grundlage*, 3 vols (Göschen Verlagshandlung 1909), who emphasizes a comparative approach already in the title of his work.

15 Bluntschli, *Allgemeines Staatsrecht* (n. 13), 5 f.

16 Bluntschli, *Allgemeines Staatsrecht* (n. 13), 61 ff., 203 ff.

17 Johann Caspar Bluntschli, *Allgemeine Staatslehre,* 5th reworked edn of the first volume of the General State Law (Cotta 1875).

18 See the exposition of different definitions of the General Theory of the State by Hermann Rehm and his still tentative attempt to find a generally accepted concept in: Hermann Rehm, *Allgemeine Staatslehre* (Mohr 1899), 1-8.

19 See Georg Jellinek, *Allgemeine Staatslehre,* 3rd edn (O. Häring, 1913), 129-379, on the one hand, and 383-795, on the other hand.

20 Eugen Ehrlich, 'Die Erforschung des lebenden Rechts', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich (Schmollers Jahrbuch) 35 (1911), 129 ff.

21 Roscoe Pound, 'Law in the Books and Law in Action', American Law Review 44 (1910), 12 ff.; Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones Company 1921); new edition (Transaction Publishers 1999), 56, 212 f.

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sociological, but from a culturalist perspective, the partisans of the German Historical School had already argued in favour of a dynamic concept of law.[22]

3. Relativization of the Own Political and Legal System

Both lines of comparative reasoning that started to develop in the eighteenth century had the potential to call into question existing political institutions and state order: either by contrasting the present conditions with the natural state law deduced from philosophical, presumptively 'rational' considerations, or by emphasizing the need to adapt the political and legal systems to changing socio-cultural contexts. The idea that the form of government or governmental action is based on traditions ('traditional legitimation' in the sense of Max Weber) was increasingly losing ground. When, in the early nineteenth century, in particular after the foundation of the German Confederation in 1815, the constitutional movement also reached the German territories,[23] the study of foreign constitutions and administrative systems became even more attractive and at the same time more concrete. The comparison opened up new learning processes.

C. The Study of Foreign Law as a Source of Inspiration for the Development of Administrative Law and as a Means of Identity Building

In the beginning of the nineteenth century, traditional institutions that had long been taken for granted, no longer seemed to be set in stone. The American and the French Revolutions had shown that new paradigms of political organization of state power and new institutional arrangements were not bound to remain in the theoretical sphere, but could be made a reality in practice. This insight made it even more attractive for lawyers to

22 See Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer, 1814), 11 ff.

23 The first constitutions, still imposed by the monarchs, were those of Nassau (1814), Schwarzburg-Rudolstadt, Schaumburg-Lippe, Waldeck and Sachsen-Weimar (all 1816), Bavaria and Baden (1818), and Württemberg (1819), see Werner Frotscher and Bodo Pieroth, *Verfassungsgeschichte,* 17th edn (Beck 2018), 134 ff. They primarily served the dynastic-governmental self-assertion, and not to ensure individual freedom, cf. Dieter Grimm, *Verfassung und Privatrecht im 19. Jahrhundert* (Mohr 2017), 190.

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study foreign political and administrative systems, which were considered to provide an example for reform.

1. The Special Interest in Anglo-American Law

Whereas the French Revolution finally led to a new monarchic system, the American Revolution had brought about an alternative federal and republican order. The analytical description of 'democracy in America', in particular of the structure and practice of local governance, by Alexis de Tocqueville,[24] based on his own observations made during a journey through North America, also increased interest in the political example of the United States in the German territories. Tocqueville clearly distinguished between governmental und administrative authority according to 'the level of specificity and detail involved in political decisions and actions'.[25] Furthermore, although the American Revolution and the War of Independence had definitively broken with the monarchy of the former motherland, the political system of England equally remained an appealing object of study. Especially since the positive assessment by Montesquieu, numerous authors undertook studies of the English parliamentary system and the mechanisms it used to safeguard individual freedom. Among these were, as has been mentioned, Friedrich Murhard[26] and Alexis de Tocqueville[27] who, however, also depicted and analysed the serious adverse social and political consequences of industrialization.[28] In this context, the German liberal thinker Robert von Mohl (1799-1875) must also be mentioned who had written

24 Alexis de Tocqueville, *De la démocratie en Amérique*, 2 vols (Louis Hauman 1835/40).
25 See Christina Bambrick, '"Neither Precisely National nor Precisely Federal": Governmental and Administrative Authority in Tocqueville's Democracy in America', Publius: The Journal of Federalism 48 (2018), 586 ff.
26 Cf. Murhard (n. 8).
27 Alexis de Tocqueville, *Voyages en Angleterre et en Irlande* (Gallimard 1835; re-published in 1982).
28 For an assessment of Tocqueville's analysis cf. Jimena Hurtado, 'L'inégalité au temps de l'égalité: démocratie, industrialisation et paupérisme chez Alexis de Tocqueville', Cahiers d'économie politique/Papers in Political Economy 59 (2010), 89 ff.

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his habilitation thesis[29] on the 'Federal State Law of the United States',[30] and, in 1848, became a member of the Parliament of the Paulskirche in Frankfurt and Minister of Justice. In his work *History and Literature of State Sciences*, he analysed the literature on 'State law' in Switzerland, the US, England, Germany, and particularly France, implicitly delineating the different paths along which the political orders had developed since the Middle Ages.[31] A differentiation between state law and administrative law that starts to develop in the second half of the nineteenth century is not yet explicitly made.[32] Here and in earlier publications, reflection on foreign law, especially on the American political system, served to generate arguments for use in reform discussions.[33]

In the year 1857, almost simultaneously with Mohl's *History and Literature of State Sciences*, Rudolf von Gneist (1816-95) published the first part of his work *Contemporary English Constitutional and Administrative Law*, which focuses on the evolution and structure of the civil service in England.[34] Although he characterized his analysis of English administrative law as 'a walk through the jungle'[35], Gneist emphasized that a comparative view on England had become more important 'since the French political system had ceased to be an exemplary model'. This observation has to be seen against the background of the proclamation of Louis-Napoléon as

29 In the German university system, the 'habilitation', which comes after the doctorate, serves to give scholars the *venia legendi*, i.e. the right to teach certain subject areas (e.g. public law) at a university and thus the qualification to hold a chair.

30 Robert von Mohl, *Das Bundes-Staatsrecht der Vereinigten Staaten von Nordamerika. Erste Abteilung: Verfassungs-Recht* (Cotta 1824). The planned second part has not been published.

31 Robert Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, 3 vols (Enke 1855/56/58); a concise comparative observation can be found in vol. III, 3 ff.

32 However, in a review of an American constitutional commentary published in 1835, Mohl criticises the non-inclusion of administrative law, see Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (Nomos 2021), 29 f.

33 For 'America as argument' cf. Charlotte A. Lerg, *Amerika als Argument. Die deutsche Amerika-Forschung im Vormärz und ihre politische Deutung in der Revolution von 1848/49* (transcript-Verlag 2011).

34 Rudolph Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, I. Teil (Springer 1857).

35 Gneist (n. 34), VI, also quoted by Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. IV (C.F. Müller 2011), 493, 523.

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Emperor of the French in 1852.[36] In the comparative chapter of his book,[37] Gneist understands the development of administrative law in Germany as a corollary of the formation of administrative organs to which quasi-judicial functions were attributed on the basis that judge-made law and judicial control of the executive, as they existed in England, were lacking in Germany. According to Gneist, the role of the courts also explains why the separation of public from private law did not take place in England.[38] With the benefit of hindsight, this explanation, which was shared by other continental authors[39] is not fully convincing. The separation of private law from public law and the development of a modern administrative law in Germany gained their most pronounced dogmatic development after the creation of independent administrative courts in the 1860s and 1870s.

Gneist deepened his research on England in further books, among them extended studies on English administrative law,[40] local self-government in England[41] and English constitutional history.[42] Younger legal scholars too showed a lively interest in the English constitutional and administrative law. An author who paid special attention to England was Julius Karl Hatschek (1872-1926).[43] In his *State law of England*, published in 1905/06, he dedic-

36 Gneist (n. 34), V.

37 Gneist (n. 34), 678-721.

38 Gneist (n. 34), 687.

39 Cf., e.g., Edouard Lafferière, *Traité de la juridiction administrative et de recours contentieux*, Tome premier, 2nd edn (Berger-Levrault 1896), 96 ff.; Julius Hatschek, *Englisches Staatsrecht mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten*, *vol. II: Die Verwaltung* (Mohr 1906), 658 ff.

40 Rudolf Gneist, *Das englische Verwaltungsrecht mit Einschluss des Heeres, der Gerichte und der Kirche geschichtlich und systematisch*, 2 vols (Springer 1886); Gneist, *Das Englische Verwaltungsrecht der Gegenwart in Vergleichung mit den Deutschen Verwaltungssystemen*, 2 vols (Springer 1883/84); the two works are fundamentally modified and extended editions of Gneist, *Englisches Verfassungs- und Verwaltungsrecht* (1857).

41 Rudolf Gneist, *Verwaltung, Justiz, Rechtsweg. Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen mit besonderer Rücksicht auf Verwaltungsreformen und Kreisordnungen in Preußen* (Springer, 1869); Gneist, *Die heutige englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment in seiner heutigen Gestalt* (Springer 1860); Gneist, *Selfgovernment: Communalverfassung und Verwaltungsgerichte in England* (Springer 1871).

42 Rudolf Gneist, *Englische Verfassungsgeschichte* (Springer 1882).

43 In addition to his books on English constitutional and administrative law, his study on the English constitutional history and his comparison between the British and the Roman Empire have to be particularly mentioned, see Julius Hatschek, *Englische Verfassungsgeschichte* (Oldenbourg 1913); Hatschek, *Britisches und römisches Weltreich: Eine sozialwissenschaftliche Parallele* (Oldenbourg 1921).

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ated one volume to the administration, analysing the different branches of the administration, including, among others, the administration in social and fiscal matters, police, local government, and civil service.[44] At the end of his comprehensive, nearly 700-page overview of the English administrative law,[45] Hatschek poses the question of whether England has an administrative law, a question, as the author remarks, first raised by the French scholar Edouard Lafferière[46] and negatively answered by Albert Venn Dicey.[47] His own answer, following the analysis of Gneist, was that England did not possess an administrative *law* but, rather, administrative *practices* (*Verwaltungsroutine*) that despite sometimes being embodied in cabinet orders, ordinances, or other legal acts were not combined with a public-private law divide.[48] Nevertheless, Gneist and Hatschek titled their books *English Administrative Law*, as did Otto Koellreutter in his habilitation thesis on *Administrative Law and Administrative Jurisprudence in Modern England*.[49] This terminological choice could be justified on the basis that the authors were describing and comparing functional equivalents.

2. The Role of French Law Studies for the Systemization of Administrative Law

Despite the publication of such German studies on English government and administration, it was, in the end, French administrative law that most

44 Julius Hatschek, *Englisches Staatsrecht mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten, vol. I: Die Verfassung* (Mohr 1905), *vol. II: Die Verwaltung* (Mohr, 1906). A shorter version can be found in Julius Hatschek, *Das Staatsrecht des vereinigten Königreichs Grossbritannien-Irland* (Mohr 1914).

45 Hatschek (n. 39).

46 Edouard Lafferière, *Traité de la juridiction administrative et des recours contentieux*, 2nd edn (Berger-Levrault 1896).

47 Cf. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885), in the 8th edn (Macmillan, 1915), 213 ff.

48 Hatschek (n. 39), 650.

49 Otto Koellreutter, *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England. Eine rechtsvergleichende Studie* (Mohr 1912). It has been said that it was Otto Koellreutter, a German, who wrote the first book on English administrative law (John S. Bell, 'Comparative Administrative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 1259, 1260 (n. 1)). However, it is Rudolf Gneist who has to be mentioned first.

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influenced discussion on the further development of administrative law in Germany which was, at that time still territorially fragmented and, therefore, following a variety of administrative traditions. The aforementioned authors, in particular Robert von Mohl and Julius Hatschek, repeatedly included references to French administrative law in their comparative writings. However, the most important impetus to consider French law as a source of inspiration when developing a modern German administrative law came from the appointment of Otto Mayer (1846-1924) as Professor of the University of Strasbourg in 1882. The University of Strasbourg had become one of the prominent German universities after the cession of Alsace to the German Empire in the Treaty of Versailles, which ended the Franco-German War of 1870/71. Otto Mayer taught French private law and German administrative law. In his *Theory of French Administrative Law*, published in 1886,[50] he extolled the French approach of respecting the public character of the activities of the state rather than treating the state as a subject of private law.[51] The idea that the state or its organs are endowed with subjective rights vis-à-vis citizens in the way that princes in former times enjoyed subjective rights vis-à-vis their subjects was particularly combatted by the French scholar Henri Barthélemy who later wrote a preface to the French translation of Otto Mayer's *German Administrative Law*.[52]

Mayer developed a system of German administrative law by comparing the different laws in the various German territories[53] and by making use of concepts of French administrative law and German private law to forge them into a coherent whole.[54] Thus, the concept of the administrative act (*Verwaltungsakt*) finds its origins in the French *acte adminstratif*; however, the latter also includes *actes administratifs réglementaires*, i.e. normative acts, in contrast to the German concept coined by Mayer.[55] Equally, for in-

50 Otto Mayer, *Theorie des Französischen Verwaltungsrechts* (Verlag von Karl J. Trübner 1886).

51 Mayer (n. 50), VIII f.

52 Barthélemy adresses the subject also in his preface, see Henri Barthélemy in Otto Mayer, *Droit administratif allemand*, vol. I (V. Giard & E. Brière 1903), 6 ff.

53 German general administrative law as a 'product of intra-German comparatistics' cf. Schönberger (n. 35), 522 ff.

54 On Otto Mayer and his conceptual foundations cf. Erich Kaufmann, 'Otto Mayer', Verwaltungsarchiv 30 (1925), 377-402.

55 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. I, 3rd edn (Duncker & Humblot 1923), 93: 'The administrative act is a pronouncement, attributable to the Administration and endowed with public power, that determines for the subject in the individual case what his rights are.'.

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stance the concepts of 'police permit' (*Polizeierlaubnis*)[56] and 'public property' (*öffentliches Eigentum*)[57] have French roots (*permis de police* and *domaine public*).[58] The German concept of 'public undertakings' (*öffentliche Unternehmungen*)[59] was influenced by the then-emerging reorientation of French administrative law[60] through the evolution of the concept of *service public*[61] which later was also to form the basis for the shaping of the concept of *Daseinsvorsorge* by Ernst Forsthoff (1902-74),[62] a fine connoisseur of French constitutional history and public law.[63] Because of the centralized structure of France, the organization of administration did not play a major role in Forsthoff's comparison, in contrast to the interest which Gneist had shown in English self-government as a source of inspiration for reform discussions in Prussia – albeit not always authentically reflected.[64]

By emphasizing juridical method, which started from specific legal concepts, Otto Mayer distanced himself from authors who combined legal thinking with approaches of social sciences and whose most prominent representative was Lorenz von Stein (1815-90).[65] Lorenz von Stein had become a renowned author because of his three-volume work on the *History*

56 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. I, 3rd edn (Duncker & Humblot 1923), 239 ff.

57 Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, vol. II, 3rd edn (Duncker & Humblot 1924), 39 ff.

58 As for the French law, cf. Otto Mayer, *Theorie des Französischen Verwaltungsrechts* (Verlag von Karl J. Trübner 1886), 227 ff and 167 ff.

59 Cf. Mayer (n. 57), 243 ff.

60 Cf. Winfried Brohm, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 30* (De Gruyter 1972) 245, 253 f.

61 The main publications on the *service public* appeared later, see Gaston Jèze, *Les principes généraux du droit administratif*, vol. I, 3rd edn (Girard 1925), 1; Léon Duguit, *Les transformations du droit public* (Colin 1913), in particular 33 ff.

62 Ernst Forsthoff, *Die Verwaltung als Leistungsträger* (Kohlhammer 1938), 6; Forsthoff, *Der Staat der Industriegesellschaft* (Beck 1971), 75 ff; Forsthoff, *Lehrbuch des Verwaltungsrechts*, vol. I, 10th edn (Beck 1973), Vorb. V.

63 Forsthoff translated and edited a German version of Montesquieu, *De l'esprit des lois: Vom Geist der Gesetze* (Mohr Siebeck 1951).

64 See above Section C 1 and Christoph Schönberger, 'Rudolf von Gneist (1816-1895) – Die altenglische Verwaltung als Vorbild für den preußischen Rechtsstaat' in: Stefan Grundmann et al. (eds), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin* (De Gruyter 2010), 241, 253 ff.

65 With regard to the *Verwaltungslehre* of Stein, Otto Mayer even spoke of 'blooming bombast', see Mayer, 'Otto Mayer' in: Hans Planitz (ed.), *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen* (Verlag von Felix Meiner 1924), 11.

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of the Social Movement in France from 1789 to the Present Day, published in 1850,[66] and his *Verwaltungslehre*[67] that first appeared in 1870 and culminated in a vision of an international, particularly European, administrative law.[68] Stein who also reflected on methodological questions of legal comparison,[69] based his administrative theory on comparative considerations, having special regard to Germany, France, England, and Austria, and on a study of emerging international administrative arrangements.[70] His conviction that it is the mission of comparative law to identify underlying common values and principles in the national legislations,[71] fitted well with the spirit that was subsequently dominant at the First International Congress of Comparative Law in Paris in 1900. The majority of the participants in this Congress, which is considered to constitute the starting point of legal comparativism as a recognized discipline of law, were of the opinion that the various legal systems should no longer be studied only on an individual basis but also as legal resources for the identification of universal principles that underlie the different norms in those individual systems. In contrast to the German term *Rechtsvergleichung*, which describes the process of comparing legal norms or systems, the French, Italian, Spanish and Portuguese expressions for 'comparative law' (*droit comparé, diritto comparato, derecho comparado, direito comparado*) still reflect this ambition to find transnational common legal principles, a *droit commun de l'humanité civilisée,* as one of the participants in the Paris Congress, Raymond Saleilles,

66 Re-edited by G. Salomon: Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich*, 3 vols (Drei Masken Verlag 1921). The work is a revised and strongly expanded version of: Lorenz Stein, *Der Socialismus und Communismus des heutigen Frankreich* (Otto Wiegand 1842).

67 Lorenz von Stein, *Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich,* 1st edn (Cotta 1870); 2nd edn (Cotta 1876); 3rd, completely revised edn in three volumes (Cotta 1887/88/89).

68 Lorenz von Stein, *Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich,* 2nd edn (Cotta 1876), 91 ff; von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft 6 (1882), 396-442.

69 Cf. Schönberger (n. 35), 523 f.

70 For further analysis, cf. Karl-Peter Sommermann, 'Europäisches Verwaltungsrecht als „die großartigste Rechtsbildung der Weltgeschichte"? Die Vision von Lorenz von Stein aus heutiger Perspektive', Die Öffentliche Verwaltung 60 (2007), 850-867.

71 Lorenz von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft 6 (1882), 425.

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put it.[72] Although the terms *droit comparé, diritto comparato, derecho comparado*, and so on, continue to be used, they no longer carry the general connotation of a set of universally applicable norms or principles that can be derived from the comparison,[73] notwithstanding the adoption of approaches that seek to identify general legal principles by comparative means in specific legal contexts such as that of the European Union.

3. Public Law Comparison as an Own Field of Research

The new self-awareness of comparative law found expression in new scientific periodicals and the establishment of academic institutions and associations. In Germany, by 1829, the interest in foreign law had led to the foundation of the journal *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (Critical Journal of Jurisprudence and Legislation Abroad), which, however, ceased publication in 1856. One of the founders was Carl Solomo Zachariae (1769-1843), a law professor from Heidelberg whose wide range of research included state theory and state law (*Staatsrecht*). In 1907, Paul Laband (1838-1918), the already mentioned Georg Jellinek (1851-1911), and Robert von Piloty (1863-1926) founded the *Jahrbuch des Öffentlichen Rechts* (Yearbook of Public Law), which dedicated and still dedicates considerable room to studies of foreign public law, in particular constitutional law. During the Weimar Republic, in 1929 the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* in Berlin launched a new journal of comparative and international law, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.* After Second World War, the journal ceased to appear for some years, until the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*

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72 Raymond Saleilles, quoted by Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung - Gedanken anlässlich einer Jubiläumskonferenz in New Orleans', Rabels Zeitschrift für ausländisches und internationales Privatrecht 66 (2002), 97, 101.

73 For a critique of the idea that the *droit comparé* constitutes an own legal order cf. Otto Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', Revue internationale de droit compare 53 (2001), 275, 277 ff. See, however, Russell A. Miller and Peer C. Zumbansen in their introduction to the volume *Comparative Law as Transnational Law – A Decade of the German Law Journal* (2012), 4, who refer to a widespread understanding of 'the study of transnational law as a process of normative *engagement* through which distinct legal systems increasingly encounter the law and legal culture of other systems'.

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(Max Planck Institute for Comparative Public Law and International Law) was created in Heidelberg in 1949 as successor of the *Kaiser-Wilhelm-Institut.* Since then, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, in English called the *Heidelberg Journal of International Law*, edited by the directors of the Institute, besides playing its role in public international law studies, has provided an important platform for comparative studies in constitutional and administrative law.

The era of National Socialism had devalued the objectives of a liberal-minded comparative law.[74] After the war, the need to rebuild the national legal order did not lead to a simple return to liberal pre-Nazi standards. It enhanced a search for new solutions and generated strong interest in foreign legislation and comparative law even though the science of administrative law more generally remained inwardly focused. One reason might be the concentration on a concretization of the standards of the new constitution, the Basic Law.[75] Efforts to develop public law further at the federal and *Länder* levels aimed at providing effective safeguards against dictatorial and arbitrary exercise of public power. The Basic Law, adopted in the American, British, and French occupation zones in 1949 as Constitution of the Federal Republic of Germany, enshrined strong guarantees of, and judicial protection for, human dignity and fundamental rights. Furthermore, it threw the constitutional order wide open to European integration.

The interest in foreign public law simultaneously induced and enhanced the scientific debate on the objectives and methodological foundations of legal comparison. In this respect, the *Gesellschaft für Rechtsvergleichung* (Society for Comparative Law), established in 1950, became an important forum. In 1963, together with its Austrian counterpart, its 'Public Comparative Law' section held a conference in Vienna that focused on comparison in public law specifically. Helmut Strebel (1911-92) and Rudolf Bernhardt (1925-2021, from 1981 to 1998, judge of the European Court of Human Rights), hinted at the different character of public law and private law. Strebel emphasized that it is the individuality of the organizational

74 For the history of the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* during the period of National Socialism cf. Ingo Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus: Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht' in: Doris Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus. Bestandsaufnahme und Perspektiven der Forschung* (Wallstein 2000), 490-527.

75 Cf. Schönberger (n. 35), 493, 535.

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structures of various states resulting from the different historical, political, and cultural backgrounds that makes a comparison difficult.[76] Bernhardt underlined that the shaping of public law, which primarily refers to the legal relationship between citizen and state, reflects political influences to a higher degree than private law does, and that this often impedes comparison for practical purposes and sometimes makes it difficult to distinguish comparative public law (in particular comparative constitutional law) from comparative politics.[77] Nevertheless, Bernhardt recognized a limited function for legal comparison in understanding national norms, an important role in the making of new laws, and yet-to-be-realized function in identifying general principles of international law and analyzing international treaties.

As far as the methodology of comparative law is concerned, the debate has remained and will remain controversial. Among the methods applied, the functional approach has been most influential. Clearly outlined by Konrad Zweigert (1911-96) and Hein Kötz (born in 1935) in their book on comparative law in the field of private law,[78] it has been explicitly or tacitly accepted and applied by many comparative scholars of public law as a valuable means for identifying functional equivalents in different legal cultures and traditions. The functional approach, in this view, does not primarily search for concordant wordings of laws or isomorphic organizational forms, but aims to grasp the social or juridical function of the compared legal institutions or norms.[79] This presupposes that the comparativist can distance himself or herself from the conceptual and dogmatic background of his or her own legal system and ideally view both of the compared legal orders 'externally' or 'objectively'. Since the function of a regulation or institution can only be explained, if the legal and social environment is taken into consideration, it necessarily includes a contextualization of the objects of comparison. The required depth of the comparison

76 Strebel (n. 1), 405-430.

77 Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431-452.

78 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, vol. 2 (Mohr 1969); the third edition appeared in an English translation: Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law,* 3rd edn (Oxford University Press 1998).

79 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd edn (Mohr 1996), 33 ff.

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undertaken depends on the objective of the research.[80] To give an example: Gaining knowledge about different legal techniques will generally need less contextualization than a comparative evaluation of the effect of judicial instruments, a comparison that also requires empirical studies and social science methodologies. In any case, one has to take care that the material used for the comparison remains – as it has been put – methodologically 'controllable'.[81]

The functional approach has met various criticisms.[82] One critique refers to the use of methods in general. While some authors – in Germany as in other countries – argue that there exists no single method of comparative public law,[83] others maintain that there is no distinctively comparative method at all.[84] The impression of a fundamental lack of methodological basis in comparative law may have arisen not least from the 'omnipresence'[85] of comparisons made without any methodological awareness or reflection.[86] Another critique focuses, from a different perspective, on the limited performance of the functional approach in public law. The arguments range from doubts about the possibility of identifying common

80 Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', Die Öffentliche Verwaltung 52 (1999), 1017, 1021 ff.

81 Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, 825.

82 A presentation and analysis of the critical positions can be found in Uwe Kischel, *Rechtsvergleichung* (Beck 2015), 95-108.

83 Giogios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (Dresdner Universitätsverlag 1998), 41 ff.; Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol. 1 (C.F. Müller 2004), 631, 660.

84 Matthias Ruffert, 'Die Methodik der Verwaltungsrechtswissenschaft in anderen Ländern der Europäischen Union' in: Eberhard Schmidt Aßmann and Wolfgang Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (Nomos 2004), 165, 168: 'methodological vacuum'; cf. also Étienne Picard, 'L'état du droit comparé en France, en 1999', Revue internationale de droit comparé 51 (1999), 885, 888.

85 Javier Barnés, 'Sobre el método del análisis comparado en el Derecho. El caso del procedimiento y de la justicia administrativa' in: Pedro Aberastury (ed.), *Estudios de Derecho Comparado* (Editorial Universitaria de Buenos Aires 2016), 53, 54 ff.

86 Cf., also, Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht', Juristenzeitung 62 (2007), 807 ff.

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social functions of law or, indeed, any social functions at all,[87] through denying the appropriateness of the functional approach with regard to certain research questions,[88] to the questioning of the presupposed neutrality and objectivity of functional comparativism[89].

Fundamental criticism comes from both legal positivists and postmodern theorists. From the perspective of a severe legal positivism, comparative law should limit itself to the description of different legal systems using general concepts that, at the same time, allow for a sufficient differentiation.[90] On this view, empirical studies would play no part in legal comparison. Postmodern theorists, on the other hand, deny the existence of universal values and emphasize the 'incommensurability of different forms of rationality' in the legal systems.[91] Therefore, they call into question the possibility of a productive outcome of legal comparativism. The postmodern critique can be considered as another form of culturalism. It contains valuable insights, in particular in view of the recognition of the particularities and different perceptions of each legal culture and legal system. However, it underestimates the driving forces behind emerging communities of values. Despite the fact that 'incommensurability does not amount to incomparability',[92] it tends to impede cross-fertilizing comparative discourses.[93]

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87 Cf. Kischel (n. 82), 95 ff.; Claus Dieter Classen, *Nationales Verfassungsrecht in der Europäischen Union – Eine integrierte Darstellung von 27 Verfassungsordnungen* (Nomos 2013), 24.

88 Cf. Ralf Michaels, 'The functional method of comparative law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 339, 369 ff.

89 Tschentscher (n. 86), 812 f, who defends a dialectical comparison, that explicitly favours a partisan approach of the comparativist.

90 Pfersmann (n. 73), 286: 'On pourra dès lors appeler « droit comparé » la discipline qui permet de décrire les structures de n'importe quel système juridique à l'aide de concepts généraux présentant la finesse nécessaire et suffisante'.

91 Dominik Richers, 'Postmoderne Theorie der Rechtsvergleichung?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007) 509, 517 (quoting Wolfgang Welsch). A further analysis of the postmodern legal comparison is given by Kischel (n. 82), 103 ff; for a critical assessment cf. also Marie-Claire Ponthoreau, 'Le droit comparé en question(s) entre pragmatisme et outil épistémologique', Revue internationale de droit comparé 57 (2005), 7, 23 ff ; Thierry Rambaud, *Introduction au droit comparé – Les grandes traditions juridiques dans le monde* (Presses Universitaires de France 2014), 22 ff., 32 ff.

92 Pierre Legrand, *Le droit comparé,* 5th edn (Presses Universitaires de France 2015), 75.

93 For the question to which extent legal transfers are possible, cf. Margrit Seckelmann, 'Ist Rechtstransfer möglich? – Lernen vom fremden Beispiel', Rechtstheorie 43 (2012), 419.

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Overall, we observe in Germany today, in line with developments in other countries,[94] an increasing pluralism of methods in comparative public law. This pluralism is due not only to scholarly ambitions, but also to the growing practical need for comparative findings in various fields of international cooperation. As a kind of common denominator, one might affirm the simple, but always helpful, insight that the method to be applied depends on the objective pursued by the comparison.[95] In many cases, in particular when searching for convergences between legal orders, the functional approach will play an important role. As long as it does not prematurely assume the existence of equivalent functions or functional equivalents in the compared legal orders, it forestalls recourse to superficial or formal considerations and draws the attention to the functions that a norm or institution fulfils in the respective legal or social order.[96] Understood in a broad sense, it is also sensitive to the path-dependency of legal systems and the cultural, social, and political contexts of legal structures, institutions, and laws.

D. The Contribution of Comparative Administrative Law to the Well-Functioning of European Multi-Level Governance

As already mentioned, studies on comparative administrative law have been encouraged in particular by practical needs of European integration, but also by international cooperation that goes beyond European boundaries.

94 Cf. Ponthoreau, 'Le droit comparé en question(s) entre pragmatisme et outil épistémologique', Revue international de droit comparé 57 (2005), 7, 23 ff.; Rambaud (n. 91), 34 ; Linda Hantrais, *International Comparative Research – Theory, Methods and Practice* (Palgrave Macmillan 2009), 36 ff.; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), 1 ff.

95 Christian Starck, 'Rechtsvergleichung im öffentlichen Recht', Juristenzeitung 52 (1997), 1021, 1026; Sommermann (n. 83), 665. Similarly, Catherine Hagenau-Moizard, *Introduction au droit comparé* (Dalloz 2018), 17 f., defends a 'pragmatic' orientation of legal comparisons – in contrast to the traditionally strict and often 'schematic' methodological focus in social sciences. She shares the opinion that legal comparison 'amounts more to heuristics than to a method', as Pierre Legrand had pointed out earlier, see Legrand, *Le droit comparé*, 5th edn (Presses Universitaires de France 2015), 58.

96 Cf. also Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr 2005), 8 ff.; Nikolaus Marsch, 'Rechtsvergleichung' in: Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd ed. (Beck 2022), 135, 149 f.

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Multilateral international treaties increasingly prescribe administrative law principles and administrative procedure. The Aarhus Convention[97] is a prominent example. Such treaties are based on comparative findings in their making and entail comparative considerations in their implementation. Furthermore, knowledge and skills of comparative law are needed in development cooperation, for example when competent advice is requested in the context of legislative reforms. The growth of comparative studies and discourses will have an increasing impact also on the theoretical and methodological orientation of legal science.

1. The Identification and Development of Common Administrative Law Principles

One of the strongest impulses to search for common or converging elements in the legal systems of the European states stems from the jurisprudence of the European Court of Justice according to which the law of the European Union (formerly the European Community) also contains general principles of law derived from the national legal orders. Thus, guarantees like legal certainty, proportionality, the protection of legitimate expectations, and the right to be heard have been identified as general principles. The awareness of common or convergent ideas and principles forms the background of the conceptualization of a 'European Administrative Law' that goes beyond principles and rules of EC/EU.[98] The broad concept, elaborated by Jürgen Schwarze in the 1980s,[99] includes the common basis of administrative law as it is reflected in the national laws of the European states. Therefore, his book *European Administrative Law*, first published

97 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Envi-ronmental Matters of 25 June 1998, UNTS vol. 2161, 447.

98 European administrative law in this narrow sense is dealt with by Paul Craig, *EU Administrative Law*, 3rd edn (Oxford University Press 2018).

99 *Europäisches Verwaltungsrecht im Werden (European Administrative Law in the Making)* was the programmatic title of a volume published by him in 1982. It contains the proceedings of a conference held by the Working Group for European Integration (*Arbeitskreis Europäische Integration*) in Hamburg in 1981.

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in German in 1988[100] and later in French[101] and in English,[102] gives not only an analysis of European Community law, but also reports on the guiding administrative law principles in twelve European countries and draws comparative conclusions. It aimed at showing, 'as a kind of handbook, the state of development currently reached in European administrative law' and intended not only to highlight 'the influences of national principles of administrative law on European Community law' but also at revealing 'the repercussions of the newly elaborated European law on the national systems of administrative law'.[103] A similar broad view of European administrative law should also underlie collective volumes, which later appeared in other European countries.[104]

In 2008, Thomas von Danwitz, public law professor and judge of the European Court of Justice, published under the same title (*European Administrative Law*) a systematic study of the national administrative law systems and their interrelation with European Community law.[105] In his view, European administrative law has three dimensions: first, the national laws which form the basis for the execution of community law by the Member States and provide the conceptual sources for Community law; second, the norms and principles developed by the jurisprudence of the ECJ for the execution of community law by European institutions themselves (direct execution); and third, the norms and the principles developed by the ECJ in order to ensure an execution by the national administrative authorities in conformity with community law.[106]

The insight that Community law significantly draws on concepts and rules of national law increases interest in the public law of other EU Member States, which indirectly, by processes of 'Europeanization', might influence one's own legal order. While in former times the study and compilation of foreign administrative laws generally aimed at providing

100 Jürgen Schwarze, *Europäisches Verwaltungsrecht*, 2 vols (Nomos 1988); 2nd edn (Nomos 2005).
101 Jürgen Schwarze, *Droit administratif européen*, 2 vols (Bruylant 1994); 2nd edn (Bruylant 2009).
102 Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 2006).
103 Jürgen Schwarze, *Europäisches Verwaltungsrecht*, vol. 1 (Nomos 1988), I.
104 See, in particular, Mario Pilade Chiti and Guido Greco (eds), *Trattato di diritto amministrativo europeo*, 2 vols (Giuffrè 2007); 2nd edn (Giuffrè 2014); Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Droit administratif européen*, 2 vols (Bruylant 2007); 2nd edn (Bruylant 2014).
105 Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Mohr 2008).
106 von Danwitz (n. 105), 5 f.

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material for general conceptual studies or inspiration for political reform projects,[107] country reports and comparative analyses now had and have to be seen against the background of a 'European administrative compound' (*europäischer Verwaltungsverbund*),[108] characterized by vertical and horizontal cooperation in a European network of administrative actors.[109] Alongside reports and comparative studies on specific topics of administrative law, such as the civil service[110] or the implementation of the EU services directive in the EU Member States,[111] comprehensive works on the administrative law systems[112] and judicial control of public administration[113] in Europe have been published. The most ambitious project is the manual '*Ius Publicum Europaeum*', edited by Armin von Bogdandy and Peter Michael Huber, together with various European colleagues. It undertakes to open up, 'under the perspective of a European legal space in the making', the foundations of public law (constitutional and administrative law)

107 Cf. Franz Becker and Klaus König in their introduction to Carl Hermann Ule, *Verwaltungsverfahrensgesetze des Auslandes*, 2 vols, (Duncker & Humblot 1967-68), vol. I, 3, 14. The second volume already dedicates a chapter to community law. For a discussion of the epistemological and practical goals of comparative public law cf. Starck (n. 95), 1023 ff.; Sommermann (n. 80), 1019 ff.

108 Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund: Formen und Verfahren der Verwaltungszusammenarbeit in der EU* (Mohr 2005).

109 Cf. Eberhard Schmidt-Aßmann, 'Verfassungsprinzipien für den europäischen Verwaltungsverbund' in: Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (Beck 2006), 241-305, § 5 para. 17: 'It [the administrative compound] manifests itself in a growing number of administrative entities in the Union, in decentralized and centralized networks, in a multi-faceted European committee system and in the practical *cooperation* of national and unional administration authorities.' English translation taken from Jörg Philipp Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer 2011), 15.

110 Siegfried Magiera and Heinrich Siedentopf (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft* (Duncker & Humblot 1994).

111 Ulrich Stelkens, Wolfgang Weiß and Michael Mirschberger (eds), *The Implementation of the EU Services Directive* (T.M.C. Asser Press 2012).

112 See Jens-Peter Schneider, *Verwaltungsrecht in Europa*, 2 vols. Vol. 1 presents the administrative law of England and Wales, Spain and the Netherlands (Universitätsverlag Osnabrück 2007), vol. 2 presents the administrative law of France, Poland and the Czech Republic (Universitätsverlag Osnabrück 2008).

113 Karl-Peter Sommermann and Bert Schaffarzik (eds), *Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, 3 vols (Springer 2019). The work contains, i.a., studies on the German territories since the beginning of the 19th century as well as on 18 European countries, the United States and Latin America.

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in the European legal orders and 'in particular their formative historical experiences, their stages of development, their systematic understanding and the juridical and jurisprudential styles'.[114] Three volumes of the manual are dedicated to administrative law[115] and two more to administrative jurisdiction.[116]

Comparative law is not only present in collective volumes of this kind, but also in many monographs. Apart from dissertations on foreign public law, doctoral theses and habilitation treatises[117] often use comparative methods to classify German law or to question traditional dogmatic approaches. Generally speaking, the perspective is becoming more and more European and transnational.[118] As far as the jurisprudence of the administrative courts is concerned, there are hardly any explicit comparative studies.[119] However, in the context of refugee and migration law, the Federal Administrative Court (which is the supreme court in public law disputes) has in some cases made reference to decisions of French courts when interpreting international or EU law.[120] The Federal Constitutional Court, by contrast, has

114 Preface to Armin von Bogdandy, Pedro Cruz Villalón and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 1 (C.F. Müller 2007), V f.

115 Armin von Bogdandy, Sabino Cassese and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 3: *Verwaltungsrecht in Europa: Grundlagen* (C.F. Müller 2010), vol. 4: *Verwaltungsrecht in Europa: Wissenschaft* (C.F. Müller 2011) and Armin von Bogdandy and Peter Michael Huber (eds), *Handbuch Ius Europaeum*, vol. 5: *Verwaltungsrecht in Europa: Gru*ndzüge (C.F. Müller 2014).

116 Armin von Bogdandy, Peter Michael Huber and Lena Marcusson (eds), *Handbuch Ius Europaeum*, vol. 8: *Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren* (C.F. Müller 2019); vol. 9: *Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz* (C.F. Müller 2021).

117 For an explanation of the 'habilitation' (n. 29).

118 To give a recent example: Mattias Wendel's habilitation treatise '*Verwaltungsermessen als Mehrebenenproblem. Zur Verbundstruktur administrativer Entscheidungsspielräume am Beispiel des Migrations- und Regulierungsrechts*' (Administrative discretion as a problem of multi-level-governance: on the compound structure of administrative scopes of decision-making), published in 2019, integrates national, European and international law. For an analysis of comparative law as a 'compound' technique see Markus Kotzur, '"Verstehen durch Hinzudenken" und/oder "Ausweitung der Kampfzone"? Vom Wert der Rechtsvergleichung als Verbundtechnik', Jahrbuch des Öffentlichen Rechts 63 (2015), 355 ff.

119 An example is given by Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015), 559 ff.

120 Recent examples are the judgement of 25 April 2019 – BVerwG 1 C 28.18 – para. 20, and of the order for reference to the ECJ of 9 May 2019 – BVerwG 1 C 14.19 – para. 41.

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shown more openness to comparative law.[121] Given the transnational relevance of fundamental (constitutional) rights questions[122], not least against the common legal background in the European Convention on Human Rights, this is not surprising.[123] Likewise, Peter Häberle (born in 1934) developed his influential concept of comparative law as the 'fifth method of legal interpretation' (alongside the four classical methods) primarily in respect to fundamental rights.[124] It is likely that the jurisprudence of the European Court of Human Rights, which deduces more and more standards for administrative procedure from Convention rights, will also generate comparative studies in administrative law. In the field of fundamental rights, it has already been the subject of intense comparative research in recent decades.

121 Jörg M. Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 193-242; Aura María Cárdenas Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts: Analyse der Heranziehung ausländischer Judikatur* (Kovač 2009).

122 Cf. Peter Häberle, 'Wechselwirkungen zwischen deutschen und ausländischen Verfassungen' in: Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol. 1 (C.F. Müller 2004), 313, 315; Sommermann (n. 83), 636 ff.

123 Although fundamental rights comparison dominates in the practice of comparative constitutional law, the comparison of state organization is increasingly gaining attention, cf. e.g., Albrecht Weber, *Europäische Verfassungsvergleichung* (Beck 2010); Claus Dieter Classen, *Nationales Verfassungsrecht in der Europäischen Union – Eine intergrierte Darstellung von 27 Verfassungsordnungen* (Nomos 2013); likewise, the book *Französisches und Deutsches Verfassungsrecht - Ein Rechtsvergleich* (French and German Constitutional Law – A Comparison), edited by Nikolaus Marsch, Yoan Vilain and Mattias Wendel and published in 2015, dedicates substantial parts to state organization. It applies, similar to Classen's study, an 'integrative approach' for the comparison of both systems, a 'continuous change of perspective', 4. A French version of the book has been published by Aurore Gaillet, Thomas Hochmann, Nikolaus Marsch, Yoan Vilain and Matthias Wendel under the title *Droits constitutionnels français et allemand* (LGDJ 2019).

124 Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich zur Rechtsvergleichung als " fünfter" Auslegungsmethode', Juristenzeitung 44 (1989), 913 ff.; reproduced also in Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot, 1992), 27 ff.

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2. The Need for Comparative Knowledge for Administrative Cooperation and the Creation of Inter-operational Structures

Within the expanding range of comparative law objectives, the search for administrative structures and procedures that will enable national administrations to effectively cooperate will become even more important. Again, it is the law of the European Union that has generated new obligations of national administrations to cooperate. This is the case, for example, in the law of product authorization. In terms of sensitive products, such as genetically modified food, all Member States participate in most authorization procedures by mediation of the European Commission or of a European agency to such an extent that no central authorization procedure is provided for.[125] A further example of a matter where cooperation has been institutionalized is food safety. In this case, however, the creation of isomorphic administrative structures at national level and a corresponding establishment of authorities at EU level were finally triggered by the BSE crisis and the creation of the European Food Safety Authority.[126] In the field of services, it was the directive of 2006 which imposed substantial duties of cooperation[127] and which led, in Germany, to the insertion of a special chapter on European administrative cooperation into the Law of Administrative Procedure.[128] Quite apart from linguistic difficulties in transnational communication, the competences and procedures of the national authorities need to be coordinated and adjusted.

125 For an analysis of the respective authorisation procedures cf. Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr 2004), 168 ff.; Thorsten Siegel, *Entscheidungsfindung im Verwaltungsverbund* (Mohr 2009), 232 ff.

126 Established by Regulation (EC) No 178/2002 of 28 January 2002, *Official Journal* L 31, 1.2.2002, 1, which led to the creation of corresponding national authorities, thus ensuring a high degree of interoperability between the Member States and the EU. Among the early national authorities created are the *Agencia Española de Seguridad Alimentaria y Nutrición* in Spain (2001), the *Bundesamt für Verbraucherschutz und Lebensmittelsicherheit* in Germany (2002) and the *Autorità nazionale per la sicurezza alimentare* (subsequently renamed *Agenzia nazionale per la sicurezza alimentare*) in Italy. In the UK, the Foods Standards Agency had already been created in 2001 on the basis of the Food Standards Act 1999, chapter 28.

127 See Art. 28 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), L 376, *Official Journal* 27.12.2006, 36.

128 See Part I Chapter 3 (§§ 8a-8e) of the Administrative Procedure Act, inserted by Law of 17.7.2009, *Bun-desgesetzblatt (Federal Law Gazette)* 2009 I, 2091.

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The need to improve the inter-operability of various administrative systems promotes their convergence and presupposes a mutual understanding of the existing national administrative laws and cultures. Comparative studies are also urgently needed with regard to the impact of EU law on national legislation.[129]

3. The Emergence of a Transnational Science of Administrative Law

With the interdependency and interaction between national, European, and international law becoming the focus of legal analysis, exchange between lawyers of different countries has been and will be more and more perceived as work on common legal problems and principles.[130] This changes the concept of legal research and lessens the limitation of national boundaries, which (long ago) Rudolf von Ihering (1818-92) considered parochial and even 'humiliating'.[131] The emerging transnational field of administrative law could pursue three main objectives: first, systematic studies of and taking part in trans- and international discourse about the concepts and methods of administrative law; second, analysis and conceptualization of the inter-operability of various legal orders; and third, making contributions to the systemic development of European and international administrative law.[132] In this last respect, the Model Rules

129 A comparative view on the Europeanization of national legislation can already be seen in: Jürgen Schwarze (ed.), *Bestand und Perspektiven des Europäischen Verwaltungsrechts - Rechtsvergleichende Analysen* (Nomos 2009); cf. from further publications Attila Vincze, 'Europäisierung des nationalen Verwaltungsrechts – eine rechtsvergleichende Annäherung', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 77 (2017), 235 ff; Cristina Fraenkel-Haeberle, Diana-Urania Galetta and Karl-Peter Sommermann (eds), *Europäisierung und Internationalisierung der nationalen Verwaltungen im Vergleich – Deutsch-italienische Analysen* (Duncker & Humblot 2017); Cristina Fraenkel-Haeberle, Johannes Socher and Karl-Peter Sommermann, Praxis der Richtlinienumsetzung im Europäischen Verwaltungsverbund (Duncker & Humblot 2020).

130 See Jean-Bernard Auby, *La globalization, le droit et l`État*, 2nd edn (Librairie générale de Droit et de Jurisprudence 2010).

131 Rudolf von Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 1st part, 6th edn (Breitkopf und Härtel 1907), 14 f.

132 Karl-Peter Sommermann, 'Objectives and Methods of a Transnational Science of Administrative Law' in: Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer 2016), 543, 551 ff. For the transnationalization of juridical

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on EU Administrative Procedure, elaborated by the Research Network on EU Administrative Law, was a highly successful cooperation of scholars and researchers from various European countries.[133] Other projects are not limited to European discourse[134] and yet others are dedicated to study of other regions of the world.[135] Thus, comparative administrative law has increasingly become part of a worldwide discourse. It has been several decades now since it became no longer appropriate to speak of a specifically 'Germanic' tradition.

E. Perspectives for the Further Development of Comparative Administrative Law in Germany

Comparative administrative law is nowadays recognized as an established field of legal study.[136] The lively debate on methodological questions is in no way a disadvantage, but rather encourages reflection on the right way to

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methodology see Antonis Chanos, 'Transnationalisierung juristischer Methodik in Europa' in: Giorgios Dimitropoulos, Athanasios Gromitsaris and Martin Schulte (eds), *Staatsreform für ein besseres Europa* (Duncker & Humblot 2016), 75 ff.

133 See Paul Craig, Herwig C.H. Hofmann, Jens-Peter Schneider and Jacques Ziller (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017). The text of the model rules and the explanations are available online at http://reneual.eu/index.php/projects-and-publications/reneual-1-0 (last accessed on 24 January 2023). See also Jens-Peter Schneider, Herwig C.H. Hofmann and Jacques Ziller (eds), *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht* (Beck 2015), and the contributions to a conference held in the Federal Administrative Court in Jens-Peter Schneider, Klaus Rennert and Nikolaus Marsch (eds), *ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband* (Beck 2016).

134 An example is the elaboration of a model code of administrative jurisdiction by European and Latin American scholars and practitioners in sessions in Germany and Brazil, see Ricardo Perlingeiro and Karl-Peter Sommermann (eds), *Euro-American Model Code of Administrative Jurisdiction - in English, French, German, Italian, Portuguese and Spanish Versions* (Editora UFF,2014).

135 Cf. in particular Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (Oxford University Press 2017). The book is part of the results of a project carried out by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

136 Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 78 (2018), 807, 808: 'eine gefestigte Disziplin'.

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deal with the often complex tasks of comparative analysis. With regard to challenges brought about by rapid political and institutional changes, which particularly affect administrative law, it has even been said that comparative administrative law has taken the 'lead of reflection' (*Reflexionsvorsprung*) over comparative private law.[137] This might be an idle question. However, one can no longer assert that legal comparison in public law stands in the shadow of comparative private law. Given the generally greater need to contextualize the objects of comparison, comparative administrative law will often require trans- or interdisciplinary approaches which may, when necessary, be pursued in cooperation with colleagues from other academic disciplines, in particular empirical, social, or political scientists.

The growing interaction between legal and administrative systems and the intensification of international cooperation between scholars in constitutional and administrative law will contribute to a further development of a transnational discipline of administrative law. Irrespective of whether national administrative law will soon be conceived and developed as part of an overarching new *ius publicum europaeum*[138] or whether it will not, the curricula of law faculties should be revised. In the curricula of traditional German law studies, legal comparison is still insufficiently represented. There are specialized Masters programmes in comparative law, but these programmes are not part of the legal studies that lead – after university – to a state examination;[139] and so they hardly reach law students at large. In order to enable young lawyers to deal competently with different legal systems, foreign language training is indispensable. International student exchanges are helpful as they convey legal cultures in their own contexts.

Future reforms of legal education are likely to be linked to the ideal of a 'European lawyer'. Andreas Voßkuhle, the former President of the German Federal Constitutional Court, characterized the European lawyer as someone who is able not only to apply the law, but also to participate in shaping law on the basis of a broad knowledge of legal structures and methodology and a deeper understanding of the interdependence between

137 Schönberger (n. 35), 505 ff.

138 In this sense Armin von Bogdandy, 'Verwaltungsrecht im europäischen Rechtsraum – Perspektiven einer Disziplin' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. IV, (C.F. Müller 2011), 3, 32 ff.

139 In order to practise as a lawyer in Germany, one has to pass a two-year clerkship and a second state examination.

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legal systems and their cultural backgrounds.[140] Regardless of whether this ideal comes to fruition or not, it is evident that comparative administrative law will play a major role, in Germany as in other European countries, in meeting the practical needs of European cooperation and integration.

140 Andreas Voßkuhle, 'Das Leitbild des "europäischen Juristen" – Gedanken zur Juristenausbildung und zur Rechtskultur in Deutschland', BDVR-Rundschreiben 2/2010, 46, 48 ff. On comparative law as a 'methodological element' of legistics cf. Marsch (n. 96), 164, 184 f.

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