Comparative Administrative Law: Particularities, Methodologies, and History

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A. Introduction

In 20th-century scholarship on administrative law, comparison played a subordinate role for a long time. Just as public law in general was a pure relative of private law in matters of legal comparison, administrative – as opposed to constitutional – law suffered from neglect within the field of comparative public law. The argument went that it is precisely administrative law which most clearly reflects the historical and cultural particularity of the individual state, thus making comparison impossible or at any rate very difficult. Just as historians liked to claim the incomparable particularity of their national history, professors of public law did the same for their respective national administrative law. The individual countries assumed that their national paths were distinctive. What is more, a remarkable paradox arose: diverse processes of reception and borrowing characterised administrative law in particular since its modern period of origin in the 19th century. There is hardly another field of law in which foreign regulations are taken up and imported as often as in the field of administrative law. Here, the political influence of individual nations, the objective persuasiveness of a foreign solution for a novel problem or even mere trends have always led to a great permeability between the national legal systems. Already

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these phenomena of exchange alone suggest the usefulness of comparative law in this area. Yet despite or precisely because of such transfer processes, claims of historical singularity persisted in the 20th century, thus hindering comparative administrative law. While a comparative approach still constituted the basic method of the emerging scholarship on administrative law in the 19th century, from Robert von Mohl to Lorenz von Stein and Rudolf von Gneist all the way to Otto Mayer,[1] it was later mostly relegated to the margins of scholarly engagement.

Since the 1980s, this traditional situation has gradually begun to change. In the European Union, Community law is superimposed on the Member States' traditional administrative law systems in various ways, so that they are increasingly confronted with one another. Some observers already discern that the Member States' administrative law systems seem to be broadly converging. Following a long period in which scholars hastily put forth claims of incomparability, a similarly hasty process of convergence now predominates. Growing globalisation has also exposed the individual administrative legal systems to a novel comparative pressure to justify themselves, primarily related to their significance as inhibiting or promoting factors in the worldwide economic competition. As a result, comparative administrative law is experiencing a renaissance, which suggests that it is time to reflect anew on its particularity, methodologies, and historical development.

With regard to the longer tradition of comparative private law, this contribution will first explore the particularities of comparative administrative law by contrasting it with comparative private law (B). Then it will turn to the methodologies of comparative administrative law. This also involves a more detailed discussion of the possibilities for capturing the various transfer processes between the national administrative legal systems (C). The study then turns to the historical development of comparative administrative law since the early 19th century. Here, a rich inventory of traditions emerges, on which the current discussion can build (D). A concluding outlook focuses on the new challenges that Europeanisation and internationalisation present for scholarship in comparative administrative law (E).

1 In detail on this below, D.

B. Particularities of Comparative Administrative Law in Contrast to Traditional Comparative Private Law

The general instruments of comparative law do not change with the particular legal sub-area that uses them, be it private law, criminal law, or public law. But comparison can have different aims and be employed in very different functional contexts.[2] Traditionally, comparative private law often pursues the policy objective of legal harmonisation. By contrast, for a long time, comparative approaches in administrative law were not aimed at legal harmonisation but sought to gain scholarly insights from putting domestic administrative law into relation with other legal systems. Moreover, comparative administrative law was motivated by the policy interest of importing individual administrative legal institutions from foreign legal systems. Individual aspects of the comparative approach may therefore certainly be weighted differently in the individual sub-areas of the law.[3] Additionally, each specialised area modifies the comparative approach, giving it a particular profile. The particular profile of comparative administrative law can be perceived more clearly if one contrasts it with comparative private law. Discussions of comparative public law commonly point out that comparative private law is more developed.[4] Just as private law is older than administrative law, it also has broader and more profound experience in the area of comparative law. But this fact does not warrant describing comparative administrative law as a mere latecomer trying to catch up. Rather, the contrast with comparative private law allows for a clearer – and itself comparative – grasp of fundamental questions of comparative administrative law.[5]

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2 On the different tasks of comparative administrative law, see below, C2.

3 However, this does not mean that there are as many comparative methodologies as there are individual areas of the law: Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. 2: Die rechtsvergleichende Methode* (1972), 65 ff.; cf. also Jörg Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung', Archiv des öffentlichen Rechts 99 (1974), 192, 224.

4 Cf. representatively Joseph H. Kaiser, 'Vergleichung im Öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 391, 402; Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431; Martin Bullinger, 'Zwecke und Methoden der Rechtsvergleichung im Zivilrecht und im Verwaltungsrecht' in: *FS für Peter Schlechriem* (2003), 331.

5 Such a quasi-'internal' comparative law is always especially instructive for administrative law, particularly in relation to private law. On this issue, for ex. Peter L. Strauss,

I. Domestic Applicability

It is firstly of great practical significance for this contrast that foreign private law is traditionally also applied domestically in the context of *international private law*.[6] Within national law, international private law refers to foreign private law for legal relationships that involve certain foreign elements (cf. art 3 ff. of the Introductory Act to the German Private Code). It could be, for example, that a dispute on child custody between parents is decided according to Egyptian family law before a German court, due to the nationality of one of the spouses. Therefore, foreign private law must be held ready for its application before domestic courts, and legal scholarship produces the pertinent knowledge of foreign legal systems also for this reason. This study of foreign law as such is not yet comparative law scholarship, but at least it creates the preconditions for it. Precisely through international private law, scholars have repeatedly come to engage with comparative law.[7]

Comparable constellations do not play a significant role in public law, however.[8] In principle, only the pertinent national administrative law is applied to cases containing a foreign element. But in individual constellations, national law may accord foreign administrative law or foreign administrative decisions internal legal effects.[9] Thus, for instance, German nationality law provides that in principle, a German loses his or her cit-

'Administrative Law: The Hidden Comparative Law Course', The Journal of Legal Education 46 (1996), 478 ff.

6 Ernst Zitelmann, 'Aufgaben und Bedeutung der Rechtsvergleichung', DJZ 5 (1900), 329 f. Cf. offering contrast with public law, in greater detail Bullinger (n. 4), 331, 332 ff.; Georgios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (1998), 22; Alessandro Pizzorusso, 'La comparazione giuridica e il diritto pubblico', Il Foro Italiano 102 (1979), Parte V, 131, 132; Raymond Legeais, 'L'utilisation du droit comparé par les tribunaux', Revue internationale de droit comparé (1994), 347, 349 ff.

7 For instance, Swiss Adolf F. Schnitzer, whose two-volume Vergleichende Rechtslehre (2nd edn, 1961) is still very much worth reading. On the frequent intertwining of figures in international private law and comparative law in general Mathias Reimann, 'Comparative Law and Private International Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 1363 ff.

8 For a similar finding in the field of *criminal law* see Hans-Heinrich Jescheck, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955), 25.

9 Classically on this Karl Neumeyer, *Internationales Verwaltungsrecht*, vol. 4 (1936), 473 ff. Inasmuch as the matter at hand is the transnational effect of national authorities' decisions – today predominantly under the influence of European law – the more recent discussion addresses this issue using the concept of the 'transnational administrative act'; cf. in summary Matthias Ruffert, 'Der transnationale Verwaltungsakt', Die

izenship upon acquiring foreign citizenship, where such acquisition results from an application filed by the German concerned (cf. § 25 para. 1 cl. 1 Nationality Act). In the case of these rules, for a legal effect to materialise under German law, a legal issue must have previously been resolved under foreign law.[10] National authorities and courts must therefore interpret and apply foreign administrative law. This *international administrative law*, shaped by the conflict of laws, is currently – in part under the influence of European Community law – gaining practical importance[11] and increasing the epistemological value of comparative work in administrative law.[12] But it is still unable to match the significance of international private law, since it lacks the alternative domestic applicability of a complete foreign legal regime. National law only allows certain points of entry for foreign administrative law, which, due to their selective character, do not entail that foreign administrative laws are systematically held ready for application before domestic courts.

Verwaltung (2001), 453 ff.; Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (2004), 138 ff.

10 Cf. in greater detail on this issue, using the example of nationality law, Hans von Mangoldt, 'Rechtsvergleichung im öffentlichen Recht: Das Beispiel der Staatsangehörigkeit', StAZ 53 (2000), 285, 290 ff.

11 Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts* (2005). Yet usage of the term vacillates. Increasingly, the term international administrative law is no longer used to designate (only) national administrative conflict of laws but to refer primarily to administrative law internationalised by international law: Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in: Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten* (2007), 395, 398 ff.; Eberhard Schmidt-Aßmann, 'Überlegungen zu Begriff und Funktionskreisen des Internationalen Verwaltungsrechts' in: *FS für Heinrich Siedentopf* (2008), 101, 103 ff.

12 A summary in Stephan Neidhardt, *Nationale Rechtsinstitute als Bausteine europäischen Verwaltungrechts* (2008), 26 f. An analysis truly grounded in comparative law is generally only required if the application of the foreign administrative law rule – just as in international private law – is subject to a national *ordre-public* clause; cf. in greater detail Olivier Dubos, 'Le droit administratif et les situations transnationales: des droits étrangers au droit comparé?' in: Fabrice Melleray (ed.), *L'argument de droit comparé en droit administratif français* (2007), 69, 83 ff.

2. Legal Harmonisation

The knowledge of foreign private law has traditionally been much more important in international trade than a knowledge of the relevant administrative law. Above all in areas related to the economy, private law was already strongly internationalised in the 19th century; the relevant rules of trade or economic law were also often somewhat removed from the national core of rules or, like stock corporation law, relatively new.[13] Moreover, the old phenomenon of international trade encouraged comparative efforts early on, particularly in the area of trade, sea, or exchange law, in order to determine shared rules.[14] This explains why there have been repeated efforts in private law towards an international uniform law,[15] with comparative private law *preparing the harmonisation of law*. While in private law, too, this only applied to sub-areas – more idiosyncratic and more deeply rooted areas such as family law or property law were hardly affected by it[16] – the possibility of an international harmonisation has nevertheless always represented an important backdrop for comparative efforts. For public law, a comparable situation is discernible only in a limited way to date. Moreover, trade contacts between the citizens were traditionally distinctly more intense than their contact with foreign administrations or the connections of various national administrations among one another. As a result, administrative law has rarely been perceived as very significant for international transactions,[17] and above all, there have hardly been efforts to arrive at international harmonisations.[18] For a long time, comparative

13 On this Helmut Coing, 'Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert', Ius Commune 7 (1978), 160 ff.

14 Karl Otto Scherner, 'Allgemeine Rechtsgrundsätze und Rechtsvergleichung im europäischen Handelsrecht des 17. und 18. Jahrhunderts', Ius Commune 7 (1978), 118 ff.

15 Jan Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1975). Ein Beispiel bietet etwa das UN-Kaufrecht nach der Wiener Kaufrechtskonvention von 1980: Peter Schlechtriem, *Internationales UN-Kaufrecht* (2007).

16 Rightly emphasised in Stig Strömholm, 'Rechtsvergleichung und Rechtsangleichung. Theoretische Möglichkeiten und praktische Grenzen in der Gegenwart', RabelsZ 56 (1992), 611, 615; Nico Florijin, *Rechtsvergelijking in het wetgevingsproces* (1993), 16.

17 Vividly on this Clifford Larsen, 'The Future of Comparative Law: Public Legal Systems', Hastings International and Comparative Law Review 21 (1998), 847, 857 f.: 'no short-term commercial necessity'; cf. also Jean Rivero, 'Vers un droit commun européen: Nouvelles perspectives en droit administratif' in: Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe. Nouvelles Perspectives d'un droit commun de l'Europe* (1978), 389, 392.

18 On the corresponding contrast to private law Kaiser (n. 4), 400.

public law therefore lacked the pragmatic driving impulse that the prospect of legal harmonisation always supplied for comparative private law.

Yet this traditional contrast is increasingly fading. In current administrative law, a growing need for mutual knowledge and coordination is emerging internationally, which has reached broad areas from environmental to economic administrative law all the way to security law.[19] Especially within the European Union, comparative administrative law often prepares the groundwork for a certain harmonisation of the Member States' administrative legislations.[20] In any event, it is doubtful that the traditionally divergent significance of legal harmonisation in private and administrative law results from the different degree of substantive difficulty that each process of harmonisation entails. Administrative legal provisions often react to shared problems in developed societies, and tradition often weighs less heavily on them than it does on private law, thus potentially facilitating harmonisation.[21]

3. Universality?

A further important difference is linked to different basic premises of comparison in private and public law. Comparative private law usually works on the implicit assumption that its actors and constellations of issues are essentially the same worldwide. It assumes that its legal institutions – be they purchase, exchange, inheritance, or tort – are at least relatively universal. Private law often involves problems, interests, and legal constructions that are centuries if not millennia old and so constitute virtually anthropological elementary constellations. Comparative private law has therefore often

19 On this in greater detail George A. Bermann, 'Comparative Law in Administrative Law' in: *L'Etat de droit. Mélanges en l'honneur de Guy Braibant* (1996), 29 ff.; Harold Hongju Koh, 'Transnational Public Law Litigation', Yale Law Journal 100 (1991), 2347 ff.; cf. also Ralf Michaels, 'Im Westen nichts Neues?', RabelsZ 66 (2002), 97, 105 f.

20 Cf. in greater detail on this below, section C (3).

21 Cf. on this already Giovanni Fontana, *Introduzione al Diritto Pubblico Comparato* (1938), reprint 1954, 125, who already energetically opposed the thesis that comparative law shows greater promise in private than in public law (119 ff.); cf. on this also below, B4 and B6. Moreover, Fontana emphasised that comparative private law often produces harmonisation projects but that these fail just as frequently.

based its analyses on a 'universal archetypology'.[22] It has always tended 'to discover common solutions based on common problems'.[23] It is certainly also problematic[24] to assume the existence of universal legal archetypes in private law, and at times, it tempts comparative private law to suggest too hastily that similarities do exist. But at any rate, such assumptions are more plausible than in the field of public law. George A. Bermann formulated this as follows:

> 'Comparative law inquiries in private law tend to assume that legal actors are basically the same the world over. This is thought to be true not only of contracting parties, but also of tortfeasors, testators, spouses, and physical and legal persons generally. Even if this is not entirely true, the differences that do exist are generally deemed to be irrelevant for comparative law purposes and have not been allowed to interfere with that enterprise. Assumptions of universality are by no means made to the same degree outside the private law field, and comparative law may have been generally less welcome there as a result.'[25]

Beyond this elementary plausibility of its problems and constructions, private law recognises an older layer of commonality due to the shared inheritance of Roman law[26] (although the extent of this older commonality

22 Constantinesco (n. 3), 75. Precisely this link to such an archetypology and elementary constellations of interest must also explain the greater ability of private law to connect to the economic analysis of the law; on the differences in this regard to public law in detail Martin Morlok, 'Vom Reiz und vom Nutzen, von den Schwierigkeiten und den Gefahren der Ökonomischen Theorie für das Öffentliche Recht' in: Christoph Engel and Martin Morlok (eds), *Öffentliches Recht als Gegenstand ökonomischer Forschung* (1998), 1 ff.

23 Thus a classic formulation by Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956), 349. This conviction continues to determine functional approaches to comparative law in private law; cf. in particular the standard work by Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (1996).

24 For a critique see Constantinesco (n. 3), 75 ff.

25 Bermann (n. 19), 30 (author's translation).

26 As is well known, this is recalled more strongly in the course of Europeanisation; cf. representatively for ex. Reinhard Zimmermann, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', JuristenZeitung 47 (1992), 8 ff.; Rolf Knütel, 'Rechtseinheit in Europa und römisches Recht', Rechtseinheit in Europa und römisches Recht 2 (1994), 244 ff.; Jean-Louis Halpérin, 'L'approche historique et la problématique du Jus Commune', Revue internationale de droit comparé (2000), 717 ff.

is quite uncertain).[27] For this reason, too, it has always made sense to return to this shared foundation again by means of comparison.

Matters are different in public law, however. Here, here was no original unity that later weakened or was lost.[28] Instead, public law is often the product of the end of the older legal unity.[29] Its connection to the state binds it to specific organisational and institutional contexts more strongly than private law.[30] The shared fact that all administrative legal systems were strongly influenced in their formation phase by the already existing categories of private law[31] (and in part still are to this day) does not suffice as a foundation of commonality.[32] While there are immemorial problems and constructions in private law, hardly any legal institution of administrative law is much older than two hundred years.[33] Moreover, unlike private

27 Criticism of an idealised description of the supposed earlier legal uniformity on the basis of Roman law for instance in Pio Caroni, 'Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus', Zeitschrift für Neuere Rechtsgeschichte 16 (1994), 85 ff.

28 On this Nils Herlitz, 'L'étude du droit administratif comparé', Revue Internationale des Sciences Administratives 18 (1952), 796, 799; Rivero (n. 17), 389, 394; John S. Bell, 'Comparative Administrative Law' in: Reimann and Zimmermann (n. 7), 1259 ff.

29 Cf. on this in greater detail below, D2.

30 Cf. Christoph Möllers, 'Methoden' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006), § 3 mn. 40. This applies similarly to procedural law; instructively on this issue the comparative analysis of the USA and France in Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France. Culture juridique française et common law* (2003).

31 Classically for Germany on this Fritz Fleiner, *Über die Umbildung zivilrechtlicher Institute durch das öffentliche Recht* (1906); on the significance of the connection to private law and the attempt of nascent German administrative law to emancipate itself from it, in detail Roger Müller, *Verwaltungsrecht als Wissenschaft. Fritz Fleiner 1867-1937* (2006), 47 ff. and 69 ff.; Wolfgang Meyer-Hesemann, *Methodenwandel in der Verwaltungsrechtswissenschaft* (1981), 29 f.

32 Vividly on this Rivero (n. 17), 389, 394: 'The model of Roman law constitutes the origins of private law. Administrative law refers to it only indirectly, in the second degree; for the only materials that the pioneers of administrative law had at their disposal were the words and concepts that originated in the repertoire of legal concepts developed within the framework of private law in the Roman tradition. This does not suffice in order to establish links between them that are just as close as the links between the individual private laws that result from a direct descent from a common source' (author's translation). This holds especially true because the young science of administrative law has everywhere attempted, to a certain extent, to emancipate itself from private law in particular.

33 On this Pizzorusso (n. 6), 131, 134; Rivero (n. 17), 389, 394: 'Par rapport aux droits privés, qui s'enracinent dans des traditions multiséculaires, les droits adminis-

law, public law has always changed at a comparatively faster rate, had to react and always reacted more quickly and nervously to social and political developments. Its development 'sways much more strongly in the political wind than that of private law, which is substantively more stable'.[34] This, too, has hindered comparison, especially since scholarship has always had its hands full appropriately perceiving the quick transformation of its domestic law and translating it into doctrine.[35] Instead, constructions and institutions have always migrated regularly between the different national legal systems in public law, both in constitutional and in administrative law. Here, there have been many ad hoc imitations of foreign models in concrete historical situations and for concrete political motives, but they were seldom prepared or accompanied by comparative legal analyses.[36] While private law was shaped by relatively constant problems and efforts towards legal harmonisation, great historico-political contingency and the unsystematic importation of individual fragments from foreign legal systems were characteristic of public law.

However, one must not underestimate that for administrative law in particular, similar issues are often reflected more directly in the respective legal systems, because they are less prestructured by codificatory legislation

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tratifs sont des tard-venus'; Sabino Cassese, *La construction du droit administratif. France et Royaume Uni* (2000), 13; Gerd Beinhardt, 'Der öffentlich-rechtliche Vertrag im deutschen und französischen Recht. Eine rechtsvergleichende Betrachtung', VerwArch 55 (1964), 151. But this certainly also represents an advantage for comparative administrative law, since it has to do with material that is more limited both historically and substantively: Massimo Severo Giannini, 'Lo studio comparato del diritto amministrativo (Discussione sul libro di Marco D'Alberti, Diritto amministrativo comparato)', Rivista trimestrale di diritto pubblico (1995), 259.

34 Michael Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts* (1998), in: Stolleis, Konstitution und Intervention. Studien zur Geschichte des öffentlichen Rechts im 19. Jahrhundert, (2001) 170, 183.

35 Vividly on this, already in 1952, Herlitz (n. 28), 800: 'It is unnecessary to emphasise how natural it is that the lawyers restrict their analysis in this way. The study of administrative law – a young discipline everywhere – is already a more than sufficient task when it limits itself to national law, which develops quickly and is subject to profound changes. Scholarship is constantly in a futile race with a legislation that progresses with crushing speed. Under these circumstances, it may seem like neglect of one's duties or unnecessary entanglement if one now also analyses the law of other states in depth. This is all the more true because one always has the impression of being without guidance in a foreign world, which it is difficult, if not very difficult, to get to know.' (author's translation).

36 On these 'legal transplants' in administrative law in detail below, B6.

than in private law. In administrative law, too, the problems to be addressed in different countries display parallels, especially in places where industrial societies react to novel shared challenges, such as in environmental law or information law.[37] Moreover, some of the questions to be solved are just as constant as private law issues, for instance in public liability law.[38] Already Lorenz von Stein viewed the similarity of the problems to be solved as the particular basis for comparisons in the field of administrative law: 'A road is a road, may road law be what it may, a school is a school, credit is credit, an epidemic is an epidemic, entirely indifferent to school legislation, credit law, the sanitation police […]. Thus, all legislation shares the lasting nature of living conditions. This is the primary basis of any comparison of positive law.'[39] Although the relevant institutional context is more significant for administrative law, the fact that the universality of private law issues is more plausible seems to be based on private law's more linear developmental history rather than on the lesser similarity of issues in administrative law.

4. Codification

In the modern era since the French Revolution, the fact that private law was systematically codified in many states also promoted comparative private law. This considerably facilitated the initial comparative access, at least in Continental Europe. Yet administrative law of the Continental European countries, too, was and still is characterised by the general absence of such systematic codifications. Even in the area of administrative procedure, the pertinent legislation is rarely comprehensive, and the legal sub-areas

37 Jürgen Schwarze, *Europäisches Verwaltungsrecht* (2005), 91; in the same vein already in 1912 Otto Koellreutter (cf. below, C2 and D6).

38 Thought-provoking discussion of this issue in Basil Markisenis, *Rechtsvergleichung in Theorie und Praxis: Ein Beitrag zur rechtswissenschaftlichen Methodenlehre* (2004), 182 ff. More recent comparative overview in Duncan Fairgrieve, Mads Andenas and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002); pioneering study on this already in Roger Bonnard, *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux États-Unis et en Allemagne* (1914) (a comparison of the public liability regime in Britain, the United States and Germany, written from a French perspective).

39 Lorenz Stein, 'Über die Aufgabe der vergleichenden Rechtswissenschaft, mit besonderer Beziehung auf das Wasserrecht', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 7 (1861), 233, 238.

are hardly linked as a whole.[40] This is caused in part by the traditional diversity of legal sources and materials in administrative law, which in turn is linked to the complexity of the relevant constitutional, administrative, and judicial organisation. It is an exacerbating factor that in many countries, certain administrative law questions are usually regulated in private law and that the importance of the ordinary courts varies in administrative law questions.[41] In view of the fragmented variety of legal texts and the often central meaning of administrative practice and jurisprudence, comparative administrative law thus confronts especially high hurdles even when first attempting to approach foreign administrative law.

5. Historico-Political Particularity

Public law, more than private law, is defined by the state's individual historical and cultural path. Administrative law in particular belongs 'to those legal matters that most clearly reflect the national character of a people and a state.'[42] To fully understand administrative law, it is thus indispensable to closely attend to the relevant national evolution. Pierre Legendre's studies demonstrate this impressively in the case of French administrative law.[43] The state structure in question and historico-political

40 Cf. Jean Rivero, 'Réflexion sur l'étude comparée des sources des droits administratifs', in: *Mélanges Michel Stassinopoulos* (1974), 135 ff.; Bernhardt (n. 4), 433 f.; Rainer Grote, 'Rechtskreise im öffentlichen Recht', Archiv des öffentlichen Rechts 126 (2001), 10, 19 and 21 f.; Giorgio Lombardi, *Premesse al corso di diritto pubblico comparator: Problemi di metodo* (1986), 103 ff.; Larsen (n. 17), 860 f.

41 Jean Rivero, 'Le droit administratif en droit comparé: Rapport final', Revue internationale de droit comparé (1989), 919, 921. Thus, for instance, the different meaning of private law and the ordinary jurisdiction within the framework of the relevant administrative law constitutes a focus of comparative analysis also for the fundamental work by Marco D'Alberti, Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia (1992).

42 Ulrich Scheuner, 'Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung', 16 *Die öffentliche Verwaltung* (1963), 714; cf. also 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; Larsen (n. 17), 857; Markisenis (n. 38), 181.

43 Cf. representatively Pierre Legendre, 'La facture historique des systèmes. Notations pour une histoire comparative du droit administratif français', Revue internationale de droit comparé 23 (1971), 5 ff.

development usually affect public law more directly than private law. As a result, the corresponding comparative approach is from the outset directed more strongly than its private counterpart towards a perspective that is not only synchronous but also diachronous.[44] Anyone who wants to examine a public-law legal institution in comparative perspective generally cannot avoid examining its historical development in greater detail. This does not mean that comparison would inevitably become more difficult to the degree that a legal institution takes on a 'more political' character.[45] But comparison is often more demanding as a legal institution's development in the pertinent historico-social context must be considered as well.

Yet the realisation that comparative administrative law depends on historical embedding to a greater extent than comparative private law should not mean that the administrative law systems in question are always interpreted as an expression of particular national administrative legal cultures and compared *en bloc*. Historical immersion is not synonymous with the (re)construction of self-contained national administrative law systems. The understanding of foreign administrative law systems does not require an isolated immersion in national history but a historical classification within the framework of a comparative administrative (law) history, which takes diverse commonalities and receptions into account.[46] A comparative history of administrative law highlights the exchanges that have always been characteristic of administrative law.[47] From the outset, this long history of mutual exchanges calls into question the image of homogenous national administrative legal spaces which have never existed. It shows on the contrary that the shaping power of national legal traditions is at times even greater in private law than in public law. Private law has often developed with a relatively great degree of independent continuity, while there have always been varied processes of exchange in public law, due to its greater sensitivity to changing political and social conditions. Raymond Saleilles already emphasised as much at the International Congress of Comparative Law in 1900.[48] What is more, the great codification movements after the French

44 Pizzorusso (n. 6), sp. 131, 134.

45 Thus the thesis of Bernhardt (n. 4), 431, 437 ff. and 450 ff.; rightfully critical of this Pizzorusso (n. 6), column 131, 134 with n. 13.

46 Gerhard Robbers, 'Europäische Verwaltungsgeschichte' in: Reiner Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte* (1991), 153 ff.

47 On the issue of 'legal transplants' in administrative law in detail below, B6.

48 Raymond Saleilles, 'Rapport d'ensemble résumant les divers rapports présentés sur la question du régime parlementaire' in: *Congrès International de Droit Comparé. Tenu*

Revolution tended to compartmentalise various national private laws. By contrast, due to their very nature as a conglomerate of the most diverse rules and institutions, which were systematized only at a late stage and often only by academic writing, administrative law remained more open to the import of foreign solutions.[49] Therefore, as much as comparative administrative law requires profound historical analysis, such an analysis must not take the form of an isolated national history, which tends to reinforce, rather than challenge the self-perception that has traditionally characterised the scholarship of national administrative law.

6. Methodological Reflectivity

Ultimately, there is no longer any reason to lament that comparative administrative law seems to have developed more slowly than comparative private law. Instead, comparative private law scholarship could profit from a stronger engagement with comparative public law. For the insufficient attention given to public-law experience with the states' historico-political difference reinforces the tendency – already widespread among legal comparatists of private law – to quickly universalise their categories, thus not actually exposing themselves to the foreignness of the foreign. Furthermore, the relative hegemony of private law means that fundamental reflections on comparative work often occur through the lens of private law, which, as the older sibling, engages in reflections 'from its perspective for the entire family.'[50] A stronger engagement with comparative public law would also fit into broader trends of comparative law methodology, where, even as private law is concerned, previous functional assumptions of similarity

à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents, vol. 1 (1905), 69, 73: 'While the development of private law has almost always occurred very traditionally, one might even say: exclusively nationally, public law – as the law of societies and communities – has, in almost all historical time periods since the Barbarians, been subject to a series of mutual borrowing that was entirely unpredictable and almost always irrational […]'.

49 Jean Rivero, 'Les phénomènes d'imitation des modèles étrangers en droit administratif' in: Walter Jean Ganshof van der Meersch, *Miscellanea W. J. Ganshof van der Meersch*, vol. 3 (1972), 619, 621; Pizzorusso (n. 6), column 131, 132 f.; Grote (n. 40), 19; cf. also already Fontana (n. 21), 125.

50 Thus accurately Bernhardt (n. 4), 430.

are fundamentally criticised[51] or at least differentiated.[52] A broad tendency in the fundamental debate of comparative law currently emphasises the historico-cultural difference of the examined legal systems. There are good reasons for this. In a less obvious way than public law, private law has been subject to political and social development and was influenced by such factors. Thus, for instance, James Q. Whitman has shown to what extent different conceptions of *legal protection of personality rights and rights against defamation* were and are premised on different social models in Germany, France, and the United States: In Europe, the legal protection against defamation was extended from the aristocratic ruling class to society as a whole. By contrast, in the United States, the former aristocratic privileges of protection against defamation were abolished and unified at the lesser level of protection that had previously applied only to the lower social classes.[53] Moreover, there were also rapidly developing areas in private law, such as stock corporation law, in which comparative law played an important role – as it did in administrative law – for purely pragmatic reasons, in order to make foreign innovations quickly available in national law.[54] Not least under European influence, more recent legal development then further blurred the problematic boundary between public and private law.[55] Private law, too, is more quickly exposed to political and social changes.[56] Some particularities of comparative administrative law are therefore increasingly the conditions of comparative law as a whole.

Thus, today, the particularities of administrative law provide comparative scholarship in this field with an advance in terms of methodological

51 On the corresponding criticism by theoreticians of 'difference' such as Pierre Legrand, in detail below, C.

52 Cf. on this for instance the contributions of Ralf Michaels, 'The Functional Method of Comparative Law', and Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in: Reimann and Zimmermann (n. 7), 339 ff. and 383 ff.; interim evaluation in Jaako Husa, 'Farewell to Functionalism or Methodological Tolerance?', RabelsZ 67 (2003), 419 ff.

53 James Q. Whitman, 'Enforcing Civility and Respect: Three Societies', Yale Law Journal 109 (2000), 1279 ff.

54 On this Richard M. Buxbaum, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft', RabelsZ 60 (1996), 201, 208.

55 See on this for instance Walter Pauly, 'Deutschland' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Band IV: Verwaltungsrecht in Europa: Wissenschaft* (CF Müller 2011), 59; Barbara Leitl-Staudinger, 'Österreich' in : von Bogdandy, Cassese and Huber (n. 55), 220.

56 Cf. Buxbaum (n. 54), 201, 217 ff.; Horatia Muir Watt, 'Globalization and Comparative Law' in: Reimann and Zimmermann (n. 7), 579 ff.

reflection: its unique character as a comparatively recent legal area, which, on the one hand, is closely linked to a state's constitutional structure and historico-political development but, on the other hand, must react quickly to industrial societies' changing concerns and therefore depends, to a significant degree, on using foreign experiences. Comparative administrative law has reacted to this specific combination of a deep historical rootedness and a restless surface. Therefore, it has the advantage of being traditionally more sensitive to the historico-cultural particularity of the compared legal systems than its private-law counterpart. Thus, it can benefit from the current problematisation of conventional assumptions of similarity in comparative private law in order to subject hypotheses of convergence to a critical review. Particularly when comparing administrative legal systems in the European Union, it is vital to combine sensitivity to the historico-cultural path of individual administrative systems with an openness to the analysis of varied processes of exchange and rapprochement. The administrative law systems of the Member States are at once similar and different, and it is the task of comparative administrative law to conceptualise this simultaneity of commonality and difference.

C. Methods of Comparative Administrative Law

1. Ideologies of Comparative Administrative Law

Scholars in the field of comparative administrative law often write from the perspective of an ideological premise without revealing or critically examining this premise, at times even without being conscious of it. Centrally, what is at stake here – as in comparative law as a whole – are two fundamental attitudes, which one can describe as the *ideology of difference* and the *ideology of similarity*.

The *ideology of difference* emphasises the ineluctable particularity and historico-cultural uniqueness of national administrative law systems. It often appeared in comparative administrative law, above all during the first two thirds of the 20th century. Frequently, the claim that a certain national administrative law was unique merely served as a pretext for declaring comparative work in this area to be useless and superfluous. This position has once again become very popular in the general debate on the principles of comparative law and belongs to an overarching trend that can be described

as the *postmodern theory of comparative law*.[57] Thus, the French Canadian Pierre Legrand in particular emphasises the historico-cultural difference and uniqueness of individual national legal systems, the radically foreign nature of the other law in question, and warns that comparative discussions are too strongly shaped by the endeavour to find similarities between the various laws.[58]

The *ideology of similarity* takes the opposite position. Traditionally, it is at home in comparative private law, but today, under the influence of European integration, it is gaining supporters in the field of administrative law as well.[59] The ideology of similarity emphasizes the commonality of the legal problems shared by different legal systems. It assumes that there are analogous substantive and legal issues beneath the surface of different national styles, provisions, and concepts. Its representatives therefore typically emphasise the convergence and further possibilities for harmonising the compared administrative law systems.

Both ideologies suffer from comparable problems. The legal systems the comparatist deals with are radically different or resemble one another, depending on the chosen premise. The premise determines the research results from the start. Thus, both the ideology of difference and that of similarity emphasise only one aspect of comparison. Since comparison always consists in examining the differences as well as the similarities of at least two legal systems, it is self-evident that one can turn either of these two aspects into an absolute. But in doing so, both ideologies ultimately

57 Erik Jayme, 'Betrachtungen zu einer postmodernen Theorie der Rechtsvergleichung (1997/98)' in: Erik Jayme, *Gesammelte Schriften, vol. 2: Rechtsvergleichung – Ideengeschichte und Grundlagen von Emerico Amari bis zur Postmoderne* (2000), 103 ff., cf. also Dominik Richers, 'Postmoderne Theorie in der Rechtsvergleichung?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007), 509.

58 Pierre Legrand, *Le droit comparé*, 1999; Legrand, 'European Legal Systems are not Converging', International and Comparative Law Quarterly 45 (1996), 52 ff.; Legrand, 'The Impossibility of Legal Transplants', Maastricht Journal of European and Comparative Law 4 (1997), 111 ff.; Legrand, 'Public Law, Europeanisation and Convergence: Can Comparatists contribute?' in: Paul Beaumont, Carol Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (2002), 225; already previously in this direction Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law', Harvard International Law Journal 26 (1985), 411 ff. (German version: Kritische Vergleiche. Versuch, die Rechtsvergleichung zu beleben, in: Günter Frankenberg, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (2003), 299 ff.).

59 On the tendency towards convergence in comparative administrative law, as inspired by European law, see in detail below, D2.

lose sight of comparison itself. The ideology of difference is ultimately no longer able to explain how one can establish a relationship between two different legal systems at all. Because of its 'neo-Romantic turn',[60] it sees any effort to develop concepts that apply equally to the compared subjects as disregarding the ineluctable particularity of each individual legal system. It is a theory of comparative law that attempts to show the impossibility of comparison. Above all, it can be understood as an endeavour to counter the idealistic functionalism that, for a long time, was characteristic of comparative private law and viewed comparison mainly as a step towards legal harmonisation. Inasmuch as these efforts often go hand in hand with the ideal of borderless markets, fundamental protest against such projects and ideals also inheres in the ideology of difference. It rubs salt into the wound of the ideology of similarity, which considers the divergence between the legal systems less as a phenomenon to be understood than a problem to be overcome. The ideology of similarity, in turn, does not really expose itself to the foreignness of foreign law but always looks for a presumed common foundation under the surface of difference. In this perspective, historico-political difference and the individual paths of national administrative legal systems quickly appear only as bothersome hindrances that must be overcome on the path to convergence. The ideologies of difference and of similarity enforce an either-or, when in fact simultaneity is at stake: the simultaneity of commonality and difference. One of the doyens of comparative public law, Robert von Mohl, therefore considered comparisons based on similarity and those based on difference equally worthwhile. Concerning comparison with English law, he wrote, 'Comparing the English state institutions with those of the Continent, namely also of the constitutional German states, directly benefits life. It is difficult to say whether this comparison is more important in those aspects in which the English institutions have served or should serve as a predecessor and model for our own or in those aspects in which they are entirely different, as is often the case in the administration.'[61]

Instead of engaging in the ideological process of rendering difference or similarity absolute, comparative administrative law in particular must

60 James Q. Whitman, 'The neo-Romantic turn' in: Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 312 ff.

61 Robert von Mohl, Die Geschichte und Literatur der Staatswissenschaften, vol. 2 (1856), 3.

assume shared substantive problems[62] so as to better grasp the uniqueness of the solution in each national legislation. That the individual legal systems share substantive problems while differing in their problem-solving structures does not constitute a theoretical opposition but rather the two poles between which every comparative analysis must move inevitably.

2. Tasks, Instruments, and Forms

Comparative administrative law can fulfil very different *tasks*, and its instruments and forms change with the tasks as well. One may distinguish very generally between *practical* and *theoretical* tasks.[63] The area of practical tasks includes preparing foreign solutions for national policy debates or – increasingly important in the European Union – working out new shared European rules on the basis of a comparative inventory of the Member States' administrative law systems, be it in law-making or jurisprudence.[64] By contrast, at the level of theory, the focus is on scholarly findings. Comparison is supposed to help better understand foreign and one's own administrative law system by confronting them. Thus, administrative law scholarship can develop a broader foundation.

Traditionally, *country reports* belong to the usual *instruments of comparative administrative law*. Employing a shared questionnaire, experts describe the national administrative legal systems or individual legal institutions to be used as a basis for comparative reflections in a subsequent step.[65] This approach certainly has the advantage of offering profound documentation of the individual administrative law systems, which isolated

62 Cf. on this already above, B3. Still worth reading, on this issue, is the fundamental debate from the 1920s concerning the question whether comparative law should be understood as a science of substantive problems: Max Salomon, *Grundlegung zur Rechtsphilosophie* (1925), 26 ff.; Julius Binder, *Philosophie des Rechts* (1925), 935 ff.

63 On the practical and theoretical tasks of comparative administrative law in summary, Bullinger (n. 4); Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', Die öffentliche Verwaltung (1999), 1017, 1019 ff.

64 On this below, E.

65 Examples in the area of administrative law are the volumes published by the Max-Planck-Institute for Comparative Public Law and International Law: *Haftung des Staates für rechtswidriges Verhalten seiner Organe. Länderberichte und Rechtsvergleichung* (1967); *Gerichtsschutz gegen die Exekutive*, 3 vols, (1969-1971); *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung* (1993).

individual research would not be able to provide. It accomplishes this aim especially well if the examined regulatory problems or legal institutions are closely linked to the structure of modern administrations. Yet from a comparative perspective, this approach also has considerable disadvantages.[66] The national reporter generally remains caught up in his own legal system and does not necessarily report on what would be significant from a comparative perspective. She considers some questions too self-evident to mention. Others do not even occur to her, given her national horizon, although they would be especially instructive for the foreign observer. The truly comparative reports are in turn presented by legal scholars, who themselves have no direct knowledge of the compared legal systems and must draw on the national reporters' statements. Thus, the risk lies in the fact that comparative cross-section reports, which are not based on comparative work by the reporter himself, join the 'parallel monologues' of national scholars (Constantinesco). If many individual reports are juxtaposed, there is also the risk that the comparative synthesis tends to identify shared principles at a very abstract level, largely ignoring the individual legal systems which have been reported on. These problems can be somewhat mitigated if the research results are first discussed, aligned, and interlinked at an authors' conference, so that shared perspectives can emerge from this dialogue.

Advances in comparative administrative law have often been achieved when individual authors concentrate on a single foreign administrative law system, with the in-depth *monographic presentation of a foreign legal system or a foreign legal institution by a legal scholar from another country* in his or her language. This may not make sense at first glance. The description of a foreign administrative law system seems to be merely the study of foreign law, at best useful information concerning another country's legal system, which does not even reach the level of comparison. One might think that a

66 On the corresponding problems, Constantinesco (n. 3), 176 ff.; cf. also Axel Tschentscher, 'Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht', JZ (2007), 807 ff.; Bell (n. 28), 1260: 'Comparisons with more than one system are often less successful. If a single author undertakes such an enterprise, then it is often difficult for her or him to have an adequately deep understanding of how the governmental systems of all the different countries work. If there is a collective work, then the explanation of the national systems has to be undertaken in a genuinely comparative way, which is not always easy for national legal experts. This requires a close interaction between the reporters. As a result, there are fewer examples of successful comparative administrative law spanning many jurisdictions than in private law.'.

study is truly comparative only if the monograph juxtaposes at least two different legal systems and examines the relationship between them. But such an assumption would underestimate how arduous it already is to present only one foreign administrative law system in depth and how many implicit – and often also explicit – comparative reflections the person has to engage in to explain a foreign administrative law to the domestic specialised public using familiar categories. Impressive models of this genre are, for instance, Otto Koellreutter's monograph 'Administrative Law and Administrative Jurisprudence in Modern England' (1912), which thoroughly contrasts its presentation of English law with German and French administrative law,[67] the book 'French Administrative Law and the Common Law World' (1954) by Bernhard Schwartz, who dedicates himself to French administrative law from the Anglo-American perspective,[68] Michel Fromont's French study on the distribution of competences between the administrative jurisdiction and ordinary courts in German law (1960),[69] and Oliver Lepsius' study on the genesis of US administrative law, '*Verwaltungsrecht unter dem Common Law*' (Administrative Law under Common Law) (1997).[70] As the authors describe the development of foreign administrative law in their own language,[71] as they try to make the concepts and institutions of another legal system comprehensible to the reader versed in the law of their home country, as they explicitly or implicitly contrast the two systems of administrative law, a new image of *both* systems emerges. The new, distanced description constructs the foreign administrative law in a form that the national lawyer could not have achieved.[72] Only the foreign scholar's observation makes

67 On this monograph in detail below, D6.

68 Bernhard Schwartz, *French Administrative Law and the Common-Law World* (1954); there cf. also the title of the first chapter: 'A Common Lawyer Looks At The Droit Administratif'.

69 Michel Fromont, La Répartition des Compétences entre les Tribunaux Privates et Administratifs en Droit Allemand, (1960); partially a German translation in: Michel Fromont, Rechtsschutz gegenüber der Verwaltung in Deutschland, Frankreich und den Europäischen Gemeinschaften (1967), 15 ff. (with the title: Die Abgrenzung von privatem und öffentlichem Recht durch die Rechtsprechung).

70 Oliver Lepsius, Verwaltungsrecht unter dem Common Law: Amerikanische Entwicklungen bis zum New Deal (1997).

71 On the complex translation issues that emerge here for the administrative-law context, instructively Fritz Paepcke, 'Sprache und Recht. Zu Grundbegriffen des Verwaltungsrechts im Sprachenpaar Französisch-Deutsch', in: Wolfgang Bergerfurth and Erwin Diekmann, *Festschrift für Rupprecht Rohr zum 60. Geburtstag* (1979), 339 ff.

72 Otto Pfersmann fittingly writes that comparative law offers an 'interprétation conceptuelle différenciée' of the national law in question: 'Le droit comparé comme

what seems self-evident within the national scope worthy of questioning. Examining phenomena that seem entirely negligible to the domestic lawyer allows connections to emerge that remain obscured in national self-descriptions. In this sense, the comparatist might understand foreign law better than the national lawyer. And conversely, the challenging examination of foreign administrative law can affect the perception of one's national legal system. Because the comparatist has moved beyond the domestic horizon, national law also becomes the subject of new and different questions. Comparison enables re-examining one's national legal system from a distance, which, precisely because it refers to the positive law practiced elsewhere, is more intense than other forms of distancing, such as those legal philosophy may provide.

Only the detailed examination of a foreign administrative law, which obliquely considers national law as well, enables the comparatist to engage institutional context and historico-cultural particularity with sufficient intensity. An example that seems familiar at first glance may illustrate this point. As is well known, the *Verwaltungsakt* of German administrative law and the *acte administratif* of French administrative law do not have the same scope of application. While German law only defines an agency's individual decision as an administrative act, legislative decrees are also a form of the *acte administratif* in French law.[73] Comparative analysis cannot content itself with merely describing this contrast. It must ask what explains this difference. In this example, one must take into account that the French conception of administrative-law remedies as an objective review suggests, from a procedural perspective, including the regulations in the *recours pour excès de pouvoir*, while the subjectification of the German law of administrative procedure and of the action for annulment contributed to a concentration on individual decisions. What is more, the strong position of the *Conseil d'État* – which, due to the centralism of French administration, was originally and for a long time the only general administrative court – and its dual function as a court and the government's counselling body meant that the jurisdiction of the French administrative courts has never been

interprétation et comme théorie du droit', Revue internationale de droit comparé (2001), 275, 283 ff.

73 See for instance Michel Fromont, 'Typen staatlichen Verwaltungsrechts in Europa' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum, Band III: Verwaltungsrecht in Europa: Grundlagen* (C. F. Müller 2010), 558.

limited to the traditional domain of adjudication between the state and private parties. By contrast, the German law of administrative procedure followed the model of civil procedure, thus primarily deciding individual legal disputes between citizens and the administration.[74] In addition, unlike French constitutional law, German constitutional law emphasises the regulation's proximity to legislation and therefore its distance from individual administrative decisions.[75] Comparative analysis guides the German viewer's attention to the particularities of French historical and institutional conditions and demonstrates that even the seemingly self-evident German conception of the administrative act and of administrative legal protection is itself the contingent product of a specific historical and institutional development, which requires a more detailed explanation in its own right.

Here, the central task of scholarship in comparative administrative law becomes apparent. Beyond the diverse individual manifestations in positive law, it can reveal structural and functional connections. Only by confronting the diverse historico-political and cultural contexts of the individual administrative legal orders is it possible to develop and test credible hypotheses concerning the crucial structural characteristics and relatively invariant factors of the administrative development in question. By categorising various phenomena evolutionarily, based on certain relationships of similarity, comparative administrative law can elaborate *comparative typologies* and *paradigmatic functional contexts*.[76] Here, the importance of methodological guidelines and warning signs should not be overestimated. Those guidelines are usually either self-evident or extremely problematic. Thus,

74 On this Jean Marie Auby and Michel Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne* (1971), 455 f.; Michel Fromont, 'Die richterliche Nachprüfung der Verwaltungsakte und Rechtsverordnungen in Deutschland (1964)', in: Fromont (n. 69), 143, 144 ff.; Fromont, *Droit administratif des États européens* (2006), 161 ff. On other aspects, in particular the civil courts' lack of power to incidentally dismiss legislative decrees in France, cf. also Fromont, 'Der französische Staatsrat und sein Werk', DVBl (1978), 89 ff. Recently, a certain tendency to give objective administrative review a stronger dimension of individual protection has emerged in French administrative law as well; summarising this issue Thomas von Danwitz, *Europäisches Verwaltungsrecht* (2008), 60 ff.

75 Emphasised in Jean Rivero, Cours de droit administratif comparé, rédigé d'après les notes et avec l'autorisation de M. Rivero, Les Cours de Droit, Diplôme d'Études Supérieures de Droit Public (1956/1957), 98.

76 Still especially stimulating on this subject are the methodological reflections of Julius Hatschek (cf. on this below, D6); see also Erk Volkmar Heyen, 'Lorenz von Stein und die europäische Rechtsgeschichte' in: Erk Volkmar Heyen (ed.), *Wissenschaft und Recht der Verwaltung seit dem Ancien Régime: Europäische Ansichten* (1984), IX, XVII.

it should be obvious today that it is necessary to culturally contextualise foreign administrative law.[77] By contrast, the oft-cited rule that the comparatist must first prepare and present foreign law in a neutral, positivistic way, in order to then engage in comparative analysis in a separate methodological step, does not stand to reason.[78] This rule either makes a virtue of necessity – if the respective 'country report' is written by a national scholar who cannot compare – or it misjudges the practice of comparative work, in which foreign and national law take turns as the object of attention and productivity consists precisely in making this back and forth explicit in the representation, reflecting on it, and using it to form analytical hypotheses.

3. Legal Transplants in Administrative Law

Today, a specific task of comparative administrative law is dealing with the phenomenon of legal transplants. Administrative law has always been characterised by the lively import and export of entire administrative structures or individual constructions and legal institutions. Here, Roscoe Pound's insight is especially accurate: 'History of a system of law is largely a history of borrowings of legal materials from other legal systems […].'[79] Thus, countries such as Italy, the Netherlands, and later also Belgium imitated the model of the French *Conseil d'État*.[80] The Soviet Union exported elements of its administrative organisation – such as the prosecution's odd role as guardian of lawfulness – into several Eastern European states, where they have survived, in part even after the collapse of Communism, to the present

77 Erk Volkmar Heyen, Kultur und Identität in der europäischen Verwaltungsrechtsvergleichung – mit Blick auf Frankreich und Schweden (2000). For comparative constitutional law: Peter Häberle, Verfassungslehre als Kulturwissenschaft (1982); Peter Häberle, Rechtsvergleichung im Kraftfeld des Verfassungsstaates (1992); Rainer Wahl, 'Verfassungsvergleichung als Kulturvergleichung' (2000) in: Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (2003), 96 ff.

78 Fundamental criticism of this in Tschentscher (n. 66).

79 Roscoe Pound, cited in Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974), (1993), 22.

80 On the export of the Franch *Conseil d'État* within Europe and to Africa Maxime Letourneur, 'Die Staatsräte (Conseils d'État) als Organe der Verwaltungsrechtsprechung' in: Helmut Külz and Richard Naumann (eds), *Staatsbürger und Staatsgewalt*, vol. 1 (1963), 337 ff.; for the comparison with Italy in detail Yves Mény (ed.), *Il Consiglio di Stato in Francia e in Italia* (1994).

day.[81] Countries like France and Great Britain oriented themselves towards the Swedish ombudsman.[82] The Austrian model of an early codification of administrative procedure influenced Czechoslovakia, Poland, Yugoslavia, and Hungary.[83] In its own way, Switzerland received German administrative law and German administrative jurisdiction.[84] There are many other examples, extending to the current spread of the independent administrative agencies – originating in the United States – in Europe.[85] Nevertheless, the problem of legal transplants, which is now receiving greater attention in general comparative debates[86] and which scholars of history similarly discuss as a problem of the relationship between comparative studies and cultural transfer[87], has been examined only cursorily so far with regard to

81 Herbert Küpper, 'Sozialistische Überreste in den Verfassungen der neuen EU-Mitgliedstaaten im Lichte des gemeinschaftsrechtlichen Homogenitätsgebots', JOR 48 (2007), 203, 240 ff. Cf. on this for Hungary in detail Herbert Küpper, 'Ungarn' in: von Bogdandy, Cassese and Huber (n. 73), 443; on continued effects of real socialism in Hungarian administrative law scholarship also András Jakab, 'Ungarn' in: von Bogdandy, Cassese and Huber (n. 55), 386.

82 On the export of the *ombudsman*, in summary Rivero (n. 47), 626; see in detail Frank Stacey, *Ombudsmen Compared* (1978).

83 Franz Becker, *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung: Eine rechtsvergleichende Untersuchung* (1960), 63 ff. and 79 ff.; there – 146 ff. – also an instructive depiction of the development towards the Federal Administrative Procedure Act of 1946 in the USA; cf. also Alfonso Masucci, 'Das Verwaltungsverfahren in Italien', AöR 121 (1996), 261, 262 f., on the model function of the German codification of administrative procedure in 1976 for the corresponding Italian legislation.

84 Roger Müller, 'Wissenschaftstransfer des deutschen Verwaltungsrechts in die Schweiz' in: Vanessa Duss et al. (eds), *Rechtstransfer in der Geschichte* (2006), 84 ff.

85 On this Johannes Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts', Archiv des öffentlichen Rechts 128 (2003), 558 ff.; detailed comparative classification in the various administrative law traditions in England, the USA, France, and Italy in D'Alberti (n. 41).

86 Imre Zajtay, 'Die Rezeption fremder Rechte und die Rechtsvergleichung', Archiv für die civilistische Praxis 56 (1957), 361 ff.; Watson (n. 79); Jean Carbonnier, 'A beau mentir qui vient de loin ou le mythe du législateur étranger (1974)', in: Jean Carbonnier, *Essais sur les Lois* (1979), 191 ff.; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', American Journal of Comparative Law 43 (1995), 489 ff.; Legrand, Legal Transplants (n. 58); David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001); Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in: Reimann and Zimmermann (n. 7), 441 ff.; Marie Theres Fögen and Gunther Teubner, 'Rechtstransfer', Rechtsgeschichte 7 (2005), 38 ff.; Duss et al. (n. 84).

87 Johannes Paulmann, 'Internationaler Vergleich und interkultureller Transfer. Zwei Forschungsansätze zur europäischen Geschichte des 18. bis 20. Jahrhunderts', His-

administrative law. While there are individual studies that look at foreign influences on their own national administrative law,[88] there has seldom been any attempt to develop systematic categories for such processes.[89]

a) An Inquiry into the Types of Exchange Processes

To conceptualise these exchange processes, it is necessary to make several distinctions. Initially, it makes sense to typologise the *different forms of the respective exchange processes*. Thus, exchange may be based on the dominance of a politically more powerful state, which *imperially exports* its legal order. Examples include the Napoleonic export of French administrative organisation in Europe, the propagation of the Soviet Union's administrative model within the Eastern bloc, or the implementation of the motherlands' administrative law in the colonies. Such imperial exports usually continue to have an impact far beyond the time of the exporting state's direct dominance.[90] But the exchange can also occur *autonomously*, if national law independently adopts a foreign legal institution, for reasons grounded in the individual national state. The adoption of the ombudsman outside of Sweden constitutes one example. Between these two extremes, there are many nuanced forms of the phenomena of exchange, in which the participating states occupy fundamentally *unequal positions* and the *transplant*, for the receiving state, is often the *condition for obtaining advantages* (such as financial funding, acceptance into international organisations).

torische Zeitschrift 267 (1998), 649 ff.; Matthias Middell, 'Kulturtransfer und Historische Komparatistik – Thesen zu ihrem Verhältnis', Comparativ 10 (2000), 7 ff.; Michael Werner and Bénédicte Zimmermann, 'Vergleich, Transfer, Verflechtung. Der Ansatz der Histoire croisée und die Herausforderung des Transnationalen', Geschichte und Gesellschaft 28 (2002), 607 ff.; Michel Espagne, 'Au delà du comparatisme' in: Espagne, *Les Transferts Culturels Franco-Allemands* (1999), 35 ff.

88 Cf. for ex. for Germany: Scheuner (n. 42), 714 ff.; for France: Fabrice Melleray, 'L'imitation de modèles étrangers en droit administratif français', AJDA (2004), 1224 ff.; for Spain: Alfredo Gallego Anabitarte, 'La influencia extranjera en el derecho administrativo espanol desde 1950 a hoy', Revista de Administración Pública 150 (1999), 75 ff.

89 Reflections on this issue, concerning administrative law in particular, in Rivero (n. 49), 619 ff.; Melleray (n. 88), 1224 ff.; cf. for constitutional law also Peter Häberle, 'Theorieelemente eines allgemeinen juristischen Rezeptionsmodells', JuristenZeitung (1992), 1033.

90 On the varied reasons for this (institutional sluggishness, training of local elites in the 'motherland', etc.), in detail Rivero (n. 49), 624 f. Instructive case study in Helmut Janssen, *Die Übertragung von Rechtsvorstellungen auf fremde Kulturen am Beispiel des englischen Kolonialrechts. Ein Beitrag zur Rechtsvergleichung* (2000).

Examples include the export of Western administrative law models to the Eastern European reform states after 1989[91] or the efforts undertaken in particular by the World Bank, in the context of development cooperation, to impel the receiving countries to ensure their administrative structures' greater efficiency and transparency in the name of 'good governance'.[92] Because of the participating states' disparate power and the link to possible advantages, such transplants oscillate between imperial coercion and autonomous import.

Moreover, the legal exchange between states that are integrated in a *multi-level structure* is becoming increasingly significant. Here, the institutions of the higher level often mediate the transplant. For instance, such a *guided horizontal transplant* exists between the individual states within the United States or the European Union Member States.[93] This includes *the import of legal constructions, required or at least prompted by European law, from the law of individual Member States into other Member States.* Thus, the notion of the protection of legitimate expectations ('*Vertrauensschutz*'), developed above all in German law, was imported into French administrative law, to which it was previously foreign, by way of the jurisprudence of the European Court of Justice.[94] In part, such imports go back to the European Court of Justice's legal comparisons, as prescribed or suggested

91 On the associated problems, for instance Paul H. Brietzke, 'Democratization and … Administrative Law', Oklahoma Law Review 52 (1999), 1 ff.

92 Margrit Seckelmann, 'Good Governance. Importe und Re-Importe' in: Duss et al. (n. 84), 108, 117 ff.; there – 120 f. – also observations on the later re-import of the exported legitimacy standards to the countries of origin. In detail on the corresponding concepts of the World Bank Christian Theobald, *Zur Ökonomik des Staates. Good Governance und die Perzeption der Weltbank* (2000); Graham Harrison, *The World Bank and Africa. The construction of governance states* (2004); cf. for the national level also Oliver Meinecke, *Rechtsprojekte in der Entwicklungszusammenarbeit: Theorie und Praxis am Beispiel von GTZ-Projekten zur Konsolidierung des Rechtsstaats in Südafrika und Sambia* (2007).

93 Kristine Kern, *Die Diffusion von Politikinnovationen. Umweltpolitische Innovationen im Mehrebenensystem der USA* (2000), 186 ff., speaks ambigously of a 'vertical transfer' in this respect.

94 In detail on this Neidhardt (n. 12), 119 ff.; cf. also Melleray (n. 88), 1225 f.; for similar examples, see Constance Grewe, 'Les influences du droit allemand des droits fondamentaux sur le droit français: le rôle médiateur de la jurisprudence de la Cour européenne des droits de l'homme', Revue universelle des droits de l'homme (2004), 26 ff.; Margrit Seckelmann, 'Im Labor. Beobachtungen zum Rechtstransfer anhand des Europäischen Verfassungsvertrags', Rechtsgeschichte 8 (2006), 69 ff.; Seckelmann (n. 92), 108 ff.

by European law.[95] *Vertical transplants*, the *export of individual states' legal constructions to the level that encompasses them*, belong in this context as well.[96] Thus, the development of the law concerning employees of international organisations and the European Union is based on the legal concepts of the national civil service legislation,[97] and international environmental law adopted the institution of emissions trade developed in the United States.[98] The procedure before the European Court of Justice, strongly influenced in its development by French law of administrative procedure, is also the product of such a transplant.[99] International and European Union law have drawn on the wealth of models and experience of national law for their regulatory needs.

b) Scope and Objects of Transplants

In addition to the structures of the relevant exchange process, it is vital to consider to what *extent* reception occurs. The spectrum ranges from the reception of a foreign system of administrative organisation and administrative law *in complexu* to merely adopting the individual regulation of a specific problem. Often, the relevant legal institution is deliberately

95 On the uniqueness of this comparative law, see below, E.

96 On this Hans F. Zacher, 'Horizontaler und vertikaler Sozialrechtsvergleich' (1977) in: Zacher, *Abhandlungen zum Sozialrecht* (1993), 376, 389 f. and 404 ff.; Jonathan B. Wiener, 'Something Borrowed For Something Blue: Legal Transplants and the Evolution of Global Environmental Law', Ecology Law Quarterly 27 (2001), 1295 ff.; on such transplants between the states and the federal level in the USA, Virginia Gray, 'Competition, Emulation and Policy Innovation' in: Lawrence Dodd and Calvin Jullson (eds), *New Perspectives on American Politics* (1994), 230, 231.

97 Karl Zemanek, 'Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 453, 465 f.; Georg Ress, 'Die Bedeutung der Rechtsvergleichung für das Recht internationaler Organisationen', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 36 (1976), 227, 247 ff. and 263 ff.

98 On this, with further systematic reflections on 'vertical transfer', Wiener (n. 96), 1295 ff.

99 Ulrich Everling, 'Das Verfahren der Gerichte der EG im Spiegel der verwaltungsgerichtlichen Verfahren der Mitgliedstaaten' in: Rainer Grote et al. (eds), *Die Ordnung der Freiheit - Festschrift für Christian Starck* (2007), 535 ff.; cf. in older scholarship Peter Becker, *Der Einfluß des französischen Verwaltungsrechts auf den Rechtsschutz in den Europäischen Gemeinschaften* (1963).

changed during the transplant and tailored to the receiving legal system.[100] In Great Britain, for instance, Parliament's special position in the review of the administration means that the citizens cannot seize the newly introduced ombudsman directly, as is the case with its Scandinavian model, but can only do so through the Members of Parliament.[101] The *various objects* of the transplant are just as significant. These may involve a certain foreign written rule, which the domestic legislature takes up, or the solution of a problem in foreign jurisprudence, which provides inspiration for domestic courts. Particularly in the field of administrative law, the *import of scholarly systematisations and doctrinal categories* is also very important. In an area of the law in which the legislature often acts less in a codificatory way and jurisprudence occupies an especially strong position, foreign law often only becomes recognisable, exportable, and imitable in the form of scholarly systematisations. The corresponding import of foreign categories and concepts then gradually also changes the perception of national law in the country of import.[102] Thus, the administrative law of Great Britain and the United States often only entered the awareness of domestic observers as to its existence and particularity by being classified using the categories of continental European administrative law.[103]

c) On Legal Scholarship's Appraisal of Transplants

Beyond such a phenomenology of legal transplants in administrative law, the corresponding exchange processes raise fundamental questions. There-

100 Richard Rose, *Lesson-Drawing in Public Policy. A Guide to Learning Across Time and Space* (1993), 29 ff.; cf. also David Dolowitz and David Marsh, 'Who learns what from whom: a review of the policy transfer literature', Political Studies 44 (1996), 343, 349 ff.

101 On this Rivero (n. 49), 631; cf. on this singularity of the British 'Parliamentary Commissioner for Administration' in detail Stacey (n. 82), 122 ff.

102 On this vividly Rivero (n. 49), 629 f.

103 It is no coincidence that the first detailed study of modern English administrative law was written by a foreigner, the German public law scholar Otto Koellreutter (cf. on this below, D6). von Mohl (n. 61), 7 already noted that in English administrative law, 'foreigners oddly enough accomplished by far the best work'. Bell (n. 28), 1260 n. 1, accurately describes it from the current British perspective: 'In many ways, the English distinctive definition of the subject has come out of intense comparison with other jurisdictions.' US administrative law was also first classified by authors with a background in German legal scholarship; cf. on all of this below in detail, D4 and D6.

fore, even if a written rule of law is adopted literally, the question arises whether it does not change its nature as a result of the transplant.[104] From the perspective of systems theory, one may ask whether a transplant does not automatically signify the transgression of a system boundary and so inevitably entails the reconfiguration of the borrowed legal institution in a different context.[105] If one emphasises the fundamental dimension of the relevant national legal culture, then one must question the possibility of a useful legal transplant even more.[106] In the discussion about legal transplants, one thus also encounters the fundamental debate over the ideologies of similarity and of difference,[107] which here takes the shape of a perspective in favor of transplantation and one that is sceptical about it.[108] Often, in any event, the reception will not bring about a convergence of the legal orders concerned but will instead unfold like the well-known children's game of 'telephone'. As it might occur in the case of an organ transplant, the receiving body may more or less accept the new organ, but it may also reject it. The transferred complexes of rules may be encapsulated in the receiving law or become a mere official façade, behind which the older legal structures continue to exist unchanged.[109] In the words of Robert von Mohl 'the mere transfer of forms without their spirit will have no effect,

104 Still very much worth reading in the area of comparative private law is the study by Felix Holldack, *Grenzen der Erkenntnis des ausländischen Rechts* (1919). Using the example of the adoption of rules of the French *Code de Commerce* in Belgium, Holldack showed how legal practice developed in fundamentally different ways, despite agreement on underlying statutes, a common language, and even consideration of the rulings of foreign supreme courts. He based methodologically profound reflections on the particularities of reception processes on these findings (42 ff. and 95 ff.) and emphasised, 'The concept of reception invariably encompasses the concept of creation' (101).

105 Fögen andTeubner (n. 86), 38, 45, thus come to the radical conclusion that there is no such thing as a legal transplant but only 'different border-crossings as part of the resignification of legal rules'.

106 Legrand (n. 86), 111 ff.

107 On this, too, already very instructively Holldack (n. 104), 43 ff.

108 A summary that contrasts the two perspectives in Rose (n. 100), 34 ff. (who opposes 'total fungibility' and 'total blockage' as extreme positions); cf. also Martin de Jong, Virginie Mamadouh and Kostantinos Lalenis, 'Drawing Lessons about Lesson Drawing' in: Martin de Jong, Virginie Mamadouh and Kostantinos Lalenis (eds), *The Theory and Practice of Institutional Transplantation. Experiences with the Transfer of Policy Institutions* (2002), 283; Seckelmann (n. 94), 72 f.

109 General reflections from the social-science perspective in Rudolf Stichweh, 'Transfer in Sozialsystemen: Theoretische Überlegungen' in: Duss et al. (n. 84), 1, 10.

while transplanting an institution into entirely divergent conditions will have a different, perhaps opposing effect.'[110]

One need not be a radical theorist of difference to realise that a legal transplant will practically never mean that a legal institution familiar from the original legal system takes the same form in the receiving legal system. This is an old insight on all forms of reception. Thus, a scholastic axiom says: '*Quidquid recipitur ad modum recipientis recipitur* (Whatever is received is received according to the nature of the recipient)'.[111] A telling example is provided by the import of the German law principle of proportionality into British law. The principle of proportionality entered into British administrative law by way of European law. While British administrative law changed as a result, no standard of review comparable to German doctrine emerged there. The tradition of parliamentary sovereignty and the restrained understanding of the judicial review of the administration meant that the principle of proportionality, following its import into British administrative law, took on different contours there than in German law. The diffusion of a legal institution does not automatically entail convergence; it can also go hand in hand with old or even new divergence.[112] Therefore, the concept of an 'irritation of the law' (*Rechtsirritation*), developed by Gunther Teubner, seems more useful in analysing legal transplants.[113] The transplant of a norm or a legal institution into another legal system functions as an irritation of the receiving law. This in turn triggers unforeseeable reactive processes, changing both the meaning of the imported norm and the internal legal context. At the same time, one must be careful not

110 von Mohl (n. 61), 3 (there with regard to the reception of English state institutions on the European continent).

111 Cf. Thomas von Aquin, *Summa theologica* (1852), vol. 1, Quaestio 75, Articulus V, 4: '*Manifestum est enim quod omne quod recipitur in aliquo, recipitur in eo per modum recipientis* (For it is clear that whatever is received into something is received according to the condition of the recipient).'.

112 Christoph Knill and Florian Becker, 'Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhältnismäßigkeitsprinzips in Deutschland, Großbritannien und der Europäischen Union', Die Verwaltung (2003), 447 ff.; cf. also Carol Harlow, 'Export, Import. The Ebb and Flow of English Public Law', Public Law (2000), 240 ff.; Matthias Ruffert, 'Die Methodik der Verwaltungsrechtswissenschaft in anderen Ländern der Europäischen Union' in: Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (2004), 165, 199; Seckelmann (n. 108), 78.

113 Gunther Teubner, 'Rechtsirritationen: Zur Koevolution von Rechtsnormen und Produktionsregimes' in: Günter Dux and Franz Welz (eds), *Moral und Recht im Diskurs der Moderne: Zur Legitimation gesellschaftlicher Ordnung* (2001), 351, 353.

to ontologise the legal orders that participate in a legal transplant or to declare them to be *black boxes* for one another. Instead, it is precisely the perception of the ubiquity of the phenomena of exchange that serves as an effective immunisation against the tendency sometimes encountered in comparative law to contrast national legal systems with one another *en bloc*, thus reinforcing national preconceptions and self-images rather than critically examining them.[114] Dealing with the diverse phenomena of export and import makes it possible to find a way out of some of the impasses of traditional comparative law.

D. The History of Comparative Administrative Law

The history of comparative administrative law illustrates the tasks and problems of comparative administrative legal scholarship in various ways. This history is relatively short, as short as the history of administrative law as a legal field and scholarly discipline. With manifold predecessors in canonical law[115] and in territorial organisation since the early modern period,[116] which was repeatedly accompanied by sidelong glances to foreign administrations,[117] the modern history of administrative law only began after the French Revolution,[118] when relationships between the administration and the citizens were brought into the ambit of constitutional law.[119] Throughout Europe, the 19th century was thus the founding era of adminis-

114 On this general danger of comparative law, Espagne (n. 87), 35 ff.

115 Gabriel Le Bras, 'Les origines canoniques du droit administratif' in: *L'évolution du droit public. Études offertes à A. Mestre* (1956), 395 ff.

116 Overviews of this evolution for the various European countries in Erk Volkmar Heyen (ed.), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (1982).

117 References to this in Rivero (n. 75), 14.

118 On the discussion about the existence and significance of administrative law in the *ancien régime*, about continuity and discontinuity, paradigmatically for France, the different perspectives in: Jean-Louis Mestre, *Introduction historique au droit administratif français* (1985); Jean-Louis Mestre, 'Frankreich' in: von Bogdandy, Cassese and Huber (n. 73), mn. 19 ff.; Benoît Plessix, 'Nicolas Delamare ou les fondations du droit administratif français', Droits 38 (2003), 113 ff. (emphasis on the continuity with the *ancient régime*); Grégoire Bigot, *Introduction historique au droit administratif depuis* (1789, 2002), 18 ff. (emphasis on the new start as a consequence of the Revolution).

119 A summary in Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol. 1 (2006), § 2 mn. 4 ff.

trative law,[120] and comparative administrative law came into being at the same time. In this founding phase of administrative law, comparison was not a mere sub-branch of scholarship on administrative law but stood at its centre. In attempting to grasp the particularity of administrative law and to understand its structures, it was natural to look beyond one's own borders and inform oneself comprehensively on the development of administrative law in neighbouring states. Yet after 1900, administrative law scholarship retreated into its national forms. Subsequently, comparison was no longer constitutive for administrative law scholarship but instead became a matter for individual experts. This only changed markedly under the influence of European integration.

I. Early 19th Century and the Dawn of Comparative Public Law in Europe

Very generally speaking, the 'long' 19th century was the true 'period of comparison' (Nietzsche). There were many reasons for this.[121] In legal scholarship, the long era of common law in Europe was ending. National codifications in the national language took their place, and Latin lost its pan-European significance as the language of scholarship and teaching. Consequently, the distance among the national legal systems increased and became more noticeable. Traditional Aristotelianism no longer prevailed in social philosophy, and with it, the long era of a supratemporal and supranational natural law also came to an end. Around 1800, the perceived world also suddenly expanded geographically, as world travellers James Cook, Georg Forster, and Alexander von Humboldt reported. The new perception of time and space clearly demonstrated that one's own world of experience was relative. Like all social phenomena, law was now increasingly historicised and relativised as well. This is what made modern comparative law possible in the first place. Since the law was no longer understood as an expression of supratemporal and immutable principles but as man-made and changeable, it could come into view in its respective reality and be

120 In individual countries, the emergence of administrative law lagged behind due to developmental particularities. This applies particularly to Switzerland, where a cooperative view of the state, the complexities of federalism and the absence of an independent administrative jurisdiction slowed and weakened the development; cf. on this Pierre Tschannen, 'Schweiz' in: von Bogdandy, Cassese and Huber (n. 55), mn. 2 ff.

121 Concise summary in Stolleis (n. 34), 179 ff.; cf. also Léontin-Jean Constantinesco, *Rechtsvergleichung, vol. 1: Einführung in die Rechtsvergleichung* (1971), 88 ff.

perceived in its relativity. Yet from the perspective of the contemporaries, modern comparative law therefore also became necessary. The more the shared, overarching, and binding elements of the past disappeared, the more the need grew to find an empirical substitute for them in comparative work.

In the area of public law, the situation changed dramatically with the French Revolution, or generally speaking with the constitutional movement, which, originating in the newly established United States and France, seized all of Europe from the end of the 18th century on. It manifested itself in a wealth of modern constitutions, in codified constitutional texts that expressed the new anti-corporative order of freedom and equality in varying forms. Ever new constitutional waves – during the Revolution and under the reign of Napoleon, after the Vienna Congress of 1815, after the French July Revolution of 1830, and finally after 1848/49 – produced ever new constitutional texts, all of which were interdependent, linked, and mutually reactive. Paradoxically, this created the conditions for a novel form of comparative public law. For on the one hand, the legal autonomy of the individual states emerged more clearly as a result of the respective written constitutions: now, the law – as artificial as it may have been in the individual case – was state law, national law. On the other hand, this distance was accompanied by a new form of exchange and interweaving, thus practically suggesting comparison. In this new diversity of states, the documents resembled one another in many ways; there were foundational texts and the texts inspired by them, overt and covert borrowings of all kinds and quality. For continental Europe, French law – with its inexhaustible wealth of constitutions after the Revolution – was the obvious point of reference for comparative purposes, while for the French authors, English constitutional law remained the primary reference point for comparative studies.[122] Substantial compilations gave access to the relevant texts, permitting closer examination.[123] In the major debates on the framing of the constitutional

122 Roberto Scarciglia, 'Profili storici dell'insgenamento del diritto pubblico comparato' in: Roberto Scarciglia and Fabio Padovini (eds), *Diritto e Università. Comparazione e formazione del giurista nella prospettiva europea* (2003), 77, 93 ff.

123 The Saxon constitutional scholar Karl Ludwig Heinrich Pölitz, for instance, published a four-volume compendium, frequently consulted at the time, on *The Constitutions of the European States in the Last 25 Years* (1817-1825; 1832-33). On Pölitz, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (1992), 165 f. A similar compilation in France at that time in Pierre Armand Dufau, Jean Baptiste Duvergier and Jean Guadet, *Collection des Constitutions, Chartes Et Lois*

texts, the liberal or conservative interpretation of constitutional monarchy, comparative constitutional law became particularly significant, especially in Germany. Scholarly analyses focused – enthusiastically or critically – mainly on the West, on France and Great Britain.

2. Comparative Administrative Law in Germany

Yet this focus beyond national borders concerned not only constitutional questions but also questions of the slowly emerging administrative law, from poor law and municipal law to public liability law and the judicial review of the administration.[124] Initially, the important authors in Germany were Carl Salomo Zachariae and Robert von Mohl. Together with Karl Josef Anton Mittermaier, Zachariae founded the 'Critical Journal for Foreign Jurisprudence and Legislation' (*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*),[125] which focused particularly on foreign public law.[126] Towards mid-century, these authors were followed by Rudolf von Gneist, with in-depth comparative studies on English administrative law,[127] and Lorenz von Stein, who dealt specifically with French, English, and German administrative law in the context of a European

Fondamentales Des Peuples De l'Europe et Des Deux Amériques; Avec des Précis Offrant l'Histoire Des Libertés et Des Institutions Politiques Chez les Nations Modernes, 6 vols (1821-1823).

124 Overview in Erk Volkmar Heyen, 'Französisches und englisches Verwaltungsrecht in der deutschen Rechtsvergleichung des 19. Jahrhunderts: Mohl, Stein, Gneist, Mayer, Hatschek', Jahrbuch für europäische Verwaltungsgeschichte 8 (1996), 163 ff.

125 On the significance of this journal Constantinesco (n. 3), 112 f. On Mittermaier's importance as a pioneer of comparative law in the area of criminal law Lars Hendrik Riemer, '"Die Welt regiert sich nicht durch Theorien": Strafrechtsvergleichung und Rechtspolitik in Karl Josef Anton Mittermaiers Konzept einer "praktischen Rechtswissenschaft"' in: Sylvia Kesper-Biermann and Petra Overath (eds), *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930). Deutschland im Vergleich* (2007), 19 ff.

126 Cf., for administrative law, the references in Heyen (n. 124), 164 (n. 3); on the French monitoring of German public law, see Jean-Louis Mestre, 'La connaissance des droits administratifs allemands en France entre 1830 et 1869 à partir de la "Revue étrangère" de Foelix', Jahrbuch für Europäische Verwaltungsgeschichte 2 (1990), 193 ff.

127 Rudolf Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, 2 vols (1857/1860).

comparative theory of administration[128] and also examined specific areas such as water law in historical and comparative perspective.[129] In the German-speaking space, the view beyond state borders – for instance from Austria to Germany[130] – was self-evident in any event. German scholars often sought out Western models, be it in France or in England, to develop their own administration.[131] Thus, in 1857, von Gneist explained his interest in English administrative law – which he compared to a 'path through a jungle' – as follows: 'In any case, the universality of the German spirit loves constant comparisons with foreign nations. Now that the French state is no longer the exemplary model, England has come to the fore more strongly than ever for us.'[132] The English tradition of local self-government, whose image von Gneist borussified in an idiosyncratic way, was supposed to guide the Prussian-German administration's modernisation under the rule of law.[133] Comparative work was similarly important at the time in France, where administrative law authors from Anselme Batbie to Edouard Laferrière quite naturally discussed the administrative law systems of the

128 Lorenz Stein, *Die Verwaltungslehre*, 7 vols (1865-1868); Stein, *Handbuch der Verwaltungslehre und des Verwaltungsrechts mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England und Deutschland* (1870).

129 Lorenz Stein, 'Die Wasserrechts-Lehre', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 18 (1866), 227 ff.

130 Wilhelm Brauneder, 'Formen und Tragweite des deutschen Einflusses auf die österreichische Verwaltungsrechtswissenschaft 1850-1914' in: Heyen (n. 76), 249 ff.

131 Taking stock for England: Wolfgang Pöggeler, *Die deutsche Wissenschaft vom englischen Staatsrecht. Ein Beitrag zur Rezeptions- und Wissenschaftsgeschichte 1748-1914* (1995).

132 Rudolf Gneist, *Das heutige englische Verfassungs- und Verwaltungsrecht*, vol. 1 (1857), V and VI ('*Weg durch einen Urwald*' [path through a jungle]). Very much worth reading in this respect also the preface to the third edition, published under a different title: Rudolf Gneist, *Das Englische Verwaltungsrecht der Gegenwart in Vergleichung mit den Deutschen Verwaltungssystemen*, vol. 2 (1884), III ff.: 'Much came together here [in England] that invited imitation' (III). Vividly on this Julius Hatschek, '49 Artikel: Gneist', ADB (1904), 403, 408: 'Almost all of these men have the peculiarity of turning their attention to England when adversity is the greatest at home and there is an impending or actual crisis of the domestic state. With such politically biased views, they consider the English model, projecting those facts onto English law that they regard as necessary for further domestic state development. G. [Gneist] cannot be absolved of this error either.'.

133 On von Gneist's pioneering achievements in comparative administrative law, in detail Christoph Schönberger, 'Die altenglische Selbstverwaltung als Vorbild für den preußischen Rechtsstaat: Rudolf von Gneist (1816-1895)' in: *Festschrift zum zweihundertjährigen Bestehen der Berliner Juristenfakultät* (2009).

most important European states in detail in their major treatises on French administrative law.[134]

There were, however, hardly any explicit discussions of the methods of comparative administrative law at the time. Only Lorenz von Stein dedicated an essay entirely to this subject. He argued that the possibility of comparative law was founded on the commonality of the regulated conditions of life, which then constituted the basis for an analysis, focusing primarily on legal history, of the individual national developments.[135] Such an explicit reflection on methods was rare also because a comparative approach was, at the time, the 'natural' method of the slowly emerging scholarship on administrative law.[136] There were pragmatic as well as fundamental reasons for this:[137] the need for new scholarly work on administrative law to justify itself; a policy interest in discovering solutions for analogous problems;[138] and not least the individual construction of national administrative law, delimited from other nations. Internationalism and nationalism were dialectically intertwined; the external focus could never be separated from the

134 Anselme Batbie, *Traité théorique et pratique de droit public et administratif contenant l'examen de la doctrine et de la jurisprudence; la comparaison de notre législation avec les lois politiques et administratives de l'Angleterre, des États-Unis, de la Belgique, de la Hollande, des principaux États de l'Allemagne, et de l'Espagne, la comparaison de nos institutions actuelles avec celles de la France avant 1789 et des notions sur les sciences auxiliaires de l'administration, l'économie politique et la statistique*, 8 vols (1862-1868); Edouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, 2 vols (1887/1888); on this Jean Rivero, 'Droit administratif français et droits administratifs étrangers' (1969) in: André de Laubadère et al. (eds), *Pages de Doctrine*, vol. 2 (1980), 475, 477. Thus, there are long passages on the most important European administrative laws as well as on emerging US administrative law in Laferrière, the true founding father of modern French administrative law (in detail on him Pascale Gonod, *Édouard Laferrière, un juriste au service de la République* (1997)), in which the author remarks on the impact of French administrative law with satisfaction: Traité de la Juridiction Administrative et des Recours Contentieux, vol. 1 (1896), Preface, V: '[…] les réformes accomplies à l'étranger semblent le plus souvent s'inspirer des idées françaises'.

135 Lorenz Stein, 'Über die Aufgabe der vergleichenden Rechtswissenschaft, mit besonderer Beziehung auf das Wasserrecht', Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft 7 (1861), 233, 235 ff.

136 Thus accurately Bernd Wieser and Bernd Kante, 'Vergleichendes Verfassungs- und Verwaltungsrecht in Österreich von 1848 bis 1918 – Eine Bibliographie', ZÖR 57 (2002), 251, 286.

137 On this, Heyen (n. 124), 163 f. and 188 f.

138 This notably applied also to areas of specialised administrative law, such as mining law or social law, which were subject to rapid change as a result of technical or social development: Wieser and Kante (n. 136), 287.

internal focus, and the perception of the other was also – and often even primarily – self-perception.

A peculiarity of German comparative public law was *inner-German comparative law*, involving the constitutional systems of the several German states. Scholarship developed a common German *constitutional law*, whose legal validity and substance however, remained unclear and disputed.[139] Comparison was used to determine typical common features of state constitutional law and qualify them as legally binding. In this scholarly endeavour, there was often still a late echo of natural law rationality. Until the foundation of the *Reich*, this pan-German constitutional law served as a shared national and constitutional bond between the individual German states. Similar tendencies also existed at the time in the developing scholarship on *administrative* law.[140] Thus, the Swabian senior civil servant Friedrich Franz Mayer attempted to develop a pan-German administrative law in 1862 by comparing the administrative law systems in the individual German states. While doing so, he also considered French administrative law, which had greatly influenced Southern Germany.[141] Mayer held that comparison allowed the contours of the individual states' legal institutions to emerge more clearly. At the same time, he thought that the comparative approach would help to find policy role models for countries with 'less

139 Manfred Friedrich, 'Die Erarbeitung eines allgemeinen deutschen Staatsrechts seit der Mitte des 18. Jahrhunderts', JöR new version 34 (1985), 1 ff.; Carl Schmitt, 'Das "Allgemeine Deutsche Staatsrecht" als Beispiel rechtswissenschaftlicher Systembildung', ZgesStW 100 (1940), 5 ff.; in detail on this issue now Carsten Kremer, *Die Willensmacht des Staates. Die gemeindeutsche Staatsrechtswissenschaft des Carl Friedrich von Gerber* (2008), 71 ff.

140 A similar situation arose later in Poland, after the country regained sovereign autonomy in 1918, when comparative law and the harmonisation of law in light of the continued validity of Russian, Prussian, Austrian, and Hungarian law in different parts of the country became a domestic task: Irena Lipowicz, 'Rechtsvergleichende Perspektiven der Verwaltungsrechtswissenschaft', Die Verwaltung, suppl. 2 (1999), 155, 156 f.; on Polish development in detail Andrzej Wróbel, 'Polen' in: von Bogdandy, Cassese and Huber (n. 73), mn. 41 ff.

141 Friedrich Franz Mayer, *Grundsätze des Verwaltungs-Rechts mit besonderer Rücksicht auf gemeinsames deutsches Recht, sowie auf neuere Gesetzgebung und bemerkenswerthe Entscheidungen der obersten Behörden zunächst der Königreiche Preußen, Baiern und Württemberg* (1862); on Mayer's method of comparative administrative law: Bodo Dennewitz, *Die Systeme des Verwaltungsrechts. Ein Beitrag zur Geschichte der modernen Verwaltungsrechtswissenschaft* (1948), 67 ff.; Toshiyuki Ishikawa, *Friedrich Franz von Mayer. Begründer der juristischen Methode im deutschen Verwaltungsrecht* (1992), 116 ff.; Christian Starck, 'Rechtsvergleichung im öffentlichen Recht', JuristenZeitung 21 (1997), 1021, 1022.

developed positive law'.[142] It was precisely comparative law that called for scholarly abstraction and the development of general fundamental legal concepts and legal institutions.[143] Unlike French administrative law, which developed from administrative jurisprudence in the 19th century, administrative law in Germany emerged precisely as a product of scholarship. For scholarly generalisations unified German administrative law beyond the diversity of the individual states' administrative legislations.[144] The approach practiced in 19th century pan-German constitutional law stressed what was unifying, harmonisable, or 'progressive' vis-à-vis distinct particularities and is reminiscent of certain present-day efforts to establish a pan-European administrative law.

3. French Administrative Law: Archetype but not Prototype

For the emerging administrative law of the European states, France played the same role that Great Britain played for constitutional law. While post-revolutionary scholarship on constitutional law essentially came into being by grappling with British parliamentarianism, the corresponding scholarship on administrative law developed above all in dealing with French administrative law. Just as the British constitution was understood as a natural model of the liberal constitutional state as a whole, French administrative law was also considered the matrix of administrative law as such, demanding comparative treatment. Comparative administrative law in the 19th century therefore primarily meant a 'passive rejection or active

142 Mayer (n. 141), 49, argues that a considerable economic gain arises 'when 1. the particular modifications of a legal institution in the individual country emerge more clearly and distinctly when compared with the developments of the same institution in other countries; 2. the detailed positive development of a legal institution in individual countries often presents itself as corresponding to the concept of the latter, and elsewhere, where positive law is less developed, the legal conclusions to be drawn from this can be deduced with even greater certainty, while it is possible, at any rate, to obtain guiding principles for the further positive development of the law.'

143 Accurately on this Dennewitz (n. 141), 67 f.

144 Contrasted in Rivero (n. 75), 82 f. To a certain extent, due to the strong dominance of *Länder* law in many matters of administrative law, such as communal or police law, this situation continues to the present day also in the Federal Republic. Cf. on this Beinhardt (n. 33), 151.

adoption of the French system'.[145] Yet there is a certain paradox in the special position of France. For French administrative law remained singular within continental Europe in many of its specific traits. Its genesis required a centralised state with authoritarian features. French administrative law freed the administration and administrative law completely from private law – including liability and contract law – in a way that no other European country has matched to the present day.[146] The reasons for this lie in the particularities of France's development after 1789. In belated reaction to the various conflicts between the monarchical centralised administration and the powerful courts (*parlements*) in the *Ancien Régime*,[147] the perception prevailed during the Revolution that the separation of powers forbid the (ordinary) courts from interfering in the area of the administration.[148] This created the conditions for the *Conseil d'État*, established by Napoleon in 1799, to answer all legal questions concerning the administration without interference from the ordinary courts. Thus, the French *droit administratif* was able to close the administration off from private law and ordinary courts in a singular way. In this sense, French administrative law served more as an archetype than as a prototype for the administrative systems of other European states[149] much as the British Constitution also remained an inimitable singular specimen despite its many foreign admirers.

145 Accurately on this Strömholm (n. 16), 616.

146 On this Rivero (n. 17), 395 ff. Hence, it is certainly paradoxical that this administrative legal system, so deeply rooted in French national history – and moreover based on the casuistry of judge-made law –, could become a successful export product: Yves Gaudemet, *L'exportation du droit administratif français. Brèves remarques en forme de paradoxe, Mélanges Philippe Ardant* (1999), 431 ff.

147 On the conflicts between the *parlements* and the monarchical bureaucracy in the *ancient régime* before the Revolution, in detail Christoph Schönberger, 'Frankreichs Parlamente im späten Ancien Régime. Gerichtshöfe zwischen Verfassungsgerichtsbarkeit, ständischer Opposition und moderner Nationalrepräsentation' in: *Selbstverwaltung in der Geschichte Europas in Mittelalter und Neuzeit.* Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 10. bis 12. März 2008 (2009).

148 The negative demarcation from the *parlements*' previous position was also expressed in the summarising description of the new, strongly reduced role of the courts in title III, chapter V, article 3 of the constitution from September 2, 1791: '*Les tribunaux ne peuvent, ni s'immiscer dans l'exercice du Pouvoir legislatif, ou suspendre l'exécution des lois, ni entreprendre sur les fonctions administratives, ou citer devant eux les administrateurs pour raison de leurs fonctions.*' On the revolutionary reorganisation of the judiciary, in detail Jean-Pierre Royer, *Histoire de la justice en France* (2001), 273 ff.

149 Jean Rivero, 'Droit administratif français et méthode comparative', Revista de la facultad de derecho y ciencias sociales 23 (1975), 375, 380: '*Non pas prototype, reproduit*

France's archetypal role was especially manifested in the work of Otto Mayer, who, at the end of the 19th century, developed his idea of German administrative law by engaging with the French administrative law created by the *Conseil d'État*.[150] In France's administrative law, he saw 'a wonderful work of art, equal to Roman private law.'[151] Mayer still had to deal with the numerous administrative legislations of the individual German *Länder*, where remained, despite the growing involvement in the *Reich* context, the bulk of administrative activity. Mayer's German administrative law was certainly a 'general German administrative law of the *Länder*' in the sense of an abstracting synthesis.[152] Yet he obtained his insights hardly from traditional inner-German comparativism but rather from looking outside the country, at the self-contained administrative law of centralised France, which was perceived as exemplary:[153]

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en série, mais bien plutôt archétype, expression extrême d'une certaine tendance, et prestigieux parce que solitaire.'.

150 Otto Mayer, *Theorie des französischen Verwaltungsrechts* (1886); Mayer, *Das deutsche Verwaltungsrecht*, vol. 1 (1895); on this Erk Volkmar Heyen, 'Otto Mayer: Frankreich und das Deutsche Reich', Der Staat 19 (1980), 444 ff.; Alfons Hueber, *Otto Mayer – Die 'juristische Methode' im Verwaltungsrecht* (1982), 77 ff. and 148 ff.; Francine Graff, *Otto Mayer et la théorie du droit administratif français en Allemagne, Thèse Strasbourg III* (1989).

151 Otto Mayer, 'Besprechung zu: Gaston Jèze, Das Verwaltungsrecht der Französischen Republik (1913)', AöR 32 (1914), 275, 277.

152 Ottmar Bühler, 'Otto Mayers Deutsches Verwaltungsrecht (Zweite Auflage). Seine Bedeutung für die Praxis und die kommende Zeit der Verwaltungsreform', VerwArch 27 (1919), 283, 306, with reference to the tradition of general German constitutional law before the founding of the *Reich*. In *ibid*., 286, Bühler also mentions that Mayer had presented a 'theory of German administrative law', insofar as his work 'abstracted, to a certain extent, the individual *Länder* legislations, which had been mainly decisive for administrative law to date, thus so to speak offering an average administrative law for the German states, which did not apply anywhere exactly as written but rather everywhere only with strong modifications and additions'; cf. on this also Dennewitz (n. 141), 125 f.

153 Friedrich Franz Mayer had already developed his pan-German administrative law a generation before, not only by means of inner-German comparative law but also by orienting himself towards the French model. He argued that of the non-German countries, 'despite certain excesses, French administrative law is the eminent choice for the development of the modern state, due to its clarity and suitability as well as its scholarly attributes in particular': Mayer (n. 141), 49 (n. 5), with reference to Gabriel Dufour; cf. on this in detail Dennewitz (n. 141), 69 f. and 122. On Otto Mayer's unconventional continuation of the comparative-law tradition of German common law, Schmitt (n. 139), 19 ff. In the preface to his *German Administrative Law* (*Deutsches Verwaltungsrecht*), vol. 1 (1895), VII, Mayer writes, 'There [in France] I was confronted with the unitary state with entirely national law. Here,

> 'French legal development – apart from the fact that it is always somewhat advanced temporally and the past is always easier to understand than the present – is especially instructive for us already because it declares and executes all new ideas of public law with a certain brusqueness, corresponding to the French nature. To put it figuratively, we always find them there in their purest forms.'[154]

Mayer's primary interest was not in a truly comparative legal view of each country's particularities, which, after all, he wanted to overcome for the German side. Rather, he undertook a holistic scholarly project, which was guided by the French example[155] but at the same time entirely autonomous in its conceptualisation.[156] Moreover, his work pertained less to the administrative law of the contemporary Third Republic than to the more authoritarian one of the preceding Second Empire of Napoleon III.[157]

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the variety of the *Länder* laws, in turn to a varying degree subject to the influence of foreign, that is, French law. There, a new law from a single mould, as it emerged from the smelting furnace of the Revolution. Here, gradual transitions, pervaded by immobile remnants of the old. There, based on these conditions, a well-established scholarship, with astounding homogeneity among the scholars. I was able to write very honestly, at the time, that I am only a reporter describing the French lawyers' deeds. All legal concepts were readily available and complete […] Who could claim that our German scholarship of administrative law has even come close to a similar conclusion?'.

154 Mayer, *Das deutsche Verwaltungsrecht* (n. 150) 55 ('French' italicised in the original).

155 With respectful criticism concerning this issue, already Erich Kaufmann, 'Otto Mayer', Verwaltungsarchiv 30 (1925), 377, 391 f.

156 Very nuanced on this Scheuner (n. 142), 718 f., with the question 'whether O. Mayer really brought the two legal orders closer together, or whether the transposition into German thought and the coining of new concepts did not greatly overshadow his role as a mediator' (719). Thus, Mayer was already criticised by his contemporaries, on the one hand for allegedly falsifying German law by reconstructing it according to French categories (thus for instance Erich Kaufmann [n. 155]). On the other hand, however, he was also reproached with misrepresenting French administrative law by describing it with his own conceptual apparatus, one indebted to a certain movement in German legal scholarship (Edgar Loening, 'Die konstruktive Methode auf dem Gebiete des Verwaltungsrechtes', Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich 11 (1887), 541, 547 f.).

157 Mayer's book on French administrative law, published in 1886, had set itself the initial task of explaining the law still in force in the area to the judges and civil servants in the *Reichsland* Alsace-Lorraine, and already for this reason, it referred expressly only to French administrative law as it stood in 1870; cf. Mayer, *Theorie* (n. 150), Preface, VII f. Mayer's views were thus defined by French scholarship on administrative law before its true modern refounder Laferrière; cf. on this Rivero (n. 75), 83 f.

In view of the influence that France's administrative law had exercised throughout the entire 19th century and considering the parallels in the structure of markedly bureaucratic states, Mayer's orientation towards the French model had a stronger foundation in reality than the Anglophilia of von Gneist a generation before.[158] From Otto Mayer to Fritz Fleiner, the comparative approach remained characteristic of general administrative law in particular. For as a legal area of general, not codified principles, it especially depended on that mixture of induction and abstraction from various administrative law systems that characterises comparative law.[159]

4. Anglo-American Administrative Law at the Margins

Initially, Great Britain and the United States were hardly included in these comparative efforts. While von Gneist had still still been able to declare the older English administrative law the model for Prussian-German development mid-century, the differences between continental Europe and the common law tradition seemed unbridgeable soon after, especially in the field of administrative law. However, in the United States, Frank J. Goodnow had already published a book explicitly dedicated to comparative administrative law in 1893. His foundational volume *Comparative Administrative Law* examined the administrative law systems of Great Britain, the United States, France, and Germany, with the explicit goal of employing comparison to obtain categories for the young North American administrative law.[160] It played a crucial role that Goodnow, like other pioneers of

158 Accurate contrasting in Heinrich Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert* (1950), 744. Otto Mayer emphasises this as well: 'French administrative law should also be able to claim our more general interest. Numerous legal concepts that have now become the common domain of German scholarship originally flourished on its grounds, and our legislations, namely those of Southern Germany, readily derived many a legal institution from its contexts' ([n. 157], preface, VIII).

159 Wieser and Kante (n. 136), 286 f. An example of a corresponding monograph based on a comparative approach from the time before the First World War is the study by Rudolf von Laun, *Das freie Ermessen und seine Grenzen* (1910).

160 Frank J. Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local of the United States, England, France and Germany*, 2 vols (1893); on the significance of this pioneering study, which was long underappreciated Lepsius (n. 70), 265 ff.; Sabino Cassese, 'Lo studio comparato del diritto amministrativo', Rivista trimestrale di diritto pubblico (1989), 678, 680; D'Alberti (n. 41), 99 ff.

American administrative law, had a German academic background and was influenced by German models.[161] His study had a historical and institutional focus and primarily treated the development and contemporary form of each administrative organisation at the national and local level.

By contrast, comparative law in Great Britain faced the great obstacle that Albert Venn Dicey, the most important legal scholar of Victorian England, stylised Great Britain as a country without administrative law. Dicey pointedly contrasted Great Britain and France. He viewed France as the country of an authoritarian special regime of public power called administrative law, while Great Britain appeared as the country of freedom, parliamentarism, and common law, which was adverse to a law of privilege.[162] In Dicey's view, the lack of an independent administrative jurisdiction in Great Britain – historically rooted in the Parliament putting an end to the British monarchy's tendencies towards bureaucratisation in the Glorious Revolution of 1688[163] – expressed its liberal constitution as a country without *droit administratif* in the French sense. Already prior to this, Anglophile French liberals had similarly criticised French administrative law. Alexis de Tocqueville, for instance, held that French administrative law inclined towards an arbitrary and authoritarian understanding of the state, which he contrasted with an idealised English situation, in which, according to his interpretation, the administration did not possess any special rights and was subordinated to the jurisdiction of the ordinary courts. At the end of the 19th century, Dicey adopted the contrast to France, which French liberals had outlined mid-century, as an English

161 On this Lepsius (n. 70), 61 ff. and 251 ff.; Thomas Henne, 'Kontinentaleuropäische Wurzeln des amerikanischen Verwaltungsrechts', Ius Commune 25 (1998), 367 ff.

162 Albert V. Dicey, *Letters introductory to the law of the constitution* (1885); after that in many editions with the title: *Introduction to the Study of the Law of the Constitution*. In detail on this Sabino Cassese, 'Albert Venn Dicey e il diritto amministrativo', Quaderni Fiorentini per la storia del pensiero giuridico moderno 19 (1990), 5 ff., who also analyses the nuancing of Dicey's position in later editions of his book; Spyridon Flogaïtis, *Administrative Law et Droit Administratif* (1986), 33 ff.; Oliver Lepsius, 'Der britische Verfassungswandel als Erkenntnisproblem. Zur andauernden Bedeutung von A. V. Dicey im britischen Verfassungsrecht', JöR new version 57 (2009), 559, 579 ff.; Oliver Lepsius, 'Die Begründung der Verfassungsrechtswissenschaft in Großbritannien durch A. V. Dicey', ZNR 29 (2007), 47 ff.

163 Providing a summary of this issue, John David Bowden Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom', Public Law (1965), 95 ff.

self-portrait.[164] In doing so, he ignored the *Conseil d'État*'s fundamental liberalisation of French administrative law in the first decades of the Third Republic.[165] His description obscured the fact that contemporary England also had an administrative law in the sense of the administration's specific rules and privileges and that the administration was not simply, like a private person, subject to general common law.[166] In focusing on the lack of a separate administrative jurisdiction and independent public liability law in Great Britain, Dicey ignored the British administration's specific substantive power to act.[167] Continental European scholars later adopted Dicey's 'myth of an administration without administrative law' (Cassese) for some time,[168] thus initially thwarting a more differentiated engagement with the particularities of administrative law in Great Britain. As a result, emerging British administrative law, which gained clearer contours at the end of the 19th century with the transition to an intervention state,[169] hardly

164 Alexis de Tocqueville, 'Rapport fait à l'Académie des Sciences Morales et Politiques sur le livre de M. Macarel, intitulé "Cours de droit administrative" (1846)' in: Alexis de Tocqueville, *Oeuvres Complètes, vol. 16: Mélanges* (1989), 185, 191 ff. On Tocqueville's criticism of French administrative law and Dicey's reception of Tocqueville, in detail Cassese (n. 162166), 45 ff.; cf. also Françoise Mélonio, *Tocqueville et les Français* (1993), 198 ff.; Lucien Jaume, *Tocqueville. Les sources aristocratiques de la liberté* (2008), 369 ff.

165 On this Rivero (n. 75), 158; Mario Chiti, 'Diritto amministrativo comparato' in: Rodolfo Sacco (ed.), *Digesto delle Discipline Pubblicistiche*, vol. 5 (1990), 206, 209.

166 On this Sabino Cassese, 'Il problema della convergenza di diritti amministrativi: verso un modello amministrativo europeo', Rivista italiana di diritto pubblico comunitario (1992), 23, 26 ff., who emphasises that Dicey fails to mention illiberal traits of British law at the time such as the generous exemption from liability of the Crown and its broadly conceived servants.

167 Detailed critical analysis in Rivero (n. 75), 151 ff.

168 One example in Josef Redlich, *Englische Lokalverwaltung. Darstellung der inneren Verwaltung Englands in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt* (1901), 470 ff. and 723 ff.; contemporary criticism of this already in Ernst Schuster, 'Zum Stand der Lehre von der englischen Lokalverwaltung', AöR 19 (1905) 169, 182 f. On the Continental reception of Dicey overall, in detail Sabino Cassese, 'La Ricezione di Dicey in Italia e in Francia. Contributo allo studio del mito dell'amministrazione senza diritto amministrativo', Materiali per una storia della cultura giuridica 25 (1995), 107 ff.

169 Cf. on this Martin Loughlin, 'Großbritannien' in: von Bogdandy, Cassese and Huber (n.73), mn. 55 ff.; Thomas Poole, 'Großbritannien (England und Wales)' in: von Bogdandy, Cassese and Huber (n. 55), mn. 8 ff.

received any attention.[170] This only began to change noticeably during the period between the World Wars, when the serious comparative engagement with the administrative law of the common law world provided numerous insights into the uniqueness of the Continental European administrative law traditions.[171] It is no coincidence that to this day, general studies on comparative administrative law often begin by comparing the ideal types of France and Great Britain.[172]

5. Legal Positivism and the Fading of Comparative Administrative Law

With the rise of legal positivism towards the end of the second third of the 19th century, the comparative engagement with the legal systems of other states initially faded into the background in many European countries, especially in Germany and Italy. Non-binding foreign law was legally irrelevant to constitutional positivism, which also had little use for comparative law, because it held that legal concepts were scientifically productive in their own right.[173] While a comparative approach had still been self-evident for Gneist or Stein a few decades earlier – whose ideas had also been shaped more strongly by politics, history and empirical analyses –, comparatism now often came to be seen as an expendable complement. In the age of legal

170 But already shortly after the turn of the century, Julius Hatschek and above all Otto Koellreutter examined English administrative law from a novel perspective; cf. on this in detail below, D6.

171 Cf. for ex. James W. Garner, 'La conception anglo-américaine du droit administratif' in: *Mélanges Maurice Hauriou* (1929), 335 ff.; Bernard Schwartz, *French Administrative Law and the Common-Law World* (1954).

172 Cf. for ex. Flogaïtis (n. 162), 33 ff.; D'Alberti (n. 41); Cassese (n. 33); on the history of administrations: Erk Volkmar Heyen (ed.), *Verwaltung und Verwaltungsrecht in Frankreich und England (18./19. Jh.)*, *Jahrbuch für Europäische Verwaltungsgeschichte* (1996); with greater emphasis on political science: Françoise Dreyfus, *L'invention de la bureaucratie. Servir l'Etat en France, en Grande-Bretagne et aux Etats-Unis (XVIIIe-XXe siècle)*, (2000). On the contrasting of the 'two models' France and Great Britain, cf. also Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa' in: von Bogdandy, Cassese and Huber (n. 73), mn. 8 ff.; Fromont (n. 73), mn. 23 ff. and 61 ff.

173 For instance, Ernst Rudolf Bierling expressly held that comparative law was dispensable in developing a formal general theory of law: *Juristische Prinzipienlehre*, vol. 1 (1894), 32 ff.; in the Weimar discussion, Hans Nawiasky still argued that one should not 'draw conclusions from historically distant or nationally separate conditions of law for the interpretation of German positive law': 'Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung', VVDStRL 3 (1927), 25, 26 f.

positivism, the objective was the construction of an autonomous scholarly system of national administrative law. For Germany and Italy, moreover, this task coincided with a 'late' process of nation-building, so that administrative law had to contribute to a huge effort of national integration. The constant expansion and differentiation of administrative law legislation and jurisprudence also contributed to this fading of comparative administrative law. Throughout the 19th century, comparative law had occupied a central position in the attempt to conceptualise and develop administrative law as an independent area of law. The constant confrontation with other administrative legal systems, be they similar or entirely different, had enabled the academic discipline of administrative law to emerge in the first place. As the nation-states consolidated their administrative legal systems at the end of the 19th century, comparative law lost its prior status as the natural foundation for a theory of administrative law.[174] Inside academia, too, comparative administrative law scholarship retreated into a niche for a small number of experts. It is a sign of this increasing self-isolation that Otto Mayer, who had still dedicated an appendix on 'international and federal administrative law' to the phenomenon of the plurality of state administrative law systems in the first edition of his textbook in 1895,[175] simply omitted this segment in later editions.[176]

The general debate on comparative law, shaped strongly by private law, had in any event hardly acknowledged comparative administrative law yet at the time. In the liberal era, private law and constitutional law seemed to be the natural general legal disciplines, while there was little awareness of the law of bureaucratic state intervention.[177] Thus, at the Parisian World Congress of 1900, which was fundamental for modern comparative law, some presentations were dedicated to comparative constitutional law, but none focused on comparative approaches to administrative law. Only Ferdinand Larnaude discussed comparative administrative law in his

174 Chiti (n. 165), 207 f.

175 Mayer (n. 154), vol. 1, appendix: § 62. Internationales und bundesstaatliches Verwaltungsrecht, 453 ff.

176 Positioning this process in the contemporary discussion, in which international administrative law, too, narrowed to become a system of purely national rules on conflict of laws, above all in German and Italian scholarship: Hartwig Bülck, 'Zur Dogmengeschichte des europäischen Verwaltungsrechts' in: Göttinger Arbeitskreis (ed.), *Recht im Dienste der Menschenwürde – Festschrift für Herbert Kraus* (1964), 29, 55 ff.

177 Vividly on this Rivero (n. 75), 15; Strömholm (n. 16), 615 f.

presentation on legislation and comparative public law.[178] He emphasised that contrasting national law with foreign law offered the advantage of clarifying theoretical issues. At the same time, he urged caution with legal imports, because transplants into foreign soil were based on certain requirements and therefore very demanding. But at the same time, he pointed out that novel legal developments in foreign administrative law often expressed socio-economic processes of change that would soon be confronted domestically as well. In such cases, carefully considered comparison could, in his view, help to prepare useful legal changes.

6. Early 20th Century Comparative Administrative Law

Yet even when legal positivism predominated – although it never absolutely prevailed –, the traditional comparative interest in foreign administrative law never disappeared entirely.[179] Thus, when legal positivism as a theoretical system proved to be less and less convincing around 1900, the desire for alternative approaches also expressed itself in the rediscovery of comparative public law.[180] Josef Redlich, for instance, emphasised in 1903 that 'even for the scholarship of positive German constitutional law, this creation of constitutional concepts by legal doctrine alone did not entirely suffice' and posed the question whether 'the juridical ascertainment of the legal material must not only pay insistent attention to the historico-political character of state legal institutions but also recognise foreign constitutional conceptions and principles, which the Germans have received from the outside

178 Ferdinand Larnaude, 'Législation comparée et droit public' in: *Congrès International de Droit Comparé, tenu à Paris du 31 juillet au 4 août 1900, Procès-Verbaux des Séances et Documents*, vol. 1 (1905), 364 ff.

179 Cf. for ex. Erk Volkmar Heyen, 'Ausländisches Verwaltungsrecht im "Archiv für Öffentliches Recht" und in der "Revue du droit public" vor dem Ersten Weltkrieg', Jahrbuch für Europäische Verwaltungsgeschichte 2 (1990), 213 ff; Wieser and Kante (n. 136), 263 ff. and 273 ff.; on the intensity of scholarly exchange between Germany and France in the pre-war period, cf. in general: Olivier Beaud and Erk Volkmar Heyen (eds), *Eine deutsch-französische Rechtswissenschaft?* (1999) (for comparative law, see there in particular the contributions of Gérard Marcou and Erk Volkmar Heyen).

180 On this for Germany, using the example of Julius Hatschek, Fulco Lanchester, *Alle origini di Weimar. Il dibattito costituzionalistico tedesco tra il 1900 et il 1918* (1985), 97 ff.; similarly for Italy Lanchester, 'Il metodo nel diritto costituzionale comparato: Luigi Rossi e i suoi successori', Rivista trimestrale di diritto pubblico 63 (1993), 959, 965 ff.

both in the area of the political development of ideas and in the field of law-making'.[181] Nonetheless, comparative law now increasingly became a matter for individual country experts.

In the area of comparative administrative law, it was above all the engagement with British administrative law that offered new possibilities. In Germany, Julius Hatschek and Otto Koellreutter no longer contented themselves with Dicey's powerful legend, while at the same time, Federico Cammeo in Italy also turned to the young administrative law of Great Britain and the United States.[182] Hatschek examined British administrative law within the framework of his comprehensive studies on English constitutional law and classified German administrative law comparatively as midway between British and French law.[183] Before the background of his comparative studies on Great Britain, Hatschek also offered innovative ideas concerning the tasks and methods of comparative public law. He was interested in using a comparative approach to deduce types of constitutional forms and functions and to recognise general structural rules, which

181 Josef Redlich, 'Zur Theorie und Kritik der Englischen Lokalverwaltung', Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 30 (1903), 559, 684; cf. there – 684 f. – also the criticism of Georg Jellinek's general theory of the state, whose concepts are considered to be not much more than 'generalisations, taken too far, of individual manifestations of positive *German* constitutional law and the conception of the state that underlies them', whose speculative character could not be obscured 'even [by] the variously successful attempts to attribute individual concrete manifestations of English, French, or American constitutional law to the formulas it posits'.

182 Federico Cammeo, 'Il Diritto Amministrativo degli Stati Uniti d'America', Giurisprudenza Italiana 47 (1895), part 4, 82 ff. Cammeo also explicitly addressed issues of methodology and held that an international harmonisation of the law would certainly be promising in administrative law as well: Federico Cammeo, 'Il diritto comparato e l'unificazione legislativa nella Società delle Nazioni', Rivista del diritto commerciale e del diritto generale delle obbligazioni 17 (1919) 285 ff. In greater detail on him, Mario P. Chiti, 'Federico Cammeo comparatista', Quaderni Fiorentini per la storia del pensiero giuridico moderno 22 (1993), 531 ff., who emphasises that Cammeo analysed the emerging US and British administrative law unfazed by Dicey's claims.

183 Julius Hatschek, *Englisches Staatsrecht, vol. 2: Die Verwaltung* (1906), 658 ff.: 'German law lies midway between the French administrative legal order and English administrative routine. We too have done everything in our power to isolate the administration completely from the [ordinary, author's note] judiciary and therefore have an administrative *law*. But we did not accomplish this complete isolation as absolutely as the French' (659, italics in original). While Hatschek followed Dicey to a great extent in his estimation, he, in contrast to Dicey, already emphasised the independent meaning of bureaucratic practice, which he called 'administrative routine', and its recognition by the courts (649).

were supposed to enable a classification of the positive constitutional law materials in question. Comparative law was supposed to reveal paradigmatic functional contexts.[184] In 1912, Koellreutter published a comparative legal study on 'Administrative Law and Administrative Jurisprudence in Modern England',[185] which, from a British perspective, constitutes the primary work on British administrative law to this day.[186] He already perceived very clearly how British administrative law was changing – a development that Dicey mostly ignored – in the transition to an intervention state and, like Hatschek, Koellreutter assigned German administrative law development 'a middle position between the English and the French one'.[187] He offered a very modern-sounding, cautious observation of convergence:

> 'But if we examine the result of this fundamentally different development in England and Germany, then we arrive at the conclusion that both countries have indeed come closer to one another in the form and handling of administrative law. If we may discern a strong 'continentalisation' in the most recent English development in the area of administrative law, we must see the reason for this in the commonality of the tasks that

184 Julius Hatschek, 'Konventionalregeln oder über die Grenzen der naturwissenschaftlichen Begriffsbildung im öffentlichen Recht', Jahrbuch des öffentlichen Rechts 3 (1909), 1, 37 ff., esp. 59 ff.; Hatschek, *Allgemeines Staatsrecht auf rechtsvergleichender Grundlage*, vol. 1 (1909), 13 ff.; Hatschek, *Englisches Staatsrecht, vol. 1: Die Verfassung*, (1905), 27 f. and 33 ff.; Hatschek (n. 132), 403, 408 f. and 411 f. On Hatschek's understanding of comparative public law: Andreas Sattler, 'Julius Hatschek (1872-1926). Staatsrecht am Anfang der Weimarer Republik' in: Fritz Loos (ed.), *Göttinger Juristen aus 250 Jahren* (1987), 365, 369 ff.; Lanchester (n. 180), 97 ff.; Ottobert L. Brintzinger, 'Julius Hatschek', NDB 8 (1969), 57 f., who even considers Hatschek 'the true founder of a modern comparative public law', because he – unlike von Gneist before him – taught others 'to understand foreign (here especially English) law on the basis of its specific legal concepts and social conditions' (57).

185 Otto Koellreutter, *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England: Eine rechtsvergleichende Studie* (1912); cf. also Koellreutter, *Verwaltungsgerichtsbarkeit, Die Geisteswissenschaften* (1913/14), 800 ff.; Koellreutter, 'Staat und Richterrecht in England und Deutschland', Der Rechtsgang 2 (1916), 241 ff. Already in his dissertation, Koellreutter had examined English law: *Richter und Master. Ein Beitrag zur Würdigung des englischen Zivilprozesses* (1908). Unfortunately, there are no detailed studies on Koellreutters comparative law involving English law; only cursory references in Jörg Schmidt, *Otto Koellreutter (1883-1972)* (1995), 3 and 5.

186 Bell (n. 28), 1260 (n. 1): 'It is interesting to note that the first book on English administrative law was written by a German [referring to Koellreutter's study]. In many ways, the English distinctive definition of the subject has come out of intense comparison with other jurisdictions.'.

187 Koellreutter (n. 185), 182 ff.; on the critical debate with Dicey, see ibid., 207 f.

> the modern civilized states have set themselves today, approximately in the same way and to the same extent, in the area of administration, and which have necessarily greatly expanded the domain of state intervention everywhere. Thus, it is comprehensible that a certain uniformity of means for achieving these tasks has emerged, albeit in different ways.'[188]

Despite the great quality of this scholarship, both before the First World War and in the subsequent period between the wars,[189] these efforts remained limited to individual scholars, who no longer strongly shaped or influenced the increasingly national scholarship of administrative law. Administrative law was now considered above all an instrument and expression of each nation's state-building process, especially since national legislation increasingly emerged as the central legal source in this area as well.[190] The nation-states' confrontation in the two World Wars reinforced this inward turn of administrative law scholarship and the mutual self-isolation of national scholars.

7. Comparative Administrative Law since 1945

Even after 1945, this situation did not change fundamentally at first. National scholarship of administrative law remained strongly introverted, and comparative administrative law lingered in a marginal position.[191] France, for instance, demonstrated its complacent belief in its traditional role as exporter of its own administrative law. Comparison with foreign administrative law systems that were perceived as less developed was intended at

188 Koellreutter (n. 185), 224.

189 Remarkable for ex. in France Roger Bonnard, *Le contrôle juridictionnel de l'administration. Étude de droit administratif comparé* (1934, reprint 2006) (comparative analysis of administrative jurisdiction); cf. already Bonnard, *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux États-Unis et en Allemagne* (1914) (comparative analysis of state liability).

190 On this Roberto Scarciglia, *Introduzione al diritto pubblico comparato* (2006), 115 f.

191 Instructive in this context are the – mostly sobering – reports on the status of comparative administrative law in individual European countries (Germany, Belgium, Greece, Hungary, Italy, Great Britain, Switzerland, France) at the Paris Conference on Comparative Administrative Law of April 1989: 'Le Droit Administratif Comparé. Journée d'étude organisée par le Centre français de droit comparé, Paris, 26 avril 1989', Revue internationale de droit comparé (1989), 849 ff.

most to extol the worldwide impact of French administrative law.[192] In Germany, by contrast, the post-war decades saw the progressive establishing of an administrative law system that was uniquely dependent, in European comparison, on the new Basic Law. This strong inward orientation made a comparative view of other administrative law systems appear secondary.[193] Very generally, the conviction was still widespread that comparative administrative law had little to offer, because other states lacked comparable institutions and principles or even a corresponding field of law.[194]

Nonetheless, actual developments after the Second World War – the expansion of the intervention state, the challenge that administrations faced with similar substantive issues, and not least the gradual emergence of European and international administrative structures – strongly suggested the greater significance of comparative law.[195] This initially became apparent in the academic fields with a strong empirical orientation, namely the *theory and scholarship of administration.* Here, particularly in the United States, the comparison of administrative forms and administrative cultures, the area of 'comparative public administration', was one of the self-evident methodological tools.[196] In the field of comparative administrative law, the true pioneer of the post-war period was the French professor Jean Rivéro (1910-2001), who brought about a fresh start for scholarship on comparative administrative law beginning in the 1950s. In a foundational Parisian lecture[197] and a series of inspiring essays, which are still exemplary

192 Fabrice Melleray, 'Les trois âges du droit administratif comparé ou comment l'argument de droit comparé a changé de sens en droit administratif français' in: Melleray (n. 12), 13, 18 ff.

193 Christoph Schönberger, '"Verwaltungsrecht als konkretisiertes Verfassungsrecht". Die Entstehung eines grundgesetzabhängigen Verwaltungsrechts in der frühen Bundesrepublik' in: Michael Stolleis (ed.), *Das Bonner Grundgesetz. Altes Recht und neue Verfassung in den ersten Jahrzehnten der Bundesrepublik Deutschland (1949-1969)* (2006), 53 ff.

194 On this Chiti (n. 165), 212.

195 Rivero (n. 75), 15; cf. also Neidhardt (n. 12), 25.

196 Overview on this in Roman Schnur, 'Über Vergleichende Verwaltungswissenschaft', Verwaltungsarchiv 52 (1961), 1 ff. On the current discussion, for instance Werner Jann, 'Verwaltungskulturen im internationalen Vergleich: Ein Überblick über den Stand der Forschung', Die Verwaltung 33 (2000), 325 ff.; Jacques Ziller, *Administrations comparées. Les systèmes politico-administratifs de l'Europe des Douze* (1993).

197 Jean Rivero, *Cours de Droit Administratif Comparé, rédigé d'après les notes et avec l'autorisation de M. Rivero, Les Cours de Droit, Diplôme d'Études Supérieures de Droit Public* (1956/1957) (transcript of the lecture authorised for publication).

today,[198] he covered the fundamental methodological and substantive issues of comparative administrative law and also addressed their significance for the incipient European integration.[199] A stronger interest in a comparative approach to the administrative jurisdiction now began to arise as well.[200] More than the multi-layered law of administrative organisation, but also more than substantive administrative law itself, which was difficult to access due to its low level of codification, the administrative courts lent themselves to comparative analysis.[201]

With the increased awareness of *European integration*'s significance for administrative law, the renaissance of comparative administrative law began in the late 1970s and continues to this day. Once again, Rivéro gave impetus to this process, with his essay 'Towards a Common European Law: New Perspectives on Administrative Law', written for one of the first research projects of this kind at the European University Institute in Florence.[202] There was greater interest in comparative law because the law of the European communities and later on the European Union was increasingly superimposed on the national administrative law systems.[203] Since the 1990s, the experience of increased *globalisation* has played a role as well. The inherent challenge for national traditions of administrative law is felt in a strong way in French administrative law in particular, which exercised hegemony in continental Europe for a long time.[204] Far beyond

198 Rivero (n. 134); Rivero (n. 49); Rivero (n. 149); Rivero (n. 40); Rivero (n. 17); Rivero (n. 41).

199 Jean Rivero, 'Le problème de l'influence des droits internes sur la Cour de Justice de la C.E.C.A.', Annuaire Français de Droit International 4 (1958), 295 ff.

200 Cf. in particular Hermann Mosler (ed.), *Gerichtsschutz gegen die Exekutive – Judicial Protection against the Executive – La protection juridictionnelle contre l'exécutif*, 3 vols (1969-1971). Roger Bonnard had already offered a foundational analysis of this issue in the period between the wars (n. 189).

201 Chiti (n. 165), 213 f.

202 Jean Rivero, 'Vers un droit commun européen: Nouvelles perspectives en droit administratif' in: Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe. Nouvelles Perspectives d'un droit commun de l'Europe* (1978), 389 ff.

203 Jürgen Schwarze (ed.), *Europäisches Verwaltungsrecht im Werden* (1982); Jürgen Schwarze, *Europäisches Verwaltungsrecht* (1988, 2005). More recently, the number of monographs on comparative administrative law has clearly increased in Germany; cf. for instance Ralf Brinktrine, *Verwaltungsermessen in Deutschland und England* (1998); Clemens Ladenburger, *Verfahrensfehlerfolgen im französischen und im deutschen Verwaltungsrecht* (1999); Lepsius (n. 70); Gernot Sydow and Stephan Neidhardt, *Verwaltungsinterner Rechtsschutz* (2007); Neidhardt (n. 12).

204 Jean-Bernard Auby, *La globalisation, le droit et l'État* (2003); Melleray (n. 88), 1228 f.; cf. also Frédéric Rouvillois (ed.), *Le modèle juridique français: un obstacle*

the issue of European integration, globalisation raises the question to what extent national legal systems are a supporting or retarding factor in the global competition of the national economies. Therefore, there are now attempts in the context of the World Bank, for instance, to develop criteria for evaluating the performance of national legal systems from an economic perspective and with quantifying methods of comparative law.[205] What is more, globalisation draws greater attention to the hybrid character of the individual national administrative law systems,[206] which can be understood less than ever as closed structures.

E. Comparative Administrative Law Beyond Methodological Nationalism and Convergence Euphoria

The increased comparison of administrative law systems in and beyond the European legal space fortunately breaks with the methodological nationalism that has impeded comparative administrative law all too often since the end of the 19th century. Yet as a result, scholarship on comparative administrative law today risks forfeiting its critical independence. The fundamental stance of undertaking comparative law with the aim of producing shared rules in legislation and jurisprudence, in other words foregrounding commonality vis-à-vis the differences in member state individual legislations,[207]

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au développement économique? (2005) (French reactions to the World Bank's 2004 'Doing Business' report).

205 On the methodological problems of this quantifying comparison based on the standard of economic efficiency: Holger Spamann, 'Large Sample, Quantitative Research Designs for Comparative Law?', American Journal of Comparative Law 57 (2009), 797 ff.; cf. on this also Rouvillois (n. 204); on the background in general Theobald (n. 92).

206 Marie-Claire Ponthoreau, '"L'argument de droit compare" et les processus d'hybridation des droits. Les réformes en droit administratif français' in: Melleray (n. 12), 23 ff.; Esin Örücü, 'Public Law in Mixed Legal Systems and Public Law as a "Mixed System"', Electronic Journal of Comparative Law 5.2 (2001), available at: http://www.ejcl.org/52/art52-2.html.

207 Cf. on this already for the European Coal and Steel Community, early on Maurice Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', Revue de droit public et de science politique 74 (1958), 841, 851 f. and 856 ff.; from the extensive literature, Hans-Wolfram Daig, 'Zu Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht' in: Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds), *Festschrift für Konrad Zweigert* (1981), 395 ff.; Meinhard Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court

is self-evident for the practice of the European institutions and certainly also legitimate. This is a basic stance that is encouraged by the permanent atmosphere of comparative law, the 'personalised comparative law'[208] within these institutions and courts, and it increasingly characterises comparative administrative scholarship as a whole. Scholarship now often strives primarily to prepare legal harmonisation by means of a comparative analysis of commonalities or at least to support manifold forms of convergence processes.[209] As legitimate as this scholarly support of the practical task of harmonisation may be, scholarship ought not limit itself to that alone. It is all the more important that scholarship on comparative administrative law also preserves the possibility of a theoretical, critically distanced observer's perspective.[210] This holds true all the more because the superimposition of European Union law heightens the awareness of many persisting differences between the national administrative law systems, so that the harmonisation process in fact paradoxically calls findings of convergence increasingly into question again.[211]

Scholarly comparative administrative law in the European legal space therefore faces a major challenge. It must guard against methodological

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of Justice of the European Communities' in: Armand de Mestral et al. (eds), *The Limitation of Human Rights in Comparative Constitutional Law* (1986), 549 ff.; newer detailed analysis in Koen Lenaerts, 'Le droit comparé dans le travail du juge communautaire', Revue trimestrielle de droit européen 37 (2001), 487 ff.

208 Gottfried Zieger, 'Die Rechtsprechung des Europäischen Gerichtshofs. Eine Untersuchung der allgemeinen Rechtsgrundsätze', Jahrbuch des öffentlichen Rechts 22 (1973), 299, 354, there with regard to the ECJ's judges, who come from different national legal systems.

209 Schwarze, *Europäisches Verwaltungsrecht* (n. 203).

210 On the similar tension between large parts of international law scholarship and a comparative law sensitive to cultural specificity, David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', Utah Law Review (1997), 545 ff.

211 Cf. on this for instance Ian Ward, 'The Limits of Comparativism: Lessons from UK-EC Integration', MJ 2 (1995), 23 ff.; Knill and Becker (n. 112). From the rich debate on convergence and divergence of the European administrative law orders, cf. representatively John Bell, 'Convergences and Divergences in European Administrative Law', Rivista italiana di diritto pubblico communitario (1992), 3 ff.; Sabino Cassese, 'Le problème de la convergence des droits administratifs. Vers un modèle administratif européen?' in: *L'État de Droit. Mélanges en l'honneur de Guy Braibant* (1996), 47 ff.; Jürgen Schwarze, 'Konvergenz im Verwaltungsrecht der EU-Mitgliedstaaten', DVBl (1996), 881 ff.; Chris Himsworth, 'Convergence and Divergence in Administrative Law' in: Paul Beaumont et al. (eds), *Convergence and Divergence in European Public Law* (2002), 99 ff.

nationalism just as much as against trite convergence euphoria. Instead, its current task is to examine the national administrative law traditions and cultures in nuanced historico-systematic individual studies. In doing so, it must not lose sight of the manifold exchange processes that have always been characteristic of administrative law. Nor should scholarship fail to recognise that shared challenges of Member States and their link in the European Union produce a convergence of the relevant structures and tools. Comparative law today can no longer mean merely contrasting administrative legal systems or individual institutions, which would be understood as the expression of a homogeneous and enclosed national legal space.[212] But it is just as impossible to overlook the fact that more recent processes of convergence and harmonisation often do not entirely replace older and deeper layers of national administrative law systems but only supplement them or amalgamate with them into new combinations. Today, the Member States' administrative law systems can only be understood as hybrid mixtures, in which the different strata of various ages do not always coexist harmoniously and the contemporaneousness of the uncontemporary becomes the rule. Neither an ideology of similarity nor a diametrically opposed ideology of difference is ultimately useful in this situation. Instead, the continuing central issue will involve the challenging task of attending *simultaneously* to the differences and commonalities of European administrative law systems.

Related to this, Europeanisation and internationalisation also create a new task for comparative administrative law, which has hardly been adequately discussed to date. In addition to the traditional horizontal comparison between different national administrative legislations, there must be an increasing *vertical comparison* between the administrative law of the individual states and the administrative law emerging at the European and international level.[213] In particular the emergence of a 'global administrative law', within the framework of the consolidation processes of international law, raises the fundamental question whether it is even possible to adequately comprehend this global law with categories that were developed

212 On this Mario P. Chiti, 'Diritto amministrativo comparato' in: Sabino Cassese (ed.), *Dizionario di Diritto Pubblico*, vol. 3 (2006), 1928, 1930 f. and 1935.

213 The particular nature of this vertical comparative administrative law has hardly been examined yet, but cf. Zacher (n. 96); Wiener (n. 96); see also above, C3, on the vertical transfer within the framework of legal transplants.

for state administrative law.[214] The nascent administrative law at the international level faces many fundamental questions of state administrative law – such as the legal formalisation of agency decisions, requirements of reasoning and participation, the confines imposed by democratically legitimated legal norms or judicial review – in new and different ways. Vertical comparative administrative law seems to require discussions similar to those conducted in horizontal comparison at the end of the 19th century on the existence and specific nature of English administrative law. The issue at that time was freeing the categories of administrative law from their fixation on French and continental European statehood and administrative jurisdiction thereby allowing a newly differentiated understanding of administrative law. Vertical comparative law must embark on a similar path today. It, too, will have to diversify the legal categories for administration in scholarship in a new way, freeing them from statist reductions and capturing the specificity of administration beyond the states in the framework of a comparative typology.[215] Yet vertical comparison encounters particular problems because the compared administrative law systems, unlike in traditional horizontal comparative law between states, are not independent from one another, but rather interwoven from the outset.[216] But as in any comparative approach, here, too, the trite extremes of the thesis of similarity – international administration is like state administration – and the thesis of difference – international administration has nothing in common with state administration – are not ultimately helpful. A new form of comparative typology must take their place, which accounts for the experience that administrative law exists not only beyond borders but also beyond states.

214 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law and Contemporary Problems 68 (2005), 15 ff.; Richard B. Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', Law and Contemporary Problems 68 (2005), 63 ff.

215 This can only be accomplished by including the particular characteristics of federal administration and administrative law in the federal states. A good example of such an analysis is Stein and Vining's comparative study on the remedies of administrative law in the European Community and in the US-American federate state: Eric Stein and G. Joseph Vining, 'Citizen Access to Judicial Review of Administrative Action in a Federal and Transnational Context', American Journal of International Law 70 (1976), 219 ff., reprinted with additional contextualisation in: Eric Stein, *Thoughts from a Bridge. A Retrospective of Writings on New Europe and American Federalism* (2000), 161 ff.

216 Pursuing this further, Zacher (n. 96), 385 ff., 393 ff. and 404 ff.