Comparative Administrative Law: Concepts and Topics

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A. Introduction

As in other areas of legal studies, comparative law must be counted among the centrally important sources of knowledge for scientifically thorough work in administrative law too.[1] Comparative administrative law is not a new field.[2] Its

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1 Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (2nd edn 2023), 27 ff. For private law, concordantly Marc-Philipp Weller, 'Zukunftsperspektiven der Rechtsvergleichung im IPR und Unternehmensrecht' in: Reinhard Zimmermann (ed.), *Zukunftsperspektiven der Rechtsvergleichung* (2016), 191 (217 with references in n. 167): 'discipline directrice of legal science'. After the great career of constitutional comparison, now administrative law is said to be developing into the most interesting reference area of comparative research in public law; according to Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law', ICLQ 62 (2013), 55 ff.

2 Thus John S. Bell, 'Comparative Administrative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 1259 (1260): 'Comparative administrative law is a long-standing discipline.' See Klaus-Peter Sommermann, 'The Germanic Tradition of Comparative Administrative Law' (this vol.). Preliminary stages are already discernible in the Ius Publicum Universale and in the concept of political science, as they shaped public law of the 17th and 18th century. On this in general Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, vol. 1* (1988), 291 ff. and 334 ff.

development reaches back to the 19th century.[3] The 'Critical Journal for Legal Science and Legislation Abroad' (*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*), founded in 1829 by Carl Joseph Anton Mittermaier and Karl Salomo Zachariä, offers proof of this. Taking up these volumes, one immediately comes across contributions on administrative law: already in vol. 1, a contribution on French administrative jurisdiction,[4] and in vol. 2, a report on the conditions in the English police system.[5] Vol. 7 then includes a review by Robert von Mohl of the leading commentary on the American federal constitution.[6] This review and an American response to it are said to constitute the first appearance of the concept 'administrative law' in the USA.[7] Later, Frank Goodnow and Ernst Freund drew on their insights gained in Germany and applied it to their work on American administrative law.[8] Goodnow had studied under Rudolf von Gneist in Berlin. Gneist, in turn, was an expert on English administration and was particularly fascinated by the idea of self-government there.[9]

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3 Cf. Erk V. Heyen (ed.), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (1982); Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber (eds.), *Handbuch Ius Publicum Europaeum* (hereafter IPE), vol. 4 (2011), § 71, mn. 31 ff. See Christoph Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); Giulio Napolitano, 'The Transformation of Comparative Administrative Law', Riv. Trimestr. Dir. Pubbl. 64 (2017), 997 ff.

4 Charles Guenoux, 'Ueber Administrativ-Justiz in Frankreich', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 1 (1829), 233 ff.

5 Georg Phillips, 'Zustand der Polizei und der Verbrechen in England', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 2 (1830), 361 ff.

6 Robert von Mohl, 'Nordamerikanisches Staatsrecht. J. Story, Commentaries on the Constitution of the United States, vol. I-III, 1833', Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 7 (1835), 1 ff. Mohl had successfully completed his habilitation in 1824 in Tübingen with a study on US federal constitutional law.

7 Jerry Mashaw, *Creating the Administrative Constitution. The lost one hundred years of American Administrative Law* (2012), 413, n. 67: Impressed by Mohl's subtle understanding of American law, the editors of the American Jurist and Law Magazine printed this review in English, together with their own counterstatement, American Jurist and Law Magazine 14 (1835), 330 ff., and in the process dealt with Mohl's criticism that Story's commentary lacked a section on administrative law.

8 On Goodnow and on Ernst Freund, two formative representatives of the field of administrative legal development in the USA, and their relations to German legal thought, see Oliver Lepsius, *Verwaltungsrecht unter dem Common Law: Amerikanische Entwicklungen bis zum New Deal* (1997), esp. 259 ff.; Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (2021), 29 ff.

9 Cf. Stolleis (n. 2), vol. 2 (1992), 385 ff.: 'Gneists wissenschaftliche Hinwendung zu England war von tiefer Sympathie für eine bürgerlich-liberale, organische Entwicklung getragen'.

Subsequently, legislative and administrative practice has again and again oriented itself towards other countries' solutions, for instance when regulating legal protection and administrative procedural law, and so has been encouraged to adopt legislation.[10] By contrast, administrative jurisprudence offers an ambivalent picture: It has gone through phases of great openness but also through phases of closure.[11] The perception of the other legal system was not always accepted without contestation. Deliberate distancing and sharp criticism were also part of the historical development of comparative administrative law. For example, A. V. Dicey's disapproval of the French concept of administrative law and the need to confront it has had a long-lasting effect.[12] At any rate, its 'belle époque', the time when it constituted itself as a science, was a time of comparative law.[13] The discipline's great theorists were also scholars of comparative law. The representative names in Germany include Robert von Mohl, Lorenz von Stein, Rudolf von Gneist, Otto Mayer, and Julius Hatschek. In France, there are Edouard Laferrière, Léon Duguit, Maurice Hauriou and Gaston Jèze, and in Italy, Vittorio Emmanuele Orlando. The development was not restricted to Europe. In the USA, Frank Goodnow's 'Comparative Administrative Law', the

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With reference to legal comparison cf. further Peter Cane, 'An Anglo-American Tradition' in: Peter Cane, Herwig C. H. Hofman, Eric. C. Ip and Peter L. Lindseth, *The Oxford Handbook of Comparative Administrative Law* (2020), 3, 10 f.: 'His work witnesses the emergence of the modern distinction between constitutional and administrative law'.

10 Schönberger 2011 (n. 3), mn. 1. See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.) (n. 3): 'the phenomena of exchange that have always been characteristic of administrative law'. On this below, under G. 3. Legal Transplants.

11 Comparative administrative law confirms such a general observation on the development of comparative law; (somewhat exaggeratedly) Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung, (3rd edn, 1996), § 4 under III., 51: 'The unbroken continuity of legislative practice confronts hesitation, rejection, and then again phases of excessive optimism in scholarship.'.

12 On Dicey's influence cf. Thomas Poole, 'Großbritannien' in: *IPE*, vol. 4 (n. 3), § 60 mn. 7 ff.; Cane (n. 9), 12 ff.

13 Oliver Jouanjan, 'Die Belle époque des Verwaltungsrechts: Zur Entstehung der modernen Verwaltungsrechtswissenschaft in Europa (1880-1920)' in: *IPE* vol. 4 (n. 3), § 69, mn. 6 ff. and 47 ff.; Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in: Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts* (hereafter GVwR), vol. 1 (2nd edn, 2012), § 3 mn. 59.

first work that systematically compared the administrative legal orders of four countries (USA, England, France, and Prussia), appeared in 1893.[14]

That the comparatist interest came to a standstill in the first half of the 20th century with its catastrophes has much to do with the political character of public law.[15] Even after 1945, the development only began sluggishly.[16] Rightfully criticism has pointed out that German administrative law at the time was too concentrated on the new constitution – the Grundgesetz (1949) – ('administrative law as concretized constitutional law').[17]

But the meager years have long since been overcome. In addition to the works already named, other, more broadly conceived studies[18] and a variety of monographs on individual questions prove this fact: From the European perspective, European unification, Union law, and the Human Rights Convention have led to a certain concentration on inner-European comparative law. But comparative law examining the Anglo-American administrative legal orders also has its own long and established tradition, which must

14 Frank Goodnow, *Comparative Administrative Law. An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany, vol. 1: Organization, vol. 2: Legal Relations* (in one volume) (1893).

15 Specifically for France Pascale Gonod, 'Über den Rechtsexport des deutschen Verwaltungsrechts aus französischer Sicht', Die Verwaltung 48 (2015), 337 (340).

16 Schönberger (n. 3), mn. 47 f. See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

17 Schönberger (n. 3); See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); there also on the 'complacency' of French literature; similarly Gonod (n. 15), 354. Generally, on the tendency of those legal systems that are often consulted by other states not to be especially interested in comparisons themselves, Christoph Möllers, Methoden in: *GVwR* (n. 13), vol. 1, § 3, mn. 40: 'German administrative law traditionally compares less than it is compared. Successful legal systems always act introvertedly; they are under less pressure to conform from outside.'.

18 Alongside the already cited works (Ius Publicum Europaeum und The Oxford Handbook of Comparative Administrative Law) cf. Marco d'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia* (1992); Michel Fromont, *Droit administratif des États européens* (2006); Giulio Napolitano (ed.), *Diritto Amministrativo Comparato* (2007); Jens-Peter Schneider (ed.), *Verwaltungsrecht in Europa* (vol. 1, 2007 and vol. 2, 2009); Matthias Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013); Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (eds.), *Comparative Administrative Law* (2nd edn, 2017); Nikolaus Marsch, 'Rechtsvergleichung' in: Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds.), *Grundlagen des Verwaltungsrechts* (3rd edn, 2021), § 3.

not be overlooked.[19] Here, US administrative law deserves special comparative attention, because it is the first administrative law conceived to be democratic from the start.[20]

The comparison between administrative legal orders of states from other regions of the world still seems insufficiently developed.[21] It is true that individual comparative relations, for example between Germany and Japan or between Spain and South American countries, have been the subject of comparative research for some time now.[22] But comparative administrative law does not offer a systematic treatment to date. Beyond the (horizontal) comparison of states' legal systems, the (vertical) comparison between national and inter- or supranational administrative legal orders is rightfully demanded today as well.[23]

B. On the Concept of 'Administrative Law'

The first task at hand is to call attention to the danger of possible distortions, which can already result from the different uses of the concept '*Verwaltungsrecht*', 'administrative law', '*droit administratif*', '*diritto ammin-*

19 More recently, cf. on this issue only Michael Taggart (ed.), *The Province of Administrative Law* (1997); Peter Cane, *Controlling Administrative Power* (2016).

20 On the intellectual history Elisabeth Zoller, *Introduction au droit public* (2nd edn 2013); Engl. trans. of the 1st edn: *Introduction to Public Law. A Comparative Study* (2008) (comparison of France, Germany, England, and USA). On the development Lepsius (n. 8).

21 Generally on comparative law in the contexts of African, Asian, and Islamic law Uwe Kischel, *Rechtsvergleichung* (2015), §§ 8-10; Zentaro Kitagawa, 'Development of Comparative Law in East Asia' in: Reimann and Zimmermann (n. 2), 237 ff. and 261 ff.; Albert H. Y. Chen, 'The Chinese Tradition' in: Cane, Hofmann, Ip and Lindseth (n. 9), 79 ff. and Chibli Mallat, 'A Middle Eastern Tradition' in : idem, from 97 ff.

22 On Japan: evidence in Ryuji Yamamoto, 'Einführung in das Allgemeine japanische Verwaltungsrecht', VerwArch 109 (2018), 190 ff. On South America: Jan Kleinheisterkamp, 'Development of Comparative Law in Latin America' in: Reimann and Zimmermann (n. 2), 261 ff.

23 Schmidt-Aßmann (n. 1), 26; Napolitano (n. 3), 1010 f.; structuring considerations on this in Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (2005) (on Germany, USA, EU, ILO, and WTO). Generally on transnational comparative law Kischel (n. 21), § 11; Mathias Siems, *Comparative Law* (2014), 249 ff.

istrativo' (1) and from the different 'conceptual ideas' (2) bound up with them.[24]

I. The Varying Breadth of Conceptual Understanding

In Germany, all legal regulations specifically directed towards the administration belong to administrative law.[25] This includes both the general theories and all of the specific administrative disciplines, in other words police, construction, environmental, tax, and social administrative law, which together operate under the name of 'special administrative law'.[26] It has not been conclusively decided whether, beyond this scope, the private law used by the administration also belongs to the concept of administrative law. In any event, the textbooks on administrative law treat the subject of 'administrative private law' as well.

In the Anglo-Saxon countries, only those matters are regularly treated as administrative law that are termed 'general' administrative law in Germany (constitutional foundations, organization, proceedings, principles, forms of action, and legal protection). In the cases discussed, individual questions of specialized administrative law can also play a role. However, they are not regarded as part of administrative law, but rather as 'tax law', 'environmental law', 'police law'. The leading textbooks in the USA usually deal in greater detail only with the laws of administrative and judicial procedure of the federal agencies.[27]

In countries like France, which developed an independent administrative jurisdiction early on, conceptualization takes yet another form. Here, '*droit administratif*' refers only to the law that falls within the jurisdiction of these courts, while other legal areas, in which the ordinary courts decide disputes

24 On what follows (also in historical comparison) Diana Zacharias, 'Der Begriff des Verwaltungsrechts in Europa' in: IPE (n. 3), vol. 4, § 72.

25 Dirk Ehlers, in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (15th edn, 2016), § 3 mn. 1 ff. and mn. 80 ff.; Hartmut Maurer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (19th edn, 2018), § 3 mn. 1 ff. and 18 ff.

26 On the division into a 'general' and a 'special' administrative law, Thomas Groß, 'Die Beziehungen zwischen dem Allgemeinen und dem Besonderen Verwaltungsrecht', Die Wissenschaft vom Verwaltungsrecht: Die Verwaltung Beiheft 25 (1999), 57 ff.

27 Schmidt-Aßmann (n. 8), 26.

with the administration, are referred to as '*droit de l'administration*', '*diritto dell'amministrazione pubblica*'.[28]

For comparative administrative law, the differences in the scope of the concept of 'administrative law' mean that the area of examination must be defined as broadly as possible. Thus, for instance, the areas in which the administration uses forms of action derived from private law cannot be excluded even in those cases where they are not covered by the concept of administrative law. Otherwise, the work that administrations do and how they are legally bound appears in a distorted perspective, compared to the countries that do not distinguish between private and public law.

A broad definition of scope is rooted in the subject itself: if the intended issues at hand in administrative law are the administration's particular ties and particular powers, then individual legal delimitations or agencies' efforts to escape certain bonds cannot entail reducing the regulatory task of administrative law. This also establishes the basis for a functional determination of administrative law's substantive scope.

2. Different 'Conceptual Ideas'

In a second respect, too, one must examine more closely from the outset whether the comparative perspective is right in comparative administrative law: namely in the conceptions about what typical situations are linked to the term 'administrative law'. Here, the influence of *academic discourses* appears even more strongly than in definition (1): The conceptual world encompasses what textbooks, specialist journals, and pertinent discussions designate under the title 'administrative law'. The German-American comparison demonstrates the significance of this issue especially well:[29]

28 Jean-Louis Mestre, 'Frankreich' in: IPE (n. 3), vol. 3, § 41, mn. 51: 'The justification of the special position of administrative law is bound to the determination of the administrative jurisdiction's area of competence.'.

29 The shaping influence of academic work on the conceptual world of 'administrative law' in the USA is clearly elaborated by Lepsius (n. 8), esp. 217 ff.; Thomas Henne, 'Die kontinentaleuropäischen Wurzeln des amerikanischen Verwaltungsrechts', Ius Commune – Zeitschrift für Europäische Rechtsgeschichte 25 (1998), 367 (383 ff.); vgl. ferner Schmidt-Aßmann (n. 8), 27 and 370 ff.

In the USA, *regulatory activities (pertaining to the economy)* dominate this conceptual world to a large extent.[30] Regulatory tasks have a very own, complex case structure: the relevant laws consistently provide only a broad framework. The responsible authorities have a broad margin of discretion. Regulatory administration is political administration, for which the instrument of rulemaking is especially interesting. Of course, in the USA, too, there are many other administrative tasks, such as those of spatial planning or social benefits. But for reasons of distributing constitutional powers, they are performed not by federal authorities but by the authorities of the individual states and communes, for which administrative law scholarship shows little interest.[31]

In Germany, by contrast, state and local administrative tasks are consistently the focus. Here, instead of wide-ranging regulatory concepts, events from citizens' *daily lives* – i.e. individual decisions taken both at the state and local levels acquire priority. Of course, in Germany, a law of regulatory tasks (in the larger sense) exists as well, in which the competent authorities, make decisions primarily based on their own discretion. But in the textbooks, this part of administrative law tends to play a minor role.

To put it succinctly: the politically acting administration shapes the concept of American administrative law. The central issue is this administration's bond to the democratic public ('accountability').[32] By contrast, compliance with and implementation of legal commitments defines the concept of German administrative law ('effective legal protection').

Both legal systems – more precisely: the respective academic conceptual ideas – thus examine different aspects of administrative actions. If distortions are to be avoided, this 'spectral shift' in determining *comparative parameters* must be considered from the start. Beyond this, insight into the partial nature of the national conceptual world can encourage *mutual*

30 Elaborated in precise terms by Francesca Bignami, 'Introduction: A New Field of Comparative Law and Regulation' in: Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation* (2016), 1 (6): 'In the United States, administration is largely synonymous with regulation.' (italics in original).

31 Criticism of this in David H. Rosenbloom, 'Administrative Law and Regulation' in: Jack Rabin, W. Bartley Hildreth and Gerald J. Miller (eds), *Handbook of Public Administration* (3rd edition, 2007), 635 (636): 'These texts and accompanying law-review-literature concentrate very heavily on regulatory commissions, thereby paying little attention to the bulk of contemporary public administrative decision-making and other activity.' Similarly, critical appraisal already in Bernard Schwartz, *Administrative Law* (3rd edn, 1991), § 1.15, 35.

32 Bignami (n. 30), 8 ff. (with fig. 9 and 11) on phases and actors of regulation.

learning, which should generally constitute an objective of modern comparative administrative law. The work of self-reflection, to which anyone who deals seriously with comparative law is always bound,[33] begins with the comparative observation of which case structures determine the 'province of administrative law'.[34]

C. The Particularities of Comparative Administrative Law

Today, it is no longer necessary to demonstrate the existence of comparative administrative law. Instead, the objective must be to highlight its *particularities*.[35] Two points define these particularities: the connection to the administration as an institution (1) and a specific orientation towards norms (2).[36]

1. Connection to the Administration as an Institution

The connection to institutions is central to comparative administrative law.[37] Administrative law is not law that applies to everyone but rather the law of a particular institution: the administration. However, one may assess the administration's strength and influence in the social interplay of forces – for comparative administrative law, it is the primary point of reference, as it is the primary addressee of all administrative regulations. Without

33 On this Anne Peters and Heiner Schwenke, 'Comparative Law beyond Post-Modernism', ICLQ 49 (2000), 800 (829 ff.). Alternatively, see Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (this vol.).

34 Concept in Taggart (n. 19).

35 Schönberger (n. 3), § 71, mn. 1 ff; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

36 A similar approach in Cane (n. 19), 2: 'three main components': 'a set of institutions', 'a set of norms' and 'a set of practices'.

37 Bell (n. 2), 1260 and 1264: 'institutional context'; Schönberger (n. 3), § 71 mn. 10; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.): 'Its connection to the state ties it to specific organizational and institutional contexts more strongly than private law.' Möllers (n. 17), § 3 mn. 40 'institutional contexts'. Similarly already Rudolf Bernhardt, 'Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 24 (1964), 431 (432): 'essential construction elements of the state'. Georgios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (1998), 64 ff.

connection to this institution, comparative administrative law loses its focus and thus its specificity.

The connection to institutions first emerges in the significance of administrative organizations, their legal forms, and their internal processes. But it also appears in the importance of the relationships to other institutions, in particular the 'neighbouring' institutions of the legislature and judiciary. In order to adequately comprehend and compare the classic themes of administrative law (legal structures, procedures, doctrines of discretion), the organization and the competences of the acting subjects must be examined as well.[38] Emphasizing their connection to institutions does not mean committing comparative administrative law to an unidimensionalor static study. To the contrary: institutions are flexible actors. They open up a broad methodological approach for comparative work (cf. under E).

The connection to institutions is not specific to continental comparative law. It also manifests itself in the US approach to administrative law. There, unlike in Europe, administration and administrative law were not a given but had to be developed out of the 1787 constitution and the play of political forces established therein after the founding of the state. American comparative studies often begin with explanations of the presidential system and the administrative agencies' link to the political system, which differs from the one in parliamentary systems.[39] A description follows of the agencies' internal structures, their relationships to the Congressional committees, to the White House, and to the Courts – authorities that by no means see themselves as mere executive instances of presidential guidelines but rather pursue their own political aims, enter into alliances with different political forces to do so, and are perceived as entirely independent actors in the media. The questions regarding the preservation of accountability, which are important for a democratic administration, can only be answered if one examines the respective institutional arrangements.

'Organization matters!' The comparative field is related to institutions. In this, comparative administrative law differs from large parts of comparative

38 A lucid examination of these components Martin Burgi, 'Verwaltungsorganisationsrecht' in: Ehlers and Pünder (n. 25), § 7, mn. 1-19.

39 Peter Strauss, 'Politics and Agencies in the Administrative State' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 44 ff.; Schmidt-Aßmann (n. 8), 63 ff.; Bruce Ackerman, 'The New Separation of Powers', Harvard Law Review 113 (2000), 633, 643 ff.

private law, but also from comparative constitutional law, inasmuch as the latter deals primarily with the protection of human rights.[40]

2. Specific Orientation Towards Norms

The second particularity of comparative administrative law is its specific orientation towards norms. This does not signify that it is restricted to a comparison of legal provisions alone. Instead, orientation towards norms means that the comparative observations are conceptualized from and towards norms. The focus is on legal norms, legal positions, legal principles, legal institutions, rules of legal application, and legal effects. What do they express, what objectives do they serve, and how do they unfold their claim to validity in social reality?

These are central questions of comparative law in the field of administrative law. They mirror law's prominent role for the administration, for which it provides not only the framework – as it does in private law – but also a legitimizing reason and limit to its actions.[41] For constitutional states, as different as their political systems may otherwise be, the executive's obligation to abide by the rule of law, the *principle of legality*, is self-evident. But also states with only poorly developed rule-of-law guarantees regularly subject their administrations to special bonds, which can be called normative in a technical sense. Preserving and reviewing these bonds are the key issues of most administrative legal orders.[42]

But the concept of norms must be broadly conceived. It encompasses statutory as well as judge-made law, national as well as international law. The general legal principles play an important role. This also includes the law laid down by the administration itself (regulations, statutes, decrees) as well as the acknowledged rules of good government and what is referred

40 Möllers (n. 17), § 3, mn. 40.

41 Accordingly, knowledge of the law is a basic requirement of those who work in the administration, and not only in 'legalistic' administrative cultures. For the USA, cf. 457 U.S. 800, 819 (1982) *Harlow v. Fitzgerald*: '[A] reasonably competent public official should know the law governing his conduct.'.

42 This more or less coincides with what can be termed a paradigm of public law; on this Bignami (n. 30), 16 f.: 'legal certainty, rules, and independent policing of the rules by courts', and which is wide-spread, 'it operates as the primary form of judicial oversight in certain newer or transitional democracies and even in certain authoritarian systems'.

to as soft law.[43] Furthermore, it encompasses functional equivalents such as the establishment of private rules and standards. On the whole, comparative administrative law engages a broader inventory of legal sources than comparative private law. When it comes to problems of 'legal pluralism', administrative law is a good area of reference.[44]

As is well-known, the relevance and rank assigned to the individual types of norms and legal standards vary from country to country. The same applies to the interpretive methods and the concretization of norms. Traditions of common law and civil law prefer different approaches here.[45] Japan in turn is a legislative state in the Continental tradition, but informal practices, go hand in hand with law enforcement. All of this must be considered, and it can be described comparatively using a norm-oriented approach. The orientation towards norms is not to be confused with formal legalism.

Yet with these questions, too, one must keep in mind some particularities of comparative administrative law. Even countries that are oriented towards judge-made law in private law, for instance, cannot avoid granting *statutory law* and its reliance on fixed elements an important position in administrative law. Environmental law, social law, tax law, and urban planning law are difficult to capture in case law but instead first need abstract legal foundations. Countries that are usually assigned to the common law sphere follow this understanding too. The legislation in administrative matters is much broader in the USA than in Germany.[46] Some scholars argue that lawyers trained in common law must learn, in administrative law, to be guided first by the text of the relevant laws.[47] On the other hand, comparative studies in

43 So also Cane (n. 19), 2 ('norms both, hard and soft').

44 Generally on legal pluralism Gunnar Folke Schuppert, *Governance und Rechtsetzung* (2011), 133 ff.; Gunnar Folke Schuppert, 'Das Recht des Rechtspluralismus', AöR 142 (2017), 615 ff.; Klaus Günther, 'Normativer Rechtspluralismus' in: Thorsten Moos, Magnus Schlette and Hans Diefenbacher (eds), *Das Recht im Blick der Anderen* (2016), 43 ff.; furthermore in Paul Schiff Berman and Ralf Michaels (eds.) *The Oxford Handbook of Global Legal Pluralism* (2020).

45 Cf. on this only Kischel (n. 21), § 5, mn. 33 ff.; Lepsius (n. 8), 31 ff.

46 But this circumstance is often obscured by the fact that these fields are identified not as administrative law but as 'environmental law', 'tax law' etc.

47 Peter Strauss, *Legal Methods* (3rd edn, 2014), 61: 'They are tempted to handle statutes with the freedom of paraphrase that they are encouraged to use in stating case law principles. Of course statutes may leave issues in doubt. Yet one must begin with the authoritative text.'.

the German tradition must not define the sphere of norms and the methods of their application too narrowly.

D. Establishing a 'Descriptive Framework'

Legal comparison needs a 'descriptive framework' (Möllers) broad enough to encompass the similarities and differences of as many administrative legal orders as possible. Yet the framework's contours must also be sharp enough to allow the *tertium comparationis* and the individual parameters of comparison to emerge.[48] This prepares what Zweigert and Kötz call 'the formation of systematics' as a further step in the comparative process.[49]

Establishing such a framework is difficult. It can only be understood as an ongoing process.[50] It must begin with the question: Is there such a thing as an overarching paradigmatic concept of administration and administrative law that can guide comparative work? References to comparative private law with its overarching emphasis on individuals and free exchange does not suffice. For comparative administrative law, the many country-specific particularities, the differences in administrative traditions and in administrative organization, could call into question whether it is even possible to develop a uniform framework.

But it is the institutional access of comparative administrative law described above that enables a step-by-step unfolding of a *basic comparative constellation*, by first demonstrating a fundamental structure (1), in which certain values are then entered (2). These are not mechanical processes following rigid rules. Instead, experience, reflexivity and creativity are required.

48 Following Möllers (n. 17), § 3 mn. 40: 'Beschreibungsrahmen'.

49 Zweigertand Kötz (n. 11), § 3 under VI., 43: 'Entire systems of comparative law, but also comparative examinations of special issues, will not be able to avoid developing their own systematics and their own concepts of a system. The system must be loose, so that it brings institutions that are heterogeneous but comparable in their function together under broad superordinate terms.' Similarly, Trantas (n. 37), 87 ff.: 'Comparative law's relation to systems in the area of public law.'.

50 A similar approach in the two-phase model, developed for comparative law in general by Oliver Brand, 'Conceptual Comparison – Towards a Coherent Methodology of Comparative Legal Studies', Brooklyn Journal of International Law 32 (2007), 405 ff.; Presentation and critique in Kischel (n. 21), § 3, mn. 97 ff.

I. Basic Structure

To put it in very general terms and unconnected to a specific legal system, the administration is the organization that is supposed to perform concrete tasks in direct daily contact with people, following certain political guidelines. This may include further tasks and forms of action such as legislation and planning; that is not yet decisive at this point. What characterizes the appearance of 'the' public administration is its actions 'on site', which deal with the individual case. The triad 'guidelines', 'tasks', and 'concrete action' are the three general characteristics that constitute the image of administration beyond the borders of states and regions.

It initially remains open what other aspects complete these key concepts: Not yet decided are the questions of *who* makes the political guidelines (a parliament, a party, an autocrat), *what* tasks are at stake, and which *norms* (laws, orders, soft law, or customary rules) are applied. All of these issues are settled only once the systems to be compared have been determined more precisely. But there are three 'fields of interest', which administrative law (in the broader sense) must address:

– the relationship of administration to politics
– the relationship of administration to the administered parties
– assuring effective task fulfilment.

The focus of these three fields of attention is the administration, as an institution delimited from its surroundings, which must define itself independently in view of the expectations directed towards it.[51] This promotes the formation of bureaucratic patterns of behavior.

Within this broadly conceived framework and by asking the question, by what means and how successfully these typical administrative fields of tension are handled, the administrative legal orders of different political systems can be put into relation with one another by working out a basic inventory of comparative parameters.[52]

51 On this Klaus König, *Moderne öffentliche Verwaltung* (2008), 8 ff.

52 On the necessity of keeping administrative scholarship open for models other than Western ones, cf. Wolfgang Drechsler, Paradigms of Non-Western Public Administration and Governance, in: Andrew Massey and Karen Johnston (eds), *The International Handbook of Public Administration and Governance* (2015), 104 ff.

2. Values

In most legal systems, however, administrative law is not restricted to the function of such a purely technical law of execution but also expresses something of the self-understanding and the value orientations of the society whose subsystem it is. In order to establish the descriptive framework, the task is to find shared values of the legal systems to be examined. Here, too, the approach must be as broad as possible initially, so as then to arrive at a concrete representation step by step. Insights from comparative constitutional law can be helpful in this process,[53] yet without calling into question the independent regulatory objectives and regulatory techniques of administrative law.[54] Here, the key words 'constitutionalism', 'human rights discourse', and 'discourse on democracy' come into play.

Two United Nations (UN) human rights treaties, adopted in 1966, express values to which many states have committed.[55] Almost all states in the world have joined the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Both Covenants describe the rights they guarantee with rather broad and often not clearly graspable elements. As a result, they are not interpreted uniformly in the different regions of the world. But they do provide a number of material points of orientation for the state-citizen relationship and so for tensions typical of the administration. These tensions can claim practically worldwide attention, and a comparison based on them does not have to face the reproach of 'Eurocentrism'.

Questions of value can be answered much more concretely when the states whose administrative legal orders are to be compared with one another see themselves as *constitutional states*.[56] Today, their sphere extends far beyond Western Europe and North America. As different as the guarantees are individually, for administrative law, constitutionalism prescribes

53 Cf. Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012).

54 On this only Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 60 ff.

55 Cf. also Kischel (n. 21), § 1, mn. 81 ff.; Siems (n. 23), 214 ff.; zur Rechtsstellung des Individuums im Völkerrecht weiterhin Anne Peters, *Jenseits der Menschenrechte* (2014).

56 On this Klaus Stern, *Grundideen europäisch-amerikanischer Verfassungsstaatlichkeit* (1984); Martin Morlok (ed.), *Die Welt des Verfassungsstaates* (2001); Rainer Grote, 'Rechtskreise im öffentlichen Recht', AöR 126 (2001), 1 (39 ff.); on 'values common to liberal states' Bell (n. 2), 1271 f.

statehood under democracy, the rule of law (*Rechtsstaatlichkeit* and *Gesetzesbindung*), and the executive power's subjection to review.

For the member states of the European Union and the Convention States of the European Convention on Human Rights, these treaties contribute to further refining administrative legal measures. Today, an inventory of shared elements of guarantee emerges here. The 'right to good administration' under art. 41 of the Fundamental Rights Charter of the European Union (EU) and a number of recommendations, which the Ministerial Committee of the European Council has passed on standard topics of administrative law, make these elements more precise. Taken together, this constitutes a set of values, a 'common code',[57] which provides a usable framework for comparing the administrative legal orders of the states in question.[58]

Overall, it can be concluded that there may not be any 'anthropological elementary constellation' upon which comparative administrative law could base itself.[59] But on the basis of the administration's typical tasks as an authority entrusted with concrete execution, it is possible to develop a framework, which, depending on the closeness of the legal systems being compared, can be filled with shared substantive guidelines.[60] The question about an overarching 'descriptive framework', that is to say, a shared comparative fundamental constellation, is thus answered *relatively*, according to which states are intended to be included in the comparison.

57 On this Eberhard Schmidt-Aßmann, in: Ruffert (n. 18), 1 (7 f.).

58 A discussion of the 'shared substrata' of national administrative laws in Europe in Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa', in: IPE (n. 3), vol. 3, §41, mn. 2. On the 'genetic code' of European administrative legal orders Schmidt-Aßmann (n. 18), 3 (7f.).

59 Concept in Schönberger (n. 3), § 71 mn. 9; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.), who refers to Constantinesco's concept of a 'universal archetypology' at this point. Tending against the assumption of administrative law's 'generic social function' Bell (n. 2), 1268 f.

60 Cf. also Bignami (n. 30), 16 ff. The four 'paradigms of public law' discussed here have another systematic approach; the typification can also be read in the sense of a gradual process of concretizing the treated values: (1) the 'rule-by-law paradigm' as standard model, which encompasses states with constitutional traditions in which the rule of law and democracy are poorly developed as well as the states listed under (2) – (4); (2) the 'fundamental rights paradigm' characteristic of the EU member states and (3) the 'ballot-box democracy paradigm' characteristic of the USA, two models of advanced constitutionalism with parallel standing; finally (4) the 'transformative democracy paradigm' as the model that goes beyond (1) and that employs courts and other institutions to enforce political and social rights in particular, in the face of weak administrations.

E. Methodological Questions: 'Heightened' Contextualization

Its connection to institutions has specific methodological consequences for comparative administrative law. Institutions are complex phenomena. They can only be understood in the context of their historical development and the conditions of their social framework. If the literature on comparative law today generally emphasizes the significance of *contextualization*,[61] then this applies to an even greater extent to comparative administrative law. Consequently, comparative work in administrative law especially depends on the insights of other disciplines: history of administration, economy of administration and finance, organizational theory, bureaucracy theory, and management concepts.[62] The mandated contextualization is reflected in an especially dense research program and must be treated in particular detail here, in the form of a *heightened contextualization*.[63]

1. Comparative Law – Not Cultural Comparison

Yet the necessary contextualization also entails the danger of an excessive challenge. While interdisciplinary openness is indispensable,[64] the material must remain manageable.[65] That is self-evident for the work of comparative

61 Kischel (n. 21), § 3, mn. 200, in further developing the concept of functional comparative law: 'A consideration of context makes up the core of comparative law: what is at stake is contextual comparative law' (emphasis in original). Cf. Uwe Kischel, 'Methods in Comparative Law – The Contextual Approach' (this vol.). Reporting the criticism of more recent streams of traditional comparative law, ultimately similar to the statement of Siems (n. 23), 40: 'Most importantly, many points of criticism highlight the relevance of context and interdisciplinarity of comparative legal research.'. Cf. still Carl-David von Busse, *Methoden der Rechtsvergleichung im öffentlichen Recht als Instrument der Interpretation von nationalem Recht* (2015), 327 ff.; Trantas (n. 37), 72 ff.

62 The administration's working methods also play an important role, today primarily electronic government; cf. on this only Martin Eifert, *Electronic Government* (2006).

63 Similarly Napolitano (n. 3), 1020 ff.: history, constitutional and political system, economic development, relations between society and government, legal culture.

64 Peters and Schwenke (n. 33), 862 ff.; alternatively see Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (this vol.).

65 A dilemma aptly described by Jerry Mashaw, 'Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America' in: Susan Rose-Ackerman and Peter Lindseth, *Comparative Administrative Law* (1st edn, 2010), 37 (44): 'A detailed understanding of macro- and micro-institutional factors; political, ideological, economic and social environments; path-dependent commitments and

law in judicial or legislative practice, for the reason alone that it is regularly subject to extreme time constraints. But it also applies to the work of *legal scholarship*. It should not be based on unrealistic standards.[66] Comparative law must not become general cultural comparison.[67]

The boundaries between the two are drawn differently, however. In countries where economic, sociological, or statistical considerations already belong to the usual forms of argumentation in legal work, as they do in US administrative law, it seems evident that especially studies in comparative administrative law may choose a broad scope.[68] German administrative law, by contrast, includes such considerations in its normal work only if the pertinent normative decision premises provide a starting point for doing so.[69] The question of what constitutes administrative law is investigated here as reflected in the pertinent norms, which do not exclude but 'filter' the influences of arguments from economics, sociology, or political science.

Given its task of contextualization, *comparative administrative law* must reach beyond issues of legal dogma. But the observable differences between the ways in which the USA and Germany evaluate to what extent norms can truly bind the administration show effects at the *meta-level*, that is to say, for the concept of comparative law. As a result, one must expect different *cultures of comparative administrative law.* If comparative studies are to be comparable in turn, then these differences in the comparative culture must first be made explicit. Furthermore, *all* participants are expected to

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inertias; and technical legal issues across multiple legal systems, seems overwhelming.'

66 Aptly Siems (n. 23), 103: 'At a practical level, it may be difficult for a comparatist to be fully familiar with the entire culture of each of the country's legal systems that she aims to examine. Thus, there is the risk of imposing unrealistic standards, a problem that can also rise for other variants of postmodern comparative legal research.'

67 Similarly Kischel (n. 21), § 3, mn. 162: 'Comparative law is a part of legal science. Its methodological point of orientation is legal science rather than sociology, political science, or economics.' Matthias Ruffert, 'Rechtsvergleichung als Perspektivenerweiterung' in: Martin Burgi (ed.), Zur Lage der Verwaltungsrechtswissenschaft, Die Verwaltung Beiheft 12 (2017), 165 (175): 'Comparative administrative law as a genuinely juridical research approach'.

68 For comparative constitutional law, cf. the debate between Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014), esp. 151 ff. ('from comparative constitutional law to comparative constitutional studies': focus on comparative political science) and Armin von Bogdandy, 'Die sozialwissenschaftliche Runderneuerung der Verfassungsvergleichung', Der Staat 55 (2016), 103 (108 ff., 115 f.: Betonung des eigenständigen Wertes der hermeneutischen Methode).

69 Cf. only Schmidt-Aßmann (n. 1), 27 ff.

engage the other side's perspective to a certain extent. Otherwise, a transatlantic exchange in matters of 'comparative administrative law' cannot work. There is no monopoly of defining the sole correct form of comparative administrate law. Recognized differences should be utilized to enrich comparative perspectives.[70]

2. Networks as Forms of Reception

Nevertheless, the question remains how to further methodologically illuminate contextualization, in its enhanced form for comparative administrative law. This is a balancing act between an overly narrow and an overly broad research framework. To find the appropriate middle ground, it can be helpful to think in networks, as recommended in more recent American scholarship.[71]

In her study 'From Expert Administration to Accountability Network', published in 2011, Francesca Bignami first reveals the restrictions of outmoded comparative administrative law: she explains that it is not enough to deal only with the forms of administrative actions and with judicial legal protection.[72] Her criticism, inspired by governance research, is based on the observation that the administration can no longer be viewed as the sole guiding authority, because other institutions have long since established themselves in its classic fields of activity, bringing about a change in power relations.[73] Examples include forms of self-regulation, panels of experts from various backgrounds, and public-private management.

If administrative legal orders are to be compared today, then – so the argument continues – the comparative framework requires a different format: for what is at stake is examining the administration in its relations to other actors, while analyzing and comparing the relevant networks.

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70 Similarly von Bogdandy (n. 68), 114 f.; for 'diversity in legal culture' and against tendencies of 'discursive imperialism'; Uwe Kischel, 'Diskursvergleich im internationalen und nationalen Recht', VVDStRL 77 (2018), 285 (312); also Christoph A. Kern, 'In der Zange der Zahlen: Rechtsvergleichung und wissenschaftlicher Zeitgeist', ZVglRWiss 116 (2017), 435.

71 Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm of Comparative Administrative Law', American Journal of Comparative Law 59 (2011), 859 ff.

72 Bignami (n. 71), 862, 871 (criticism 'of the persistence of this two-fold scheme of administrative organization and judicial review').

73 The discussion refers to a 'changed administrative landscape', Bignami (n. 71), 905.

The focus lies on four such ties in particular:[74] the administration's relationship (1.) to the elected representatives of politics, (2.) to organized interests, (3.) to courts, and (4.) to the general public. These relationships are identified as 'accountability relationships'. They have a normative connotation but outline a field of analysis that is governed not only by normative concepts: The subjects of comparison are legal provisions, which regulate these relationships and allow the actors to introduce their own logics of action to the respective administrative proceedings.

At stake here are the actors' different rationalities of acting in enmeshed relationships, which are not necessarily aligned hierarchically but interact in different ways. It is the recognition of *plurality*, of *complexity*, and of *dynamics* that differentiates the new network concept from the outmoded form of comparative administrative law.

To grasp this interplay of powers, this study will refer to the social-science scholarship on administration, which contains rich empirical material, in addition to insights from history and state theory.[75] The rights to give instructions and other possibilities of control, which the political leadership usually possesses vis-à-vis administrations, serve to explicate the importance of the administrative sciences. This arsenal cannot be grasped only by comparing relevant law. Instead, it is necessary first to work out the different dynamics that are typical of a presidential system like that of the USA and of a parliamentary system like that of most European states.[76]

A further field of examination in which comparative administrative law depends on the administrative research of the social sciences is the administration's relationship to organized interests. How political science differentiates between a pluralistic-competitive and a neo-corporatist representational model when analysing legal provisions can sharpen the gaze here for the underlying different state and societal perceptions.[77] Thus, the American conception that the state should involve itself as little as possible in the self-organization of societal interests may explain the open, broad participation of the notice-and-comment procedure. By contrast, in the neo-corporatist model towards which the European countries and the EU incline, statehood is an essential point of reference. Such different

74 Bignami (n. 71), 872 ff.
75 Bignami (n. 71), 874 f.
76 Bignami (n. 71), 875 and 880 ff.
77 Bignami (n. 71), 887 f.

underlying ideas must be taken into account when comparing procedures of administrative law-making.[78]

Despite including insights from other disciplines, the network model does not mutate into a general cultural comparison. Instead, it continues to focus on the *law*. This normative point of departure and this goal determine the comparative parameters. Rather than simply dismissing the perspective of outmoded comparative administrative law, this process expands it.[79] Yet this happens not in a merely additive but in an integrative way. The new paradigm that Francesca Bignami evokes in the title of her work involves integrating a changed administrative reality, which necessarily has consequences for the method. Precisely in its open but nevertheless norm-oriented reception, the network model underlines and intensifies the heightened contextualization necessary in comparative administrative law. As a model, its application is variable enough to contain the differences between the comparative cultures listed above and to bridge a gaping trans-Atlantic trench in comparative administrative law.

3. Tools for a Rough Orientation: 'Legal Families' and 'Administrative Cultures'

The flood of information that comparative administrative law must handle requires orientation: what should be considered? According to what aspects should the information be summarized and categorized? The answers to these questions depend first and foremost on the epistemological interest that the concrete comparative legal project is supposed to serve. The preconceptions of the comparative legal scholar in question must necessarily be accorded a certain influence too, yet this is bound up with the duty of continued self-observation, so as to prevent the danger of narrowing the perspective. In addition, comparative legal literature offers some aids for orientation: the theory of legal families (a), the differentiation between

78 On this in detail Bignami (n. 30), 20 ff. as well as the contributions of Wendy Wagner, 'Participation in the U.S. Administrative Process' in: Bignami and Zaring (n. 30), 109 ff. and Stijn Smismans, 'Regulatory Procedure and Participation in the EU' in: Bignami and Zaring (n. 30), 129 ff. On this below under G. 3. a.).

79 Bignami (n. 71), 873: 'The conceptual shift from a vertically organized administration to a plural accountability network of government bureaucrats and public and private actors broadens the horizons of comparative analysis and enables a more productive exchange with good governance debates in a number of ways.'

common-law and civil-law legal systems (b), and the typologies of certain administrative cultures (c).

(a) It is possible to refer to '*legal families*' in the sense of genealogy and evolution or in the sense of legal structure.[80] That the theory was developed from comparative private law[81] does not yet speak against it. Of course, for public law, it must be shifted to other indicators that determine family.[82] Thus, for instance, Michel Fromont emphasizes the two criteria of organization and the state-citizen relationship and on this basis distinguishes between a French, a German, and a British administrative legal model within Europe.[83] He then assigns other European states to these models. Before this background, one can observe the development of the models themselves and of their variants. Convergences as well as retained autonomies appear. Information is bundled and fields of attention are suggested.

There is continued criticism that the theory is too closely related to European legal thinking.[84] Yet this criticism is relativized by the fact that nowadays, constitutional elements can be found in the administrative legal orders of many non-European countries as well.[85] Consequently, legal families may be used to clarify the aforementioned 'descriptive framework', the 'comparative basic constellation'. Fromont emphasizes that this offers only a rough orientation.[86] Thus, he confirms the assessment for comparative administrative law that the theory of legal spheres has otherwise encountered as well: 'their reduction of complexity allows for a first quick access'.[87]

80 On the following Grote (n. 56), 11 ff.; furthermore H. Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in: Reimann and Zimmermann (n. 2), 421 ff. (for a focus on traditions, not on families).

81 Cf. only Zweigert and Kötz (n. 11), 62 ff.

82 Similarly Bell (n. 2), 1266; in detail Grote (n. 56), 26 ff.: basic rights, separation of powers, principle of the rule of law, and democracy principle as 'structural principles that shape the system'; von Busse (n. 61), 292 ff.

83 Fromont (n. 18), 13 ff.; Michel Fromont, 'Typen staatlichen Verwaltungsrechts in Europa' in: *IPE* (n. 3), vol. 3, § 55.

84 Weighing these issues: Glenn (n. 80), 434 ff.

85 Grote (n. 56), 37 ff.

86 Fromont (n. 83), § 55, mn. 76.

87 Thus accurately Kern (n. 70), 434; similarly Kischel (n. 21), § 4, mn. 10 ff. and 25 f. ('primarily a didactic tool'); similarly Siems (n. 23), 72 ff., 92; Napolitano (n. 3), 1002 f.

(b) The *separation between common law and civil law* does not define the system in comparative administrative law.[88] This has several reasons: For one, administrative law is strongly determined by statutory law, also in the common law states.[89] The high degree of flexibility that is often said to be associated with judicially created common law, for example in private law,[90] can therefore find only limited expression in administrative law. Here, just like in the civil law states, the administration must first proceed from the text of the relevant laws, following the principle of legality.[91]

Additionally, the two main representatives of common law, the USA and the United Kingdom (UK), significantly diverge from one another, particularly on issues that are important for administrative law.[92] Peter Cane concludes his comparative work on the administrative legal orders of the USA, England, and Australia with the statement:

> 'However, our study has shown that the US concept of common law is significantly different from its Anglo-Australian counterpart.'[93]

Consequently, taken alone, it is not very meaningful whether a legal system is attributed to common law or civil law. Comparative administrative law must not be ensnared by the circumstances in private law. Individual fea-

88 Siems (n. 23), 41 ff., 64 ('may only have a limited explanatory value').

89 Cf. William J. Novak, 'The Administrative State in America' in: Armin von Bogdandy, Peter M. Huber and Sabino Cassese (eds), The administrative state (2017), 98 (110): 'By 1932, the common law tradition, that had shaped and ruled so much of public and private life through the early nineteenth century, had been displaced as a principle tool of American governance. And a regime of constitutional law, positive legislation, and administrative regulation assumed prominence.' Generally on the significance of statutory law for comparative administrative law cf. Napolitano (n. 3), 1025 f. This applies particularly to the areas of special administrative law, such as to environmental, regulatory, or tax law. If these areas are not treated as administrative law (such as in the USA, at any rate in academic discussions), then the importance of positive law and the role of the legislative power in comparative law run the risk of remaining underexplored.

90 Cf. on this (admittedly with nuances) Zweigert and Kötz (n. 11), § 18; similar in substance (albeit without reference to common law in particular) Mathias Reimann, 'The American Advantage in Global Lawyering', RabelsZ 78 (2014), 1 (9 ff.).

91 On this above under C. 2.

92 Zweigert and Kötz (n. 11), § 17, 233; similarly Cane (n. 19), 519: 'Judge-made law came to be understood as a category of rules supplementary to legislation rather than a qualitatively different mode of law-making.'

93 Cane (n. 19); emphasizing certain shared traditions more strongly Bell (n. 2), 1266 with reference to Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990).

tures borrowed from the outmoded comparison of common law and civil law can only ever be *one* argument in addition to others.

(c) Administrative science deals with *administrative cultures*.[94] This refers to 'fundamental interpretations, attitudes, perspectives, values [and] basic assumptions', which, in addition to administrative techniques and the administrative institutions, shape the image of the administration.[95] It is a typology that involves both historical developments and empirical examinations. For instance, there is a focus on a legalistic and a managerialistic administrative culture, as well as on one shaped by civil society. A European pluralistic administrative culture as a parallel independent type exists in rudimentary form at best.[96] The formation of further types is not precluded.[97]

The administrative cultures defined in this way can facilitate contextualization for comparative administrative law. They condense observations on the measures and motives that underlie administrations' actions. Systemically, there is a close connection to theories of bureaucracy. The law-oriented questions confronting comparative administrative law are illuminated by the fact that legalism is assigned its own type and the other 'cultures' are also described in relation to this orientation. Conversely, typology warns of according law an absolute value in comparative studies.

F. Topics and their Transformation in Comparative Administrative Law

Administrative law is the forum where the always precarious relationship between individual freedom and the concretely articulated demands of the public good must be balanced. This is its central *function* within the state legal system. Today, one must assume that administrative law has a

94 With its specific focus on the administration, the idea should encounter fewer concerns than the sociological topos of 'legal culture', which, given its breadth, meets with reservations in comparative law; on this Kischel (n. 21), § 4, mn. 27 ff.

95 Thus Klaus König, 'Verwaltungskultur – typologisch betrachtet' in: Klaus König, Sabine Kropp, Sabine Kuhlmann, Christoph Reichard, Karl-Peter Sommermann and Jan Ziekow (eds), *Grundmuster der Verwaltungskultur* (2014), 13; König (n. 51), 838 ff.

96 On this Sabine Kuhlmann, 'Verwaltungspluralität in Europa: Konvergenz, Divergenz oder Persistenz?' in: König, Kropp, Kuhlmann, Reichard, Sommermann and Ziekow (n. 95), 467 ff.

97 On the influence, for ex., of Confucianism as non-Occidental world view of administrative culture, cf. König (n. 51), 842 ff.

dual mission:[98] on the one hand to restrain public administration from interfering with individuals rights, and on the other (of equal importance), to enable it to fulfil its duties in the welfare state.

I. Classic Topics

We owe an early concrete examination of the major topics in comparative administrative law to Frank Goodnow. On the basis of his systematic comparative studies, Goodnow emphasized three criteria that an administrative legal order must satisfy.[99] It must firstly, be able to guarantee that political demands can be engaged; secondly, it must ensure that administrative tasks are fulfilled competently and efficiently; and it must (thirdly) respect citizens' individual rights.

The triad is accountability, efficiency, and judicial review. The classic topics of comparative administrative law assigned to these terms are:

- the rule of law, the subjection to instructions, parliamentary review, publicity of information;
- forms of administrative action; incentives for an efficient use of resources, reviews of economic viability;
- forms of organizing state and self-administration that are appropriate to the tasks;
- administrative procedures, judicial review, and state liability.

The textbooks of comparative administrative law focus on precisely these topics.[100] The topics are subdivided further and made more concrete, without distinguishing between a macro- and a micro-comparison. The major topic of judicial review for instance, is then structured into studies of the

98 Thus for German administrative law Eberhard Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, 2004), 16 ff. For US administrative law similarly Julia Beckett, 'Five Great Issues of Public Law and Public Administration' in: Rabin, Bartley Hildreth and Miller (n. 31), 697 ff., in summary 715: 'In the checks and balances of democratic governance, laws do not obstruct, courts do not interfere, and regulation do not impede. Public law and public administration share concerns about practices, actions, procedures, and goals. The important theme in all the great issues is how to balance the shared concerns on law and administration in serving the public interest.'

99 Reporting: Mashaw (n. 65), 44 f.

100 Cf. Fromont (n. 18), (73 ff.), administrative jurisdiction (111 ff.) and administrative legal protection (163 ff.), rule of law (232 ff.); forms of action (209 ff., 285 ff., 297 ff.), state liability (325 ff.). Napolitano (n. 18): organization (61 ff.), procedure

court systems ('monism' or 'dualism'), legal standing, the scope of review, and the interim measures of legal protection, which are in turn incorporated in the relevant provisions of the constitution. This does not involve dwelling on external conceptualizations or mere textual comparisons of the relevant provisions but instead asks about the historical development and the functions of the instruments found in the legal systems examined, so that functional equivalents can be analysed as well.

2. Context-Sensitive Treatment: Inspiration From Administrative Science

Historical, political, economic, and technical frameworks of administration are necessary components of comparative administrative law. That is the core of the 'increased' dependence on context, which the issue demands. Administrative science is useful as a catalyst. For it consolidates and makes accessible insights from other disciplines and subjects, such as administrative economy, administrative sociology, administrative business management, or administrative psychology. In what follows, seven fields serve as examples, from which comparative administrative law derives ideas for its context-sensitive work:[101]

– *Administration and politics*:[102] The administration's positioning – within the constitutional system that separates the powers (law and budget as means of control) as well as within different governmental systems – and the role of bureaucracy, which pushes for independence, belong to the classic inventory of studies in administrative science. After the dismissal of the separation theory, the administration's policy-forming function has emerged more clearly as well. The political interplay of powers, in which the administration is involved, is diversified by the inclusion of associations and organized interests in general.

(107 ff.), administrative contracts (175 ff.), liability (265 ff.), administrative jurisdiction (283 ff.).

101 Cf. only Rabin, Bartley Hildreth and Miller (n. 31), section 2 (Organization Theory), section 3 (Budgeting and Financial Management), section 4 (Decision-Making), section 5 (Personal Management), section 6 (Public Policy), section 8 (Comparative and International Relations), section 11 (Information Technology).

102 König (n. 51), 8 ff.; Jörg Bogumil and Werner Jann, *Verwaltung und Verwaltungswissenschaft in Deutschland* (2nd edn, 2009), under 4.5; Renate Mayntz, *Soziologie der öffentlichen Verwaltung* (1978), 60 ff.

- *Administration and the public*:[103] This issue involves the administration's communication with the media, organizations of civil society, and the general public. Forms of structured communication, for ex. in certain administrative procedures, stand next to processes of spontaneous information and communication. The public's free access to administrative information and the administration's use of the internet are part of this issue as well.
- *Administrative organization*:[104] The diversity and the dynamics of organisation as one of the most important resources of control must be made clear here.[105] Organizational contexts and organizational maxims join the isolating examination of individual (legal) forms of organization. Usually, bureaucratic organizations are central.[106] Yet the significance of collegial, participatory, or self-administrating forms of organization should not be overlooked either. The differentiation of administrative organization that results from including private economic subjects and actors of civil society is its own topic.[107]
- *Administrative tasks*:[108] The inventory and criticism of tasks are classic topics of administrative science. This includes statements concerning the different ways of fulfilling administrative tasks as well as proposals of task reform, for ex. of lean management, task privatization and the experiences gained from it.
- *Administrative staff*:[109] The law of public service (including salary law and pension law) only makes up the external framework. It is filled with information on training courses and career patterns, on staff recruitment and staff management. Special forms such as volunteer work and undesirable developments such as the spoils system are also a part of this.

103 Arno Scherzberg, *Die Öffentlichkeit der Verwaltung* (2000), 23 ff., Hermann Hill (ed.), *Verwaltungskommunikation* (2013).

104 König (n. 51), 278 ff.: differentiation between an institutional, a structural, and a functional concept of organization; Bogumil and Jann (n. 102), under 3.2-3.5. In detail Gunnar Folke Schuppert *Verwaltungswissenschaft* (2000), 544 ff.

105 On this, the contributions in Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Verwaltungsorganisationsrecht als Steuerungsressource* (1994).

106 König (n. 51), 104 ff.; Bogumil and Jann (n. 102), under 4.1-4.2.

107 Extensively Schuppert (n. 104), 277 ff.: Public administration in the spectrum of collaboration to fulfill state and private tasks: findings (281 ff.), analyses (341 ff.), role of law (420 ff.).

108 On this König (n. 51), 183 ff.

109 König (n. 51), 490 ff.; Andreas Voßkuhle, 'Personal' in: *GVwR* (n. 13), vol. 3, § 43.

– *Administrative techniques*:[110] This includes information on purely practical work processes and recordkeeping, which may be important in order to comparatively evaluate certain types of administrative procedures. But above all, this category includes knowledge of the 'technical concepts' that characterize administration and administrative law, meaning the business of records and archives, e-government and digitalization: in practical terms, the epistemic, informational, and communicative prerequisites for all administrative action.
– *Decision processes in the administration*:[111] This category requires examining the administration's entire system of action. The forms of action, procedural law, and the doctrine of application of the law make up the legal side. Administrative science goes significantly beyond these issues. It examines the various forms of programming, of implementation and evaluation. It reveals and, if applicable, empirically proves deficits in execution and maps out differences between implementing and framing decisions (planning, regulating). In addition to the formal types of action, the informal ones are also of interest. The decision standards and techniques, such as management techniques, play an important role.
– *Checks on administration*:[112] This is a group of issues that has already been treated in descriptions of administrative law, taking the findings of administrative science into account. Reviews by supervisory authorities, courts, and audit offices make up the core. In addition, new authorities, such as the data protection officer and the ombudsman, as well as the check provided by an informed public are taken into consideration. It is important to have knowledge of the inner dynamics of the review processes that occur in these institutions.
– *Administrative reforms*:[113] The history of administration is a history of its reforms and attempted reforms. Administrative reforms have various manifestations, for ex. as functional reforms, territorial reforms, or ser-

110 On this only Rabin, Bartley Hildreth and Miller (n. 31), section 11 (information technology); Karl-Heinz Ladeur, 'Die Kommunikationsinfrastruktur der Verwaltung' in: *GVwR* (n. 13), vol. 2, § 21.

111 König (n. 51), 349 ff.; Bogumil and Jann (n. 102), under 4.3.

112 Linking the perspectives of administrative science and administrative law Simon Kempny, *Verwaltungskontrolle* (2017); Wolfgang Kahl, 'Begriff, Funktionen und Konzepte von Kontrolle' in: *GVwR* (n. 13), vol. 3, § 47; furthermore Fritz Morstein-Marx (ed.), *Verwaltung. Eine einführende Darstellung* (1965), (contributions no. 21-25) as well as Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds), *Verwaltungskontrolle* (2001).

113 König (n. 51), 657 ff.; Bogumil and Jann (n. 102), under 5.2.

vice law reforms. They are meant to be implemented regularly (also) with the help of administrative law, and in turn, they have a retroactive effect on administrative law. The concept of New Public Management and the different ways in which individual administrative legal orders adopt it in international comparison serves as a good background when analysing the tasks of guidance assigned to administrative law.

3. New Emphasis

The multifaceted image that administrative research paints of the administration entails not only descriptive findings on the current state of comparative administrative law but also demands reflecting on this state and asking whether changes in scholarly access are indicated.

a) Preliminary Considerations

To this end, what follows will contrast the outmoded comparative perspective with its criticism in an *exemplary* (and slightly exaggerated) way, in order then to discuss some new emphases:[114]

- The administration is the central actor in the classic fields of comparative administrative law. The subjects of comparison are how *it* is governed by parliaments and other political committees, *its* competences and types of action, *its* standards and *its* review by the courts and other authorities. The clear perspective leads to clear comparative parameters and clearly defined assessments. This is primarily an advantage.

Yet there are also certain disadvantages that cannot be overlooked: The comparative framework seems static, and the administration's roleplay seems mechanistic. The underlying understanding of administration can be described, in Richard Stewart's much-cited term, as a 'transmission belt'.[115] Accordingly, administrative law appears as a self-contained world, expressed in its formal elements and concentrated on its instrumental function.

114 On the following the studies by Bignami (n. 71) and Napolitano (n. 3).

115 Richard Stewart, 'The Reformation of American Administrative Law', Harvard Law Review 88 (1975), 1667 (1671 ff.): 'The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases.'.

It does not follow from this comparison of its positive and negative effects that the present concept of comparative administrative law would have to be dismissed or radically changed. The administration continues to be the central reference point for administrative law, just as administrative law is the central reference point for comparative administrative law. Thus, the matter justifies a certain measure of isolating, static examination. But if administrative action and administrative law are designed for efficacy, then the dynamics of actions and the changes of the framework in the comparative parameters must also find their place. New developments must be integrated. This can lead to a broadening of the research field and a shift in thematic emphases, which in turn changes the approach to comparative administrative law.

Three examples will serve to demonstrate this: the governance perspective (b), internationalization (c), and the role that information plays today in the administration's array of measures (d). But the examples also show that one must not be too quickly drawn in by the fascination of what is new and global and that one should not demand too much change. Changes of emphasis are at stake, not radical transformations.

b) Governance Perspective

Governance research, which is no longer a new focus in political science, makes it clear that the state cannot regulate important social sectors of the state alone (and that they were probably not regulated alone in the past either). Instead, regulation occurs in cooperation with commercial enterprises, associations, and other private actors. 'Regulatory structures' are at stake, requiring that the participants' different motives of action be coordinated and these results be maintained. New legal forms are advanced to this end: complex treaties to adopt specified provisions, mixed economic enterprises, working groups, and other hybrid forms of collaboration, which require developing a framework and rules of reliable, fair procedure.[116]

Governance structures do not supplant the administration. It manifests itself in these structures in various ways. But it must use other instruments

116 On this above under E. 2. as well as Gunnar Folke Schuppert (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien* (2005); Gunnar Folke Schuppert, *Governance als Prozess. Koordinationsformen im Wandel* (2009); Schuppert (n. 104), § 16, mn. 20 ff.; Martin Eifert, 'Regulierungsstrategien' in: *GVwR* (n. 13), § 19.

than those that correspond to the classic image of the executive power making unilateral sovereign decisions. Consequently, administrative law must think beyond its traditional scope. It must attend to the *interfaces*, where the participants' decisions converge within the regulatory structures. Therefore, it is not enough to compare the legal forms used. It is necessary to examine the participants' various motives as well, which determine the dynamics of the regulatory structures.[117] These ways in which administrative law *interlinks* with private law, and potentially also with criminal law, must be handled juridically.

This is also interesting for comparative administrative law: It is important to evaluate experiences with these issues of interlinkage in different legal systems and to develop models that can also be implemented transnationally. The breadth of the governance perspective proves to be especially advantageous for comparative work. It creates a broad frame in which to place states, without considering whether they have assigned a certain task or a certain political field more to administrative regulation or more to a private enforcement of the law. In the end, the governance perspective inevitably relegates comparative law to the path of *intradisciplinary* research. Topics include:

- Complex contractual arrangements to cover networks of private and administrative actors;
- Sanctions of a criminal, administrative, and contractual nature to enforce duties adopted self-regulatively;
- Forms of collective legal protection: group actions for ex. in environmental law or consumer protection law in areas that are subordinated, in the countries, variously to administrative supervision or private law enforcement;
- The role of soft law, 'agreements', and other forms of soft configuration of duties.

Yet in all this, it should not be overlooked that governance structures are dominant only in certain areas of administrative law. These areas concern market and economic regulation (in the broader sense), product safety, healthcare, and certain aspects of environmental protection. It is no coincidence that the American literature in comparative law emphasizes the governance perspective so strongly. For to a great extent, the USA's admin-

117 On this Bignami (n. 71), 872.

istrative law (or more precisely: what this term designates in the textbooks and leading journals) is concentrated on regulatory law.[118]

But administrative comparative law must not become entirely caught up in this. Not everything is governance. Rather, there are numerous other areas, such as police law, construction law, and tax law, which cannot be fully comprehended with conceptions of governance. In these fields, just as in the past, administrative law proves its value by structuring the legal relationships between the administration and the individual citizen, as the addressee of a burdensome order or as the petitioner for benefits to be awarded. These areas, too, with their small-scale case constellations that include the citizens directly, are worth being treated from the perspective of comparative law.

c) Internationalization of Administrative Law

Where the complex phenomenon of the internationalization of administrative law is concerned, two issues must be distinguished.[119] For one, the matter at hand is the increased importance of *international law*. International law is not yet *per se* a suitable subject of comparative administrative law. Yet the process of its creation often draws on models from national law, and in this respect, comparative administrative law can be seen as a practical prerequisite for international law, which should also be used for its interpretation. A topic that stems from comparative law is the impact of international law on national law. What are the techniques of reception? What isolation mechanisms are activated? How do legal systems even deal with the superimposed layer of international law? These are questions that can be evaluated comparatively.

Even more important is the second way in which the internationalization of administrative law manifests itself. This is the *internationalization of administrative relations*.[120] Of course, forms of cooperation beyond the state

118 Schmidt-Aßmann (n. 8), 10.

119 The following reflections are only sketched out. A systematic treatment of this topic would have to consider Europeanization as a supranationally heightened variant of the superimposition of legal systems and the development of internal administrative structures, one which confronts comparative administrative law with additional challenges.

120 On the following Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by*

have always existed between national administrations. But, as a glance at tax law, social law, or police law shows, such cooperation has increased significantly in recent times and has reached a new level of intensity. In addition to these *horizontal* relationships, *vertical* and *diagonal* relationships between national administrations and international organisations have emerged.[121] International law and administrative law, originally disparate subject matters, have moved closer together. The meaning of familiar legal forms has changed; new forms have been added. As a result, comparative administrative law has new key functions as well.

International mutual assistance is one example. It is a classic legal institution. In its practical implementation, it must rely on the participating administrations having a certain knowledge of the other administration's law or at least being able to attain it quickly. Otherwise they cannot assess what services they can expect from a foreign authority as administrative assistance and where its limits lie. In what legal framework and with what means the information has been collected may also determine the use of information obtained domestically. These are practical fields of application of comparative administrative law.

The topic '*global regulatory process*' has proven to be a field of research with its own profile.[122] Globally, the regulation of important social fields, above all of science, is seen as an important and necessary task. In very general terms, its fulfilment can be understood as a complex process that occurs in multiple phases and involves numerous institutions: legislative and law-enforcing authorities, agencies, courts, and private associations. In this respect, there are overlaps with the topic of 'governance'. For comparative law, the issue firstly is to gather the states' different regulatory techniques and to analyse the different mixing ratios of features derived from regulatory and private law: what regulatory tasks are in the hands of the state, and what is left to private initiative? Beyond this, comparative law can help to better understand the influences of international regulatory authorities on the national legal systems.[123] *Global regulation* thus becomes

International Institutions. Advancing International Institutional Law (2010); Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (2016).

121 Cf. Napolitano (n. 3), 1012.

122 Bignami and Zaring (n. 30); there on research design 8 ff.: rulemaking, oversight, enforcement, judicial review.

123 On this for ex. Gregory Shaffer, 'How the WTO Shapes the Regulatory State' in: Bignami and Zaring (n. 30), 447.

an area of reference for vertical and diagonal comparative law.[124] At the same time, it underscores the need for an interdisciplinary approach, which transcends the limits of the traditional disciplinary foundations of faculties of law.

d) 'Information-Based' Administrative Law

A third field where new developments prompt new emphases, in comparative administrative law as well, is administrative law concerning information. Typical administrative law conflicts today often arise not from the administration's decisions but from its treatment of information. The contradictory objectives of data protection and the publicity of information demarcate an area that revolves around 'information' as a medium of control and has proven to be conflictual.[125] One need only think of security agencies' secret data acquisition or of the administrative practice of publishing consumer information on the internet. The transnational traffic of information in the context of international administrative aid and of agency networks that exist worldwide show that administrative law concerning information has its own international and global perspective.

Comparative law in particular can make clear that one must consider other *cognitive interests* than the 'accountability paradigm', which is prioritized for the topics of 'governance' and 'global regulation'. Above all, the issue at hand is protecting and enforcing individual rights in situations that appear very confusing to the individual affected citizen. Information takes on ubiquitous and diffuse forms. Dealing with them is a real event, which lacks clear legal forms. Information is difficult to grasp, and so the administration's treatment of it is also difficult to contest. The value of information to which access is demanded often depends on a very specific point in time. This requires a quick decision. Conversely, once published, information can also hardly be eliminated again. Additional interests of legal protection come into play when information is gathered secretly.

On the whole, administrative law concerning information is a far-reaching legal area, for which the 'paradigm of individual legal protection' is at

124 Napolitano (n. 3), 1025 ff.; Bignami (n. 30), 34.

125 On the phenomenon of 'information-based conflicts' Eberhard Schmidt-Aßmann, *Kohärenz und Konsistenz des Verwaltungsrechtsschutzes* (2015), 157.

least as important as the 'paradigm of accountability'.[126] The comparative analysis of the relevant law must keep an eye on *both* orientations and monitor which of the two is emphasized in concrete situations. This stimulates reciprocal learning processes: Thus, a great deal speaks for the fact that legal systems which, like the German system, shifted only later from the principle of classifying documents to that of disclosing them, have not yet sufficiently grasped the profound change this involves for the entire administrative communication, for ex. in systematizing administrative reviews. Conversely, comparative law in administrative law concerning information can remind an administrative legal order, which, like the American one, is primarily focused on linking the administration to democratic government, how important citizens find the protection of their privacy. While the right to privacy was discussed in the USA earlier than in Europe, it was not developed as comprehensively as can now be said of European data protection law.[127] The scandals involving secret data acquisition by the National Security Agency (NSA) highlight the importance of an elementary, constitutionally recognized interest, which can demand an appropriate space in a free system of administrative law.[128]

G. General and Particular Objectives of Comparative Administrative Law

Comparative administrative law is first and foremost a scholarly project. In this, it is no different from comparative private, or criminal law (1).[129] But in its practical objectives, it has somewhat different focal points than

126 This does not preclude overlaps between the two paradigms: 'freedom of information' is simultaneously a means of strengthening 'accountability'; treated comparatively (USA, UK, Australia) in this respect in Cane (n. 19), ch. 11. Conversely, effective data protection can depend on arrangements that are not only shaped by individual rights but also rely on objective controls and structures of governance; cf. Friederike Voskamp, *Transnationaler Datenschutz. Globale Datenschutzstandards durch Selbstregulierung* (2015).

127 On this with further references Manuel Klar and Jürgen Kühling, 'Privatheit und Datenschutz in der EU und den USA – Kollision zweier Welten?', AöR 141 (2016), 166, esp. 177 ff.; Thomas Wischmeyer, *Überwachung ohne Grenzen. Zu den rechtlichen Grundlagen nachrichtendienstlicher Tätigkeiten in den USA* (2017).

128 Cf. on the public's privacy expectations vis-à-vis video surveillance of public spaces, which exceeds the level of protection guaranteed by US law, Klar and Kühling (n. 127), 205 with reference to empirical evaluations in the literature.

129 On comparative law generally Zweigert and Kötz (n. 11), § 2, I.; Siems (n. 23), 2 f.

comparative private law (2).[130] Both are interlinked in important ways and this is illustrated with the example of legal transplants (3).

1. Scholarly Project

The objective is to gain fundamental insights into the ordering and controlling aspects of law in society by means of comparative examination. What approaches and what forms of law (private law, criminal law, public law) are enlisted to pursue these effects and how the different approaches are connected to one another to form 'arrangements' are central questions of *interdisciplinary* research. Governance-oriented comparative administrative law is well-positioned to answer them.

Fundamental knowledge makes it possible to understand foreign legal systems. But it also fosters awareness of the particularities of one's own legal system. Therefore, the German Council of Science and Humanities, the *Wissenschaftsrat*, speaks succinctly of an 'analytical distance', which comparative law, like legal history, enables.[131] In the framework of *interdisciplinary* research, moreover, comparative law can contribute to better understanding the dynamics of social processes.[132]

The forms of scholarly comparative administrative law vary depending on the subjects of comparison and cognitive interests.[133] In addition to studies on individual legal institutions, there are explorations of complex reception processes. Generally speaking, in order to do justice to issues of administrative law, it is necessary to include framework conditions and the effects of enforcement. The connections to constitutional law and to administrative science practically inhere in the matter. This demands an ambitious development of theories, which does not happen abstractly in advance, though, but rather gradually while analysing the material. This

130 Schönberger (n 3), § 71 mn. 4 ff; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.) ('Particularities of Comparative Administrative Law in Contrast to Traditional Comparative Civil Law'); von Busse (n. 61), 32 ff.

131 Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland* (2012), 31.

132 On this only Stefan Grundmann and Jan Thiessen (eds), *Recht und Sozialtheorie im Rechtsvergleich. Law in the Context of Disciplines* (2015).

133 Systematically on this Hirschl (n. 68), 193 f., who outlines a spectrum that reaches from detailed studies of individual systems to typologies and then to large-scale analyses of empirically obtained material, which are intended to clarify causal relations.

already shows how necessary it is to capture the legal systems included in the comparison in positive terms and to present them compactly, that is to say, how necessary it is to *work on the material*. Description alone is not comparative law, but it is an 'indispensable prerequisite' for it.[134]

2. Practical Objectives

The results of academic work do not remain in the ivory tower of academic self-assurance but instead spread to the practice of legislation and the application of the law. In this respect, too, one can in principle refer to the general comparative literature.[135] But the advance of international administrative actors (UN Security Council, World Bank, World Trade Organization [WTO]) and the increase in international and European administrative cooperation set slightly different priorities.[136]

(a) First and foremost, the task of scholarly work in comparative administrative law is to obtain general principles of law. National administrative law has developed in large part from legal principles and still continues to develop in them today, if one thinks of the transnational development of the principle of proportionality. But above all, European and international administrative law (including global administrative law) depend on the development of general principles. This becomes especially clear in cases where regulations of international law or of EU law refer to shared traditions or to principles of other legal systems, as demonstrated for ex. in art. 6 para. 3 Treaty on the European Union (TEU).[137] But the reach of general

134 Cf. only Max Rheinstein, *Einführung in die Rechtsvergleichung* (2nd edn, 1987), 22.

135 On this Kischel (n 21), § 2, mn. 81 ff. and 22 ff.; Thomas Pfeiffer, 'Rechtsvergleichung und Internationales Privatrecht in der Berliner Republik' in: Thomas Duve and Stefan Ruppert (eds), *Rechtswissenschaft in der Berliner Republik* (2018), 157 ff.

136 Cf. on the following Bernhardt (n. 37), 431 ff.; Karl-Peter Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', DÖV 52 (1999), 1017 ff.; Karl-Peter Sommermann, 'Erkenntnisinteressen der Rechtsvergleichung im Verwaltungsrecht' in: Anna Gamper and Bea Verschraege (eds), *Rechtsvergleichung und juristische Auslegungsmethode* (2013), 195 ff.; Martin Bullinger, 'Zwecke und Methoden der Rechtsvergleichung im Zivilrecht und im Verwaltungsrecht' in: Ingeborg Schwenzer and Günter Hager (eds), *Festschrift für Peter Schlechtriem* (2003), 331 ff.; Möllers (n. 17), § 3 mn. 41 (practical relevance for the formation of internal administrative law and for cooperation structures in the EU).

137 Art. 38 para. 1 lit c of the Statute of the International Court of Justice ('the general principles of law recognized by civilized nations'), art. 6 para. 3 TEU ('the consti-

principles extends far beyond these particular cases. Comparative work in administrative law has its most important practical scope here.

(b) Secondly, their task is to serve as a *source of inspiration*, aiding with the preparation of major legislation projects, such as the codification of administrative procedural law. The development of the German Administrative Procedure Act of 1976 and the draft of an EU administrative procedural law constitute examples.[138] Comparative law is also a source of inspiration when preparing the legislation of secondary EU law. Finally, it is worth noting the large number of recommendations with which the Council of Europe seeks to ensure that the administrative legal orders of its Member States guarantee basic standards of administrative law.[139] They constitute an individual expression of the effort to harmonize the law, which is a classic objective of studies in comparative law.[140]

(c) The third practical goal of comparative law is to function as an *interpretive aid* for the interpretation of provisions, which in turn originated with the help of comparative law scholarship.[141] Here, comparative law is part of the genetic construction. To what extent insights from comparative law can also be consulted in other cases and perhaps even represent a 'fifth interpretive method' (Peter Häberle)[142] is contested and, for administrative law (unlike for constitutional law), may be considered for general teachings

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tutional traditions common to the Member States'), similarly art. 52 para. 4 EU CFR; art. 340 para. 2 TFEU ('non-contractual liability [...] in accordance with the general principles common to the laws of the Member States'). Without textual reference, but also in this matter art. 41 EU CFR ('right to good administration'); on this Matthias Ruffert, in: Matthias Ruffert and Christian Calliess (eds), *TEU/TFEU Commentary* (4th edn, 2011), art. 41 CFR, mn 3 ('In this respect, Basic Law builds on international and European legal traditions as well as on the traditions of the Member States.'), in detail von Busse (n. 61), 217 ff.

138 On the Administrative Procedure Act: Carl Hermann Ule and Hans Becker, *Verwaltungsverfahren im Rechtsstaat* (1964); Carl Hermann Ule (ed.), *Verwaltungsverfahrensgesetze des Auslandes* (1967). On EU law: Jens-Peter Schneider, Herwig C. H. Hofmann and Jacques Ziller (eds), *Research Network on EU Administrative Law (ReNEUAL)-Model Rules on EU Administrative Procedure* (2014), there esp. introduction mn. 28 ff.

139 On this, the references in Ulrich Stelkens, in: Paul Stelkens, Hans Joachim Bonk and Michael Sachs (eds), *Verwaltungsverfahrensgesetz* (9th edn, 2018), EUR mn. 25 ff.

140 Cf. Zweigert and Kötz (n. 11), § 2, V.

141 In detail on the following von Busse (n. 61), 94 ff., 324 ff. and 392 ff.

142 Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, 1998), 312 ff.; Peter Häberle, 'The Rationale of Constitutions from a Cultural Science Viewpoint' (this vol.).

at most.[143] The German courts have an even more restrictive policy.[144] Other countries' courts are somewhat more open, even if the justification and the limits of such an approach are contested.[145] The member state courts act as 'functional Union courts' when applying EU law, which is thus a special case.[146]

(d) The great number of *conflict-of-law questions*, which require a comparative law approach in private law and have led to a firm connection between the two, do not exist in administrative law. But with the internationalization of administrative relations, above all in economic and regulatory law as well as in environmental, social, and tax law, forms of transnational administrative cooperation that demand knowledge of foreign law have increased.[147] An administration can only decide whether, for example, 'appropriate safeguards' and 'effective legal remedies' exist in a third state and whether it is therefore, pursuant to art. 46 EU General Data Protection Regulation (GDPR), authorized to transmit personal data to this state, if it familiarizes itself with the state's law or can otherwise access reliable knowledge. Dealing with foreign law assumes a minimum standard of comparative experience. In this case, the results are not a mere interpretive aid supplementing other interpretive aspects but a fundamental element of the application of law, as they provide information for the evaluations that

143 Cf. Kischel (n. 21), § 2, mn. 53 ff.; decidedly rejecting this for administrative law Möllers (n. 17), § 3 mn. 41.

144 On this Hannes Unberath and Astrid Stadler, 'Comparative Law in the German Courts' in: Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Laws* (2015), 581 ff. For different observations cf. Andreas Voßkuhle, 'Constitutional Comparison by Constitutional Courts – Observations from Twelves Years of Constitutional Practice' (this vol.).

145 Cf. only Thomas Kadner Graziano, 'Is It Legitimate and Beneficial for Judges to Compare?' in: Andenas and Fairgrieve (n. 144), 25 (40 ff.).

146 National courts may only abstain from a duty to refer pursuant to art. 267 TFEU if the interpretation of the relevant rule of EU law leaves 'no scope for any reasonable doubt'. Part of this obligation is also to make sure 'that the matter is equally obvious to the courts of the other member states' CJ judgment of 6.10.1982 (case 283/81) mn 16 – C.I.L.F.I.T.

147 Christian Tietje, *Internationalisiertes Verwaltungshandeln* (2001), 171 ff. and 288 ff. (selected areas); Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (2005); Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (2007); Markus A. Glaser, *Internationale Verwaltungsbeziehungen* (2010). Transnational police law is a separate issue; fundamentally on this Bettina Schöndorf-Haubold, *Europäisches Sicherheitsverwaltungsrecht* (2010).

inhere in the norm.[148] To date, comparative law lacked this relevance to practice, that is to say, the direct significance for authorities and courts, but now its importance is becoming more apparent.[149]

3. Special Case: Legal Transplants

Legal transplants constitute a subject area in which theoretical and practical work is interwoven in especially intimate ways. The transplant itself is primarily a political process, in which legislation or the judiciary are driving forces.

The question to what extent components of one legal system can truly be transplanted into another remains controversial.[150] In its own estimation, comparative administrative law can contribute arguments in favour of both sides of this dispute.[151] In administrative law in particular, the connection to institutions and a particular dependence on context raise doubts about the possibility of legal transplants. Yet, the development of administrative law has seen an entire series of successful transplants.[152]

Instead of questioning the possibility of legal transplants in general, it is advisable to look more closely at the conditions in which a transplant oc-

148 In terms of the conflict of laws, what is at stake is answering preliminary questions in the context of applying one's national law; cf. Ohler (n. 147), 49 f.

149 Similarly, Schönberger (n. 3), § 71 mn. 6; See Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

150 References in Kischel (n. 21), mn. 38; Siems (n. 23), 196 f.; Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom', American Journal of Comparative Law 58 (2010), 583 (586-602); Margrit Seckelmann, 'Ist Rechtstransfer möglich? – Lernen vom fremden Beispiel', Rechtstheorie 43 (2012), 419 ff.; Günter Frankenberg, 'Legal Transfer' (this vol.).

151 On the following Schönberger (n 3), § 71 mn. 25 ff; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.).

152 Schönberger (n. 3), § 71 mn. 25; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.). Specifically on the influence of German administrative law, cf. Gonod (n. 15): on France; Irena Lipowicz, 'Einfluss des deutschen Verwaltungsrechts auf die Lehre des Verwaltungsrechts in Polen', Verwalt. 48 (2015), 365 ff.: on Poland; Francisco Velasco, 'Die Rezeption des deutschen Verwaltungsrechts in der spanischen Rechtsordnung', Verwalt. 48 (2015), 383 ff.: on Spain. An instructive presentation of numerous indirect processes in Javier Barnes (ed.), *Transforming Administrative Procedure* (2008).

curs or should occur as well as at the effects of reception.[153] Two examples may clarify that such an analysis demands a great degree of sensitivity in view of administrative law's special context dependence.

a) The Notice-and-Comment Procedure of the Administrative Procedure Act (APA)

Unlike most Continental laws on administrative procedure, the American Administrative Procedure Act of 1946 has a procedure for administrative rulemaking (§ 553 APA), which broadly comprises of three interrelated steps: (1) ex-ante public announcement of impending legislation or regulation (2) providing an opportunity for the public to comment (3) adopting regulation only after examination of the comments received and explanation provided.[154] The procedure is considered a crown jewel of American legal thinking and expression of a *pluralistic* understanding of the public good, which gives everyone the chance to participate in good legislation. It stands for transparency and deliberation. Its pleasantly open character suggests transplanting it also to administrative legal orders which have no or only rudimentary procedural requirements to date for the administration's rulemaking. Yet, the *initial situation of constitutional policy*, which prompted the creation of the notice-and-comment procedure in the USA, does not exist in Germany: in the USA, the 'independent agencies', which act largely autonomously, adopt the politically meaningful regulations. There is also no effective ban on delegation. The notice-and-comment procedure is supposed to compensate for the agencies' broad scope of action in this situation. In Germany, by contrast, it is the parliamentary responsible government, that has the jurisdiction to adopt regulations. Moreover, there are the restraints on delegation (art. 80 para. 1 cl. 2 Basic Law): 'content, purpose and scope' of the delegation have to be fixed by parliament itself. A compelling reason or even a constitutional obligation to 'readjust' delegated rulemaking procedurally thus does not exist.

On the other hand, the *German legal order* is not averse to taking over the APA model: While it is not customary for the public to participate in

153 On this Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in: Reimann and Zimmermann (n. 2), 441 ff.

154 Cf. only the portrayal in Susan Rose-Ackerman, in: Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, *Due Process of Lawmaking* (2015), 77 ff. and 98 ff.; Peter Strauss, 'US Rulemaking' in: Barnes (n. 152), 229 ff.; Schmidt-Aßmann (n. 8), 170 ff.

the rulemaking of the executive power, this is already provided in some areas, such as spatial planning law. Thus, it is not a foreign concept. The Joint Rules of Procedure of the Federal Ministries moreover prescribe that drafts of regulations must be communicated to central organizations and expert groups, albeit leaving their selection to the discretion of the minister in question. Such a model is no longer suited to the equality of democratic opportunities of participation. The changed communicative situation speaks for a reconstruction: Instead of classifying documents, the standard today is that everyone has the right to access information freely. Adopting individual elements of the notice-and-comment procedure certainly seems attractive to a modern procedural law of administrative rulemaking.

By contrast, judicial reviews of procedure should not be expanded. The courts should also not be encouraged to intensify their already existing reviews of rulemaking procedure. The American experiences suggest that caution is in order here. At least for a time, the courts placed demands that were too high. As a result, necessary lawmaking acts have often been excessively delayed. Even if there is no empirical proof for the reproach that legislation is increasingly 'ossified',[155] one should avoid the procedure becoming unattractive and the agencies attempting strategies of evasion.

b) Independent Agencies

The independent agencies are a second institution illustrating the problem of legal transplants. The USA is considered the country of origin.[156] The classic example is the Interstate Commerce Commission, founded in 1887 to regulate train tariffs. The New Deal expanded this type of agency especially, which today includes for ex. the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), the Federal Communication Commission (FCC), and the Consumer Product Safety Commission (CPSC). While it is broadly understood what an 'independent agency' means or what purpose it serves, there is no precisely delimited *legal form*. This is because independent agencies in the American system not only manifest themselves in diverse constellations, but also because their pos-

155 Cf. the references in Cane (n. 19), 301 (n. 17).

156 Briefly on the development there Peter Strauss, *Administrative Justice in the United States* (2nd edn, 2016), 178 ff.; in detail Marshall J. Breger and Gary J. Edles, *Independent Agencies in the United States* (2015).

ition is decisively determined by the American political system's premises of constitutional law and policy.[157]

In Europe, the idea has found a following above all in the regulation of network economies.[158] In part, it was adopted voluntarily; in part, the EU obligated the member states to do so in order to relieve the reduction of state monopolies from political pressure. In comparative law studies, the relevant experiences in the individual countries show how complex administrative organizational law in particular is and how difficult it is to predict the success of a legal transfer in this field:[159]Thus, despite the state's centralism, independent administrative agencies in France have for some time now belonged 'to the established and generally accepted structure of the regular administrative organisation.'[160] England, which one would expect to be especially close to American ideas of administrative organisation and regulation for various reasons, does indeed have a large number of independent agencies.[161] Yet these are tied to the ministries in various ways.[162]

157 Cf. the contributions in Susan Rose-Ackerman (ed.), *Economics of Administrative Law* (2007); comparing in precise terms Daniel Halberstam, 'The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 139 ff. (on the USA, Germany, and France); Martin Shapiro, 'A Comparison of US and European Independent Commissions' in: Rose-Ackerman, Lindseth and Emerson (n. 18), 234 ff.

158 On this Johannes Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsrechts', AöR 128 (2003), 558 (584 ff.); Matthias Ruffert, 'Verselbständigte Verwaltungseinheiten: Ein europäischer Megatrend im Vergleich' in: Hans-Heinrich Trute, Thomas Groß, Hans Christian Röhl and Christoph Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts* (2008), 431 ff. (comparing England, France, Germany, and EU).

159 Johannes Masing and Gérard Marcou (eds), *Unabhängige Verwaltungsbehörden* (2010); a summary in Gérard Marcou, 'Die Verwaltung und das demokratische Prinzip' in: *IPE* (n. 3), vol. 5, § 92, mn 38 ff.; Christoph Möllers, 'Verwaltungsrecht und Politik', there § 93 mn. 52 ff.

160 Thus Johannes Masing, 'Organisationsdifferenzierungen im Zentralstaat' in: Trute, Groß, Röhl and Möllers (n. 158), 428; similarly Eberhard Schmidt-Aßmann and Stéphanie Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen', ZaöRV 67 (2007), 395 (443 ff.); ultimately also Ruffert (n. 158), 438 f.

161 On the Non-Departmental Public Bodies (NDPBs) Paul Craig, *Administrative Law* (7th edn, 2013), under 4-004; Ruffert (n. 18), 434 ff.

162 Cf. Craig (n. 161), under 4-011 and 4-017 ff.

In Germany, the problem of independent agencies is treated contingently to a great extent: The idea of an independent federal bank has positive connotations. The data protection officers' independence is recognized as well. But apart from that, agencies that work without instructions meet with considerable constitutional misgivings. Accordingly, the provisions of EU law establishing the independence of regulatory agencies for certain decisions have been adopted reluctantly.[163]

Apart from such external difficulties, of course one must ask whether independent agencies are really a ubiquitously applicable type of modern administrative law. Their history and their function are very closely connected to the US governmental system and its understanding of society. In the absence of a constellation that at least resembles the American field of tension between the parliament and the president, the concept remains vague. For it gains its force from a competitive situation, which effectively also guarantees a minimum of control. At any rate, the agencies in the EU administration can be compared with the US independent commissions only with difficulty.[164]

This does not mean that *decouplings* from the central authorities would not be appropriate for certain administrative tasks. Most administrative legal orders have these decouplings. One such area is expert risk assessments. But these organizational structures must be legitimated and structured independently. A general distrust of an outmoded agency system and the hope of being able to pursue more progressive politics with new organizational forms do not suffice.

H. Conclusion: Comparative Administrative Law – A Process of Shared Learning

The treatment of legal transplants once again clarifies the current tasks of comparative administrative law: It does not correspond to the self-understanding of developed administrative legal orders to take over legal institutions or regulatory systems *in toto* from another system. Ideologically charged eagerness to reform is entirely misplaced. In administrative law,

163 On this with further references Markus Ludwigs, 'Bundesnetzagentur auf dem Weg zur independent agency?', Verwalt. 44 (2011), 41 ff.

164 On this Shapiro (n. 157), esp. 245 f.; Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (2014).

it already fails because the legal field as such is inherently grounded. Instead, the starting point of all practical comparative law must be 'the similarity of the issues to be solved'.[165] Such work requires food for thought and arguments for 'regulatory' or 'institutional choice'. The modern form of comparative administrative law is therefore '*shared learning*'.[166] This concept refers to communicative processes, which activate reflection in all participating legal systems. That applies also to Union administrative law, whose legislative preparation and judicial follow-up (art. 267 TFEU) can be understood as institutionalized forms of learning.

Comparative law makes arguments but does not force. It prompts a cautious review that weighs advantages and disadvantages and a transformation of outmoded *acquis* and dogmas. It is sobering to look at other legal systems. For it becomes apparent that there are regularly several ways to solve a problem. This realization prevents entrenched hubris just as much as continuing self-doubt. Many an instance of media frenzy would be calmed if one considered other, constitutionally similarly oriented legal systems. But above all, comparative law is a source that nourishes the adaptability of the *law* and the vibrancy of *legal scholarship*. The fundamental concern of both is learning.

165 Schönberger (n. 3), mn. 11; see Schönberger, 'Comparative Administrative Law: Particularities, Methodologies, and History' (this vol.); also Bell (n. 2), 1257 (1266 f.).

166 On this Schmidt-Aßmann and Dagron (n. 160), 395 f.