The Transformation of Administrative Law in Europe
La mutation du droit administratif en Europe

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The Transformation of Administrative Law as a Transnational Methodological Project

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A. Introduction

At first glance, a researcher familiar with the thorough debate about the reform of administrative law going on in Germany¹ might be deceived into believing that a similar discussion was undertaken elsewhere in Europe, in particular in the other large Member States such as Great Britain and France. Together with the unfortunate effects of the language barrier which should not be underestimated, this might be the reason for the deficient reception of that debate in Europe.² In a way, the German discussion is threatened with isolation.

However, it appears to be worth while to undertake a comparative analysis. Although an overall debate on reform might be absent in other countries, there is considerable reflection about new dimensions of administrative

¹ A (slightly different) German version of this paper is published in Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (eds.), Methoden der Verwaltungsrechtswissenschaft (Baden-Baden: Nomos 2004), at 165. I am grateful to both of them as well as to Prof. Dr. Andreas Voßkühle, Freiburg, for their support and to Prof. Dr. Olivier Jouanjan, Strasbourg, and Dr. Stefan Mückl, Freiburg, for their help in collecting the relevant French material. I am also grateful to Anne Daut and Romy Schroeder for their linguistic support. This version has been updated.

² Cf also the presentation by Mahendra P. Singh, German Administrative Law in a Common Law Perspective (Berlin: Springer 2001), published by the (Heidelberg) Max Planck Institute for Comparative Public Law and International Law, which does not mention the reform debate.
law in Britain as well as in France. In any case, it can be presumed that the judicial and extra-judicial framework for reform is similar in all Member States and that it has caused similar modifications in the respective administrative legal systems. This article is thus putting forward the thesis that administrative modernisation, constitutionalisation and Europeanisation with their manifold facets have influenced administrative law and administrative legal scholarship in different legal systems in a similar way, with comparable results. This subject will be at the centre of the analysis (below D). It will be preceded by a short glimpse at the different starting points in the administrative legal systems and their corresponding research and teaching with a brief introduction into what has been achieved – and failed to be achieved – in the German debate (below C).

It is further presumed that the reform of administrative law is a common European methodological phenomenon which can be abstracted from the single processes of modernisation taking place in the different legal systems, although these processes are not yet interlinked by a transnational discussion. There is thus a presumption of convergence ‘below the surface’ (below E). Consequently, the result of this developing ‘subcutaneous’ network can only be formulated as what is to be desired from further research (below F).

B. The idea of comparison in administrative law

I. Comparison of methods: A vacuum of methodology

The first obstacle, however, lies in the absence of a generally recognised method for the comparison of methods. In spite of the importance attributed to a comparative perspective, methodology has not yet been included into any comparison. Given this lack of a methodological basis, there is no choice but to create it.

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2. Comparative law and public law –
comparative law and administrative law

(a) A contradictory start

This state of affairs is also due to the ambivalent position of comparison in
matters of public law. There still appears to be a search for orientation. On
the one hand, it is a platitude to affirm that the comparative perspective is
underdeveloped with respect to public law, in particular administrative law. On
the other hand, neither the practical necessity for comparative analyses
nor their existence can be denied – whether in constitutional law going as
far back as Aristotle, or in administrative law, where comparison lies at the
origins of German administrative legal reasoning in the work of Otto Mayer.
Although in comparative legal studies public law ranks in second place

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6 See only Rudolf Bernhardt, ‘Eigenheiten und Ziele der Rechtsvergleichung im
öffentlichen Recht’, (1964) 24 Zeitschrift für ausländisches öffentliches Recht und
Völkerrecht – Heidelberg Journal of International Law 431 at 431.

7 George A. Bermann, ‘Comparative Law in Administrative Law’, in: L’État de droit –
Mélanges en l’honneur de Guy Braibant, (Paris: Dalloz Sirey 1996), 28 at 30 et seq,
enumerates the reasons for this: the non – ‘mainstream’ position of administrative
law, the lower level of transnational exchange (compared with private economic
law), the absence of universality in legal rules, the lack of coherence (no con-
sensus about the division in ‘sub-fields’). On the marginal position of comparative
law in general see Georgios Trantas, Die Anwendung der Rechtsvergleichung bei der
Untersuchung des öffentlichen Rechts (Dresden: Dresdner Universitätsverlag 1998),
19.

8 Karl-Peter Sommermann, ‘Die Bedeutung der Rechtsvergleichung für die Fort-
entwicklung des Staats- und Verwaltungsrechts in Europa’, (1999) 52 Die Öffent-
liche Verwaltung 1017 at 1018, and much earlier Joseph H. Kaiser, ‘Vergleichung im
öffentlichen Recht – Einleitung’, (1964) 24 Zeitschrift für ausländisches öffentliches
Recht und Völkerrecht – Heidelberg Journal of International Law 391 at 391. Accord-
ing to Trantas (n 7 above), at 13, comparison is on the rise in public law. It is
accompanied by comparative administrative science on the level of political
sciences, cf already Roman Schnur, ‘Über Vergleichende Verwaltungswissen-

9 Kaiser (n 8 above), at 392; Trantas (n 7 above), at 16, footnote 3, explaining that
Aristotle had compared 158 constitutions in The Constitution of Athens.

10 Otto Mayer (1846-1924), professor of law in Strasbourg and Leipzig, developed the
leading textbook at the foundations of German administrative law (Deutsches
1924) from an analysis of the French system (Theorie des französischen Verwal-
tungsrechts, 1917). Cf also Möllers (n 1 above), at 53 with footnote 226, and the
classical work on English administrative law by Rudolf Gneist, Das englische Ver-
behind private law, there are manifold publications about single problems or particular comparative elements in certain areas of public law. Recently has attempts have been made to strengthen the comparative perspective in public law, either by the reluctant adoption of the categorisation in *familles de droit* (Rechtskreise) from private law, or by trying to systematise public law using comparative aspects.

**(b) A variety of methods in comparative administrative law**

These efforts at least demonstrate the variety of methods in comparative administrative law. There is no need to step back from recognising that the comparative method in public law also has to combine elements of description, history, conceptual dogmatics, typology, or legal and social functionalism. Looking at the comparison of methods, the importance of the historical and the legal-functional element is obvious. The first is important to explain methodological particularities which cannot be understood without a look at their genetic formation, the second to illuminate the interrelationship between the concepts and institutions within a legal order. Thus, the ordinary concentration of comparative law upon the sociology of law is considerably diminished.

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11 This may be proved by the recent practice of the German association of public law professors to face various subjects from a comparative perspective (beyond Austria and Switzerland); cf Werner Heun, *Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit*, (2002) 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 80 and Astrid Epiney, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, *ibid.*, at 362.


13 Trantas (n 7 above), at 87 et seq.

14 On this plurality of methods Trantas (n 7 above), at 41 et seq.


16 The stress on the sociology of law is criticised by Thomas Groß, *Die Autonomie der Wissenschaft im europäischen Vergleich* (Baden-Baden: Nomos 1992), at 30. Cf the
Generally, comparative studies – whether in private or public law – are undertaken in four steps: (1) First of all, the position and policy basis of the own legal order is located and explained. (2) Following this, the relevant foreign law needs to be detected and interpreted, before (3) the material can be arranged and systematised. Finally, (4) the results have to be evaluated in terms of legal policy (efficiency, practicability, ‘justice’).

(c) Comparison of methods in a variety of methods

With some slight modifications, this procedure can be applied when trying to develop a methodology for the comparison of methods. In becoming aware of the position of one’s own legal system (step 1), the development and reform of methods has to be in the centre of interest, and the look at foreign legal systems (step 3) has to concentrate less on the content of principles and rules (and on their sometimes tiresome description) than on the relevant methods. The target of comparing the measure of change in methodology can only be attained by establishing a relationship between the initial and the final situation of the relevant methodological development, and this is exactly what the last step (step 4), the evaluation of results, is aimed at, thus finding a proper jurisprudential basis.

There seems to be no other way than formulating a basis for comparing the methods of administrative law against the background of a variety of methods. Though affected by a touch of arbitrariness and lacking practical approval, this approach has the advantage of creating some resistance to methodological mistakes, given the wide discretion it allows for. Fortunately, there appears to be neither a necessity for a ‘battle of methods’ nor a change of paradigm.

Finally, the comparison of methods in administrative law is advantageous in relation to the comparison of the law as such, as the effects of political orientations are substantially lower, though not entirely absent. The more critical discussion of new concepts inspired by social sciences by Anne Peters and Heiner Schwenke, ‘Comparative Law Beyond Post-Modernism’, (2000) 49 I.C.L.Q. 800, in particular at 829 et seq.

17 Cf Trantas (n 7 above), at 47 et seq.


20 As to the obstacles in comparative public law resulting from this cf already Bernhardt (n 6 above), at 432; Ulrich Scheuner, ‘Der Einfluß des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung’, (1963) 16 Die Öffentliche