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≡ The Oxford Handbook of
COMPARATIVE
ADMINISTRATIVE LAW

THE OXFORD HANDBOOK OF

**COMPARATIVE
ADMINISTRATIVE
LAW**

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EDITORS' PREFACE

RECENT decades have witnessed a flourishing of the comparative study of public law. While private law has long dominated the field of comparative law more generally, this is changing rapidly. Focusing on collective volumes, notable contributions have included scholarship in the fields of comparative constitutional law (e.g. Ginsburg and Dixon 2011; Rosenfeld and Sájo 2012; Bogdandy, Cassese, and Huber 2006–20), comparative administrative law (e.g. Rose-Ackerman and Lindseth 2010; Bogdandy, Huber, and Cassese 2016; Rose-Ackerman, Lindseth, and Emerson 2017), and comparative international law (e.g. Roberts et al 2018; Roberts 2017).

This *Oxford Handbook of Comparative Administrative Law* is intended to expand the field of comparative administrative law (CAL) still further both in relation to methodology and in cross-systemic content. The *Handbook* aims to explore and extend our understanding of a broad range of issues of both historical and contemporary import, from origins of particular administrative law traditions to the role of information and information management in today's digitalizing legal systems. In so doing, the various contributions illustrate the complex relationships between administrative law and other areas of public law, notably constitutional law and international law. Together, the contributions show how the law governing the exercise of public administrative power has developed over time and in different legal orders, shedding light on the nature and role of public law at national, supranational, and international levels. These various orders, rather than being regarded as strictly separated, distinct entities may be better understood as a spectrum of possibilities for exercising and controlling public power. In fact, one of the great advantages of using the angle of CAL for the study of today's public law is its potential to explore and explain links between these different levels of governance in an integrated and dynamic manner.

Like comparative law generally, CAL presents many challenges: pedagogical, methodological, historical, systemic, and linguistic, for instance, to say nothing of finding the large resources needed for robust comparative legal research. This *Handbook* seeks to address itself to these many challenges, as well as others. Following this Preface, the volume is divided into several parts. Part I is concerned with beginnings and foundations of comparative administrative law as a topic of scholarly interest. It therefore raises and introduces the issue of how to individuate 'units of comparison', which is one of the topics dealt with in Part III. In contrast to a long tradition, developed in comparative private law research, of dividing up the world's legal systems into 'families' such as common law, civil law, and others, the historical treatment of CAL in this volume takes inspiration from an understanding of legal phenomena, in terms of 'traditions' of legal

thought, most strongly associated with Patrick Glenn (Glenn 2017). The *Handbook* adopts a modified version of Glenn's approach that combines focus on three particularly rich and longstanding bodies of thought—Anglo-American (Cane), French (Mestre), and German (Sommermann) with an aspiration to extend our gaze beyond the Anglo-European-American intellectual axis to other parts of the world: China (Chen) and the Middle East (Mallat), for instance.¹

Part II turns to methodological issues. There is a large and growing literature on the methods and objectives of comparative law. For centuries, legal comparison has been directed to at least three distinct ends: improved understanding of law by study of similarities and differences between various legal systems and legal traditions; policy-motivated searching for 'the best law'; and making sense of processes of 'spontaneous' diffusion and deliberate transplantation of law from one legal system or tradition to another. The chapter by Prado in Part II concerns itself with these traditional goals. The chapters by D'Alberti, Ziller, and Chiti address methodological issues: how to choose units of comparison, how to undertake comparison between sub-national units within complex, national polities; and how to compare legal systems that operate in different languages (or even legal systems that nominally use the same language but with legally significant local variations of culturally-specific meaning). Through chapters by Bertelli and Cece, Lindquist and Searle, and Garoupa and Amaral-Garcia, Part II further explores the relationship between comparative administrative law and cognate fields: public administration, political science, and law and economics. Cutting across all these chapters are the questions of time and a distinction between diachronic and synchronic legal analysis. The idea that history is a mode of comparison across time rather than location, diachronic rather than synchronic, is the starting point for Sordi's chapter in Part II.

Part III reflects one of the *Handbook's* underlying assumptions, namely that there are significant relationships between public law, institutions of government, and practices of politics. The chapters in this Part are primarily concerned with this relationship, which is cashed out in terms of types of governmental regimes: parliamentary (Ip), presidential (Bocksang Hola), semi-presidential (Boyron), and authoritarian (Yap); and regimes beyond the nation-state (della Cananea). Comparison may, of course, focus on units that display the same or similar regime types. If so, regime type is likely to play a lesser explanatory role. On the other hand, when the units of comparison manifest different regime types, the comparison is enriched by paying attention to the possible influence of this factor on public law. This is more obvious in the case of constitutional law, which concerns itself primarily with governmental systems as a whole. It is, perhaps, easier for administrative lawyers to neglect variations in regime type because they focus on only one of the major sets of institutions that constitute governmental regimes. The assumption underlying this Part arises, to some extent, out of dissatisfaction with the analytical and pedagogical distinction between areas of public law, notably constitutional law, administrative law, and public international law. The separate origins and

¹ Chapters on Africa and Latin America were also planned but sadly did not come to fruition.

development of these categories can be traced and explained historically. For instance, in Western traditions at least, the emergence of constitutional law as a category of thought fitting our modern understanding is often traced to the late eighteenth century, before the social and political conditions that led to the development of modern conceptions of administrative law had materialized. This is not the place to explore this theme further. It is enough to observe that comparative study of public law can promote sensitivity to the relevance of regime design to the exercise and control of administrative power.

The chapters in Part IV pursue this theme by considering some basic concepts that are as relevant to other areas of public law as to administrative law: the idea of administrative power itself (Biddulph), separation of powers (Strauss), the rule of law (Napolitano), accountability (Psygkas), the public/private distinction (Auby), and democracy (Ramraj).

The following three Parts then home in more narrowly on administration and administrative law, dealing with the creation ('constitution') and allocation of administrative power (Part V.1), its functions (Part V.2), and its control (Parts VI and VII). The two chapters in Part V.1 are concerned respectively with national administration (Ruffert),² and supranational and transnational administration (Mendes).

The challenge of distinguishing between various kinds of administrative institutions and functions is further explored in the second half of Part V. Here we have chosen to organize the subject matter in two distinct ways: first, in terms of rule-making (Stack), adjudication (Asimow), and implementation (Scott), reflecting traditional tripartite separation-of-powers theory; and secondly, in terms of three areas of government activity: regulation (Fisher), security and foreign relations (Dickinson), and information management (Finck and Spiecker). The presence of two chapters on information highlights the increasing relevance to administration of the law of information. Of course, the choice of these three areas in no way implies that other governmental functions are not equally worthy of comparative study.

Parts VI and VII are concerned with control of administrative power and administrative institutions rather than their creation ('constitution') and functions. However, the distinction between creation and control is made more for clarity of presentation and pedagogic efficiency than as a result of a deeply held conviction about its robustness and significance. Indeed, a strong argument can be made that there is a significant relationship between the way public power is allocated and the ways it is controlled (Cane 2016), a belief reflected in Part III of the *Handbook*. Part VI focuses primarily on institutions of control, whereas Part VII examines 'grounds' of control. As to the former, the key institutions include legislatures (Metzger), courts (Thio and Fairgrieve), 'tribunals' (Bradley), ombudsmen (Harden), and auditors (Brenninkmeijer). The chapters on courts also recognize a distinction between review (both 'judicial' and 'non-judicial') of administrative decision-making, and the imposition of civil and criminal liability for such decisions.

² This chapter focuses on the juridical relationship between executives and bureaucracies. A separate chapter on 'third-party government' and outsourcing was planned but did not come to fruition. Chapter 23 (Auby) deals with some aspects of this topic.

'Grounds of control' in Part VII are conceptualized in terms of 'norms and values of administration'. This nomenclature rests on the idea that control of the exercise of administrative power may be either prospective ('ex ante') or retrospective ('ex post'). It can be argued that this distinction is important for understanding the operation of different modes of control such as 'checks-and-balances' (characteristically prospective and preventative) and 'accountability' (characteristically retrospective and reparative). Terminology used to refer to the various norms and values is notoriously unstable and variant between legal systems. Here, they are grouped into seven categories of norms and values concerned, respectively, with (1) procedure (Barnes); (2) reasoning (Wilberg); resolution of issues of (3) law (Craig), and (4) fact (Daly); (5) substantive 'reasonableness and proportionality' (Mathews); (6) openness and transparency (Reichel); and (7) recognition and protection of 'rights' (Bignami).

The landscape of comparative administrative law is still largely a green field open for development. The chapters in Part VIII look to the future with an eye, in particular, on methodology (the respective contributions of Dotan and Lindseth) and theoretical frameworks (those of Hoffman and Huang). In her final, overview chapter Susan Rose-Ackerman concludes by expressing the 'hope that, going forward, professors of administrative and public law will engage in comparative work that seeks to connect the doctrines of administrative law and the practices of the regulatory/welfare state to democratic values based on transparency, participation, and public reason-giving'.

The essays in this *Handbook*, both individually and collectively, provide various views of a 'cathedral' (Calabresi and Melamed 1972). Admittedly, there are many other cathedrals and many possible vantage points. We, the editors, are responsible for the choice of topics that are surveyed and for the selection of individual authors invited to participate to present their particular perspectives. In reviewing the chapters, we find that today's public law is a field with blurry boundaries. Distinctions between, for example, constitutional law and administrative law or between sub-national, national, supranational, and international law remain subject to debate. This is not least a result of the variety of sources of law applicable to administrative action, which include not only constitutional provisions and basic political norms but also substantive, statutory, and non-statutory principles, and fundamental individual rights at the base of the legal order, all of which permeate the entire legal system, including, especially, its administrative organization, procedures, and decision-making.

Therefore, we are proud of the fact that the chapters collected here offer a multitude of possible pathways to gaining understanding, and reflecting upon possibilities, of CAL research, its origins, traditions, and meanings. By using comparative lenses, we offer tools for studying the outcomes of different historic trajectories, structural designs, conceptual definitions, and—sometimes complementary, sometimes contradictory—modes of thinking about public law and public functions. The book's contributions also show how much the inter-related multi-level legal systems of this world depend on a firm understanding of 'foreign' legal orders. Administrative law is an important tool for regulating the exercise of public power and its comparative study reveals a great degree of diversity in thought about what public power is and how its exercise can be properly controlled.

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PART I

BEGINNINGS

CHAPTER 1

AN ANGLO-AMERICAN TRADITION

PETER CANE

1.1 TRADITION

THIS chapter explores the idea of a ‘tradition’ of comparative administrative law in the trans-Atlantic Anglosphere. The concept of ‘a tradition’ is both open-textured and contested (Glenn 2014, ch. 1). However, for present purposes it is enough to adopt Patrick Glenn’s definition of a tradition as a narrative ‘that allows our predecessors to speak to us, with more—or less—insistence’ (Glenn 2014, 2). A tradition projects the past into the present and relates the present to the past. In Glenn’s opinion, a tradition ‘is inherently normative: it provides present lessons as to how we should act’ (Glenn 2014, 17); and so tradition, he says, is not history (Glenn 2014, 5). By contrast, this chapter is primarily about how comparative administrative law has been, and is, done, not how it can and should be done.

The chapter is divided into three main sections. The first deals with a period from the early eighteenth to the late nineteenth century. At this time, Western comparative public law was predominantly an Anglo-European affair. England was the main focus of comparative attention, and the most influential observers were French and German, including the Baron Montesquieu, Jean-Louis De Lolme, and Rudolph Gneist. The work of Montesquieu and De Lolme predates invention of the modern concept of ‘constitutional law’, which may be traced to the end of the eighteenth century. As a result of early centralization and bureaucratization of power in European polities, a distinct category of ‘administrative law’ appeared on the Continent earlier than it did in England or America. Gneist’s work witnesses the emergence of a distinction between constitutional law and administrative law.

The second section focuses on a period between about 1880 and 1940, a time of heavy intellectual traffic between England and the US, in which we may locate the birth of an identifiably Anglo-American tradition in comparative administrative law. It was at

this time that English and American administrative law scholars began comparative engagement with both European systems and each other's. A leading figure in this development (and arguably founder of the tradition) was Albert Venn Dicey. In the Anglo-European phase, scholars concerned about executive power pinned their hopes for its control mainly on legislatures. In the Anglo-American phase, courts displaced legislatures as the main repositories of such hopes.

The third main section of the chapter is concerned with the impact on the Anglo-American tradition of the US Administrative Procedure Act (APA). The APA marked the maturation of American administrative law as a legal category concerned above all with judicial control of administrative power. One result was that scholars (subliminally) began to think of English and American administrative law not as two interpretations of a common tradition but as two distinct sets of solutions to the shared problem of controlling the executive/administration. Another result was the divorce of administrative law from constitutional law in the scholarly tradition, both domestically and comparatively.

1.2 THE PRE-HISTORY OF THE ANGLO-AMERICAN TRADITION

1.2.1 Montesquieu

Charles Secondat, the Baron Montesquieu, may justifiably be credited with founding the Anglo-European tradition of comparative administrative law. A French aristocrat, he lived in England for a short period between 1729 and 1731. At this time, the post-Revolutionary English system of government was an object of admiration and envy in Europe, England having been the first country in the region to make decisive moves towards what we would now call 'constitutionalism'. Montesquieu's account of the English system of government—the most famous aspect of *The Spirit of the Laws* (Montesquieu 1989) – instantly became, and remains to this day, one of the tracts most formative of the thought-worlds of government, politics, and law. In different ways, it was highly influential in France and America in the latter half of the eighteenth century, and the ideas it expressed are now part of the bedrock of public law theory.

As already noted, Montesquieu wrote long before the modern concepts of 'constitutional law' and 'administrative law' were invented. As a distinct category of thought, 'constitutional law' was made imaginable by the appearance of the first national, codified constitutions in the late eighteenth century (Gosewinkel 2018). In the Anglosphere, the category of 'administrative law' was invented to address the growth of bureaucracies in the industrialized world from the late nineteenth century onwards.

In Montesquieu's account, the word 'constitution' refers to the 'nature', or 'shape' or 'structure' or 'make-up' of relations between the governors and the governed in a polity.

For him, the ‘laws of the constitution’ would have been the aspects of those relations that were ‘necessary . . . deriving from the nature of things’ (Montesquieu 1989, 3). It does not follow, of course, that in Montesquieu’s day, England¹ lacked law relating generally to the governance of the polity or, more particularly, to the creation, allocation, and control of administrative power (as we would now call it). Only about forty years before Montesquieu’s visit to England, the Glorious Revolution of 1688 had fundamentally re-adjusted various aspects of the formal relationships between the main organs of central government: the monarchy, the Houses of Parliament, and the courts. In particular, royal power and influence over the exercise of legislative and judicial power were very significantly curtailed, and ‘sovereignty’ shifted from the monarch to the (monarch-in-) Parliament. In the eighteenth century, it has been said, the House of Commons ‘had two main functions: holding ministers to account; and redressing the people’s grievances . . . In the years which immediately followed the revolution . . . [m]uch energy in parliament was devoted to examining the activities of the executive government’ (Harris 2009, 176; see also Jupp 2006, ch. 3). As the century progressed, Parliament engaged increasingly in the essentially administrative business of licensing and regulating large, infrastructural projects by enactment of ‘local’, ‘private’ (as opposed to ‘general’, ‘public’) legislation.

Beyond the centre, local administration (in areas such as law and order, regulation, and welfare) was conducted, notionally at least, on behalf, and in the name, of the monarch, most importantly by Justices of the Peace (JPs) who, from the time of the Tudors, had been ‘the pillars of local government and the favourite agents of the central government in the localities’ (Chrimes 1965, 137). In addition, various appointed commissions and boards played important roles in local administration, dealing with matters such as drainage and sewerage, and the relief of poverty. For about a century, until they were abolished in 1641, conciliar courts (notably Star Chamber) exercised significant judicial control over central and local government. Early in the seventeenth century, the Court of King’s/Queen’s Bench began adapting the existing administrative writs of *certiorari*, *mandamus*, and prohibition as new judicial mechanisms for controlling local administration in the name of the monarch (Henderson 1963). In the interstices of the remedially-oriented writs, the grounds of judicial review, recognized today, were taking shape (Craig 2015, 25–95). The basic justification for central court intervention was to ensure that decision-makers acted legally, within jurisdiction; and provided they did, errors ‘within jurisdiction’ could be effectively challenged only if obvious ‘on the face of the record’ (Murray 2016). Following the abolition of the conciliar courts, central control of local administration rested chiefly in the hands of the Court of King’s Bench until the nineteenth century, when Parliament started creating ‘tribunals’ and inspectorates to monitor and discipline the implementation of statutory regimes of regulation and welfare (Port 1929, 54).

¹ Although relatively little is yet known about the law of public administration in the American colonies in the eighteenth century, there is no reason to think that it did not substantially resemble English law at the time, adjusted to local conditions. By the beginning of the eighteenth century, English law was established as the formal legal regime in all the colonies.

There are good reasons to think that Montesquieu knew, at most, very little about the English law of administration in his day. For one thing, he identified administrative power with the functions of royal government at the centre (making war and peace, sending and receiving ambassadors, establishing security, and preventing invasions (Montesquieu 1989, 157)). He did not mention local administration. Nor, apparently, did he realize that a significant portion of the business of eighteenth-century parliaments (local, private legislation) was essentially administrative. Moreover, in relation to central administration, he misled readers by describing the monarch's basic function as 'executing' the will of Parliament or 'the general will of the state' (ibid, 158). However, the Glorious Revolution had had very little impact on the monarch's legal ('prerogative') powers of unilateral action, especially in foreign affairs. It is true that the Revolution established the principle that the monarchy was dependent on Parliament not only for its very existence but also for funding of all its public activities; but still, it was neither directly dependent on, nor answerable to, Parliament for the way it exercised its powers of unilateral action.

Secondly, Montesquieu conceived of the function of courts (either in fact or in ideal theory, or both) as merely being mechanical application of the law. In fact, however, the common law courts were the most significant source of general legal rules in the English system of his day. It was not until a century later that Parliament began enacting significant amounts of general, public (as opposed to local, private) legislation. Moreover, since 1688 the central courts had enjoyed a monopoly power of statutory interpretation to the exclusion of both the monarch and Parliament. Also, as we have seen, from the early seventeenth century, and especially after 1641, they played a very significant role in controlling local administration.

In summary, then, Montesquieu overestimated the role of the legislature in the English system and underestimated the significance of the functions of the executive and the courts. Nonetheless, Montesquieu's chief preoccupation was control of the exercise of administrative power. As a member of the French aristocracy, he was looking for ways to prevent monarchical absolutism and to promote 'liberty' (Carrithers 1977, 66–75). Montesquieu thought that the English system was the only system in the world the goal of which was the promotion and preservation of liberty. In his view, two aspects of its design were of particular importance. First, in the English system, governmental power was divided between three separate organs—the legislature, the executive, and the courts. Administrative power was the province of the executive alone: although the legislature should have 'the faculty to examine the manner in which the laws it has made have been executed', it should not 'have the right to check ['veto'] executive power' (Montesquieu 1989, 162). Judicial power was reposed in courts independent of both Parliament and the monarch. Judges, he believed, should be chosen from amongst the people, and their only ('invisible and null': ibid, 158) task was mechanically to apply 'the precise text of the law' (ibid) to the resolution of disputes and the punishment of crimes. There is no liberty, Montesquieu asserts, 'if the power of judging is not separate from legislative power and executive power' (ibid, 157). If judicial power 'were joined to the legislative power, the power over life and liberty of the citizens

would be arbitrary'; and if it 'were joined to executive power, the judge could have the force of an oppressor' (ibid, 157).

Secondly, however, legislative power (which Montesquieu seems to have considered the greatest and most important of the three types of power) was shared between the three 'estates of the realm': the monarch, the aristocracy (in the House of Lords), and the people (in the House of Commons). This sharing of legislative power enabled the Lords to 'check' (put obstacles in the way of) the Commons (and vice versa), Parliament to check the monarch, and the monarch to check Parliament.

For Montesquieu, then, the keys to control of administrative power were, first, to share legislative power amongst three 'estates of the realm' (or, in more modern terms, 'constituencies', understood in a social-political rather than a technically electoral sense), giving each, including the executive monarch, (only) limited power in the legislative process; and secondly, to create an independent judiciary, separate from both the legislature and the executive, the only role of which was mechanical application of law made by others. The first key was seized by the American Founders and the second was given an especially austere interpretation by the French Revolutionaries. Today, the dynamics of the relationship between the executive and the legislature provide the basis for classification of governmental regimes into parliamentary, presidential, and semi-presidential categories. Concerning the judiciary, modern theory distinguishes between judicial independence and separation of judicial power. In England, Montesquieu's chief conceptual legacy was judicial independence. William Blackstone stressed its importance in his 'domestication' of Montesquieu for English consumption (Allison 2007, 79–82); and it provides the conceptual foundation for AV Dicey's account of the rule of law (Dicey 2013, 94–119). Rigid separation of ('ordinary') judicial power from executive and legislative powers remains a feature of the French system and, in a very different context, of the Australian system (Cane 2009, 57–62). Montesquieu's keys provide parameters for contemporary debates in comparative, as much as non-comparative, public law.

But this is not Montesquieu's only claim to fame: he may plausibly be identified as the first, major socio-legal, or 'law and society', scholar. In his view, '[l]aws, taken in the broadest meaning, are the necessary relations deriving from the nature of things' (Montesquieu 1989, 3). The laws of nature, he said, 'derive directly from the constitution of our being' (ibid, 6). He divided positive laws into three categories that we would now refer to as international law, (domestic) public law, and (domestic) private law. Public law is concerned with 'the relation between those who govern and those who are governed' (ibid, 7). The law 'most in conformity with nature is the one whose particular arrangement best relates to the disposition of the people for whom it is established' (ibid, 8). 'Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another' (ibid). The disposition of the people is affected by matters such as 'the *physical aspect* of the country [original italics] ... climate ... the location and extent [of the terrain] ... the way of life of the peoples ... the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners' (ibid, 9). To the modern ear, Montesquieu's

understanding of the relationship between law, its subjects, and its environments, sounds rather too deterministic and, in some respects at least (such as climate) distinctly odd; but this does not undermine Montesquieu's intellectual achievement in conceiving of politics, government, and law as related to one another, and to their 'contexts' and 'environments'. Montesquieu's contextual approach also had a significant historical strand and—even more importantly for present purposes—a major comparative element. Montesquieu's intellectual imagination encompassed two millennia of time and the farthest corners of the world known to Europeans. Historically and contextually sensitive comparison of laws provides the gold standard for the modern scholar.

1.2.2 Montesquieu's Successors

As we have seen, for Montesquieu, the genius of the English constitution resided in its division of powers between three distinct institutions, each exercising a different characteristic power, combined with the sharing of legislative power in a system of mixed government. His main preoccupation was how to design a constitution so as to forestall monarchical despotism. In the result, he underestimated the relative importance in the English system of both the executive and the judiciary.

By contrast, in *The Constitution of England*, first published in 1771 (De Lolme 2007), Jean-Louis De Lolme put much more emphasis on 'separation of powers' (as opposed to mixed government) (Lieberman 2006, 336–40). This allowed him to champion the advantages of a strong (monarchical) executive which, nevertheless, being unitary, could be more easily controlled than plural counterparts; and, in contrast to Montesquieu, to attribute to the judiciary (and the common law: Lieberman 2006, 340–6) a more realistically active role in maintaining stability in the system. Whereas Montesquieu had chronicled and admired a hybrid system of institutional/functional and socio-political division and sharing of power, De Lolme (who inspired Americans, such as Andrew Hamilton, who favoured a strong executive: McDaniel 2012, 44; Scheuerman 2005) laid the groundwork for a predominantly functional theory of government suited to a changed world in which 'estates of the realm', as political forces, would be wiped out by the incoming tide of democracy. De Lolme's other important innovation was to extend his discussion beyond England by analysing the role of English government in the affairs of Scotland and Ireland and, further afield, those of the colonies (McDaniel 2012). In this context, De Lolme was strongly unionist and imperialist.

We may, then, credit, or blame, De Lolme for marginalization of the 'mixed government', socio-political-power-sharing aspect of the tradition founded by Montesquieu. Of course, power-sharing lies at the bottom of the 'checks and balances' insisted upon by the American Founders. However, they wanted public power generally (not just legislative power) to be shared amongst institutions, each of which would characteristically exercise one or the other of Montesquieu's trio of public powers. They seem not to have imagined those institutions as each representing a different socio-political constituency. Ironically, such an approach offers a plausible account of federalism—an American

invention about which, of course, Montesquieu said nothing. The individualistic focus of democracy, coupled with free-market economics, tends further to suppress group-based claims; and this, we may speculate, might help to explain modern versions of democracy, such as populism and other appeals to ‘those left behind by the political process’.

Montesquieu’s and De Lolme’s analyses of the English constitution were unashamedly tendentious. Both observers used historical and comparative materials to support and justify their respective, ideologically-driven, understandings of English government and law. Through one ideological lens, Montesquieu looked for and found a model of ‘moderate’, non-despotic, liberty-enhancing government—a sort of monarchical republic. Through another, De Lolme sought and found a model of stability resulting, he thought, from the fact that in England, a unitary executive enjoyed a monopoly of administrative power. Both authors were ‘public intellectuals’ and men of affairs, well known to a wide audience, highly respected and influential in political circles.

Rudolph Gneist, a German academic, judge, and politician, began studying English government in the 1850s. By this time, positivism, legal science, and historical jurisprudence had largely displaced the natural law thinking of the seventeenth and eighteenth centuries. Gneist’s *magnum opus*, *The History of the English Constitution*, was first published in English in 1886. Gneist professed commitment to the new intellectual trends but, as in the case of his predecessors, his understanding of the English system was coloured by his political purposes (Bornhak 1896). Montesquieu and De Lolme had modelled England as ‘the ideal of political liberty for the people of the Continent’ (Bornhak 1896, 82–3). However, the transplantation of English ideas had not turned out as well as people had hoped and expected. By mid-century, Germany was wracked by partisan political instability. The problem, it was surmised, ‘must lie not in the constitution but in the administration’ (Bornhak 1896, 83). ‘The adoption of English public law seemed incapable of giving satisfaction . . . because . . . it had been limited to the [sic] constitutional law and had ignored the [sic] administrative law’ (Bornhak 1896, 84). In this way of thinking, essential components of the English system were administrative decentralization and administrative law: ‘the gratuitous service of the propertied classes in official positions and the non-partisan execution of the public law in the administrative courts’ (Bornhak 1896, 87)—in other words, a system of local administration centred on Justices of the Peace (that both Montesquieu and De Lolme had failed to see), coupled with an independent administrative jurisdiction (Gneist 1889, 360–72), which Gneist constructed as an ideal of non-partisan service to the state. In Bornhak’s judgement, ‘[t]o have clearly recognized and demonstrated the nature of [self-administration and administrative jurisprudence] is the imperishable achievement of Gneist as a teacher of public law’ (Bornhak 1896, 96). According to GW Prothero (Prothero 1888, 32) it was in Gneist’s treatment of ‘the humbler stages of our polity’ that ‘the pre-eminent merit of his work consists.’ Montesquieu had understood the executive, its role, and control, primarily in terms of the structural power relationships between it, the legislature, and the courts. Gneist’s intellectual advances were to recognize the importance, first, of administrative government beyond the centre; and, secondly, of legal rules and principles regulating the allocation and control of public, administrative power.

Looking at the modern practice of comparative administrative law, Gneist's appreciation of the importance of government beyond the centre has left relatively little mark. Even more than domestic administrative law scholars, comparativists tend to pass very lightly over 'the humbler stages' of the polities being studied. Regarding Gneist's concern with rules and principles of administrative law, the picture is rather more complex. Both Montesquieu and De Lolme were primarily concerned with 'structural' or 'institutional' questions about how power could be distributed in such a way as to minimize the chance that it would be abused. They were concerned more with prevention of the abuse of power than with repair of its consequences. By contrast, Gneist threw a spotlight on controlling administrative power by surrounding it with enforceable rule-based constraints—a 'normative' or 'substantive' approach (see e.g. Gneist 1889, 331–4, 340–9, 373–95, 403–13). His work witnesses the emergence of the modern distinction between constitutional and administrative law.

This is not to say that the distinction between institutional structure and controlling norms marks the boundary between constitutional law and administrative law. For instance, the substance of human rights law is generally understood to be part of constitutional law rather than administrative law. Conversely, in the US system, in more recent times, questions of institutional design have attracted attention from scholars who would think of themselves as (comparative) administrative lawyers rather than (comparative) constitutionalists (e.g. Strauss 2016). The relationship between structural, prophylactic controls and substantive, reparative controls is also being investigated comparatively (e.g. Cane 2016). However, in contemporary public law scholarship there is more than a trace of the idea that while constitutional law deals with large questions of institutional design and structure, and in large concepts such as sovereignty, separation of powers, and rule of law, administrative law is concerned with quotidian, technical minutiae of administrative practice in terms of less-architectural, 'smaller' substantive concepts such as legality, reasonableness, and procedural fairness.

In the West, there is a much longer tradition of substantive comparison of private law than public law. This is partly the result of assumptions that in the case of public law, the legal-structural and extra-legal environments in which the substantive law operates are both harder to investigate and more critical for fruitful comparison than in the case of private law; and that the values underpinning private law are more universal than those supporting public law. In my opinion, these assumptions underestimate the importance of context and value-pluralism in understanding private law; but that is a topic for another day. Even so, it is, perhaps, harder to ignore structural, institutional issues in comparing systems of public law than systems of private law.

1.2.3 Conclusion

How, then, might we summarize the contributions of Montesquieu and his successors to an Anglo-American tradition of comparative administrative law? Two points stand out. First, the pioneers explicitly put description in the service of normative assessment, using

information and analysis of the observed system as a basis for proposing improvements to the observer's. Mixture of the descriptive and the prescriptive remains a significant feature of modern comparative public law, both practical and theoretical. Although there is no such thing as value-free description, such an approach creates a risk not so much of distortion or misrepresentation as of blindness to what the observer would rather not find. Secondly, while some aspects of the pioneering analyses have acquired foundational status—institutional/functional separation of powers, and checks-and-balances, for instance, others—such as a strong appreciation of importance of vertical division of power, and of the distinction between structural and substantive modes of control of administrative power, have left fainter marks.

1.3 ANGLO-AMERICANIZATION OF AN ANGLO-EUROPEAN TRADITION

AV Dicey might seem an odd choice as founder of an Anglo-American tradition of comparative administrative law. After all, his influence as a public lawyer rests on a classic, controversial attempt to systematize English *constitutional* law (in *Introduction to the Study of the Law of the Constitution*). Moreover, he famously denied the existence in England of the 'administrative law' that he considered to be a wholly undesirable French phenomenon. Nevertheless, there is good reason to think of Dicey as the first, major English student of comparative administrative law, studying both the French and American systems in detail.

At the time Dicey wrote, the ratification of the US constitution had long since laid the foundation for the emergence of constitutional law as a distinct category of scholarly analysis. By contrast, the conditions that would lead to the recognition of a distinct category of 'administrative law' in the US and English systems—expansion and centralization of government activities, major growth in the bureaucracy, and democratization—were in their childhood. Dicey's conservatism inclined him to hope that they would not mature. His thought-world was largely framed in Montesquieuan terms. Two contours of the Montesquieuan terrain stand out: a non-parliamentary executive; and a strong concept of judicial independence. Dicey favoured firm control of the executive, and much of his constitutional theory is driven by that preference. For instance, it explains his antipathy to the French *droit administratif* and administrative courts, and his celebration of 'the ordinary law of the land'. Secondly, it explains his deep concerns about responsible government (ministerial responsibility to Parliament) in the light of democratization and the strengthening of political parties (Dicey 2013a, 122–50), one effect of which was greatly to increase the capacity of the executive to control the 'sovereign' Parliament.

Thirdly, it helps us to interpret the centrality of the 'rule of law' to Dicey's constitutional analysis. Dicey notes that 'foreign observers... such as De Lolme... or Gneist... have

been more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law' (Dicey 2013, 95). The three elements of Dicey's rule of law—no punishment without breach of the law, equality of governors and governed before the (ordinary, private) law, and the common law (non-statutory and non-constitutional) origin of rights—are all directed to limitation and control of executive action. From this perspective, the rule of law is Dicey's version of administrative law.

Fourthly, Dicey's concern for control of the administration explains his interest in and admiration for the US system, which emerges clearly from his only-recently published lectures on comparative constitutional law (Dicey 2013a, esp. 76–88). Dicey found the source of the (much-to-be-desired) stability and conservatism of the US system in the dynamics of the relationship between Congress and the extra-Congressional Presidency. That relationship was regulated by the constitution which was, in turn, enforced by the Supreme Court. Dicey's opinion was that like the English, the US system adhered to and manifested the rule of law (Dicey 2013a, 78); but also that it was set against the radical ideals of those who hoped 'to accomplish things for the mass of the people by means of the intervention of the State' (Tulloch 1977, 839).

When it comes to influence on and within the Anglo-American tradition of comparative administrative law, it is a close-run thing between Montesquieu and Dicey. In 2018, Kevin Stack opined that '[t]he story of [US] administrative law over the past century can be understood as a repeated contest between two strains of thought'. One, he associates with JB Thayer, and the other with Dicey (Stack 2018, 294). In the English context, Lord Hewart (Hewart 1929) and Sir William Wade (Wade 1971) are typically cited as Dicey's most faithful disciples; although Hewart was more concerned about administrative rule-making than administrative adjudication. The likes of William Robson (Robson 1928) and AV Jennings (Jennings 1933) are identified as leading Diceyan antagonists. The essence of the English debate is memorably captured in a distinction, first drawn by Carol Harlow and Richard Rawlings, and which has resonated on both sides of the Atlantic, between 'red-light' (Diceyan) and 'green-light' (anti-Diceyan) approaches to administrative law (Harlow and Rawlings 1984).

In US debates, Dicey's 'rule of law' was taken effectively to mean the rule of courts, implying that they had the last word on what the law is. Thayer, by contrast, championed the position that courts should, in certain types of case, 'defer' to statements of law made by administrators, effectively, giving the executive the final say on what the law is. In 1927 John Dickinson (on the very first page of his administrative law monograph (Dickinson 1927, 3)), transported his readers back to the 'age of Coke'. His target was 'administrative adjudication', by which he meant the application of law to facts prior to and independently of any dispute. The growth of this practice, Dickinson argued, inevitably undermined individual rights by making them 'more flexible, and more responsive to uncertain factors of discretion, than when they are left to be defined by the more rigid processes of a court applying supposedly permanent rules of law' (Dickinson 1927, 29). For this reason, administrative tribunals were to be 'feared' and courts 'favoured' (Dickinson 1927, 76). For Dickinson, Dicey was the champion of the supremacy of law

over government (Dickinson 1927, ch. II). Dickinson considered a written constitution to be ‘the most effective possible application of [Coke’s] idea of a law sovereign over all laws which emanate merely from government’ (Dickinson 1927, 96). The law of a constitution is fixed, inflexible and rigid in a way that law made by administrators (and legislatures) is not. Like Coke’s ancient, customary, common law, it stands above and behind all law promulgated by governmental institutions. Just as Coke insisted on the power of the common law courts to enforce that law against governmental institutions, so Dickinson insisted on the power of courts to enforce constitutional (and non-constitutional) law on administrative tribunals and other law-promulgating organs of government. What Dickinson explains at length (Dickinson 1927, ch. V), and Dicey eventually had to concede (Dicey 1915), is that there must be ‘practical limits’ to the supremacy of law enforced by courts, in order to preserve the effectiveness, efficiency, and vigour of the other branches of government.

During the 1930s, in reaction to the massive expansion of the federal bureaucracy under the New Deal, Diceyan ideas were called in aid by Franklin Delano Roosevelt’s opponents (e.g. Beck 1932, esp. ch. XII) and castigated by his supporters (Frankfurter 1938; Landis 1938, 2–4, 96–7, 123–4). In 1941, Roscoe Pound expressed his opinion that American judges of the day were ‘much in the position of the common-law judges under the Stuarts,’ guardians of the common law rights of citizens against executive absolutism (Pound 1941, 138–9). In these trans-Atlantic conversations, the debate was about how to understand a common, English heritage, of which Dicey was a leading interpreter. One reason for Dicey’s ubiquity in these exchanges, I suggest, is that almost despite himself, he had crucially re-oriented debates about executive power and its control.

To explain: as Montesquieu astutely observed, the Revolution of 1688 had (at least) two fundamental results. One was to re-adjust the relationship between the monarch and Parliament, transferring sovereignty from the one to the other. A second was to free the common law judges from royal control and secure their effective ‘independence’. What Montesquieu failed to understand was the major role that the common law courts had played in the English system of government before the Revolution, and which they continued to play afterwards, as law-makers and reviewers of local administrative activity. De Lolme took significant steps towards remedying this defect by giving detailed and perceptive accounts of the civil and criminal justice systems that examined, amongst other things, the dynamics of non-legislative law-making. He celebrated the fact (as he saw it) that

to such a degree of impartiality has the administration of public Justice been brought in England that... any violation of the laws... though committed by the special direction of the very first Servants of the Crown, will be publicly and completely redressed (De Lolme 2007, 250–1).

On the other hand, he mentions the supervisory jurisdiction of the Court of King’s Bench only in passing (De Lolme 2007, 87); and (like Dicey later), the only administrative remedy to which he gives detailed consideration, and that in the context of criminal law, is the writ of *habeas corpus* (De Lolme 2007, 135–8).

It was Gneist who first clearly appreciated the significance of judicial review of administration in the English system. By the time he was writing, Blackstone had ‘domesticated’ Montesquieu for English consumption by spelling out the special significance of judicial independence in English arrangements (Allison 2007, 78–83). Although Dicey’s awareness of the ‘administrative justice system’ seems to have been no better than De Lolme’s, his masterstroke was to build on Blackstone, placing courts front-and-centre by associating them with one of his three pillars of the constitution: the rule of law.² It was this aspect of his analysis that travelled quickly and easily across the Atlantic and struck a chord with people who opposed increasing conferral of ‘judicial power’ on the administration (and growth of ‘administrative law’ in the sense of law made by the administration).

Dicey casts a long shadow even today. Stack’s opinion about the US administrative law tradition, cited earlier, appears in a review of two books on deference, one by Adrian Vermeule (Vermeule 2016), in which, Stack says, the author offers a ‘response to resurgent Diceyan [sic] critiques of administrative law’ (Stack 2018, 296). Perhaps the most controversial of those critiques is that of Philip Hamburger (Hamburger 2014) whose ‘arguments against “administrative power” and administrative law [says Stack] are Diceyan [sic]’ (Stack 2018, 296 fn. 8). In fact, Hamburger outdoes Dicey, berating him for (apparently) allowing ‘administrative regulations’ to qualify as a species of the ‘law’ that it is the job of the courts (alone) to enforce (Hamburger 2014, 260–1).³ To Hamburger’s eyes, administrative rule-making and administrative adjudication were both outlawed in seventeenth-century England. Moreover, argues Stack, although Vermeule starts out as an anti-Diceyan, his argument that judicial deference amounts to ‘law’s abnegation’ in fact sends him right back into Dicey’s camp (Stack 2018, 306). Dicey is dead. Long live Dicey!

This is not to say that Dicey swept all before him. In his pathbreaking comparative administrative law treatise of 1903 (Goodnow, 1903), Frank Goodnow barely mentions Dicey. Goodnow tells us that he was effectively forced to take a comparative approach because of the lack of literature in English concerning ‘the activity of government . . . with the exception of . . . both the legislature and the courts’ (Goodnow 1903, 1). Thus, in addition to England and the US, he writes about France and Germany. Goodnow proposes to deal only with administrative law except to the extent that reference to ‘constitutional law’ is ‘absolutely required’ (Goodnow 1903, v). Unsurprisingly, however, his efforts to distinguish analytically between the two are less than satisfying (Goodnow 1903, 6–9); and only 167 of 629 pages are devoted to control, as opposed to organization, powers, and functions of the administration.

² The other pillars were parliamentary sovereignty and conventional constitutional norms—‘conventions of the constitution’. In his comparative work (Dicey 2013a), Dicey seems to have added a fourth pillar: ministerial responsibility. In this work he also demonstrates his appreciation for a codified constitution as a check on the legislature.

³ In so doing, Hamburger conflates rules made under statutory delegation and rules made under the extra-statutory prerogative.

Goodnow identifies three institutional mechanisms of control—administrative (concerned primarily with securing efficiency), judicial (concerned primarily with protecting the individual), and legislative (concerned primarily with public well-being). Goodnow gives no detailed consideration to administrative control. Although he does not mention the rule of law, in good Diceyan fashion the great bulk of the discussion of control is devoted to judicial control, only eight pages being given to legislative power ‘to remedy special administrative abuses’, twenty to ‘legislative control of finances’, and six to ‘impeachment’. The emphasis in Goodnow’s analysis perhaps reflects the fact that in the US at the turn of the twentieth century, attempts to challenge administrative action were commonly based on constitutional (structural/institutional) grounds. He divides his discussion of judicial control by type of institution: ‘ordinary courts’ (civil and criminal), and the ‘special’ administrative ‘courts’ (or ‘jurisdiction’). What we would now call ‘judicial review of administrative action’ is treated as a job mainly for ‘the higher courts’. Goodnow devotes only four pages to ‘grounds of judicial review’. Goodnow’s treatment is overwhelmingly structural and institutional as opposed to substantive.

The same is true of two other, now-neglected, products of the inter-war period: Ghose 1919 and Port 1929. Nagendranath Ghose (a ‘vakil’ – lawyer—of the Calcutta High Court) divides his almost-700-page discourse on ‘comparative administrative law’ into an ‘analytical and historical’ section, a section (by far the longest) on ‘substantive’ law (concerned with the organization and powers of the administration), and a section (the shortest) on ‘adjective’ law (concerned with control of administrative power). Ghose’s sophisticated treatment is deeply and eruditely historical and comparative, and invaluable for its analysis of colonial administrative law in India. In apparently-the-first English textbook on administrative law, Frederick Port devoted a whole chapter to ‘defining the subject’, distinguishing it from constitutional law. He explained inclusion of chapters on the US and French systems, and an historical chapter on England, on the ground that they demonstrated ‘the efficacy of a system which in general imposes one governmental function as a safeguard on another, thus minimising the chance of tyranny’ (Port 1929, 20). In England, he argued, the legislative and judicial powers had, ‘in a sense’ developed out of the administrative power (Port 1929, 18) because, in his view, ‘in ancient as well as in modern times, the administrative is, in the last resort, the most essential of State functions’ (Port 1929, 327). Port detected a long historical arc in which judicial and legislative power had first, as a function of changing political and governmental practice and social demands, moved away from the executive; but in which, by ‘statutory re-grant . . . during the last half century or so . . . a good deal of the territory surrendered long since’ by the executive had been regained (Port 1929, 328).

1.3.1 Conclusion

Until the mid-nineteenth century, comparative administrative law was predominantly an Anglo-European affair. Largely thanks to Dicey, the period between (say) 1880 and 1940 witnessed the birth of a vibrant Anglo-American intellectual conversation which

reached its zenith in the 1930s. As in the earlier Anglo-European tradition, debates concerned how best to control administrative power. However, the terms of the debate had changed, focusing no longer on the structural relationships between the various branches of government but on the role and powers of the judicial branch in scrutinizing and controlling the executive branch.

1.4 THE US ADMINISTRATIVE PROCEDURE ACT

Debate amongst pro- and anti-Diceyans around the New Deal was not the only long-running comparative skirmish in America in the early part of the twentieth century. Another took place between Ernst Freund and Felix Frankfurter. Their dialogue revolved around a choice between ‘common-law’ and ‘civil-law’ models of bureaucracy.

The civil law model relied on centralised, agency-based, state administration aimed at the implementation of regulatory standards through expert legislators and bureaucrats. The common law model fundamentally distrusted bureaucratic administration, and as a consequence, identified courts as the proper locus for administrative governance (Morag-Levine 2007, 604).

Both Frankfurter (as we have seen) and Freund ‘rejected the widely held dogma, most authoritatively pronounced by A.V. Dicey, that equated the Rule of Law with the freedom to challenge any administrators’ [sic] deprivation of a private right in a proceeding conducted in “the ordinary legal manner before the ordinary Courts of the land” ... [However], [f]or all that, the two disagreed fundamentally about administrative law’ (Ernst 2009, 172; see also Chase 1982; Ernst 2014). Whereas Freund (a German emigré) was suspicious of administrative discretion which he, like Gneist, thought should be tightly cabined by statutory law enforced by administrative courts along the lines of the German *rechtsstaat*, Frankfurter favoured freeing administrators as much as possible from judicial review and detailed management by the legislature. Frankfurter got his way over legislative control when, in the 1930s, the Supreme Court more or less abandoned the non-delegation doctrine. In return, however, he and his fellow New Dealers were forced to accept procedural regulation of administrative rule-making and adjudication, enforced by the ordinary courts under standards of review of various degrees of intensity. This compromise was enacted in the Administrative Procedure Act 1946 (APA).

The scheme of the APA has three main planks: restatement of the law of judicial review, including the grounds; separation of agency officials who exercise judicial power from policy and prosecutorial staff so as to provide adjudicators a significant measure of independence; and proceduralization of agency ‘adjudication’ and rule-making. The APA represented a sea-change in American administrative law, shifting the main thrust

of regulation of the 'administrative state' from limiting its growth by the use of structural, separation of powers ideas (non-delegation doctrines) to regulating the bureaucratic process and subjecting it to judicial control on substantive and procedural grounds. The APA also re-oriented the Anglo-American tradition of comparative administrative law. From a comparative perspective, the APA might be understood as a triumph of Diceyan, rule of law ideas over German, *rechtstaat* principles—of retrospective over prospective control. In the words of Bernard Schwartz, published in 1949 in his study of British administrative law, '[t]he central and most characteristic feature of our Anglo-American polity, one that has evoked countless praise from foreign observers, is embodied in the almost axiomatic concept of the *rule or supremacy of law*' (Schwartz 1949, 2; original italics). The entry for 'separation of powers' in the Index of Schwartz's book refers the reader to the entry for 'rule of law'. Most of the book is devoted to the law of judicial review of administrative action, and the discussion of Parliament is concerned only with its role in scrutinizing delegated legislation. Of the handful of references to US statutes, more than half are to the APA.

The apotheosis of this new, court-and-retrospective-control-focused, substantive/procedural approach to the executive is, perhaps, Schwartz's 1972 comparative study, with his English co-author, William Wade, of English and US administrative law (Schwartz and Wade 1972). An important feature of this style of comparative work is its focus on finding similarities between national systems rather than understanding differences (Schwartz 1949, vii). The main interest was in 'solutions or lack of solutions, for the problems of keeping the powers of government under proper control' (Schwartz and Wade 1972, 3). The question was no longer how to understand a common heritage but, in the words of Judge Henry Friendly, how best to fulfil a common task: to 'protect the citizen from arbitrary exertions of the awesome power of government' (Schwartz and Wade 1972, xxi). Largely gone is discussion of the organization and powers of the administration, and its location in the institutional landscape of government. In its place we find analysis of the two main targets of judicial control, namely administrative rule-making and adjudication. (Comparative) administrative law had been detached from its constitutional moorings.

Other important factors in the scholarly divorce between what we might call 'constitutionalist' and 'administrativist' approaches to the executive were the post-Second World War human rights movement, and the proliferation of codified constitutions and bills of rights, first during European decolonization in the 1940s–1970s and, later, during Soviet decolonization following the fall of the Berlin Wall in 1989. Under the dominant, late eighteenth-century US constitutional paradigm, constitutional rights protect, first and foremost, against abuse of legislative, not administrative, power. Despite the radical aggrandisement of the power of executives vis-à-vis legislatures since the nineteenth century, in most places (with some notable exceptions such as South Africa and Kenya) legal protection against the administration is still largely a matter for sub-constitutional law. The substantive stuff of constitutional law is made of 'fundamental, human rights'. The divorce has also been greatly assisted by globalization. There is no global polity; and this, for many, makes the language of constitutionalism inapplicable at the supra- and

trans-national levels (Cane 2017). If global regulatory power is to be controlled—so the argument goes—this must be done sub-constitutionally by ‘global administrative law’. Similarly, some have argued that the European Union ‘polity’ is best understood as a development of the administrative state and not in terms of classic principles of constitutional design (Lindseth 2010; Lindseth 2017). Late twentieth-century horizontal fragmentation of the administrative state by outsourcing and privatization also escapes the language of eighteenth-century constitutionalism, leaving administrative law to make the running. These factors have affected comparative public law as much as its domestic counterparts.

Stephen Gardbaum identifies a ‘post-war constitutional paradigm’ consisting of a codified, written constitution that establishes ‘the ground rules of government’ and protects certain rights, and which ‘sits at the apex of its legal system . . . [as] the supreme law of the land . . . authoritatively interpreted and applied by a high court with power to set aside conflicting non-constitutional law and legal acts’ (Gardbaum 2012, 169). The solidification of this paradigm, coupled with Britain’s re-orientation to Europe (in the guise of both the European Union and the Council of Europe’s European Convention on Human Rights) have affected the way the Anglo-American tradition of comparative administrative law has been practised since the 1970s. Some ‘Anglo’ scholars still find Anglo-American comparison interesting and valuable (e.g. Cane 2016; Craig 2017; Fisher 2007), although more as ‘two systems divided by the common law’ (Cane 2019) than as parts of an ongoing, common tradition. But many more analysts, both Anglo and American, have turned their comparative gaze to Europe and the European Union, and to other parts of the world. Some Americans see in the European Union a diffused system of power somewhat like their own. Because EU governance raises issues of regulation and administrative rule-making in contexts similar to those that prevail in the US, US scholars feel they have valuable experience to impart. Susan Rose-Ackerman has been a pioneer of such re-orientation of American interest from England to Europe (Rose-Ackerman 1995; Rose Ackerman 2005; Rose-Ackerman, Egidy, and Fowkes 2015).

Rose-Ackerman was also instrumental in organizing a conference at Yale Law School in 2008 to kick-start ‘comparative administrative law’ as a universal focus of scholarly activity alongside the already-established ‘comparative constitutional law’ and ‘global administrative law’ (Rose-Ackerman, Lindseth, and Emerson, 2017 is the product of the second of such conferences). Such movements have been greatly assisted by the apparently unstoppable march of English as the universal language of comparative legal scholarship—although it must be said that given the intimate connections amongst law, language, and culture, linguistic imperialism (like other imperialisms) is bound to be a mixed blessing. A valuable consequence of such developments has been the adoption of non-nationalistic principles of individuation, such as regime-type, or concepts and understandings of law: Romanist (civil), Islamic, and Confucian, for instance (Glenn 2014).

From the start, writers in the Anglo-European/American tradition of comparative administrative law have had mixed motives—on the one hand, to describe, analyse, and explain another system; and on the other to find in that system pitfalls to be avoided, or solutions suitable to be adopted, in the observer’s own system. Our early predecessors

were more or less unashamedly tendentious and ideological. Amidst the political and social chaos that afflicted much of Europe in the eighteenth and nineteenth centuries, England seemed like an oasis of stability and good government. Political instability in the modern, post-colonial world has catalysed both scholarly interest in comparative public law, and ideologically-driven exportation and transplantation of Anglo-American public law around the world. In this way, the Anglo/European-American tradition, the seeds of which were planted in the eighteenth century, has persisted and flourished.

1.5 CONCLUSION

At the risk of oversimplification, we may conclude by saying that in the course of the 300 years we have surveyed in this chapter there have been at least three major changes in the scholarly tradition around limitation and control of executive, administrative, and bureaucratic power. First, legislatures have given way to courts as the centre of attention. Secondly, structural approaches have been eclipsed by substantive solutions. Thirdly, and relatedly, as a result of (1) the invention of the written constitutional code at the end of the eighteenth century; (2) the development of the international law of nation-states in the nineteenth century; and (3) enormous increases in the size of bureaucracies beginning around the turn of the twentieth, the holistic approach to public law that we find in Montesquieu, for instance, has been superseded by a fragmentation of the field of study into at least three distinct categories: constitutional law, administrative law, and international law. Nevertheless, it is hoped that this chapter has revealed advantages in understanding the current practice of comparative administrative law in the English-speaking world as having its roots in a long tradition of scholarly inquiry and reflection about public power, its location and control.

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CHAPTER 2

FRANCE

The Vicissitudes of a Tradition

JEAN-LOUIS MESTRE

IN 1973, in his *Droit administratif comparé*, Brazilian professor José Cretella noted that French jurists considered their administrative law as a ‘model and a true export item’. This explained, in his view, why they devoted little time to the study of administrative law abroad, despite recognizing the significance of works by René David and Jean Rivero, whose lectures he had attended in Paris.

While this opinion may initially seem convincing, further knowledge of foreign administrative law as well as comparative research carried out by French jurists point to a more nuanced view. Admittedly, the manner in which these authors have covered foreign administrative law cannot be separated from the way they perceived their own national law and the jurisdiction which played a key role in establishing it. This said, as soon as French administrative law was recognized as a legal discipline in the first half of the nineteenth century, foreign administrative law was also seen as a worthwhile object of study. The expression ‘*droit administratif*’ appeared during the French Revolution before being formalized in 1807. Nonetheless, during the *Ancien Régime*, many rules regarding royal administration and its territorial subdivisions already existed. Generally quite different from those relative to private law, these rules granted advantages to the King, to Provinces, and to cities, as well as to other communities on the basis of public interest. However, these rules could also restrict such prerogatives or impose obligations in return. Administrative trials frequently generated controversies between judges, who had full security of tenure, royal *Intendants*, and members of the King’s Council. As of 1789, the national assemblies delegated most important administrative litigation to administrators. Their mistrust of judges led to such administrators being tasked with carrying out revolutionary measures. The separation of powers between the executive and the judiciary was thus interpreted in favour of the executive: resolving administrative disputes was tantamount to administering. The constitution of 1799, which brought the

rise of Napoleon Bonaparte to power, maintained this system, albeit with two adjustments: the creation of a council for the departmental Prefect and the creation of the Council of State. The Head of State was provided with advice on proceedings brought before the Council of State. This procedure was later refined and, in practice, the Head of State was bound by the Council's position. Under the Second Republic, and then in 1872, the Council of State was granted the right to produce legal judgments and to annul administrative acts if an authority had exceeded its powers.

Three main periods may be discerned. The first of these ran from the *Restauration*, immediately after the first Napoleonic Empire (1814–15), until the end of the Second Empire in 1870. This period of political instability is characterized by the great diversity of the first expressions of interest in foreign administrative law: educational prospects, journal articles, as well as political and nationalistic controversies. Knowledge of these laws increased considerably with the creation of the *Société de Législation comparée*. During the Third Republic (1870–1940), many of the comparisons carried out repeatedly sparked debates with political and nationalistic overtones. After the Second World War, the teaching of comparative administrative law made significant headway. The development of research and the increase in publications stimulated reflections on the methods and the 'scientific field' of comparative administrative law.

2.1 THE DIVERSITY OF THE FIRST EXPRESSIONS OF INTEREST IN FOREIGN ADMINISTRATIVE LAW (1815–70)

During the reign of Louis XVIII, as the first professor to teach 'French administrative law', Joseph-Marie de Gérando revealed his intention to shed light on the subject through 'comparisons drawn from legislation in other countries.' This approach displays his open-mindedness. A member of the French Council of State during the Napoleonic period and then under the *Restauration*, he also held important administrative posts in Tuscany, Rome, and Catalonia under French occupation.

His successor, Louis-Antoine Macarel, another member of the Council of State, acknowledged that he dealt little with administrative legislation from other countries. He nonetheless pointed out that he 'understood the significance of such comparisons' for administrators and men of state. He also expressed a wish that 'comparative administration' would become the object of a separate lecture. Moreover, he went as far as recommending the creation of a faculty of political and administrative sciences where such a lecture would even be a compulsory component of the doctoral degree.

Admittedly, Macarel clearly differentiated 'science of administration' and 'administrative law', the former being aimed at the study and improvement of public service in tune with the needs of society, whereas the latter was comprised of all legal rules regarding

the organization and functioning of administration as well as those determining its relations with citizens. Quite common at the time, this view, shared by authors such as Macarel, Gérando, and Alexandre Vivien de Goubert, would persist. Yet they opined that this distinction was not absolute and that both subjects were intertwined. In this way, the study of administration was bound to involve questions drawn from administrative law.

At that time, during the reign of Louis-Philippe (1830–48), two periodicals sought to spread knowledge of foreign law. The first of these, entitled the *Revue étrangère de législation et d'économie politique*, was expressly comparativist in nature. Its pages were aimed not only at 'satisfying rightful curiosity', but also—and most significantly—at using 'comparative methods' to enhance national legislation both by revealing its limitations and suggesting means for improvement. The second journal was the *Revue de législation et de jurisprudence*. These publications came about thanks to the efforts of two lawyers who had moved to Paris and been granted French nationality: Jean-Jacques Foelix from the Rhineland and Louis Wolowski from Poland. In this endeavour, they received valuable assistance from Jules Bergson, a colleague at the Paris Bar who was born in Warsaw and had studied in Berlin and Utrecht.

Administrative law featured quite prominently in both journals, whose lists of contributors included the discipline's most eminent specialists: Gérando, Macarel, Cormenin, Denis Bouchené-Lefer, Firmin Laferrière, Émile Victor Foucart, Louis Cabantous, and others. In addition to legal chronicles and bibliographic records, one can find around fifty articles dealing with administration in most European states, albeit not in equal measure. Most of these writings concerned either states of the Italian peninsula or the German Confederation. The subjects covered also varied greatly. Eclecticism was the rule. Truly comparative papers were far less numerous than those dealing with one country at a time.

It is noticeable however that several topics were addressed more frequently because of the particular interest they aroused among French authors curious as to the effect that reforms implemented in various states would have on legislation bequeathed by the Napoleonic Empire. These authors were wary of any repeal of this legislation as it would denote a decrease of French influence. They looked to changes in foreign legislation for arguments they could bring before the French legislator, especially when dealing with decentralization and the status of public officials.

Other works also confronted French and foreign law on controversial administrative questions. In *L'Ancien Régime et la Révolution*, Tocqueville strongly condemned guarantees granted to government officials whose criminal and civil liability could not be triggered before a court of law without the authorization of the Council of State. Tocqueville insisted that such a requirement was incomprehensible to the English or Americans. He had already pointed this out in his review of Macarel's *Cours* at the *Académie des sciences morales et politiques*. He had also been critical of what Macarel called 'administrative justice', stating that administrative litigation was ultimately to be decided on by the King. Alexis de Tocqueville had been outraged by such claims, rather, supporting the view that no free people could accept such a system which went against natural equity and

freedom. On the contrary, he had praised the general legal authority of English and American judges. Tocqueville also explained how local organization structured freedom in England and in the US, whereas France imposed a very strict system of administrative centralization. His main criticism of French authors stemmed from their tendency to consider the French administrative system as almost perfect and envied by other countries. Tocqueville saw this as merely 'petting national pride'. He did hasten to add, however, that as a product of the Revolution of 1789, French administrative law would be imitated in other European countries, wherever a similar revolution were to occur.

Despite his liberal views when it came to 'subjects of administration', Vivien dismissed the relevance of any comparisons between England, the US, and France, despite his admiration for the former. Indeed, in both these foreign states, in contrast to France, administrative power was limited because of the large number of tasks entrusted to citizens. Vivien was convinced that this fundamental difference carried over to the legislative sphere: English and American laws were so precise that no scope was left for discretion in their implementation. As he saw it, were a public official not to apply a provision of the law, a judge would then impose the sentence intended by the law for the violation of this precise provision. In this way, judges from these countries were unable to hinder administrative actions as the legislator did not provide them with free will. It was quite the opposite in France where the law merely established principles and granted general powers to the administration. By providing French judges with the right to annul administrative acts or by allowing them to bring administrators before their courts, administration would be under their supervision, just as it had been in the *Parlements* of the *Ancien Régime*. In this way, Vivien, who fulfilled important functions within the Council of State, took an opposite view to Tocqueville on the existence of an administrative jurisdiction.

He also did not wish to 'borrow' the principles of local administration from England or the US, convinced as he was that such transplants were dangerous because each people had 'its customs, its historical traditions and its political condition'. The same applied to religious affairs: Vivien argued that one could find points of comparison but not a model to imitate. The same could, again, be said when it came to civil servants, where he explicitly shunned English, American, and Russian practices. He did however recognize that Prussia and Württemberg granted their civil servants guarantees that were worth imitating. Furthermore, he considered that Belgium and the German states could show France the way when it came to questions of recruitment. All in all, comparisons between the freedoms enjoyed by the English and the hampering effect of French administrative regulations often left Vivien with a feeling of 'painful envy'. It must nonetheless be said that in a few rare cases, which he studied in detail, Vivien suggested that French regulations yielded better results.

In 1862, *La justice administrative en France* was published by Rodolphe Dareste, an author with a particularly rich intellectual background: a graduate of the *Ecole des Chartes*, he was both a doctor of law and a doctor of letters. At the time, Dareste, who was one of the co-founders of the *Revue historique de droit français et étranger*, was a lawyer at the Council of State and at the Court of Cassation. At the very beginning of his

book he claimed that comparativism, like history, was necessary in order to understand any national institution. According to Dareste, comparing an institution to those of 'neighbouring countries' could provide in-depth analysis which would in turn allow an appreciation of its worth. He would demonstrate this premise by conducting a study of the two French institutions that Tocqueville had been so critical of: administrative justice and the guarantees granted to government officials. In order to convince his readers, he referenced foreign studies which he would draw from.

Dareste explained that there were three possible systems for settling disputes relating to administration: referring them to ordinary judges, to the administrators themselves, or to administrative judges. The first system, which he did not criticize, was the choice in England, the US, and in a few Swiss cantons. Belgium and the Netherlands adopted a similar approach. The second system provided citizens with no guarantees, leaving them at the mercy of administrators and thus giving rise to much criticism. According to him, this was the case in Prussia and the Austrian Empire. The third system was that of France, whose legislation had served as a model for most of Europe. As examples of French influence, he cited the provincial Councils and the Council of State in the kingdoms of Spain, Naples, and Piedmont. He also mentioned the *Administrativjustizhof* of the Grand Duchy of Hesse.

Through fear of a confusion of powers, as condemned by Montesquieu in *L'Esprit des lois*, France had adopted this system with the legislator intending to guarantee mutual independence between administration, a component of the executive, and justice. Admittedly, the foundation of this system was despotic in nature but it would be harsh to condemn it in light of the vast improvements carried out after the reforms of the Council of State in 1806. In all states possessing a powerful administration, it provided the firmest guarantee of citizens' rights. This form of justice was also sought-after by liberals in states where it did not exist or when its scope appeared too limited compared to that of administrators.

Admittedly, the 'freest peoples,' those of England and the US, had not made this choice. But it would not be appropriate for France to invoke the case of England, where 'things are undertaken freely and spontaneously,' and where there is no centralized administration. Dareste reproduced all of Vivien's views on the nature of English and American laws. While outlining the features of the Court of Queen's Bench, and drawing parallels with the French Council of State, Dareste claimed that were France to undergo fundamental political change, her Council of State would be perfectly capable of fulfilling the role of the Court of Queen's Bench, whose members were not only judges but 'the first public servants of the Kingdom' with 'almost unlimited powers' because of the effects of their Writs. Like Vivien, after further comparisons between the main French and English courts, he concluded that 'England's example in no way discredited our institution of administrative justice.'

This defensive stance was approved by Léon Aucoc, then a *maître des requêtes* at the Council of State, who published a review of Dareste's work in the *Journal Officiel* as well as in a brochure which was appropriately entitled *La juridiction administrative et les préjugés*. More broadly, Aucoc was delighted that Dareste resorted to international

comparisons: 'The science of administrative law can only gain from such a widening of its horizons'. He also noted with satisfaction that this would make most French administrative rules appear even more legitimate.

Despite his defence of French administrative justice, Dareste also made full use of his knowledge of foreign law when it came to calling for changes in French law. When dealing with the distribution of administrative disputes between judges, administrators, and administrative judges, he made a note of countries where 'the progress of constitutional ideas' had led to the creation of joint bodies of distribution, such as the *Tribunal des conflits* during the ephemeral Second French Republic. He pointed out that the guarantees granted to government officials by the constitution of the Consulate had been adopted by many states. He did however find fault with a system which rendered the accountability of public officials illusory. He also emphasized the fact that Prussia had renounced such a system and that England 'provided an inspiring example' because all civil servants could be held accountable. Throughout his study of accountability, he pointed out the differences between France and England. The same method was followed by Judge Poitou in his book *La liberté civile et le pouvoir administrative en France*. And in a similar vein, the desire to see French administrative institutions improve prompted the *Académie des sciences morales et politiques* to call for comparisons to be made between France and other European states. Such measures could only be applauded by Dareste who considered that comparativism would enable jurists from these countries to fully appreciate the value of their national institutions.

During the reign of Louis-Philippe, a chair in administrative law had been created in all law faculties. But despite Edouard Laboulaye's influential study of education and administrative noviciate in Germany, the government's plans to develop the discipline were not implemented before the Revolution of 1848. As of the proclamation of the Second Republic, a decree which reorganized the *Collège de France*, with a view to training the future administrators of the new regime, created a chair in history of French and foreign administrative institutions. But this novelty was not to last. The *Collège de France* nonetheless kept a chair in comparative legislation which Laboulaye held until 1879. In line with de Tocqueville, he glorified the freedom of the English and the Americans, as well as self-government and the competence of judges. He even quipped that during the Second Empire, it was the 'absence of administration' which explained 'the strength' of their countries.

In 1854, Georges Schützenberger, a professor of administrative law from Strasbourg, was awarded a chair in comparative administration based on the experience of German universities. The Inspector General of Law Faculties, F Laferrière, tasked Anselme Batbie, a young Professor at the Faculty of Toulouse who had been an auditor at the French Council of State, with lecturing on comparative administrative law. As of 1857, Batbie was appointed to the Faculty of Law of Paris. He wrote the sizeable *Traité théorique et pratique de droit public et administratif* which included, as specified by the title, 'the comparison between our legislation and the political and administrative laws of England, the United-States, Belgium, Holland and the main states of Germany and Spain'. Seven volumes were published between 1861 and 1867.

Batbie specifically wished to fill a void in other administrative law works which dealt exclusively with French law. He considered that this aim was best served by studying the laws of three sorts of countries: those where administration differed most notably from that of France—namely England and the US; those which, like Spain, had followed in France's footsteps; and those, finally, like Belgium, Holland, and the German states, who had adopted a middle path through a combination of French 'administrative regularity' and English 'self-government'. He drew his information from numerous German works, such as those that Rudolf von Gneist and Ed Fischel had devoted to England, as well as from Belgian, Dutch, and German books, among which Colmeiro's received particular praise. The writings of Tocqueville and Laboulaye were of great help when dealing with the US, as were those of Story and Baird. He also made use of various information campaigns on university education carried out in several countries.

Batbie rounded off the almost forty chapters of his *Traité* with a passage entitled 'comparative law'. After an historical overview of French rules, he then moved on to presenting legislation from other countries, even if they were not explicitly mentioned in the title. These included Sweden, Norway, Russia, and Italy. In each case Batbie dealt mainly with the salient features. Yet his analysis extended beyond mere juxtaposition as he explained similarities and differences and pointed out influences from one country on another. The interest generated by this comparative contribution played a part in the creation of the *Société de Législation comparée* in 1868.

2.2 THE DEVELOPMENT OF KNOWLEDGE AND COMPARATIVE DEBATES DURING THE THIRD REPUBLIC (1870–1940)

Batbie was a member of its initial scientific committee, alongside members of the Council of State such as Aucoc. This initiative stemmed directly from better awareness of the value of studying foreign law and was aimed at facilitating the task of those wishing to do so, either through personal taste or professional need. This appeared all the more valuable as the laws of civilized countries were evolving, thus explaining the desire that knowledge of them not be impeded merely because of language barriers. Hence the idea of publishing an *Annuaire* containing a French translation of the main laws put in place, and an analytical table, turning all such volumes into a 'sort of textbook', not only for scholars but also for legal practitioners and for legislators.

Much to the satisfaction of its founders, the publication of the first *Annuaire* in 1872 met with great national and international success. This success developed as the number of listed states and translated texts increased. These translations also came with notes: eighty collaborators worked on the *Annales* at the beginning of the twentieth century. Alongside this 'collection which was unique in the world', the *Société de Législation comparée* also published a monthly bulletin which kept track of the debates held during its

sittings and other comments. It received aid from the *Comité de législation étrangère* of the Ministry of Justice which was founded in 1876.

As was pointed out by Ribot, who would become an important political figure of the Third Republic, administrative law was heavily represented in these publications. Thus the first contribution dealing with Russia was devoted to local administration. It spanned sixty-one pages. The *Annuaire* was nothing short of a goldmine of information on French translations of legislative texts and some regulatory texts pertaining to the administrations of numerous states. For example, the table of contents for the first thirty volumes shows that texts on expropriation in forty-seven states were reproduced.

The help provided by these *Annuaire*s played a part in Batbie's decision to publish a second edition of his *Traité* in 1885. He stuck with the same process: almost all studied subjects were rounded off with a subdivision entitled 'comparative law'. This time, however, the length of these subdivisions had increased considerably: the one dealing with expropriation was forty-five pages long. Not only had Batbie updated the material, he had included a greater number of states while also delving deeper into the analogies and differences. It should also be noted that Batbie's comments did not display nationalism. In general, because of differences in geographic conditions and mentality, he deemed it unrealistic to search for rules applicable in all states. Sporadically, he would weigh up the pros and cons of laws in France and elsewhere. He would point out what he perceived as regrettable in French legislation and would place as much stress on decreasing French influence as on its progress.

At that time, Edouard Laferrière, who was Vice President of the Council of State,¹ dedicated a lengthy preliminary chapter of his prestigious *Traité de la juridiction administrative* to comparative legislation in the field of administrative litigation. He distinguished between three groups of states. The first group was comprised of countries whose system was close to that of France, due to the predominance of three features: the separation of powers between administration and justice, the existence of administrative courts, and a procedure for resolving conflicts of jurisdiction. In the second group, for which Belgium provided the clearest example, Laferrière placed states devoid of administrative courts but where administrative and judicial functions were nonetheless separate. In these, judicial tribunals had jurisdiction when it came to claims against administration but they played no part in active administration, nor could they annul administrative acts. Things were quite different when it came to the Anglo-American system which accepted that administrative and judicial functions could be mixed and exercised by the same people. It also allowed judges to issue injunctions to administrators.

Laferrière expressed his satisfaction with the fact that the French system was not isolated. He noted that Italy's adoption of the second system had been found wanting and that a Bill was on the verge of restoring resolution of contentious attributions to the *Consiglio di Stato*. He also pointed out that England had recently established administrative offices with jurisdictional competences. However, he remained moderate in his

¹ It should be noted that the Vice President is the effective head of the Council of State.

defence of the French system and stated that no system could be ‘criticised or praised a priori based on abstract principles’.

In the doctoral classes which Théophile Ducrocq gave at the Faculty of Law of Paris between 1884 and 1886, he included information on foreign municipal systems which he grouped according to four situations. This study may have seemed all the more useful to him because the authors of the municipal laws of 1874 and 1884 had cited numerous foreign laws, even referring to ‘the common law of Europe’, which designated their similarities on a number of points (Le Yoncourt 2014, 170–3). Ducrocq published a study on the state of small municipalities in France and in Italy, claiming he was in favour of the Italian policy of abolishing the least populated of them. However, he was opposed to any alignment with the UK, claiming French local administration was ‘remarkable in its simplicity and its clarity, especially when compared with that of England’. In 1897, in the seventh edition of his *Traité*, he added about fifty pages on local administration in a great number of European states and in the US, establishing classifications along the way based on texts published in the *Annuaire de législation étrangère*. Finally, he compared these laws with those of France while praising the simplicity and uniformity of French legislation. He noted the triumph of the elective principle in France, where all holders of municipal executive power were elected. He did however perceive this triumph as unwise.

The purpose of examining such developments in ‘administrative jurisdictions abroad’ was clearly stated: he argued it was wrong to believe that administrative jurisdiction was ‘specific to France’. It existed in most of the major states of continental Europe. It had been kept in Alsace-Lorraine, even after annexation by the German Empire, and had started to spread within the Federate states: Prussia, Wurtemberg, Bavaria, Baden, and Saxony. Progress had thus been achieved through a reduction of the excessive power of administrators. Italy and Spain had reinstated it, having realized the many drawbacks caused by its absence. Belgium had not followed suit, but its system was to be criticized on the ground that irregular administrative acts could not be annulled by judges. The English system was described as less equitable than the French one: even if judges exerted efficient control over administrations, the absence of responsibility of the Crown was deplorable and the accountability of its officials remained an illusion. As for the American system, it could in no way be envied by the French who benefited from their *recours pour excès de pouvoir*.

Ducrocq added that at any rate, even if no other country had a system close to that of France, it would be wrong to conclude that France’s administrative jurisdiction should be replaced by a judicial jurisdiction. Indeed, he argued that it would be dangerous to believe that a satisfactory law in one country could be adopted without difficulty in another culture. Ducrocq’s use of comparison was thus clearly destined to convince his students and his readers of the soundness of the French system.

Beyond their difference in tone, the works of Batbie, Laferrière, and Ducrocq demonstrate, as do the publications of the *Société de Législation comparée*, the increase in interest in foreign legislation. This trend led to the organization of the first International Congress of Comparative Law in 1900.

During this congress, Ferdinand Larnaude, who was a professor at the Faculty of Law in Paris, as well as the founder of the *Revue du droit public et de la science politique en France et à l'étranger*, presented a long and nuanced general report entitled 'Droit comparé et droit public'. In it, he gave a commentary on the three functions of a comparative study of constitutions and administrative legislation. First and foremost, it should expand jurists' thought processes. Then, in turn, it should improve the interpretation of constitutional and legislative texts. And finally, it should provide legislators with models. This last advantage was often put forward by jurists who supported the comparative method, such as Paul Guyot in his account of Marcel Sibert's *Principes généraux sur la situation juridique des fonctionnaires anglais*, which was published in the *Revue générale du droit, de la législation et de la jurisprudence* and claimed that comparative law was 'a tool in a reformist jurist's arsenal' (Cherfouh 2017, 197). Larnaude, however, remained circumspect about this view. He argued that 'there was no greater danger for public law than importing aspects of foreign law' for the simple reason that it was rarely possible to import all that surrounded said legislation. In his mind, it was clear that the laws of a country should ideally develop purely according to national logic. He did, however, recognize that the comparative method made it possible for the legislator to grasp the trends throughout other evolving legislation as well as the processes enabling them.

When it came to the benefits of comparative law from the legislator's point of view, Larnaude took a more measured stance than both the *Société de législation comparée* and Aucoc in his 1889 presentation before the *Académie des sciences morales et politiques*. Admittedly Aucoc, who had presided over the *Comité de législation étrangère*, had explained which precautionary measures had to be taken before imitating foreign legislation. However, this advice had mainly focused on the methodology required throughout the in-depth study prior to incorporating measures capable of improving national law.

From this perspective, Larnaude considered that it was only after having studied a national institution that one should move on to studying its foreign equivalent, identifying similarities and contrasts along the way, even if this resulted in mere juxtapositions. Furthermore, he added that such investigations of foreign laws were only of practical worth if they belonged to the same family. For example, he dismissed what would have amounted to 'English import items', such as transferring administrative litigation over to judicial judges, just as he refused any suggestion that the English should adopt 'our *recours pour excès de pouvoir* which would be ill-suited to their needs'. As for Saleilles' and E Lambert's idea that comparative research should give birth to a 'common law for civilised humanity', Larnaude was not alone in describing such standardization of public laws as 'a dream' which would have the benefit of putting an end to age-old bias and even rivalry between states.

In the preface to the French translation of Paul Laband's *Das Staatsrecht des Deutschen Reiches*, under the title *Droit public de l'Empire allemand*, Larnaude reasserted his preference for systems allowing for a historical and internal evolution of law, while still recognizing that French and German administrative law could render each other mutual services. The publication of this book owed much to the efforts of both Maxime Boucart,

a member of the Council of State, and Gaston Jèze, who taught in Aix-en-Provence at the time. Together, they created the *Bibliothèque internationale de droit public* which gathered translations of foreign books they wished to help French jurists discover. Among these were Edward Jenks' *Essai sur le gouvernement local en Angleterre* and Otto Mayer's *Le droit administratif allemand*. Both books were prefaced by Henry Berthélemy, a professor of administrative law in Paris, who hoped the French would draw inspiration from *self-government* in order to improve decentralization. Despite emphasizing the differences between French and German legal conceptions, Berthélemy noted how both systems reached similar practical solutions. In the climate of the Franco-German rivalry of the time, Mayer's claim that French administrative law was 'a step ahead' of its German counterpart made it all the easier for Berthélemy to dispute its foundations. These were also criticized by Léon Duguit who did, however, recognize the authority of the most eminent Germanic jurists, such as Léon Michoud. Duguit's command of German meant he was particularly familiar with their work, which was also highly praised by the accounts Guyot published in the *Revue générale du droit*. Duguit sporadically took great interest in technical analyses of public service concession, for instance, or the appointment of civil servants or '*patrimoines-buts*'. Duguit did, however, have to insist that his own views on the latter theme were not merely borrowed from IE Bekker and A Brinz. His objectivism played a part in preventing the German doctrine of subjective public rights from having a strong impact in France. His study entitled *L'État, le droit objectif et la loi positive* was written as a response to Georg Jellinek's *System der subjektiven öffentlichen Rechte*.

In 1902, Jèze released a translation of Dicey's *Introduction to the Study of the Law of Constitution* under the title *Introduction à l'étude du droit constitutionnel*. One of its chapters compared the rule of law in England to French administrative law. Inspired by Tocqueville, Dicey claimed that French administrative law rested upon two ideas that were absolutely foreign to English conceptions. First and foremost, in the case of a conflict between an individual and the state, the government and its officials enjoyed special rights as well as non-statutory privileges derived from the prerogative of public authority. Secondly, they remained immune from courts because courts did not have jurisdiction in administrative matters. Any comparison with England, which at the end of the seventeenth century had dismissed conceptions similar to those that triumphed in France, ineluctably condemned the French system. Dicey diluted his criticisms in the preface and in two closing passages of this French version of his book. He asserted that French administrative law was a 'remarkable and original creation so characteristic of French spirit in the field of jurisprudence', that it had considerably evolved since the mid-nineteenth century, and that it could be likened to equity. He then went on to recommend reading the works of Laferrrière and Hauriou in order to grasp this fact. However, his comparative chapter inevitably caused a great stir on the other side of the Channel.

In 1903, as a 'staunch partisan' of French administrative law, which he viewed as 'the purest technical form of this kind of law', Hauriou responded to these criticisms. Admittedly, he first acknowledged Dicey's perspicacity for writing, just as he had also claimed, that French administrative law was based on the prerogative of public authority.

There was more praise for Dicey's description of French administrative law as being jurisprudential in nature, and close to equity. However, he believed Dicey's delineation of an arbitrary French administration was off the mark, claiming that Dicey underestimated the scope of the Council of State's evolving jurisprudence. Hauriou accepted the simplistic idea that 'there were no administrative laws' in England and in the US, because common law applied to the relationships between the state, public officials, and individuals. He considered common law as 'ordinary law' in that it applied first and foremost to the relationships between individuals. From a theoretical point of view, he conceded that this system may appear worthy of preference because individual freedom was fully guaranteed by the absence of administrative prerogatives. In practice, however, he thought French administrative law was superior. In England, the absence of administrative procedures generated problems. As proof of this, Hauriou quoted issues with the construction of the Manchester canal, for which the need of a specific Bill had caused multiple complications and expenses. Finally, regarding questions of responsibility, he asserted that the French citizen benefitted from better protection from 'mistakes' committed by public administration.

Jèze then translated a book which demonstrated, as he was happy to write, that it was wrong to assert that the 'Anglo-Saxons' had no administrative law. This book—*Les principes du droit administratif des États-Unis*—was the work of professor Franck Goodnow, who had already published a book entitled *Comparative Administrative Law*. To Goodnow's mind, Dicey's conception of administrative law was far too restrictive. In reality, many subjects that the French considered as administrative law were subject to legal regulation in English-speaking countries. He went as far to say that administrative law must exist in all countries claiming to have reached a certain degree of political evolution. Whether or not it was recognized and taught as a discipline was another matter. This opinion was shared by another American scholar. In 1929, in Hauriou's *Mélanges*, James Garner revisited the 'Anglo-American conception of administrative law'. He paid particular attention to legislative innovations and asserted that the state's unaccountability was becoming a point of growing dissension.

Even if publications such as the *Annuaire de législation comparée* and the works compiled in the *Bibliothèque internationale de droit comparé*, amongst others, provided French jurists with abundant information, interest in administrative comparativism remained marginal in the law faculty curriculum. In the main, it was considered that national law had proven capable of ensuring a satisfactory balance between government prerogatives and the respect of citizens' legitimate rights. Not even in Paris, where there was a chair in comparative constitutional law, was a chair in comparative administrative law created. It was therefore left to the discretion of professors, if they so wished, to refer to foreign law in their doctoral lectures. They did so only from time to time. For example, Georges Scelle dealt with mining as part of public law. He identified various 'families' of mining legislation, and pointed out the differences and similarities between American law, German law, and Soviet law.

Professors were at liberty to suggest thesis subjects in the field of foreign law. Albert Kammerer wrote *La fonction publique d'après la législation allemande*. Paul Alglave

studied *L'assurance contre l'incendie, service public en Allemagne*. And Eugène Brès dealt with *La municipalisation des services d'intérêt public en Italie*. In-depth discussions about the opinions of various German and Italian authors were carried out in theses, subject matters of which appeared more conceptual. This was the case in Joseph Barthélémy's study of *Les droits subjectifs des administrés* and in Guillaume de Bezin's research on *Les autorisations et approbations en matière de tutelle administrative*, both of which were written under the supervision of Hauriou. The same applied to Jean Guillaouard's *La notion juridique des actes d'exécution des autorisations et des concessions administratives*, which was completed under the direction of Louis Le Fur. Even if the opinions put forward were subject to criticism, these works reflected the prestige that surrounded such 'illustrious authors' from Germany and Italy at the dawn of the twentieth century. However, they remained rare.

As a result of the absence of specialized lectures in the university, administrative law textbooks for students allotted precious little space to foreign law. Berthélémy's *Précis* devoted a mere footnote to Mayer's book, which he himself had prefaced. Louis Rolland's *Précis* remained silent on the matter. M Hauriou's *Précis* began with a paragraph distinguishing countries with 'judicial administration' from those with 'executive administration', while at the same time recognizing there were many variations between the most characteristic opposites that were England and France. Such variations forced one to reassess the 'framework of comparative legislation' mapped out in E Laferrière's *Traité*. But despite including a bibliography, this paragraph only took up five of the 1,150 pages of the last edition, which André Hauriou updated in 1933. Jèze put his knowledge of foreign law to good use in his *Principes généraux du droit administrative*, but only in the few chapters dealing with public officers and civil servants.

In his *Précis*, Roger Bonnard made almost no mention of such subjects, despite the fact he had published both *De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux États-Unis et en Allemagne*, and *Le contrôle juridictionnel de l'administration. Étude de droit comparé*. In the second book, Bonnard operated on the basis of the classical distinction between the judge administrator system, the common courts system, and the administrative tribunals system. He methodically analysed the declination of these systems in a dozen European states, among them pre-Hitlerian Germany, as well as in the US. He concluded that the third system was making ground, albeit without completely discounting the second system, whereas the first system was on the verge of extinction. Noteworthy was Raymond Carré de Malberg's lengthy chapter on 'the administrative function' in his *Contribution à la théorie générale de l'État*, which showed his profound knowledge of German doctrines. Works by Charles Eisenmann also played a part. In 1931, having previously revealed the thinking of Hans Kelsen, he translated Fritz Fleiner's *Institutionen des deutschen Verwaltungsrechts* under the title *Les principes généraux du droit administratif allemand*. Edouard Lambert, who had become the great promoter of comparative law, insisted on the importance of comparative studies of jurisprudence. He likened the opinions of the Supreme Court judges in the US to the conclusions of the *maîtres des requêtes* of the French Council of State. Despite all this, national law remained the object of instruction in faculties.

However, things were very different at the *École libre des sciences politiques*, which had been founded in the aftermath of the traumatic defeat by Prussia and was tasked with the training of France's administrative elites. It is therefore no surprise that 'the comparative dimension was ever-present' (Richard 2015, 224). As of 1872, Dareste inaugurated a lecture on administrative organization in France and abroad. The subject was topical at the time since, if one is to believe the *maître des requêtes* Emile Flourens, the law of 10 August 1871 on the organization of the *département* closely mirrored Belgian law on *provinces*. This theme was often taught by members of the Council of State. Between 1880 and 1908, the lecture was even entitled 'comparative administrative organization'. Further lectures which covered both financial administration and economic administration focused on other countries as well as on France. During the inter-war period, the second of these was taught by Georges Pichat, who was also at the head of the Council of State. Another of its members, Henry Puget, dealt with administration and administrative life abroad. He then had an influential role at the *Institut de droit comparé* in Paris. Raphaël Alibert, a former member of the Council of State, gave an account of 'public authorities and public services in foreign countries', namely Germany, England, Belgium, the US, Italy, and Switzerland. He dealt with 'legal ideas', administrative jurisdiction, national and local authority, and with civil service.

2.3 THE PROGRESS OF COMPARATIVE TEACHING AND RESEARCH SINCE 1945

After the Second World War, in the context of increased openness and international cooperation in the Western world, a positive sign was to appear: the Faculty of Law of Paris created a doctoral lecture on comparative administrative law. It was given by Rivero whose contribution was fundamental (Cazaban 2009, 1066–79). Whereas comparative administrative law possessed considerable potential in terms of intellectual research and improvement, at a time where state intervention was on the rise in many countries, Rivero realized that it remained 'under-developed' in France despite substantial new studies and theses by Paul-Marie Gaudemet (*Le statut des agents de l'État en Belgique; Le civil service britannique*), Denis Lévy (*La responsabilité de la puissance publique et de ses agents en Angleterre*) and Charles Fourier (*La liberté d'opinion des fonctionnaires dans différents pays*). It should be noted that Rivero himself had only devoted a brief passage of his thesis to German opinions on his subject.

Between 1954 and 1958, Rivero provided his students and all those who received his handouts with his methodological insight, and his views on judicial review of the legality of administrative acts, as well as on public authority. Through these lectures, Rivero gave French publicists much of the material that had been needed for more than a century. He preferred the expression 'comparison of administrative laws' to that of

'comparative administrative law', as he felt it better captured the process of those seeking to go beyond the study of national law.

Through various means, Rivero established himself as a brilliant promoter of comparative administrative law and of French administrative law. He supervised the theses of jurists who would later take over from him, be they French, such as Michel Fromont who would translate Forsthoff's *Lehrbuch des Verwaltungsrechts* under the title *Traité du droit administratif allemand* in 1970, or foreign, such as Luis Contreras-Laguado, Luna Benites, Libardo Rodriguez, and Spyridon Flogaïtis. Rivero would later preface the latter's enlightening comparison between French administrative law and British administrative law. Incidentally, one should note that several aspects of this comparison had already been pointed out by Michel Distel in the *Revue internationale de droit comparé*. Rivero also published review papers such as one in which he studied the replication of foreign models, the reasons for doing so, the means employed, and possible outcomes. The many seminars he took part in often led to his writing the synthesis report. This was the case after the international roundtable which was held in Aix-en-Provence, the proceedings of which were published in the *Annuaire européen d'administration publique*. He outlined the possibilities for moving towards common administrative law. He gave lectures or conferences at the *Faculté internationale de droit comparé* as well as in some thirty foreign universities, in Europe of course, but also in Africa and in South America. Roland Drago, another specialist in administrative law, dedicated part of his work to comparative law. Convinced that it could improve relations between peoples, he recommended its study to students and to those who wished to reform laws in their country. Over a period of thirty years, he was first Secretary General, and then President of the *Société de législation comparée*.

But beyond this international reach, the many obstacles that remained were stressed in 1989 during a study day held by the *Centre français de droit comparé* in Paris. The Councillor of State, Guy Braibant, bemoaned the fact that too few lectures were devoted to comparative administrative law in French universities and that theses on the matter remained rare. Yves Gaudemet, who had taken over from Rivero at Paris II, complained that there was a greater audience for French comparativists abroad than in France, where comparative law was often perceived as 'a form of scholarship best left to experienced jurists', whereas it should be recognized as an irreplaceable means of improving one's understanding of leading mechanisms. Rivero himself had felt that an initial growth in interest had given way to relative indifference as of the 1950s. This despite the fact that textbooks by Marcel Waline or Georges Vedel and Pierre Delvolvé had sought to rekindle such interest by providing geographically organized bibliographies and by referring their readers to the *Revue internationale de droit comparé*, to the *Revue internationale des sciences administratives*, to the *Annuaire européen d'administration publique*, as well as to the specialized chronicles in the *Revue de droit public et de la science politique en France et à l'étranger* and in the *Revue française de droit administratif*.

The call for a renewal of research and lecturing in comparative administrative law was taken seriously. In 1990, Georges Dupuis organized a symposium on the subject of administrative jurisdictional control, which followed a comparative approach. In 1991,

at the University of Paris I, Franck Moderne launched a diploma of advanced studies in comparative public law throughout Europe, while Fromont, Pierre-Laurent Frier, and legal historian Marcel Morabito, who would go on to translate Sabino Cassese's *Culture et politique du droit administrative*, organized Franco-German and Franco-Italian curricula which bore some resemblance to the Franco-English curriculum that André Tunc had set up with King's College in London. For the fiftieth anniversary of the *Revue internationale de droit comparé*, Étienne Picard noted that much progress had been made. Despite this, he still evoked methodological difficulties and lamented the fact that better use was not made of laws that were profoundly different to French law. He regretted that interest in comparative law was not higher, especially as French law would have much to learn from it. He was also convinced that comparative law could raise awareness, beyond basic national differences, about the unity of law as a phenomenon.

In 2004, a coordinating body was created with the help of Moderne and Étienne Fatôme in order to bring together research centres from ten universities and various other establishments. It was tasked with avoiding fragmentation of their work on comparative public law as well as offering a better platform for their research. In the programmatic work devoted to *Le devenir du droit comparé en France*, the director of the *Annuaire européen d'administration publique*, Jean-Marie Pontier, insisted on the scope of requests by students for an in-depth study of foreign laws, while also pointing out the scale of discussions between foreign scholars. He underlined the mutual advantages that administrative laws could derive from confrontation and moving beyond national boundaries. Fromont published a work of synthesis dealing with *Le droit administratif des États européens*. At Sciences-Po Paris, an academic chair was created with a view to studying the 'mutations of public action and public law'. It was awarded to Jean-Bernard Auby, the author of *La globalisation, l'État et le droit*. Under various forms, there has been an increase in the number of university lectures which discuss comparative administrative law and which include European and international law within inter-state comparisons. Marie-Claire Ponthoreau held a symposium devoted to *La dénationalisation de l'enseignement juridique* during which Pascale Gonod, as the head of Franco-Italian meetings of administrative law, pointed out how this trend had been encouraged by student trips abroad.

As has been pointed out by Luc Heuschling, who devoted his thesis to a comparison between *État de droit*, *Rechtsstaat*, and the Rule of Law, it is possible for topics of the *agrégation* competitive examination to be based on foreign administrative law.

In 2015, Jean-Marc Sauvé, the Vice President of the Council of State, claimed that the deficiencies mentioned in 1989 had since been taken care of by academics. He added that the Council of State was making increasing use of comparative law while exercising its consultative functions. Things are no different when it comes to the legislator. Furthermore, the same applies to the litigation function: invoked by public rapporteurs such as Mattias Guyomar, Suzanne von Coester, Gaëlle Dumortier, and Rémi Keller, comparative law provides 'precious help in the decision making process'. He recognized that comparative studies allowed for a different perception of French administrative law, thus better emphasizing its shortcomings as well as its merits, and paving the way for

improvement. These studies also provide insight into various approaches of solving new and common problems for the twenty-first century. The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, which owes its inception to the Council of State, has often made use of the French institution's experience and vast jurisprudence. In turn, it can be suggested that the Council of State has benefitted from its membership in the Association.

In the first volume of the *Droit administratif—Administrative Law* collection, edited by Auby, one can find the proceeds of the symposium which Fabrice Melleray held on *L'argument de droit comparé en droit administratif français*. They reveal some of the trends that this chapter has shown to be historically entrenched: the manipulation of elements of foreign law within French debates, the selective usage of the factors under consideration, the simplistic or even distorted view of foreign law, a form of competitive spirit, the influence of patriotism or nationalism. All this, however, should not detract from the genuine attempt at improving French administrative law by taking foreign law into account. This concern has occurred far more often than one might expect in a country whose administration and administrative law, as has often been noted, have exerted significant influence on those of other states. This influence extends not only to former protectorates and colonies, but also to states which adopted a combination of strong administration and an administrative jurisdiction capable of holding public authorities in check. This influence has given rise to much research by French jurists as well as by jurists from independent former colonies, most notably those who pursued their studies and defended their theses in French universities. Despite being beyond the scope of this chapter, it should be noted that the works of these foreign French speaking students have been very well documented.

When authors such as Elisabeth Zoller, Picard, Ponthoreau, Fromont, Gaudemet, François Lichère, Hubert-Gérald Hubrecht, Horatia Muir Watt, Alexis Le Quinio, Gonod, and Melleray ponder the very nature of comparative law, namely the issue of whether or not it should constitute 'an autonomous scientific field', distinct from the study of foreign laws, it is evident that their thinking extends far beyond that of former authors. Nonetheless, it is clear that these former authors already took a marked interest in making appropriate use of 'the comparative method'.

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CHAPTER 3

THE GERMANIC TRADITION OF COMPARATIVE ADMINISTRATIVE LAW

KARL-PETER SOMMERMANN

3.1 INTRODUCTION

THERE is still a widespread view among legal comparatists that administrative law belongs to those fields of law where national peculiarity is most pronounced (Scheuner 1963, 735; Strebel 1964, 409, 428; Kahn-Freund 1974, 17; Cassese 2000, 3, 4; Schmidt-Aßmann and Dagron 2007, 395, 396).¹ This opinion casts doubts on the purpose of any comparison of different administrative law systems that goes beyond an academic interest in identifying differences and similarities. By contrast, the comparison of private law has always been considered to be of utmost practical importance because transboundary social and commercial relations require a legal framing and entail, from the perspective of contracting parties, the necessity of choosing the applicable law (cf. Husa 2015, 12). A rational choice can only be made if those who choose have enough knowledge of the relevant foreign law and of the advantages and disadvantages that different legal solutions offer for the resolution of conflicts.

However, comparison of public law has been gaining increasing importance in recent decades. The greater role that comparative constitutional law and comparative administrative law nowadays play even in the context of legal practice is not only attributable to the fact that the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) have made legal comparison an integral part of their hermeneutic

¹ Already in the nineteenth century, Lorenz von Stein underlined that the individual differences of the States reflect ‘the true, inexhaustible wealth of life in the world... which is nowhere greater than in the field of public administration and its law’, see von Stein 1870, 13.

approach to European law and have thus drawn the attention of practising lawyers to comparative aspects (for the ECtHR see Breuer 2010, 223 ff., for the ECJ von Busse 2015, 217 ff.). A need for common substantive principles and inter-operable administrative structures pushes academics and practitioners to investigate and study public law of other European countries (Sommermann 2016, 552 f.), and more and more frequently also of systems outside Europe. Often, the identification of the preconditions that must be met if a legal regulation is to be compatible with vertical and horizontal cooperation in the European Union (EU) results from an exchange and a collaboration between academics and practitioners. And increasingly, national legislators take inspiration from foreign laws identified by comparative studies.

Although the diversification of epistemic and practical interests of comparative public law (Sommermann 2013, 195 ff.) can be perceived as a phenomenon associated with the processes of Europeanization and globalization, a look back into legal history reveals that essential elements of modern comparative law can already be seen much earlier. In the Germanic tradition, as in the traditions of other European countries, comparative approaches to public law in the eighteenth and nineteenth centuries are of special interest. It was then that rationalism and, later, legal positivism gave rise to the first forms of ‘universalist’ and ‘culturalist’ approaches to legal comparison. While universalist approaches focus on generic legal and institutional problems of political communities and, therefore, look for common solutions, culturalist approaches emphasize the historical and cultural imprint of the law and consequently remain suspicious of universal solutions.

3.2 GOVERNANCE AS A SUBJECT OF COMPARATIVE STUDIES IN THE ERA OF ENLIGHTENMENT

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

3.2.1 Growing Interest in the Comparison of Political and Administrative Cultures

A key work for the development of legal and political thinking in Europe and in North America in the eighteenth century was ‘The Spirit of the Laws’ (*De l’esprit des loix ou du*

rapport que les loix doivent avoir avec la constitution de chaque gouvernement, les mœurs, le climat, la religion, le commerce) written by Montesquieu and deliberately published in Geneva (i.e. outside of absolutist France) in 1748. It exercised an important influence on German authors. Three aspects have to be highlighted: First, Montesquieu discussed prominent ancient statesmen and political philosophers such as Solon, Plato, Aristotle, and Cicero, thus paying respect to an old European tradition; second, although starting from classical typologies, he systematically developed a culturalist approach for the comparison of governments and laws, pointing out their relationship with climatic and geographic circumstances and cultural particularities; and third, he utilized the description of foreign political and legal systems for an implicit criticism of the situation in his own country, in particular by describing the government and laws of England in an idealizing manner, leaving the intended comparison with France to the reader.

One of the German-speaking authors strongly influenced by Montesquieu was Johann Heinrich Gottlob von Justi (1720–71) who, in 1762, published his work ‘Comparison between the European and the Asian and other allegedly barbarian governments’ (*Vergleichungen der Europäischen mit den Asiatischen und anders vermeintlich Barbarischen Regierungen*). Notably, Justi focuses his gaze on countries of other continents, in particular on China and Peru, and criticizes the arrogance of Europeans towards so-called ‘barbarian cultures.’ Their governments, institutions, and laws including, for instance, their tax law systems, are then analysed, on the basis of reports given by missionaries and explorers, and described as more developed and humane in some respects than those of European states. Seventy years later, the insight that the political and legal order of a country has to be seen in its cultural context was prominently exposed in the study by Friedrich Murhard (1779–1853) on ‘The right of nations to strive for political constitutions that are modern and appropriate to their degree of cultural development’ (*Das Recht der Nationen zur Erstrebung zeitgemäßer, ihrem Kulturgrade angemessener Staatsverfassungen*).² Murhard, a representative of liberal thinking and, like other liberals, highly interested in political ideas originating from England, took a special interest in the constitutional arrangements, put in place after the Glorious Revolution, and their further development. He underlined that the English constitution could not be understood without considering the social and political reality which, over time, had moved away from original constitutional objectives and changed the function of the institutions considerably (Murhard 1832, 335–55).³

² The adaptation of the form of government to the development of a nation is also pointed out by v. Struve 1847, 16.

³ For a further analysis see G Lottes, ‘Hegels Schrift über die Reformbill im Kontext des deutschen Diskurses über Englands Verfassung im 19. Jahrhundert’ in C Jamme and E Weisser-Lohmann (eds), *Politik und Geschichte—Zu den Intentionen von Hegels “Reformbill”-Schrift* (2016) 151, 161; see also R Ludwig, *Die Rezeption der Englischen Revolution im deutschen politischen Denken und in der deutschen Historiographie im 18. und 19. Jahrhundert* (2003) 225–7.

3.2.2 Universalism versus Culturalism

However, it would be premature to conclude that already in the eighteenth and early nineteenth centuries, a culturalist view on the political and administrative systems was the dominating comparative approach. During this period, ‘General State Law’ (*Allgemeines Staatsrecht*), also called ‘Natural State Law’ (*Natürliches Staatsrecht*), became a prominent scientific subject, sometimes embedded in works on ‘General Science of the State’ (*Allgemeine Staatswissenschaft*) (Voß 1796, 261 ff.; v. Struve 1847, subtitle of vol. I). Suffused with the idea that reason will lead all societies to similar principles relating to the organization and the tasks of government, Heinrich Gottfried Scheidemantel (1739–88), for instance, defined General State Law as ‘the laws that are common to all civil societies because they originate in the very nature and essence of the State’ (Scheidemantel 1775, 4; the same definition is given by von Martini 1791, 54). His reflections on the role and organization of government, the economic order and social life are primarily based on political philosophy of the seventeenth and eighteenth centuries as well as ancient political thinkers. Brief examples of historical developments or institutions in different states are given in order to confirm general principles (Scheidemantel 1775, 34 f., 402 ff.).

For several decades, books on General State Law remained an important academic literary genre. Thus, the Swiss scholar Caspar David Bluntschli (1808–81), at that time professor in Munich, published his renowned work on the state in the year 1852 under this title (*Allgemeines Staatsrecht*) and even some later publications were so titled (cf. Hatschek 1909, who emphasizes a comparative approach already in the title of his work). However, the perspective had changed and was influenced by the evolving positivism in legal theory as well as by the emerging new social sciences. Bluntschli clearly distinguished between general and special State Law (Bluntschli 1852, 5 f.) and put more emphasis on the respective historical developments of the individual states (ibid, 61 ff., 203 ff.). Soon, ‘General State Law’ was succeeded by the ‘General Theory of the State’ (*Allgemeine Staatslehre*); Bluntschli renamed the fifth edition of his work, published in 1875, accordingly. The General Theory of the State was intended to capture the notion and essence of the state as a whole by opening up the epistemological foundations to approaches of other scientific disciplines (see the exposition of different definitions of the General Theory of the State by Rehm 1899 and his still tentative attempt to find a generally accepted concept, ibid, 1–8). In this way, Georg Jellinek (1851–1911) included in his ‘General Theory of the State’, published in 1900, a substantive part dealing with empirical aspects, thus transcending the limits of the then-prevailing legal positivism. He distinguishes between the ‘Allgemeine Soziallehre des Staates’ (General Social Theory of the State, which integrated knowledge of the evolving modern social sciences) and the ‘Allgemeine Staatsrechtslehre’ (General Legal Theory of the State, which focused on legal phenomena) (Jellinek 1913, 129–379, on the one hand, and 383–795, on the other hand). Jellinek can also be seen a predecessor of slightly younger authors who paved the way for a later conceptualization of the law as a living instrument linked to societal development (Ehrlich 1911, 129 ff.) and for a focus on the ‘law in action’ (Pound 1910,

12 ff., and 1921, 56, 212 f.). Not from a sociological, but from a culturalist perspective, the partisans of the German Historical School had already argued in favour of a dynamic concept of law (see v. Savigny 1814, 11 ff.).

3.2.3 Relativization of the Own Political and Legal System

Both lines of comparative reasoning that started to develop in the eighteenth century had the potential to call into question existing political institutions and state order: either by contrasting the present conditions with the natural state law deduced from philosophical, presumptively ‘rational’ considerations, or by emphasizing the need to adapt the political and legal systems to changing socio-cultural contexts. The idea that the form of government or governmental action is based on traditions (‘traditional legitimation’ in the sense of Max Weber) was increasingly losing ground. When, in the early nineteenth century, in particular after the foundation of the German Confederation in 1815, the constitutional movement also reached the German territories,⁴ the study of foreign constitutions and administrative systems became even more attractive and at the same time more concrete. The comparison opened up new learning processes.

3.3 THE STUDY OF FOREIGN LAW AS A SOURCE OF INSPIRATION FOR THE DEVELOPMENT OF ADMINISTRATIVE LAW AND AS A MEANS OF IDENTITY BUILDING

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

⁴ The first constitutions, still imposed by the monarchs, were those of Nassau (1814), Schwarzburg – Rudolstadt, Schaumburg-Lippe, Waldeck, and Sachsen-Weimar (all 1816), Bavaria and Baden (1818), and Württemberg (1819), see W Frotsher and B Pieroth, *Verfassungsgeschichte* (17th edn, 2018) 134 ff. They primarily served the dynastic-governmental self-assertion, and not to ensure individual freedom, cf. D Grimm, *Verfassung und Privatrecht im 19. Jahrhundert* (2017) 190.

3.3.1 The Special Interest in Anglo-American Law

Whereas the French Revolution finally led to a new monarchic system, the American Revolution had brought about an alternative federal and republican order. The analytical description of ‘democracy in America’, in particular of the structure and practice of local governance, by Alexis de Tocqueville (Tocqueville 1835/40), based on his own observations made during a journey through North America, also increased interest in the political example of the US in the German territories. Tocqueville clearly distinguished between governmental and administrative authority according to ‘the level of specificity and detail involved in political decisions and actions’ (Bambrick 2018, 588). Furthermore, although the American Revolution and the War of Independence had definitively broken with the monarchy of the former motherland, the political system of England equally remained an appealing object of study. Especially since the positive assessment by Montesquieu, numerous authors undertook studies of the English parliamentary system and the mechanisms it used to safeguard individual freedom. Among these were, as has been mentioned, Friedrich Murhard (Murhard 1832) and Alexis de Tocqueville (Tocqueville 1835/1982) who, however, also depicted and analysed the serious adverse social and political consequences of industrialization (for an assessment cf. Hurtado 2010). In his work *History and Literature of State Sciences*, the German liberal thinker Robert von Mohl (1799–1875) (who had written his habilitation thesis⁵ on the ‘Federal State Law of the United States’ (Mohl 1824) and, in 1848, became a member of the Parliament of the Paulskirche in Frankfurt and Minister of Justice) analysed the literature on ‘State law’ in Switzerland, the US, England, Germany, and particularly France, implicitly delineating the different paths along which the political orders had developed since the Middle Ages (Mohl 1855/56/58; a concise comparative observation can be found in vol. III, 3 ff.). A differentiation between state law and administrative law that starts to develop in the second half of the nineteenth century is not explicitly made. Here and in earlier publications, reflection on foreign law, especially on the American political system, served to generate arguments for use in reform discussions (for “America as argument” cf. Lerg 2011).

In the year 1857, almost simultaneously with Mohl’s *History and Literature of State Sciences*, Rudolf von Gneist (1816–95) published the first part of his work *Contemporary English Constitutional and Administrative Law*, which focuses on the evolution and structure of the civil service in England (Gneist 1857). Although he characterized his analysis of English administrative law as ‘a walk through the jungle’ (ibid, p. v), Gneist emphasized that a comparative view on England had become more important ‘since the French political system had ceased to be an exemplary model’. This observation has to be seen against the background of the proclamation of Louis-Napoléon as Emperor of the French in 1852 (ibid). In the comparative chapter of his book (ibid, 678–721) Gneist

⁵ In the German university system, the ‘habilitation’, which comes after the doctorate, serves to give scholars the *venia legendi*, i.e. the right to teach certain subject areas (e.g. public law) at a university and thus the qualification to hold a chair.

understands the development of administrative law in Germany as a corollary of the formation of administrative organs to which quasi-judicial functions were attributed on the basis that judge-made law and judicial control of the executive, as they existed in England, were lacking in Germany. According to Gneist, the role of the courts also explains why the separation of public from private law did not take place in England (ibid, 687). With the benefit of hindsight, this explanation, which was shared by other continental authors (e.g. Lafférière 1896, 96 ff.; Hatschek 1906, 658 ff.) is not fully convincing. The separation of private law from public law and the development of a modern administrative law in Germany gained their most pronounced dogmatic development after the creation of independent administrative courts in the 1860s and 1870s.

Gneist deepened his research on England in further books, among them extended studies on English administrative law (Gneist 1886/67; Gneist 1883/84; the two works are fundamentally modified and extended editions of Gneist 1857), local self-government in England (Gneist 1860; Gneist 1869; Gneist 1871) and English constitutional history (Gneist 1882). Younger legal scholars too showed a lively interest in the English constitutional and administrative law. An author who paid special attention to England was Julius Karl Hatschek (1872–1926).⁶ In his *State Law of England*, published in 1905/06, he dedicated one volume to the administration, analysing the different branches of the administration, including, among others, the administration in social and fiscal matters, police, local government, and civil service (Hatschek 1905/06; shorter version: Hatschek 1914). At the end of his comprehensive, nearly 700-page overview of the English administrative law (Hatschek 1906), Hatschek poses the question of whether England has an administrative law, a question, as the author remarks, first raised by the French scholar Edouard Lafférière (Lafférière 1896) and negatively answered by Albert Venn Dicey (Dicey 1915, 213 ff.). His own answer, following the analysis of Gneist, was that England did not possess an administrative *law* but, rather, administrative *practices* (*Verwaltungsroutine*) that despite sometimes being embodied in cabinet orders, ordinances, or other legal acts were not combined with a public-private law divide (Hatschek 1906, 650). Nevertheless, Gneist and Hatschek titled their books *English Administrative Law*, as did Otto Koellreutter in his habilitation thesis on ‘Administrative Law and Administrative Jurisprudence in Modern England’ (Koellreutter 1912).⁷ This terminological choice could be justified on the basis that the authors were describing and comparing functional equivalents.

⁶ In addition to his books on English constitutional and administrative law, his study on the English constitutional history and his comparison between the British and the Roman Empire have to be particularly mentioned, see J Hatschek, *Englische Verfassungsgeschichte* (1913); J Hatschek, *Britisches und römisches Weltreich: Eine sozialwissenschaftliche Parallele* (1921).

⁷ It has been said that it was Otto Koellreutter, a German, who wrote the first book on English administrative law (JS Bell, ‘Comparative Administrative Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1259, 1260 fn. 1). However, it is Rudolf Gneist who has to be mentioned first.

3.3.2 The Role of French Law Studies for the Systemization of Administrative Law

Despite the publication of such German studies on English government and administration, it was, in the end, French administrative law that most influenced discussion on the further development of administrative law in Germany which was, at that time still territorially fragmented and, therefore, following a variety of administrative traditions. The aforementioned authors, in particular Robert von Mohl and Julius Hatschek, repeatedly included references to French administrative law in their comparative writings. However, the most important impetus to consider French law as a source of inspiration when developing a modern German administrative law came from the appointment of Otto Mayer (1846–1924) as Professor of the University of Strasbourg in 1882. The University of Strasbourg had become one of the prominent German universities after the cession of Alsace to the German Empire in the Treaty of Versailles, which ended the Franco-German War of 1870/71. Otto Mayer taught French private law and German administrative law. In his *Theory of French Administrative Law*, published in 1886 (Mayer 1886), he extolled the French approach of respecting the public character of the activities of the state rather than treating the state as a subject of private law (ibid, viii f.). The idea that the state or its organs are endowed with subjective rights vis-à-vis citizens in the way that princes in former times enjoyed subjective rights vis-à-vis their subjects was particularly combatted by the French scholar Henri Barthélemy who later wrote a preface to the French translation of Otto Mayer's *German Administrative Law* (Barthélemy 1903, vi ff.).

Mayer developed a system of German administrative law by comparing the different laws in the various German territories (cf. Schönberger 2011, 493 and 522 ff.: German general administrative law as a 'product of intra-German comparatistics') and by making use of concepts of French administrative law and German private law to forge them into a coherent whole (on the conceptual foundations cf. Kaufmann 1925). Thus, the concept of the administrative act (*Verwaltungsakt*) finds its origins in the French *acte administratif*; however, the latter also includes *actes administratifs réglementaires*, i.e. normative acts, in contrast to the German concept coined by Mayer.⁸ Equally, for instance the concepts of 'police permit' (*Polizeierlaubnis*) (Mayer 1923, 239 ff.) and 'public property' (*öffentliches Eigentum*) (Mayer 1924a, 39 ff.) have French roots (*permis de police* and *domaine public*) (ibid, 227 ff and 167 ff.). The German concept of 'public undertakings' (*öffentliche Unternehmungen*) (ibid, 243 ff.) was influenced by the then-emerging reorientation of French administrative law through the evolution of the concept of *service public* (cf. Brohm 1972, 253 f.),⁹ which later was also to form the basis for the shaping of the concept of *Daseinsvorsorge* by Ernst Forsthoff (1902–74)

⁸ cf. Mayer 1923, 93: 'The administrative act is a pronouncement, attributable to the Administration and endowed with public power, that determines for the subject in the individual case what his rights are.'

⁹ The main publications on the *service public* appeared later, see Jèze 1925, 1; Duguit 1913, in particular 33 ff.

(Forsthoff 1938, 6; Forsthoff 1971, 75 ff.; Forsthoff 1973, Vorb. V [preliminary remark]), a fine connoisseur of French constitutional history and public law.¹⁰ Because of the centralized structure of France, the organization of administration did not play a major role in Forsthoff's comparison, in contrast to the interest which Gneist had shown in English self-government as a source of inspiration for reform discussions in Prussia—albeit not always authentically reflected (see Section 3.3.1 and Schönberger 2010, 253 ff.).

By emphasizing juridical method, which started from specific legal concepts, Otto Mayer distanced himself from authors who combined legal thinking with approaches of social sciences and whose most prominent representative was Lorenz von Stein (1815–90).¹¹ Lorenz von Stein had become a renowned author because of his three-volume work on the *History of the Social Movement in France from 1789 to the Present Day*, published in 1850,¹² and his *Verwaltungslehre* that first appeared in 1870 (2nd edn 1876; 3rd, completely revised edn in three volumes, 1887/88) and culminated in a vision of an international, particularly European, administrative law (Stein 1876, 91 ff. and Stein 1882). Stein who also reflected on methodological questions of legal comparison (cf. Schönberger 2011, 523 f.), based his administrative theory on comparative considerations, having special regard to Germany, France, England, and Austria, and on a study of emerging international administrative arrangements (cf. Sommermann 2007). His conviction that it is the mission of comparative law to identify underlying common values and principles in the national legislations (Stein 1882, 425), fitted well with the spirit that was subsequently dominant at the First International Congress of Comparative Law in Paris in 1900. The majority of the participants in this Congress, which is considered to constitute the starting point of legal comparativism as a recognized discipline of law, were of the opinion that the various legal systems should no longer be studied only on an individual basis but also as legal resources for the identification of universal principles that underlie the different norms in those individual systems. In contrast to the German term *Rechtsvergleichung*, which describes the process of comparing legal norms or systems, the French, Italian, Spanish, and Portuguese expressions for 'comparative law' (*droit comparé*, *diritto comparato*, *Derecho comparado*, *direito comparado*) still reflect this ambition to find transnational common legal principles, a *droit commun de l'humanité civilisée*, as one of the participants in the Paris Congress, Raymond Saleilles, put it (Michaels 2002, 101). Although the terms *droit comparé*, *diritto comparato*, *Derecho comparado*, and so on, continue to be used, they no longer carry the general connotation of a set of universally applicable norms or principles that can be derived

¹⁰ Forsthoff translated and edited a German version of Montesquieu, *De l'esprit des lois: Vom Geist der Gesetze* (1951).

¹¹ With regard to the *Verwaltungslehre* of Stein, Otto Mayer even spoke of 'blooming bombast', see Mayer 1924b, 11.

¹² Re-edited by G Salomon: L von Stein, *Geschichte der sozialen Bewegung in Frankreich*, 3 volumes (1921). The work is a revised and strongly expanded version of: L Stein, *Der Socialismus und Communismus des heutigen Frankreich* (1842).

from the comparison,¹³ notwithstanding the adoption of approaches that seek to identify general legal principles by comparative means in specific legal contexts such as that of the European Union.

3.3.3 Public Law Comparison as an Own Field of Research

The new self-awareness of comparative law found expression in new scientific periodicals and the establishment of academic institutions and associations. In Germany, by 1829, the interest in foreign law had led to the foundation of the journal *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (*Critical Journal of Jurisprudence and Legislation Abroad*), which, however, ceased publication in 1856. One of the founders was Carl Solomo Zachariae (1769–1843), a law professor from Heidelberg whose wide range of research included state theory and state law (*Staatsrecht*). In 1907, Paul Laband (1838–1918), the already mentioned Georg Jellinek (1851–1911), and Robert von Piloty (1863–1926) founded the *Jahrbuch des Öffentlichen Rechts* (*Yearbook of Public Law*), which dedicated and still dedicates considerable room to studies of foreign public law, in particular constitutional law. During the Weimar Republic, in 1929 the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* in Berlin launched a new journal of comparative and international law, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. After Second World War, the journal ceased to appear for some years, until the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (Max Planck Institute for Comparative Public Law and International Law) was created in Heidelberg in 1949 as successor of the *Kaiser-Wilhelm-Institut*. Since then, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, in English called the *Heidelberg Journal of International Law*, edited by the directors of the Institute, besides playing its role in public international law studies, has provided an important platform for comparative studies in constitutional and administrative law.

The era of National Socialism had devalued the objectives of a liberal-minded comparative law.¹⁴ After the war, the need to rebuild the national legal order did not lead to a simple return to liberal, pre-Nazi standards. It enhanced a search for new solutions and generated strong interest in foreign legislation and comparative law even though the science of administrative law more generally remained inwardly focused. One reason might be the concentration on a concretization of the standards of the new constitution, the Basic Law (Schönberger 2011, 535). Efforts to develop public law further at the federal and *Länder* levels aimed at providing effective safeguards against dictatorial and arbitrary exercise of public power. The Basic Law, adopted in the American, British, and

¹³ For a critique of the idea that the *droit comparé* constitutes an own legal order cf. Pfersmann 2001, 277 ff. See, however, Miller and Zumbansen 2012, 4, who refer to a widespread understanding of ‘the study of transnational law as a process of normative *engagement* through which distinct legal systems increasingly encounter the law and legal culture of other systems’.

¹⁴ For the history of the *Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht* during the period of National Socialism cf. Hueck 2000.

French occupation zones in 1949 as Constitution of the Federal Republic of Germany, enshrined strong guarantees of, and judicial protection for, human dignity and fundamental rights. Furthermore, it threw the constitutional order wide open to European integration.

The interest in foreign public law simultaneously induced and enhanced the scientific debate on the objectives and methodological foundations of legal comparison. In this respect, the *Gesellschaft für Rechtsvergleichung* (Society for Comparative Law), established in 1950, became an important forum. In 1963, together with its Austrian counterpart, its 'Public Comparative Law' section held a conference in Vienna that focused on comparison in public law specifically. Helmut Strebel (1911–92) and Rudolf Bernhardt (born in 1925, from 1981 to 1998, judge of the European Court of Human Rights), hinted at the different character of public law and private law. Strebel emphasized that it is the individuality of the organizational structures of various states resulting from the different historical, political, and cultural backgrounds that makes a comparison difficult (Strebel 1964). Bernhard underlined that the shaping of public law, which primarily refers to the legal relationship between citizen and state, reflects political influences to a higher degree than private law does, and that this often impedes comparison for practical purposes and sometimes makes it difficult to distinguish comparative public law (in particular comparative constitutional law) from comparative politics (Bernhard 1964). Nevertheless, Bernhard recognized a limited function for legal comparison in understanding national norms, an important role in the making of new laws, and yet-to-be-realized function in identifying general principles of international law and analyzing international treaties.

As far as the methodology of comparative law is concerned, the debate has remained and will remain controversial. Among the methods applied, the functional approach has been most influential. Clearly outlined by Konrad Zweigert (1911–96) and Hein Kötz (born in 1935) in their book on comparative law in the field of private law (Zweigert and Kötz 1969/71 and 1998), it has been explicitly or tacitly accepted and applied by many comparative scholars of public law as a valuable means for identifying functional equivalents in different legal cultures and traditions. The functional approach, in this view, does not primarily search for concordant wordings of laws or isomorphic organizational forms, but aims to grasp the social or juridical function of the compared legal institutions or norms (Zweigert and Kötz 1996, 33 ff.). This presupposes that the comparativist can distance himself or herself from the conceptual and dogmatic background of his or her own legal system and ideally view both of the compared legal orders 'externally' or 'objectively'. Since the function of a regulation or institution can only be explained, if the legal and social environment is taken into consideration, it necessarily includes a contextualization of the objects of comparison. The required depth of the comparison undertaken depends on the objective of the research (Sommermann 1999, 1021 ff.). To give an example: Gaining knowledge about different legal techniques will generally need less contextualization than a comparative evaluation of the effect of judicial instruments, a comparison that also requires empirical studies and social science methodologies. In any case, one has to take care that the material used for the

comparison remains—as it has been put—methodologically ‘controllable’ (Schmidt-Aßmann 2018, 825).

The functional approach has met various criticisms (cf. Kischel 2015, 95–108). One critique refers to the use of methods in general. While some authors—in Germany as in other countries—argue that there exists no single method of comparative public law (Trantas 1998, 41 ff.; Sommermann 2004, 660), others maintain that there is no distinctively comparative method at all (Ruffert 2004, 168: ‘methodological vacuum’; cf. also Picard 1999, 888). The impression of a fundamental lack of methodological basis in comparative law may have arisen not least from the ‘omnipresence’ (Barnés 2016, 54 ff.) of comparisons made without any methodological awareness or reflection (cf. also Tschentscher 2007, 807 ff.). Another critique focuses, from a different perspective, on the limited performance of the functional approach in public law. The arguments range from doubts about the possibility of identifying common social functions of law or, indeed, any social functions at all (cf. Kischel 2005, 95 ff.; Classen 2013, 24), through denying the appropriateness of the functional approach with regard to certain research questions (Michaels 2006, 369 ff.), to the questioning of the presupposed neutrality and objectivity of functional comparativism (Tschentscher 2007, 812 f., who defends a dialectical comparison, that explicitly favours a partisan approach of the comparativist).

Fundamental criticism comes from both legal positivists and postmodern theorists. From the perspective of a severe legal positivism, comparative law should limit itself to the description of different legal systems using general concepts that, at the same time, allow for a sufficient differentiation.¹⁵ On this view, empirical studies would play no part in legal comparison. Postmodern theorists, on the other hand, deny the existence of universal values and emphasize the ‘incommensurability of different forms of rationality’ in legal systems (Richers 2007, 517, quoting Wolfgang Welsch).¹⁶ Therefore, they call into question the possibility of a productive outcome of legal comparativism. The postmodern critique can be considered as another form of culturalism. It contains valuable insights, in particular in view of the recognition of the particularities and different perceptions of each legal culture and legal system. However, it underestimates the driving forces behind emerging communities of values. Despite the fact that ‘incommensurability does not amount to incomparability’ (Legrand 2015, 75), it tends to impede cross-fertilizing comparative discourses (for the question to which extent legal transfers are possible, cf. Seckelmann 2012, 419 ff.).

Overall, we observe in Germany today, in line with developments in other countries (cf. Ponthoreau 2005, 23 ff.; Rambaud 2014, 34; Hantrais 2009, 36 ff.; Samuel 2014, 1 ff.), an increasing pluralism of methods in comparative public law. This pluralism is due not only to scholarly ambitions, but also to the growing practical need of comparative findings in various fields of international cooperation. As a kind of common denominator,

¹⁵ Pfersmann 2001, 286: ‘On pourra dès lors appeler “droit compare” la discipline qui permet de décrire les structures de n’importe quel système juridique à l’aide de concepts généraux présentant la finesse nécessaire et suffisante.’

¹⁶ A further analysis of the postmodern legal comparison is given by Kischel 2015, 103 ff; for a critical assessment cf. also Ponthoreau 2005, 23 ff.; Rambaud 2014, 22 ff. and 32 ff.

one might affirm the simple, but always helpful, insight that the method to be applied depends on the objective pursued by the comparison (Starck 1997, 1026; Sommermann 2004, 665).¹⁷ In many cases, in particular when searching for convergences between legal orders, the functional approach will play an important role. As long as it does not prematurely assume the existence of equivalent functions or functional equivalents in the compared legal orders, it forestalls recourse to superficial or formal considerations and draws the attention to the functions that a norm or institution fulfils in the respective legal or social order (cf. also Möllers 2005, 8 ff.). Understood in a broad sense, it is also sensitive to the path-dependency of legal systems and the cultural, social, and political contexts of legal structures, institutions, and laws.

3.4 THE CONTRIBUTION OF COMPARATIVE ADMINISTRATIVE LAW TO THE WELL-FUNCTIONING OF EUROPEAN MULTI-LEVEL GOVERNANCE

As already mentioned, studies on comparative administrative law have been encouraged in particular by practical needs of European integration, but also by international cooperation that goes beyond European boundaries. Multilateral international treaties increasingly prescribe administrative law principles and administrative procedure. The Aarhus Convention¹⁸ is a prominent example. Such treaties are based on comparative findings in their making and entail comparative considerations in their implementation. Furthermore, knowledge and skills of comparative law are needed in development cooperation, for example when competent advice is requested in the context of legislative reforms. The growth of comparative studies and discourses will have an increasing impact also on the theoretical and methodological orientation of legal science.

3.4.1 The Identification and Development of Common Administrative Law Principles

One of the strongest impulses to search for common or converging elements in the legal systems of the European states stems from the jurisprudence of the European Court of

¹⁷ Similarly, Catherine Hagenau-Moizard, *Introduction au droit comparé* (2018) 17 f., defends a 'pragmatic' orientation of legal comparisons—in contrast to the traditionally strict and often 'schematic' methodological focus in social sciences. She shares the opinion that legal comparison 'amounts more to heuristics than to a method', as Pierre Legrand had pointed out earlier, see Legrand 2015, 58.

¹⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, UNTS vol. 2161, 447.

Justice according to which the law of the European Union (formerly the European Community) also contains general principles of law derived from the national legal orders. Thus, guarantees like legal certainty, proportionality, the protection of legitimate expectations, and the right to be heard have been identified as general principles. The awareness of common or convergent ideas and principles forms the background of the conceptualization of a ‘European Administrative Law’ that goes beyond principles and rules of EC/EU.¹⁹ The broad concept, elaborated by Jürgen Schwarze in the 1980s,²⁰ includes the common basis of administrative law as it is reflected in the national laws of the European states. Therefore, his book *European Administrative Law*, first published in German in 1988 (Schwarze 1988) and later in French (Schwarze 1994/2009) and in English (Schwarze 2006), gives not only an analysis of European Community law, but also reports on the guiding administrative law principles in twelve European countries and draws comparative conclusions. It aimed at showing, ‘as a kind of handbook, the state of development currently reached in European administrative law’ and intended not only to highlight ‘the influences of national principles of administrative law on European Community law’ but also at revealing ‘the repercussions of the newly elaborated European law on the national systems of administrative law’ (Schwarze 1988, vol. I, i). A similar broad view of European administrative law should also underlie collective volumes, which later appeared in other European countries (in particular Chiti and Greco 1997/2007; Auby and Dutheil de la Rochère 2007/2014).

In 2008, Thomas von Danwitz, public law professor and judge of the European Court of Justice, published under the same title (*European Administrative Law*) a systematic study of the national administrative law systems and their interrelation with European Community law (v. Danwitz 2008). In his view, European administrative law has three dimensions: first, the national laws which form the basis for the execution of community law by the Member States and provide the conceptual sources for Community law; second, the norms and principles developed by the jurisprudence of the ECJ for the execution of community law by European institutions themselves (direct execution); and third, the norms and the principles developed by the ECJ in order to ensure an execution by the national administrative authorities in conformity with community law (ibid, 5 f.).

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

¹⁹ European administrative law in this narrow sense is dealt with by Craig 2018.

²⁰ *Europäisches Verwaltungsrecht im Werden (European Administrative Law in the Making)* was the programmatic title of a volume published by him in 1982. It contains the proceedings of a conference held by the Working Group for European Integration (*Arbeitskreis Europäische Integration*) in Hamburg in 1981.

projects,²¹ country reports and comparative analyses now had and have to be seen against the background of a ‘European administrative compound’ (*europäischer Verwaltungsverbund*; cf. Schmidt-Assmann and Schöndorf-Haubold 2005), characterized by vertical and horizontal cooperation in a European network of administrative actors.²² Alongside reports and comparative studies on specific topics of administrative law, such as the civil service (Magiera and Siedentopf 1994, with a comparative analysis by Niedobitek, *ibid* 11–66) or the implementation of the EU services directive in the EU Member States (Stelkens, Weiß and Mirschberger 2012), comprehensive works on the administrative law systems (Schneider 2007 and 2008) and judicial control of public administration (Sommermann and Schaffarzik 2019) in Europe have been published. The most ambitious project is the manual ‘Ius Publicum Europaeum’, edited by Armin von Bogdandy and Peter Michael Huber, together with various European colleagues. It undertakes to open up, ‘under the perspective of a European legal space in the making’, the foundations of public law (constitutional and administrative law) in the European legal orders and ‘in particular their formative historical experiences, their stages of development, their systematic understanding and the juridical and jurisprudential styles’ (Preface to v. Bogdandy, Cruz Villalón, and Huber 2007, v f.). Three volumes of the manual are dedicated to administrative law (v. Bogdandy, Cassese, and Huber 2010, 2011, and 2014) and two more to administrative jurisdiction (in preparation).

Comparative law is not only present in collective volumes of this kind, but also in many monographs. Apart from dissertations on foreign public law, doctoral theses and habilitation treatises²³ often use comparative methods to classify German law or to question traditional dogmatic approaches. Generally speaking, the perspective is becoming more and more European and transnational.²⁴ As far as the jurisprudence of the administrative courts is concerned, there are hardly any explicit comparative studies.²⁵ However, in the context of refugee and migration law, the Federal Administrative Court (which is the supreme court in public law disputes) has in some cases made reference to

²¹ cf. Becker and König in their introduction to Carl Hermann Ule, *Verwaltungsverfahrensgesetze des Auslandes*, 2 vols (1967–68) vol. I, 3, 14. The second volume already dedicates a chapter to community law. For a discussion of the epistemological and practical goals of comparative public law cf. Starck 1997, 1023 ff.; Sommermann 1999, 1019 ff.

²² cf. Schmidt Assmann (2006) § 5 para. 17: ‘It [the administrative compound] manifests itself in a growing number of administrative entities in the Union, in decentralized and centralized networks, in a multi-faceted European committee system and in the practical *cooperation* of national and unional administration authorities.’ English translation taken from Terhechte 2011, 15.

²³ For an explanation of the ‘habilitation’ see n. 5.

²⁴ To give a very recent example: Mattias Wendel’s habilitation treatise ‘*Verwaltungsermessen als Mehrebenenproblem. Zur Verbundstruktur administrativer Entscheidungsspielräume am Beispiel des Migrations- und Regulierungsrechts*’ (‘Administrative discretion as a problem of multi-level-governance: on the compound structure of administrative scopes of decision-making’), published in 2019, integrates national, European, and international law. For an analysis of comparative law as a ‘compound’ technique see Kotzur 2015.

²⁵ An example is given by Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (2015) 559 ff.

decisions of French courts when interpreting international or EU law.²⁶ The Federal Constitutional Court, by contrast, has shown more openness to comparative law (Mössner 1974; Cárdenas Paulsen 2009). Given the transnational relevance of fundamental (constitutional) rights questions (cf. Häberle 2004, 315; Sommermann 2004, 636 ff.), not least against the common legal background of the European Convention on Human Rights, this is not surprising.²⁷ Likewise, Peter Häberle (born in 1934) developed his influential concept of comparative law as the ‘fifth method of legal interpretation’ (alongside the four classical methods) primarily in respect to fundamental rights (Häberle 1989). It is likely that the jurisprudence of the European Court of Human Rights, which deduces more and more standards of administrative procedure from Convention rights, will also generate comparative studies in administrative law. In the field of fundamental rights, it has already been the subject of intense comparative research in recent decades.

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

Within the expanding range of comparative law objectives, the search for administrative structures and procedures that will enable national administrations to effectively cooperate will become even more important. Again, it is the law of the European Union that has generated new obligations of national administrations to cooperate. This is the case, for example, in the law of product authorization. In terms of sensitive products, such as genetically modified food, all Member States participate in most authorization procedures by mediation of the European Commission or of a European agency to such an extent that no central authorization procedure is provided for (for an analysis cf. Sydow 2004, 168 ff.; Siegel 2009, 232 ff.). A further example of a matter where cooperation has been institutionalized is food safety. In this case, however, the creation of isomorphic administrative structures at national level and a corresponding establishment of authorities at EU level were finally triggered by the BSE crisis and the creation of the

²⁶ Recent examples are the judgment of 25 April 2019 – BVerwG 1 C 28.18 – para. 20, and of the order for reference to the ECJ of 9 May 2019 – BVerwG 1 C 14.19 – para. 41.

²⁷ Although fundamental rights comparison dominates in the practice of comparative constitutional law, the comparison of state organization is increasingly gaining attention, cf. e.g. Weber 2010; Classen 2013, Wieser 2020; likewise, the book *Französisches und Deutsches Verfassungsrecht—Ein Rechtsvergleich (French and German Constitutional Law—A Comparison)*, edited by Nikolaus Marsch, Yoan Vilain, and Mattias Wendel and published in 2015, dedicates substantial parts to state organization. It applies, similar to Classen’s study, an ‘integrative approach’ for the comparison of both systems, a ‘continuous change of perspective’ (Marsch, Vilain, and Wendel 2015, 4).

European Food Safety Authority.²⁸ In the field of services, it was the directive of 2006 which imposed substantial duties of cooperation²⁹ and which led, in Germany, to the insertion of a special chapter on European administrative cooperation into the Law of Administrative Procedure.³⁰ Quite apart from linguistic difficulties in transnational communication, the competences and procedures of the national authorities need to be coordinated and adjusted.

The need to improve the inter-operability of various administrative systems promotes their convergence and presupposes a mutual understanding of the existing national administrative laws and cultures. Comparative studies are also urgently needed with regard to the impact of EU law on national legislation (a comparative view on the Europeanization of national legislation can already be seen in Schwarze 2009; Vincze 2017; Fraenkel-Haeberle, Galetta and Sommermann 2017; Fraenkel-Haeberle, Socher and Sommermann 2020).

3.4.3 The Emergence of a Transnational Science of Administrative Law

With the interdependency and interaction between national, European, and international law becoming the focus of legal analysis, exchange between lawyers of different countries has been and will be more and more perceived as work on common legal problems and principles (cf. also Auby 2010, 240 ff.). This changes the concept of legal research and lessens the limitation of national boundaries, which (long ago) Rudolf von Ihering (1818–92) considered parochial and even ‘humiliating’ (v. Ihering 1907, 14 f.). The emerging transnational field of administrative law could pursue three main objectives: first, systematic studies of and taking part in trans- and international discourse about the concepts and methods of administrative law; second, analysis and conceptualization of the inter-operability of various legal orders; and third, making contributions to the systemic development of European and international administrative law (Sommermann 2016, 551 ff.; for the transnationalization of juridical methodology see Chanos 2016). In this last respect, the Model Rules on EU Administrative Procedure, elaborated by the Research Network on EU Administrative Law, was a highly successful cooperation of

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

²⁹ See Art. 28 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), *Official Journal L* 376, 27.12.2006, 36.

³⁰ See Part I Chapter 3 (§§ 8a–8e) of the Administrative Procedure Act, inserted by Law of 17.7.2009, *Bundesgesetzblatt (Federal Law Gazette)* 2009 I, 2091.

scholars and researchers from various European countries (Craig, Hofmann, Schneider and Ziller 2017).³¹ Other projects are not limited to European discourse³² and yet others are dedicated to study of other regions of the world.³³ Thus, comparative administrative law has increasingly become part of a worldwide discourse. It has been several decades now since it became no longer appropriate to speak of a specifically ‘Germanic’ tradition.

3.5 PERSPECTIVES FOR THE FURTHER DEVELOPMENT OF COMPARATIVE ADMINISTRATIVE LAW IN GERMANY

Comparative administrative law is nowadays recognized as an established field of legal study (Schmidt-Aßmann 2018, 808: ‘eine gefestigte Disziplin’). The lively debate on methodological questions is in no way a disadvantage, but rather encourages reflection on the right way to deal with the often complex tasks of comparative analysis. With regard to challenges brought about by rapid political and institutional changes, which particularly affect administrative law, it has even been said that comparative administrative law has taken the ‘lead in reflection’ (*Reflexionsvorsprung*) over comparative private law (Schönberger 2011, 505 ff.). This might be an idle speculation. However, one can no longer assert that legal comparison in public law stands in the shadow of comparative private law. Given the generally greater need to contextualize the objects of comparison, comparative administrative law will often require trans- or interdisciplinary approaches which may, when necessary, be pursued in cooperation with colleagues from other academic disciplines, in particular empirical, social, or political scientists.

The growing interaction between legal and administrative systems and the intensification of international cooperation between scholars in constitutional and administrative law will contribute to a further development of a transnational discipline of administrative law. Irrespective of whether national administrative law will soon be conceived and developed as part of an overarching new *ius publicum europaeum* (see v. Bogdandy 2011, 32 ff.) or whether it will not, the curricula of law faculties should be revised. In the curricula of traditional German law studies, legal comparison is still insufficiently

³¹ The text of the model rules and the explanations are available online at <<http://renewal.eu/index.php/projects-and-publications/renewal-1-0>> (last accessed on 30 September 2019). See also Schneider, Hofmann, and Ziller (2015), and the contributions to a conference held in the Federal Administrative Court in Schneider, Rennert, and Marsch (2016).

³² An example is the elaboration of a model code of administrative jurisdiction by European and Latin American scholars and practitioners in sessions in Germany and Brazil, see Ricardo Perlingeiro and Karl-Peter Sommermann (eds), *Euro-American Model Code of Administrative Jurisdiction—in English, French, German, Italian, Portuguese and Spanish Versions* (2014).

³³ cf. in particular v. Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi, and Piovesan (2017). The book forms part of the results of a project carried out by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

represented. There are specialized Masters programmes in comparative law, but these programmes are not part of the legal studies that lead—after university—to a state examination;³⁴ and so they hardly reach law students at large. In order to enable young lawyers to deal competently with different legal systems, foreign language training is indispensable. International student exchanges are helpful as they convey legal cultures in their own contexts.

Future reforms of legal education are likely to be linked to the ideal of a ‘European lawyer’. Andreas Voßkuhle, the former President of the German Federal Constitutional Court, characterized the European lawyer as someone who is able not only to apply the law, but also to participate in shaping law on the basis of a broad knowledge of legal structures and methodology and a deeper understanding of the interdependence between legal systems and their cultural backgrounds (Voßkuhle 2010, 48 ff.). Regardless of whether this ideal comes to fruition or not, it is evident that comparative administrative law will play a major role, in Germany as in other European countries, in meeting the practical needs of European cooperation and integration.

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³⁴ In order to practise as a lawyer in Germany, one has to pass a two-year clerkship and a second state examination.

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CHAPTER 4

THE CHINESE TRADITION

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4.1 INTRODUCTION

FOR most of the time during the last two millennia, China was a dynastic empire ruled by an emperor as ‘Son of Heaven’ (*tianzi*), holding the Mandate of Heaven (*tianming*) according to Confucian doctrine, with the assistance of a highly developed mandarinat of imperial organs and offices at the national and various local levels. ‘Administrative law’ in the modern sense of a set of legal norms enacted by the legislature or developed by the judiciary that simultaneously empower and constrain state organs and officials for the purpose of protecting the rights and liberties of subjects or citizens did not exist in traditional China. But there did exist for more than two millennia elaborate and sophisticated rules regulating the powers and functions of each component of the highly complex and extensive machinery of imperial organs and officials, and prescribing in detail the duties of officials as well as the multiple and complicated monitoring, supervisory, and disciplinary mechanisms applicable to the exercise of powers and performance of duties by officials in different state organs (Ch’ien 1982). These rules were codified in various complex and detailed legal documents which can be said to constitute China’s ‘traditional administrative law’, such as, for example, *Tangliudian* (‘The Six Canons of the Tang Dynasty’); *Da Qing huidian* (‘The Collected Statutes of the Great Qing’); and *Liubu zeli* (‘Ordinances of the Six Ministries’) (Zhang Jinfan and Li Tie 1991; He Qinhua and Gong Yuting 2016, 130–2). There existed a remarkable degree of continuity in the overall structure and even the names of state organs in successive dynasties. For example, the basic framework of the bureaucracy and even the names of a significant number of state organs and ministries in the Qing Dynasty (1644–1912) was to a considerable degree similar to those in the Tang Dynasty (618–907) nearly one millennium before.

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By the late nineteenth century, Qing China's increasing subordination to Western imperialism and semi-colonialism, and the exercise of extraterritorial jurisdiction in Chinese territory by the Western powers—which was by this time perceived as a humiliating violation of China's sovereignty—convinced significant numbers of Chinese political and scholarly elite that there was a desperate need for China to 'save' and strengthen itself by pursuing modernization. In the legal and political domains, this generally meant extensive borrowing or transplant of Western political and legal institutions. After China's defeat by Japan in the Sino-Japanese War of 1894–95, Japan's experience of successful modernization was widely admired by Chinese intellectuals, and the Japanese model was perceived as one that China should imitate in its self-strengthening efforts. As far as legal studies were concerned, Japan became the primary destination of Chinese students going abroad to learn modern knowledge and skills (Sun 2010; He Haibo 2007; Wang Jian 2001, ch. 2).

This chapter will therefore begin with the introduction and reception of Japanese administrative law in China in the late Qing Dynasty. It will then survey the study of comparative law and the influence of foreign law on the development of Chinese administrative law in the Republic of China era (1911–49) and after the establishment of the People's Republic of China (1949–). Major developments in Chinese administrative law in both the Republican era and the Communist era will also be briefly outlined as the context of administrative law scholarship. It will be seen that the story of the study of comparative and foreign administrative law in modern China is very closely intertwined with the story of the development of Chinese administrative law itself. As one scholar puts it: 'The development of comparative law in modern China is essentially the development of law itself' (Zhang 2019, 228). This is because modern Chinese law is not primarily an indigenous enterprise or an outgrowth of the Chinese tradition. To the contrary, there was a radical discontinuity between traditional Chinese law and modern Chinese law that exists in the domain of administrative law or public law generally, as well as in private law and the general structure of the legal system. The new legal systems that were constructed in both the Republican era and the Communist era were to a significant extent a transplant of Western legal models, concepts, doctrines, and institutions. Hence the practical significance and impact of the study of comparative and foreign administrative law in modern China is actually much greater than the case in the Western states in which modern administrative law originated.

4.2 THE LATE QING DYNASTY

'*Xingzhengfa*' (which may be literally translated as 'law of the operation of government'—the modern Chinese term for 'administrative law')—did not exist in the classical Chinese language used in pre-modern China. Chinese characters (*Kanji*) have been used in the language of neighbouring Japan since antiquity; the Chinese-character term for 'administrative law' was first used in Japan to translate the French term '*droit administratif*' and the German term '*Verwaltungsrecht*' (Sun 2010, 187), before it was imported

into China by Liang Qichao (1873–1929), a leading Chinese reformist intellectual whose life spanned the late Qing and the early Republican periods. Liang first used the term ‘*xingzhengfa*’ in an article on comparative constitutions published in 1899. This article, entitled ‘On the similarities and differences between the constitutions of various countries’, was compiled on the basis of Japanese materials (Sun 2010, 188–9). Soon after, in late 1900, the first Chinese article on ‘*xingzhengfa*’ was published: this was a translation by Chinese students studying in Japan of an article on social administrative law by a German scholar (ibid, 189).

Then, in 1902, the first major treatise in the Chinese language on comparative administrative law was published. This was the Chinese translation of Frank J Goodnow’s (1859–1939) two-volume work on *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany*, first published in 1893 in New York.¹ The Chinese translation, produced by the education scholar Bai Zuolin, was itself a translation of the Japanese translation of Goodnow’s book by Ukita Kazutami (1860–1946).² Goodnow was an American scholar who had studied in France and Germany. He became famous in modern Chinese political history by serving as a legal adviser to the new Republican government established after the 1911 Revolution, particularly as adviser to President Yuan Shikai (1859–1916), who was also the last Imperial Chancellor of the Qing Empire. The translated version of Goodnow’s work introduced to Chinese readers for the first time the basic concepts, principles, and structure of modern Western administrative law in the UK, the US, France, and Germany.

Another pioneering work on administrative law published in Chinese was the translation published in 1906 of an abridged version of the six-volume work by the Japanese scholar Oda Yorozu (1868–1945) on *The Administrative Law of the Qing State*.³ He was one of the founders of the academic discipline of administrative law in late nineteenth-century Japan and the author of one of the earliest texts on Japanese administrative law published in 1895 (Sun 2010, 188); he would later in 1921 be appointed as a justice of the Permanent Court of International Justice, the direct predecessor of the International Court of Justice. Oda’s book on German administrative law was translated into Chinese and published in 1904 (Ye 1998, 6). His six-volume work on the administrative law of the Qing Empire was published in several phases between 1905 and 1914 under the auspices of the ‘Temporary Committee on Research into Taiwanese Customs’ as the Committee’s first report. Taiwan had been ceded by the Qing Empire to Japan in 1895 after China’s defeat in the war with Japan. This was a time of increasing Japanese scholarly interest in the study of China, which would facilitate, among other purposes, the expansion of Japanese influence on China (Huang 2013, 166). Oda’s work was a systematic and comprehensive study, employing modern Western notions and categories of administrative

¹ A reprint of the 1903 edition of the book was published in 1970 by Burt Franklin in New York.

² Another Chinese translation of a new edition of this book was subsequently published in 1931: Sun 2010, 189; He Qinhu 2006, 294, 324.

³ See the discussion in Huang Taotao 2013. Another Chinese translation of the abridged version of this work was published in 1909. The currently available Chinese translation of this work is Zhitian Wan 2003.

law, of the legal rules on the operation of the government system of traditional China, where the modern concept of administrative law had never existed. The work, as translated into Chinese, served the dual functions of enabling Chinese readers to have a better and fuller understanding of China's own administrative system, and of introducing Western ideas and concepts of administrative law, mediated by Japan's own political culture, into China (He Qinhua 2006, 306–7).

At the same time as the publication in the Chinese language of Goodnow's and Oda's works, Chinese translations of works on foreign, particularly Japanese, administrative law were published, and a few books by Chinese scholars on administrative law (*xingzhengfa*) also appeared. For example, in 1902, *An Outline of Japanese Administrative Law*, compiled and translated from Japanese by Dong Honghui (1878–1916), a Qing civil servant-turned-revolutionary, was published. 1903 saw the publication of the Chinese translation of a treatise on administrative law by the Japanese scholar Shimizu Tōru (1868–1947), who was one of the pioneers of Japanese administrative law scholarship. In 1904, the Chinese translation of Oda's book on German administrative law was published as mentioned above. Then, in 1905, the first two books on administrative law by Chinese scholars who studied law in Japan, Xia Tonghe (1872–1925) and Cao Lüzhen (b.1872), respectively, were published. Cao's book was only seventy-five pages in length and was largely based on Shimizu's lectures. Xia's book reached 304 pages (160,000 Chinese characters) and was based on a wider range of sources and included more original ideas of his own. In recent Chinese scholarship on the history of modern Chinese administrative law, Xia's book was evaluated highly as having laid the foundation for modern Chinese administrative law scholarship (Liang 2018). Subsequent developments in Chinese administrative law scholarship were to reveal that the basic conceptual structure and vocabulary of the modern Chinese scholarship of administrative law largely followed those established by Xia's book.

Xia was particularly well positioned to comment on the emergence of modern Chinese administrative law. He had come first in the imperial civil service examination in 1898 and then briefly served as an official in the Qing court. From 1904 to 1905, he studied in Japan under the intensive programme in law and political science newly established specially for Chinese students by Ume Kenjiro (1860–1910), one of the founding fathers of modern Japanese civil law and president of Tokyo Law School at the time. This programme was run annually between 1904–1908 and produced five classes of a total of 1,060 graduates, including Xia Tonghe, Bai Pengfei (1870–1948) who subsequently became one of China's top scholars of administrative law in the Republican period), and Zhang Junmai (1887–1969, also known as Carsun Chang Chun-mai, a leading draftsman of the Republican constitution of 1946). Top Japanese legal scholars had taught in this programme, including Minobe Tatsukichi (1873–1948) (who taught constitutional law), Shimizu Tōru (1868–1947) (who taught administrative law), and Okada Asataro (1868–1936) (who had assisted the Qing court in the drafting of a new criminal code for China).

The last decade of the Qing Dynasty (i.e. the first decade of the twentieth century) saw an increasing number of Chinese publications on administrative law, and the beginnings of the teaching of administrative law in China's newly established universities

and law schools. Chinese students educated abroad (mostly in Japan, but also some in Europe and America) as well as Japanese legal scholars visiting China played important roles in these developments. By 1908, more than twenty books (including translations) on administrative law had been published in Chinese (He Haibo 2007, 42; He and Gong 2016, 133). By the time of the 1911 Revolution, a total of thirty-nine books (including translations) and over twenty articles (including translations) on administrative law had been published (Sun 2010, 189). The regulations on the new Imperial Capital University (*Jingshi daxuetang*) promulgated by the Qing regime in 1902 provided for administrative law as part of its curriculum. This was the first time in which the Chinese term ‘*xingzhengfa*’ was used in an official document (ibid, 190). Administrative law was also included in the curriculum of the Imperial Capital Law School (*Jingshi falü xuetang*) established in 1906. The Japanese legal scholar Okada Asataro was the first teacher of this course (ibid, 190).⁴ The Imperial Capital School of Law and Political Science (*Jingshi fazheng xuetang*) that began to recruit students in 1907 also included administrative law in its curriculum (Sun 2010, 190).

At this time, the content of Chinese publications and courses on administrative law was largely foreign (particularly Japanese) and comparative administrative law, as the concept of modern administrative law had been transplanted to China from abroad, and the indigenous Chinese system of government had hardly been studied by reference to the categories of Western administrative law. Japanese administrative law, as in the case of the modern Japanese constitutional and legal system, was almost completely a transplant of European—particularly German and French—legal models (Ushijima 2009, 82). The drafting of the Meiji constitution of 1889 was heavily influenced by the constitution of the German Empire. As far as administrative law was concerned, the most relevant article in the Meiji constitution was Article 61: ‘No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law’ (Takii 2007, 158). In 1890, the Law on Court Organization and the Law of Administrative Litigation were introduced in Japan. The concepts of *Rechtsstaat* and administration according to law, along with the model of specialized administrative courts to handle law suits brought by citizens against state organs and officials, were adopted. Generally speaking, citizens aggrieved by an administrative action were required first to petition for review of the action by a higher administrative authority; litigation could only be the last resort. Only specified types of administration actions could be the subject of litigation, and there was only one administrative court at the national level (with no administrative courts at lower or local levels).

In the last decade of its rule, the Qing court, which had hitherto resisted political reform, began to take steps to reform the Chinese administrative, legal, and constitutional systems. In 1901–06, a series of administrative reforms were introduced to re-structure and modernize the bureaucracy (He and Gong 2016, 132). In 1902, Shen Jianben

⁴ Okada’s lectures were subsequently compiled as a book by Xiong Yuanhan and published in 1912: see He Qinhua 2006, 299; Gao Qinwei 2017.

(1840–1913), an imperial official well versed in traditional Chinese law, and Wu Tingfang (1840–1913), experienced in the common law tradition, were appointed ministers for law reform. In particular, Wu, born in the Straits Settlement, was the first Chinese person to qualify as a barrister in England, and had served as a member of the legislature in the British colony of Hong Kong. Bills for new codes of criminal law, civil law, commercial law, organic law of the courts, the law of civil procedure, and the law of criminal procedure were drafted, some with the assistance of Japanese jurists. In 1905, it was announced that the traditional civil service examination (on the basis mainly of the Confucian classics) would be abolished as from 1906.

In 1905 five Qing ministers visited Japan, Britain, and France, studying their constitutional systems and reporting back to the Qing court. Following these visits, an imperial decree was promulgated in 1906 stating that the regime would learn to practise constitutionalism (*xianzheng*) and prepare to make a constitution. In 1907, imperial decrees were promulgated on the establishment of provincial consultative assemblies and a national political assembly—which were duly elected in 1909 and 1910 respectively. In 1908, an ‘Imperial Constitutional Outline’ was promulgated together with a nine-year plan for constitutional reform. The Outline set out the basic principles to be incorporated into a constitution to be adopted in the future. Shortly after the outbreak of revolution in the city of Wuhan in October 1911, the Qing court promulgated the ‘Nineteen Articles of the Constitution’ drafted by the Political Assembly as guiding principles for the drafting of the new constitution. The articles in effect provided for a constitutional monarchy in which political power would be exercised by a Prime Minister who had the confidence of Parliament. However, the proposed reform came too late; the Qing Dynasty soon came to an end with the establishment of the Republic of China by the revolutionaries in 1912.

4.3 THE REPUBLICAN ERA

In its first one and a half decades, the new Republic was plagued by political instability, frequent changes of government, and several civil wars between army generals in control of different parts of the country. After the promulgation of the first Provisional Constitution of the Republic of China in March 1912, several constitutions were drafted but none was fully effective (Pan 1945). Despite this, there was some progress in the development of a new and modernized legal system, drawing on the groundwork done in the last decade of the Qing and the bills drafted in that period. Some of these bills were now enacted as laws; for the first time in Chinese history, a system of courts was established in accordance with the principle of separation of powers enshrined in the Provisional Constitution. Article 49 of this constitution provided that ‘the Courts shall try civil and criminal cases, but administrative litigation and other special litigation shall be separately provided for by law’. Article 10 provided that ‘citizens shall have the right to bring proceedings before the Court of Administrative Justice (*Pingzhengyuan*)

in respect of unlawful official actions that infringe upon their rights.' These provisions implied that the Republic would follow the Japanese system of an administrative court separate from ordinary courts.

A Court of Judicature (*Daliyuan*) was established in 1912 which served as the supreme court of the newly established system of courts. The year 1914 saw the enactment for the first time in Chinese history of a Law of Administrative Litigation, and the establishment of the Court of Administrative Justice to try cases of administrative litigation (Wang Guisong 2015). In its early years (until 1916), a division of this court was the Censorate (*Suzhengting*), reminiscent of the Censorate (*Duchayuan*) in the traditional system of imperial government, with power to impeach senior officials (Nie 2019). The relevant provision in the constitution promulgated in 1914 during Yuan Shikai's presidency was as follows (Article 43): 'The Secretary of State and the Heads of the Departments may be impeached by the Censorate (*Suzhengting*) and judged by the Court of Administrative Justice, should they violate the law.' Although there remained some controversy regarding whether jurisdiction over administrative litigation should be exercised by a separate administrative court (i.e. the Japanese, German, and French models) or by ordinary courts (the Anglo-American model) (Wang Guisong 2015, 144–6), the Court of Administrative Justice remained operational in the period 1914–28.

According to one study, 70 per cent of the content of the Law of Administrative Litigation Law was modelled on the Administrative Litigation Law of Japan (*ibid*, 142). As in the case of Japan (and unlike Germany), there was in China only one administrative court at the national level, with no such court at provincial or other local levels. Also, as in Japan, administrative litigation was only a remedy of last resort, as citizens aggrieved by administrative acts should first petition for review by higher administrative authorities in accordance with the Law of Petitions (*Suyuanfa*) enacted in 1914. However, whereas the jurisdiction of the Japanese Administrative Court was limited to the types of administrative actions specified in law, the *Pingzhengyuan* had a broader jurisdiction over all administrative measures that infringed upon people's rights. Also unlike the case in Japan, citizens who had initiated a suit against an administrative measure could not withdraw it without the *Pingzhengyuan*'s permission: this provision was designed to protect citizens from being coerced by officials to withdraw their suits. As regards remedies, the *Pingzhengyuan* had the power to nullify or vary the impugned administrative action. According to one study, in its fourteen-year history, the court had nullified the impugned action in 24 per cent of the cases tried by it, and varied the impugned action in 22 per cent of the cases tried (*ibid*, 153).

In 1928, a new government known as the National Government (*Guomin zhengfu*) was established in the capital of Nanking after the military forces led by Chiang Kai-shek defeated the other 'warlords' and succeeded to unify the greater part of China, except the relatively small areas under the control of the Chinese Communists. Chiang had succeeded Dr Sun Yat-sen as leader of the Chinese Nationalist Party (Kuomintang or KMT) upon Sun's death in 1925. Dr Sun was generally regarded as the founding father of the Republic of China. His doctrine of 'the Three Principles of the People' had been adopted as the KMT's ideology for the building of the Chinese nation-state: the Principle

of People's National Consciousness (*minzu*), the Principle of People's Rights (*minquan*), and the Principle of People's Livelihood (*minsheng*). Dr Sun also developed the theory of the 'five-power constitution'. Sun drew a distinction between 'power' (*quan*) and 'function' (*neng*), or between 'political power' (*zhengquan*) and 'governing power' (*zhiquan*). According to this theory, 'the people should exercise the four political powers of election and recall, of initiative (*chuangzhi*) and referendum (*fujue*), and the government the five governing powers of administration, legislation, adjudication, examination, and control' (Ch'ien 1950, 152). Sun believed that the Western theory of separation of powers between the legislature, the executive, and the judiciary was inadequate. Drawing on the traditional Chinese political system which included institutions of the Censorate and civil service examination, Sun proposed the establishment of the two additional powers of 'control' or 'supervision' (*jiancha*) and of 'examination'.

The KMT's approach to constitutional development was based on Sun Yat-sen's three-stage programme for China's political transformation. The first was 'military government' (*junzheng*) for the purpose of ending warlordism and unifying the country. The second was preparation for constitutional democracy under the KMT's 'political tutelage' (*xunzheng*). The third and final stage would be 'constitutional government' (*xianzheng*). Thus the KMT regime promulgated a provisional constitution in 1931 known as the Constitution of the Republic of China in the Period of Political Tutelage (*ibid*, 137), which expressly vested state power in the KMT, inspired by Leninist practices. In theory, the period of political tutelage came to an end soon after the Japanese War of Aggression on China (1937–45), when a new constitution was adopted by a constituent assembly convened by the KMT in December 1946. This constitution was supposed to move China from the stage of 'political tutelage' to full liberal constitutional democracy, with a government elected by free multi-party elections and respectful of civil liberties, under the superintendence of a Constitutional Court—the first of its kind in Asia. However, the promises of this constitution were never realized in mainland China, as the country soon descended into a state of civil war between the KMT and the Chinese Communist Party, ending with the retreat of the KMT regime to Taiwan in 1949.⁵

After the KMT established the National Government in Nanking in 1928, it acted quickly to establish a new political system which, in accordance with Sun's theory, consisted of five principal organs or 'yuan': the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Control Yuan, and the Examination Yuan (*ibid*, 152). The Judicial Yuan had under it the Ministry of Justice, the Supreme Court (replacing the Court of Judicature—*Dali yuan*—of the former regime in Peking), the Administrative Court (replacing the *Pingzhengyuan*), and the Commission for Disciplinary Punishment of Public Functionaries. Thus, the existing system of separate courts for civil and criminal cases on the one hand and cases of administrative litigation on the other hand was maintained. As regards disciplinary punishment of officials, the Control Yuan now had power to impeach them, but whether they were to be punished would be adjudicated by the Disciplinary Commission. The Legislative Yuan engaged actively in legislative work

⁵ The liberal-democratic aspirations of the 1946 constitution have been realized in Taiwan since the 1990s.

immediately after its establishment. Many major laws, including a comprehensive civil code (largely based on the German and Swiss civil codes), had been enacted by the early 1930s. A new Law of Petitions (to higher administrative authorities) was enacted in 1930, and a new Law of Administrative Litigation in 1932.

In the Republican era, research and teaching of administrative law in universities and law schools that began in the last years of the Qing continued to develop and expand. By the 1930s, more than thirty books on foreign administrative law had been translated into and published in Chinese (Ye 1998, 5). At the same time, over forty books on administrative law by Chinese scholars had been published (*ibid.*, 5). Nearly twenty Chinese scholars of administrative law were well known by the 1930s (*ibid.*, 5; He Qinhua 2006, 295–9). It may be said that by the 1930s or 1940s, Chinese scholarship on administrative law had reached a state of relative maturity, with all basic concepts and principles being well developed, and the structure of the academic discipline being well elaborated. There was a critical mass of scholars and of scholarly literature on the subject. Japanese and European concepts and techniques of administrative law had been integrated into the study of the laws and regulations in the domain of administrative law promulgated by the government and legislature of the Republic of China. The body of Chinese academic literature on administrative law grew steadily in size. According to one count, by the time of the establishment of the People's Republic of China in 1949, approximately 450 books (including translations) and 120 articles (including translations) on administrative law had been published in republican China (He Qinhua 2006, 294, 298).

Two of the most famous and influential scholars of administrative law in Republican China were Bai Pengfei and Zhong Gengyan, both of whom had studied in Japan. They taught at Peking University and Chaoyang University in Peking respectively. Two of their representative publications will be introduced here. We first consider Bai's treatise on *A General Study of Administrative Law*, a book 376 pages in length, first published in 1927 (an updated but condensed version of which was published in 1932) (*ibid.*, 307). In his book, Bai explained that there were three major families or traditions of administrative law in the world: the French, the German, and the Anglo-American. He pointed out that contemporary Chinese administrative law was largely modelled on that in Japan, which in turn was based on the German model. Bai also acknowledged that much of the content of this book was based on the teachings of his teacher, Professor Minobe Tatsukichi of Tokyo Imperial University. Bai's book was often cited by scholars as evidence of the strong Japanese influence on administrative law scholarship in Republican China. Indeed, it has been pointed out that the basic structure and much of the content of Bai's book were derived from Minobe's book (*ibid.*, 310, 322).

Bai's book provided, *inter alia*, a detailed analysis of discretion (*Ermessen* in German) in administrative decision-making. It explored a variety of legal relationships in public law, which it divided into general governing relationships, and special power relationships between parties in respective positions of command and obedience. Special power relationships could in fact exist in both private law and public law (e.g. the parent-child relationship was a special power relationship in private law). As for public law, there were six types of special power relationships of note. For example, officials, soldiers,

students in government-funded schools, and prisoners were parties occupying the inferior position in a special power relationship. The chapter on administrative action (*Verwaltungsakt* in German) then provided a detailed study of different types of administrative action and their effects (three such effects were analysed). Bai distinguished between administrative action in a broad sense and in a narrow sense. The broad sense of administrative action included all actions taken by the government, including for example, the building of a road or bridge, the establishment of a university, auctioning government property, or government purchase of goods. Administrative action in its narrow sense involved the exercise of power by an administrative organ, for example, in making an order, granting a permission, conferring or taking away a right, etc. The section also included the study of public law contracts (contracts governed by public law, or *öffentlich-rechtlicher Vertrag* in German) which, unlike administrative measures that were unilateral acts of the administration, could only come into existence with the consent of the parties concerned. In the section on damages for harm (*sunhai peichang*) and compensation for loss (*sunshi buchang*), Bai pointed out that unlawful administrative actions would result in both the individual's liability of officials and the state's liability for damages for the harm done to citizens, while lawful administrative actions taken for the public interest that resulted in loss to citizens would lead to compensation payable by the state. The section on public legal persons dealt with public bodies under the state or established for the purpose of public welfare. They included some social and financial bodies, such as publicly funded schools and railway companies. Public legal persons also included local autonomous bodies that played a role in local administration.

We now turn to Zhong Gengyan's treatise on *A General Study of Administrative Law*, a book 316 pages in length first published as teaching materials for students in 1923 and subsequently published for a broader readership in 1927 (*ibid*, 315). Zhong explained that the sources of administrative law included enacted law (which included not only legislation but also the constitution) and non-enacted law (including customary law, judicial precedents, and 'principles of reason' (*lifa*)). It has been pointed out that Zhong's emphasis on principles of reason as a source of administrative law can be understood in light of the inadequacy of positive administrative laws and regulations in China at the time (Chen 2007, 317–18).

Zhong's discussion of 'administrative functions' included administrative legislation, administrative adjudication, private law acts done in the course of administration, and administrative action (*xingzheng xingwei*). Administrative legislation included 'orders', which Zhong divided into regulatory orders (*fagui mingling*, or *Verwaltungsverordnung* in German) (which could only be made if so authorized by the constitution or by law) and administrative rules (*xingzheng guize*, or *Verwaltungsvorschrift*) (which did not affect citizens' rights and could be made in exercise of the inherent power of administrative organs). After discussing 'orders', Zhong turned to 'administrative action' (*xingzheng xingwei*). He divided administrative actions into administrative measures (*xingzheng chufen*, or *Verwaltungsakt*), which were unilateral acts of the administration, and consensual acts such as public law contracts (administrative contracts) and agreed actions. Four types of administrative measures were analysed. Zhong also dealt with the question

of whether every administrative measure need to be expressly and specifically authorized by law or regulations. He concluded that the requirement of authorization by law was only applicable to administrative measures that affected people's rights or obligations, and was not applicable to administrative measures that conferred benefits on people. Zhong's chapter on administrative functions also covered execution in administrative law, including administrative punishment and administrative coercive execution. In his chapter on remedies, Zhong discussed the Law of Petitions and the Administrative Litigation Law that were in force in China at the time. He pointed out that whereas administrative litigation could only be brought against administrative measures that were unlawful, petitions for review by a higher administrative authority could be brought either on the ground that the measure was unlawful, or on the ground that it was inappropriate in the circumstances. He argued that omission or failure to act could constitute an administrative measure. As regards the right to damages for violation of rights by administrative measures, Zhong opined that this should be enforced in proceedings in private law or civil law, and that the liability for such damages should be borne by the state.

The two works discussed above were both published in 1927. They were followed by other major scholarly works on administrative law published in the 1930s. One of the last treatises on administrative law published in China during the Republican era was the book on *Essentials of Administrative Law* by Lin Jidong (1915–90), published in 1946 (Chen 2007, 313). Lin was a law graduate of Chaoyang University in Peking and had also studied at the Meiji University in Tokyo. He subsequently migrated to Taiwan, where the KMT regime was relocated after its defeat by the Chinese Communists in the Civil War, and became a leading scholar of administrative law in Taiwan and a Grand Justice of the Judicial Yuan from 1958 to 1985. His books on administrative law published in Taiwan were the most authoritative and popular works on the subject for several decades. Both the Republican constitution and laws, and the Republican tradition of legal scholarship, had been transplanted to Taiwan in 1949, where administrative law and its scholarship (as was the case in other legal domains) continued to develop, and flourished since the 1990s when authoritarian one-party rule by the KMT gave way to the liberalization and democratization of the political system.

4.4 THE COMMUNIST ERA (PEOPLE'S REPUBLIC OF CHINA)

Upon the establishment of the People's Republic of China (PRC) in 1949, the Chinese Communist Party (CCP) regime decided to abolish in their entirety the laws and legal and political institutions of the former KMT regime (Chen 2018, 29). There was thus a 'clean break' with the past—the dark age of feudalism, imperialism, colonialism, and capitalism—permitting a 'fresh start' towards a socialist and eventually communist society in accordance with the ideology of Marxism-Leninism-Mao Zedong Thought.

After the CCP was founded in 1921, it had gradually developed its own political and legal tradition in rural areas under its control. This tradition was partly shaped by theories and institutions imported from the Soviet Union, and partly by indigenous ideas and practices invented by Mao and his comrades. In the first few years of its history, the newly established PRC regarded the Soviet Union as the pioneer and leader of the international communist movement, and was willing and eager to borrow extensively from the Soviet model and experience in economic, social, political, and legal domains (Chen 2000).

There was evidence of considerable Soviet influence, particularly that of the Stalinist constitution of 1936, in the text of the first PRC constitution adopted in 1954 and in the political and legal institutions created by it. According to the constitution, the supreme organ of state power was the National People's Congress (NPC), to which the State Council (the highest executive organ), the Supreme People's Court, and the Supreme People's Procuratorate were responsible. The NPC was the functional equivalent of the Supreme Soviet in the Soviet Union, to which the highest Soviet executive, judicial, and procuratorial organs were responsible. The Chinese institution of the procuratorate or procuracy, which enjoys equal constitutional status as the court and the executive organ, was a replica of its Soviet counterpart. And as in the Soviet Union which was a Party-state, state institutions in the PRC are led by and controlled by the Communist Party which practises 'democratic centralism' (a political doctrine of Soviet origins) (Feldbrugge 1985, 249)—which in practice means that the will of the highest leadership of the Party is supreme.

Article 97 of the 1954 constitution provided that '[c]itizens of the PRC have the right to make written or oral accusations against functionaries of state organs regarding violation of the law or dereliction of duty. Citizens who have suffered loss as a result of infringement of citizens' rights by functionaries of state organs have the right to compensation.' In the Maoist era (1949–76), the provision regarding the right to compensation had never been implemented. Nor was any system of administrative litigation established. A Ministry of Supervision was established by the Organic Law of the State Council in 1954, but was abolished in 1959 during the turn against 'socialist legality' that began with the 'Anti-Rightist Campaign' of 1957 (Chen 2010, 53). The Ministry of Supervision had power to supervise the performance of administrative organs and to investigate accusations by citizens regarding officials' misconduct. Officials suspected of having committed a criminal offence would be investigated by the procuratorate and prosecuted before the court. Party cadres were also subject to the CCP's internal disciplinary system.

In the early 1950s, some legal rules and regulations were promulgated on matters of economic reform and land reform that would fall within the concept of administrative law. However, Chinese scholarship on administrative law was slow to develop after the establishment of the PRC, and seemed to lag behind some other areas of the law such as criminal law and constitutional law. No single textbook or treatise on administrative law was written and published by Chinese scholars in the Maoist era, except one book on *Reference Materials on the General Principles of Administrative Law* that was published

by the Chinese Renmin University Press in 1956 (Jiang 2007, 95). A few books on the administrative law of the Soviet Union were translated into Chinese and published.⁶ For a few years during the 1950s, Soviet administrative law was taught in a few law schools, including the departments of law at China Renmin University and Peking University (ibid, 95). The Russian jurist SS Studenikin (1905–57), a leading scholar of Soviet administrative law, visited Beijing and taught briefly at the China Renmin University and the Beijing College of Political Science and Law (He Haibo 2007, 45).

Beginning from the time of the Anti-Rightist Campaign of 1957, legal education and scholarship in the PRC suffered a downturn, and was completely halted during the ‘Cultural Revolution’ era. During the Anti-Rightist Campaign, many jurists were purged. Those who had advocated legality and its improvement by the regime were accused of ‘using the law to resist the Party’. Principles such as the supremacy of law, equality of all before the law, independent adjudication of cases by courts, and the right of the accused in criminal proceedings to be defended by lawyers, were all criticized as reactionary bourgeois ideas that should be rejected. Mao even said that ‘what is needed is the Rule of Man, not the Rule of Law’ (Chen 2010, 53). The situation became even worse after Mao launched the ‘Cultural Revolution’ in 1966. Mao openly advocated the idea that ‘revolutionary violence’ and the ‘dictatorship of the proletariat’ should not be subject to legal restraint. ‘Lawlessness’ (*wufa wutian*) was considered a good in the Cultural Revolution era—an era of legal nihilism and massive violations of human rights (Chen 2018, 34–7).

After Mao’s death in 1976, the veteran revolutionary Deng Xiaoping soon consolidated power as the supreme leader of the Chinese Communist Party. In late 1978, the now legendary Third Plenum of the 11th Central Committee of the CCP decided to turn away from Mao’s politics of ‘class struggles’ to China’s economic modernization and the construction of ‘socialist legality’. The great new era of ‘reform and opening’ thus began. There was a renaissance, and steady and rapid development, of legal education and scholarship immediately following 1978. Many legal scholars who had been purged twenty years earlier in the Anti-Rightist Campaign or ten years ago in the Cultural Revolution were rehabilitated and appointed to teach and research in the newly re-opened law schools and institutions of legal research all over the country.

In 1982, a new constitution—the fourth constitution in the history of the PRC—was adopted by the NPC. The topic of citizens’ rights was moved from chapter 3—where citizens’ rights were provided for in all three previous constitutions—to chapter 2, reflecting the post-Mao regime’s commitment to the protection of citizens’ rights. The principle of the equality of all citizens before the law and the independent exercise of judicial power by the courts, both of which had existed in the 1954 constitution but disappeared from the 1975 and 1978 constitutions, were restored in the 1982 constitution.

⁶ Four books on Soviet administrative law, including two by SS Studenikin, were translated by the State Law Unit of the China Renmin University and published in 1953–57. Two other works on Soviet administrative law were published in 1951 and 1955 respectively. It has been pointed out that 165 Soviet legal texts were translated and published in 1952–56, and relatively few were on administrative law. It seemed that among Chinese students sent to study in the Soviet Union in the 1950s, none specialized in administrative law. See He Haibo 2007, 45.

The principle of legality was enshrined in Article 5, which provides, inter alia, that ‘the state upholds the unity and dignity of the socialist legal system’; ‘all state organs, the armed forces, all political parties and public organisations and all enterprises and institutions must abide by the Constitution and the law’; ‘no organisation or individual is privileged to be beyond the Constitution or the law’. This constitution has been amended five times since 1982. The third amendment in 1999 wrote into the constitution the principle of ‘ruling the country according to law and constructing a socialist rule-of-law state’ (or *Rechtsstaat*). The concept and term of ‘human rights’ was written into the constitution in 2004.

The 1980s were a critical period in the development of the teaching of and scholarship on administrative law in the PRC. There was some learning and borrowing from the Soviet Union in this decade. Four books on Soviet administrative law were translated and published between 1983 and 1988 (He Haibo 2007, 45). But Soviet influence soon declined with the introduction into the Chinese academia of pre-1949 Chinese literature on administrative law, post-1949 Taiwanese literature on administrative law, and literature on administrative law in Europe (particularly Britain, France, and Germany), America, and Japan (Yu 2006). Leading administrative law scholars in China began to take an active part in the planning and drafting of new legislation in the domain of administrative law, such as the landmark Law of Administrative Litigation enacted in 1989—the first law of its kind in the PRC’s history. Scholarly contributions continued to be made to the creation of other building blocks of contemporary PRC administrative law, including the State Compensation Law (1994), the Administrative Punishment Law (1996), the Administrative Supervision Law (1997), the Administrative Review Law (1999), the Law on Legislation (2000), the Administrative Licensing Law (2003), and the Administrative Coercion Law (2011) (Ye 1998, 12; Jiang 2007, 98).

Two senior Chinese scholars of comparative administrative law published their magnum opus in the 1980s. Gong Xiangrui (1911–96), law professor at Peking University who received his postgraduate education in London and Paris in 1936–39, published his book on *Comparative Constitutional and Administrative Law* in 1985. Wang Mingyang (1916–2008), law professor at the China University of Political Science and Law (since 1983) who stayed in France from 1948 to 1958 for doctoral study and postdoctoral research, produced his famous trilogy, which began with *British Administrative Law* published in 1987 when he was aged seventy-one, followed by *French Administrative Law* in 1989, and *American Administrative Law* in 1995—a two-volume work of approximately one million Chinese characters in length based on his research visit to the US in the early 1990s. In addition, he also published in 1991 a *Concise Textbook on British, French, American and Japanese Administrative Law*, and a book on *Foreign Administrative Litigation Systems*. His manuscript on *Comparative Administrative Law*, unfinished because of ill health, was published in 2006. According to a study of Chinese legal literature published in the period 1998–2002, Wang’s works were cited 494 times, making him the eighth most frequently cited Chinese legal scholar at the time (Zhang and Zhang 2009, 58; He Haibo 2007, 47). Gong and Wang were the pioneers of the study of comparative administrative law in the PRC. Since the publication of their works, numerous volumes

on comparative and foreign administrative law have been published by younger scholars, and the government has also compiled many sets of reference materials on foreign administrative law for use in Chinese legislative drafting.

Since the publication of the first textbook of administrative law in 1983 and the first textbook of the law of administrative litigation in 1990, Chinese scholarship on administrative law has made great strides. A strong and expanding community of scholars of administrative law has been built up under the academic leadership of members of the first generation of administrative law scholars who came of age after the PRC was founded, such as Luo Haocai (1934–2018) (Luo also served as a Justice and Vice President of the Supreme People's Court), Ying Songnian (1936–) and Jiang Ming'an (1951–) (Gong Xiangrui's student). Many younger members of this community have received training abroad, in Japan, Europe, or North America. There were increasing opportunities of academic exchange between China and these overseas countries. Associations to promote scholarly exchange in administrative law among scholars in mainland China and Taiwan, and among scholars in East Asia, have been formed and been active in organizing periodic conferences (He Haibo 2007, 44, 46). Foreign and comparative administrative law has exerted a significant influence on the development of Chinese law and on administrative law scholarship since the 1980s. Unlike the case in the Republican era when Chinese administrative law scholarship was largely shaped by that of Japan, the developing administrative law scholarship in China since the 1980s has drawn on diverse external sources, particularly that of the US, Taiwan, Japan, Germany, Britain, and France, as studies of citation counts indicate (*ibid.*, 59).

The contours of contemporary Chinese administrative law scholarship may be discerned from the basic topics usually covered in textbooks of administrative law. They typically include the basic principles of administrative law, administrative action (*xingzheng xingwei*), administrative legal relationship, administrative actors (*zhuti*, alternatively translated as 'subjects'), administrative legislation, specific types of administrative action (such as administrative punishment, administrative licensing, administrative coercion, administrative adjudication, and administrative contract), administrative procedure, administrative liability, administrative review, administrative compensation, and administrative litigation. It may be seen that there is a considerable degree of continuity with the earlier scholarship of the Republican era.

In his book on *Comparative Administrative Law* (2006), Wang Mingyang (1916–2008) explains that comparative law serves multiple functions: (1) facilitating the understanding of legal development as a universal phenomenon in different societies; (2) enabling the people of the comparative scholar's home to understand better their own laws in the light of comparison with foreign laws; (3) providing reference materials for legislative and judicial work; (4) promoting understanding of foreign countries and facilitating international corporation; and (5) contributing to the development of uniform laws or legal harmonization among countries. As this chapter demonstrates, the development of modern Chinese law in the last century has taken a most tortuous path. Comparative administrative law has been an important component of, and has indeed contributed to,

the project of the construction of a modern system of administrative law in China. ‘In the late nineteenth century, China embarked on a century-long journey to “modernize” its legal system in the image of foreign, and primarily Western, law’ (Zhang 2019, 228). The journey now continues; future chapters of the story are yet to be written.

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