Abstract

This chapter outlines some basic approaches to identifying frameworks of comparative research. It first argues that establishing comparative frameworks is a task ubiquitous to legal methodology. The framework is the decisive factor identifying the comparators and allowing assessment of similarities and differences. The framework allows identification of what to compare, how many commonalities the comparators have to start with, and how 'foreign' the two elements subject to comparison may be, so as to facilitate meaningful comparison. The chapter thus shows how comparative frameworks are flexible in serving the objectives defined by comparative scholars. This fluid feature of the framework of comparison and the relatively ubiquitous nature of the comparative method is the backdrop to the discussions in this chapter, critically reviewing three major frameworks identified by the objectives of the comparative approach: law as 'category', as 'source', and as 'variable'.

Keywords

theoretical frameworks, comparative frameworks, legal methodology, comparative method, comparative approach

CHAPTER 48

IMAGINING THEORETICAL FRAMEWORKS

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This chapter outlines some basic approaches to identifying frameworks of comparative research. Identifying the framework of comparison is an essential element of conducting comparative legal research. A framework of comparison defines which kind of law should be compared, to which end, and serving which objective (Kischel 2015, 97). This chapter argues, first, that establishing comparative frameworks is a task ubiquitous to legal methodology. The framework is the decisive factor identifying the comparators and allowing assessment of similarities and differences. The framework allows identification of what to compare, how many commonalities the comparators have to start with, and how 'foreign' the two elements subject to comparison may be, so as to facilitate meaningful comparison (Frankenberg 2016, ix–xii). Section 48.1 of this chapter shows how comparative frameworks are flexible in serving the objectives defined by comparative scholars. They are central to defining the methodology of comparison. A framework can, therefore, be used to identify comparisons between legal systems as well as within them, on one level of regulation or between multi-level regulatory approaches, between various language groups or within one, between various generally applicable norms or between various policy-specific provisions.

This fluid feature of the framework of comparison and the relatively ubiquitous nature of the comparative method is the backdrop to the further discussions in Sections 48.2 to 48.4 of this chapter. These describe and critically review three major categories of comparative frameworks identified by the objectives of the comparative approach: law as 'category', 'source', and 'variable'. Section 48.2 on law as 'category' addresses comparative frameworks

that seek to simplify legal differences by means of establishing classifications of legal systems and approaches. By contrast, the objective of using comparative law as a ‘source’ of law—the focus of Section 48. 3—requires quite a different framework and methodology. This section discusses this approach by reference to the development of European Union (EU) administrative law as an example of contemporary legal developments. The third framework (Section 48.4), is identified with law as a ‘variable’ in comparative studies. This model is used especially when law is looked at through a trans-disciplinary lens.

48.1 Ubiquitous Comparisons

The comparative method is not specific to cross-systemic comparative law. It is, in fact, inherent in the very nature of legal methodologies, each establishing their specific framework for undertaking the relevant comparison. Several mundane examples serve to illustrate this: In matters of equality and non-discrimination, lawyers, for example, habitually compare whether two situations are sufficiently alike to require equal treatment. They will then continue to distinguish whether factors proposed to justify differential treatment establish sufficiently differentiable conditions. When deciding whether to apply a norm by means of analogy, lawyers will identify whether an approach chosen in one policy area is applicable in another. The approach is to first identify regulatory gaps by comparison to situations of fully-fledged regulation. These gaps will be filled by concepts arising from an analysis of the transferability of solutions from one policy area to another. The comparative method is also widely applied in multilingual legal systems such as, for example, Belgium, Switzerland, Canada, and the EU—to name just a few—which require the interpretation of legal provisions by comparing different language versions thereof. In various languages,

terminology has different connotations and contextual meanings thus requiring a comparative approach to interpretation of law.

In fact, the very basic approach of subsuming the facts of a situation under the requirements of legal norms will generally entail some comparative work, first by determining which set of norms are best suited to be applied to a situation, in case of several possible contenders, and then by allocating factual situations to normative requirements following their interpretation. Importantly, such comparisons have not only a dimension of applying the abstract norm to concrete facts, but there is also the dimension of time. 'The past is a foreign country; they do things differently there' (Hartley 1953, 1) is an adage from the opening lines of a well-known novel but is also well-adapted to spurring a critical approach to normative claims. These generally need to be interpreted and applied in a particular legal system to different legal and societal contexts than those prevailing at the time of the origin of the norm.

The routine nature of the comparative method in law thus results in the fact that the formulation of a comparative framework can require work within or beyond a single legal system, within or beyond a single regulatory policy area, within or beyond a single language or group of languages, within one level of regulation or between them (sub-national, national, supra-national, trans-national, or international).[1]

Accordingly, a comparative framework can be defined both narrowly and broadly. A narrow framework examines specific legal questions within legal systems or sub-elements

1 The latter is, for example, a regular requirement in the EU when Member States of the EU implement European legislation in the form of directives, establishing a policy goal but leaving Member States freedom in achieving the objective. Especially in the fields of administrative and regulatory law, comparisons can take place between general provisions and policy-specific provisions, as well as between various policy specific policy areas.

thereof; a broader framework, by contrast, can deal with comparative questions that span across legal systems, levels of regulation, or policy areas. Each individual comparative framework will therefore be established somewhere along a spectrum of possibilities of comparing matters within a legal system, or within a single policy area regulated on a national and trans-national level, as well as between legal systems of different countries or between regulatory approaches on different levels of regulation—sub-national, national, or trans-national. This spectrum-nature of establishing comparative frameworks to solve legal questions within and across legal systems arises from the fact that the comparative approach is ubiquitous in legal methodology. Therefore, the boundaries between narrow cases of identifying comparative frameworks in order to solve legal questions, on one hand, and broader cases of cross-border comparisons, as one might call them, on the other hand, can be quite fluid. The definition of any task of comparative research, from the more mundane tasks of legal research to the conduct of a comparative exercise that reaches out across boundaries of legal systems, policy areas, or disciplinary boundaries, is thus a question of the definition of the framework of the comparative research. The framework of research, or in other words, the perspective taken on the material to be compared, depends on the objective to be pursued with the research question.

48.2 Law as Category

In the past, cross-systemic comparative studies have often included large systematization projects in the form of taxonomies of legal systems or ‘families’. In Europe, the concept of using comparative law for classification was advocated during the enlightenment-era by thinkers such as Leibniz, who suggested a classification of legal families to present law as a ‘project for all nations, countries and times’ (Leibniz

1667, ch. 7). During the twentieth century, a series of prominent comparatists worked on the most common classifications of families of law in the service of a largely prescriptive mission (Bignami 2016, 31). Their key indicators of differentiation—in other words, the identification of the framework around which differences are identified and explained—were chosen mostly with a focus on private law and civil procedure (e.g. David 1964; Zweigert and Kötz 1996). The reason for the disregard of public law, and more specifically administrative law, was that these fields of law were often regarded, at the time, as too state-centred to be subjected to meaningful comparison, despite the fact that interest in comparative administrative law reaches back to the early nineteenth century (Huber 2014, 6). This initial interest was, however, suppressed by the emergence of more state-centred, positivist approaches in the late nineteenth century and first half of the twentieth century—exactly the formative years of many of the big comparative model-building exercises known and cited today. Accordingly, the explanatory value for the field of public law including administrative law, of the model-building undertaken by the creation of legal families as they are described in private law, remains contested.

Establishing a framework for creating some sort of taxonomy of systems of law requires the identification of meaningful factors differentiating between systems, which allow for generalized distinctions. Such factors will need to be identified on the basis of a certain commonality between legal systems relevant for the research question, and must have sufficiently identifiable explanatory value in relation to differences or commonalities with other elements of the legal system not directly addressed by the research question itself. Whether the factors meaningful for one field of law, such as contract law or the law of obligations, are meaningful in another area, such as public law or administrative law more specifically, is not at first sight obvious. Importing classifications of legal systems, such as

the distinction between ‘common law’ and ‘civil law’ countries, thus needs to be reviewed for the pertinence of the factors used to define the framework for classification.

48.2.1 Difficult Legal Families

For instance, applying typical private-law based classifications such as the common law/civil law divide to administrative law shows that there are quite possibly as many differences between countries classified as common law and or as civil law as meaningful commonalities between them. In fact, it is hard to see which fault-lines might be explicable by the categorization of common law and civil law—a distinction that historically was largely developed from the perspective of a private law research framework.

Within ‘common law’ countries, for example, the UK stands out as a country following mainly unwritten constitutional traditions instead of having a written constitution. The US, on the other hand, has one of the preeminent modern constitutions of this world, and the only surviving constitution dating back to the age of Enlightenment. The US Supreme Court has developed a long-standing tradition of reviewing legislation against constitutional standards, an approach not shared by all common law countries including the UK. And whilst the UK—coincidentally like France before the introduction of legislation in 2015—was one of the last holdouts in the EU without codified administrative procedures, the US has developed a very particular model in the Administrative Procedure Act (APA) of 1946. Further, whilst the US constitution is based on highly pluralistic and individualistic approaches, the Irish constitution is a model of a constitution with social rights. The US, Canada, and Australia are highly developed federal structures, while the UK was, until devolution at the end of the twentieth century, a unitary system, as are smaller common law countries such as Ireland and New Zealand. Countries within the common law family differ widely in their internal organization and in the power dynamics between the executive and the legislative branches of

power, some having presidential and others parliamentary (and mixed) systems of government.

Equally, there are significant differences between systems within the countries labelled as being within the 'civil law' tradition. They have quite different constitutional structures, approaches to the nature of individual rights, the role of procedural provisions, judicial review, and the structural organization of agencies. For example, France is a highly unitary country and takes a developed approach to integrating overseas territories. Its system of government is a presidential system with parliamentary elements. These elements make it distinctively different from, for example, Germany, which has a multi-level federal structure and a parliamentary system of government. Differences in approaches reach all the way down to fundamental distinctions regarding what falls within public law versus what is in the realm of private law; and such distinctions reflect different understandings of the relationship between the state and the individual. For instance, are public contracts a special category separate from ordinary contracts or not? Or is state liability treated fundamentally differently from civil liability? In France, for example, public liability is one of the matters frequently adjudicated by administrative courts, whilst, for example, in Germany, Italy, and Belgium, matters of state liability are matters to be dealt with by the ordinary civil courts according to private law principles, subject to certain modifications based on public law ideas. The French constitution confers on the executive autonomous regulatory powers whereas in Germany—as coincidentally in the UK—in principle the executive can only act on the basis of an explicit delegation of power by Parliament. The EU, on the other hand, is a mixed system in this respect, using elements of both approaches.

Therefore, using traditional factors for the classification of countries in '*grandes systèmes juridiques*' (e.g. David 1964) needs to be re-evaluated against specific research frameworks and individual issues. Using generalized classifications largely based on past,

private-law centred research, may give rise to dangerously false positives about family-of-law-based similarities in comparative administrative law. Since the fault-lines of meaningful distinctions in administrative law appear to run all over the map of traditionally drawn boundaries, the relevance of 'legal family'-based research frameworks in comparative administrative law requires using the legal family classifications of the past as no more than one of many possible explanatory hypotheses. Families can be difficult at times, even legal families.

48.2.2 Law as a Dynamic Social Construct

Additional caution is required because public law and administrative law may change considerably over time. The creation of a research framework based on old schematic classifications might not be capable of sufficiently capturing such changes. In the design of a research framework for comparative work, one should avoid claims of historic universality of classifications. Developments in public law are shifting. This can be illustrated by the juxtaposition of two famous quotes from the German debates of the twentieth century, admittedly a period of considerable constitutional unrest. After the First World War, Otto Mayer famously quipped that while 'constitutional law changes, administrative law perseveres' ('Verfassungsrecht vergeht, Verwaltungsrecht besteht', Mayer 1924).[2] On the other hand, following the constitutional changes in the wake of the Second World War, Fritz Werner coined the well-known headline of 'administrative law as the concretisation of constitutional provisions' ('Verwaltungsrecht als konkretisiertes Verfassungsrecht', Werner

[2] This remark was made in review of the developments of administrative law in Germany in the wake of the adoption of the ''Weimar constitution'' of 1919 replacing the former empire's constitution with that of a republic.

1959) reflecting on the changing understanding of the relation of fundamental rights and constitutional obligations with administrative law. Classifications therefore need to be carefully analysed for their temporal dimension since classifications are often historic snap-shots. Each comparator, or central factor around which the specific classification is organized, needs to be regularly re-evaluated against historic developments. Contemporary research into common values in Global Administrative Law (e.g. Anthony, Auby, Morison, and Zwart 2011) or into developments of organizing pluralism in public law systems (Delmas-Marty 2009) most helpfully describe and illuminate large-scale systemic changes taking place within short periods of time. In this context, whole new fields can arise which require their own approaches and comparative frameworks for understanding (Sordi in this volume; Bignami 2016). One example is the emergence of the principle of proportionality as a key vector of the changing role of fundamental constitutional rights in administrative law, a principle which has had an impressive career in various legal systems in the past decades (for many, see e.g. Barak 2012; Huang and Law 2016, 305–4). Other examples of fast-paced shifting of concepts are found in changing roles taken on by the 'administrative state', as well as trans-national cooperation and international organizations engaging in administrative matters.

48.2.3 Creating Key Terminology

In view of the difficulties in applying past categorizations to comparative administrative and regulatory law, possibly the greatest advantage of functional approaches is their engagement in the difficult task of creating key terminology and concepts capable of facilitating cross-systemic analysis. Finding common language to describe similar matters is a challenging but important task for comparative research. An early, but no less famous, example of such terminology-building is contained in '*De l'Esprit des Lois*' (Montesquieu 1748.) Here

Montesquieu used comparative study of systems as a basis for developing the ideal-type systematization of the *trias politicae,* distinguishing between functions of executive, legislative, and judicial branches of government. This terminology has been usefully employed ever since in legal debates to compare variants of certain ideal-type institutional designs. Coining key terminology can also be used in the context of a research framework to mark certain organizing concepts. This reduces complexity in debates and allows for bundling diverse phenomena within a single comparative framework. Therefore, the creation of key terms as frameworks for comparative approaches allows us to understand conceptual developments, to mark a moment of changes of conceptual developments in historic terms, and to build bridges for trans-disciplinary discourses (Folke Schuppert 2011, 471–2). Montesquieu's study also illustrates the latter point. After all, its full title was '*De l'Esprit des Lois—ou du rapport que les lois doivent avoir avec la constitution de chaque gouvernement, les moeures, le climat, la religion, le commerce &c.*'[3] Other more contemporary terms that have been deployed as frameworks for comparative research are 'globalization', 'transnationalization', 'Europeanization' and 'pluralization' of societies, 'digitalization' of the performance of public tasks, 'urbanization', and 'cooperative' (as opposed to of hierarchic) governance relations.

48.3 Law as Source

In practice, a highly relevant research framework for comparative administrative law is to treat it as a source for concepts to be employed in different contexts. This framework is based on the understanding of comparative law being the only real-life laboratory for testing and

[3] 'The spirit of laws—or the relation which the laws have with the constitution of each government, the habits, the climate, the religion, the commerce and other things.'

applying legal concepts and constructs. The comparative view across legal systems and across policy areas widens the pool of concepts available for the design and development of administrative and regulatory law and solutions. It uses the position in other countries as a foil for judging the workability and weaknesses of solutions in the observer's own country (Schönberger 2011, 509).

48.3.1 Contexts of Comparative Law as a Source

The source-oriented comparative research framework can be used in search for 'building blocks' of a new legal order or the development of new fields of law. Prior to legislative initiatives, a comparative review of existing models of regulation and an analysis of successes and failures may serve to enrich an understanding of possibilities and assist informed choices on the basis of foreign experiences. Such reviews can be used to improve legislation as well as judicial decision-making. This approach is often used, especially in situations of potential regulatory competition.

Another context of the use of comparative administrative law as a source is transfer of concepts from one policy area to another. In the development of individual defence rights in EU administrative law, for example, many concepts that originated from criminal law have been brought into EU administrative law and litigation. Examples include the concepts of 'equality of arms', privilege for lawyer-client communications, and rights of access. At the time of introduction to the EU legal system, these were primarily enshrined in national criminal law and subsequently transferred to EU administrative law (Hofmann, Rowe, and Türk 2011, 204).

A further context of the 'comparative law as source' framework, is seeking out case law from other systems to develop court-based solutions. Especially in small jurisdictions, such as Luxembourg, courts explicitly use comparative law in order to develop their own body of

case law and to search for solutions to common legal problems. The Luxembourg administrative courts have a long tradition of using foreign case law mostly, however, from legal systems close to the home legal tradition—in the case of Luxembourgish administrative law these are predominantly French or Belgian law.

Finally, using the framework of comparative law as source may be required by international trade agreements (FTAs), which may obligate their members to mutually recognize administrative-law based regulation and technical norms. Mutual recognition results to a certain degree in de-territorialization of law in that the operation of the public law of one territory is extended to the territory where it is subject to mutual recognition. The corollary of this effect, however, should be that law-makers in the originating territory would, ideally, not only take into account the effects of their decisions within the home territory but also within other territories where their decisions will likely have effect. Comparative work concerned with horizontal mutual recognition should thus focus on both the originating state and the receiving state because conditions for the exercise of administrative functions in the two might differ considerably. The same is true of study of new generations of free trade agreements, such as the CETA agreement between the EU and Canada, and the FTA between the EU and Japan, which may require mutual recognition of foreign technical standards and authorizations. Mutual recognition thereby leads to partial de-territorialization of public law since, de facto, the standards created in one legal system gain validity beyond the territorial limits of that legal system and obtain normative power in the receiving country.

48.3.2 The EU as Model of Comparative Law as a Source in Practice

One example of the real-life use of the ‘comparative law as a source’ framework is EU administrative law, which was developed by recourse to so-called ‘general principles of EU law’ as well as (mostly policy-area specific) legislation. Contrary to what their name

suggests, general principles of EU law may not only be structural but may also directly establish rights and obligations of individuals, EU institutions and bodies, and the Member States of the EU. General principles of EU law include principles derived from the rule of law, such as legal certainty and the related protection of legitimate expectations, and the non-retroactivity of disadvantageous legal acts. They also encompass the right of defence and related concepts of fair hearing, equality of arms, and protection of legal privilege; and, under the principle of good administration, matters such as the obligation of transparency, the right of access to documents and to a reasoned decision, and non-discrimination and equality.

In establishing general principles of EU law, the Court of Justice of the European Union (CJEU) heavily relies on the comparative method (Lenaerts 2003, 879–903). It takes inspiration from the legal traditions found in EU Member State legal systems or from public international law and then adapts elements of these systems that are in principle compatible with the specific nature of EU law. It then adapts and adjusts them to the specificities and necessities of the EU legal system. In that regard, general legal principles can, in effect, be borrowed from specific policy areas in national law and eventually applied in a somewhat different setting within the EU legal context. The motivation for the comparative method is to obtain guidance from studying the various solutions adopted for a common legal problem in different legal systems. Such methodology is best suited to the objectives of the Union-based on the rule of law (Lenaerts 2003, 879). The various legal traditions thus compared and contrasted not only constitute the legal and philosophical backgrounds of the EU legal system but also amount to a pool of legal concepts, methods, and experience useful in solving genuine and current problems in the concrete application of abstract legal principles.

The sort of approach can be illustrated in operation by the very early case law of the CJEU, which openly used the comparative method to develop an EU ‘common law’ of administrative procedure, largely by elaborating on the general principles of law underlying

the common constitutional traditions of the EU Member States. Two cases stand out as examples of this approach. The first is *Algera*, an administrative law case from the very early days of the CJEU dealing with the identification, on the basis of comparative administrative law, of when judicial review of European 'administrative measures', should be possible. Further, the Court dealt comparatively with the question of the standard of review appropriate to control of legality.[4] Another early example is the creation of fundamental procedural rights in the context of administrative procedures. In *Nold*, the Court stated that it was 'bound to draw inspiration from the constitutional traditions common to the Member States' of the EU, and that it could not 'therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States'.[5] One might even argue that the CJEU case law developed a common administrative law of the EU through use of general principles of law. In doing this, the CJEU, incidentally following the tradition of the French Conseil d'Etat, de facto followed a common law approach in building the EU legal system. The US Supreme Court, by comparison, has been quite reluctant to build a federal common law of administrative procedure (Donnelly 2007, 1105).

The law resulting from this process, is applicable not only to EU institutions and bodies but also, within the highly integrated administrative system of Member State bodies acting within the scope of EU law. It thus contributes to creating a single integrated legal system on the basis of, and linking together, various previously autonomous legal orders. It does this by establishing procedural principles applicable to various national bodies in diverse internal structures (unitary and federal, parliamentary and presidential), legal traditions, and historic experiences.

[4] Joined Cases 7/56 & 3–7/57 *Algera and others v. Common Assembly* [1957/58] ECR 39.

[5] Case 4/73 *Nold v. Commission* [1974] ECR 491, para. 13.

The framework of ‘comparative law as a source’ is of course facilitated by the design of institutions—be they judicial, legislative, or executive. All institutions in the EU, the European Parliament, the Council, and the CJEU, are made up of members from all different Member States, thus representing all the legal traditions and systems found within the member states of the EU. Thus a comparative approach is built into the structure of the EU and promotes the objective of creating a new legal system.

48.3.3 Diffusion of Concepts through Comparative Law as a Source

Generally, the comparative law as source framework is a powerful tool of diffusion of concepts or may even lead to wholesale transplants of legal concepts (e.g. Watson 1974; Miller 2003). Again, the European integration process of the past sixty to seventy years is a good example of how important it is to maintain a framework for understanding and studying the evolution of legal concepts through a flow of comparative law-based diffusions. As can easily be seen in the evolution of EU law and legal systems influenced by it, concepts once ‘uploaded’ from the national level to the EU level will be ‘downloaded’ again from the European to the national level.[6] Furthermore, concepts are diffused horizontally between national systems and vertically between states and the international level through the case law of the European Court of Human Rights (ECtHR), adjudicating claims under the European Convention on Human Rights (ECHR).

In this sense, the framework of comparative law as a source enriches the literature on diffusion theories in the social sciences. Many changes in legal systems are based on

[6] Vectors for this development are the principles of primacy of EU law over national law and the obligation of Member States effectively to enforce EU legal concepts and rights arising from EU law.

borrowing of approaches from other legal contexts—internally from one policy area to another, between levels within multi-level legal systems or externally from different legal systems. Laws may be transplanted from historic legal orders, as in the case of the reception of Roman and Canon law into various European legal systems since the Middle Ages. They may also originate from 'living' legal orders, as the diffusion of the proportionality principle from national to supra-national law shows (Barak 2012). The legal context of both the originating and the receiving legal orders can and often will affect the process of diffusion. When exported, a legal concept may be affected by factors such as the interplay between substantive and procedural law, and linguistic and other conventions, thus changing how the concept operates and is understood in its new environment.

A vivid example of such a process of adaption and change is found in the institution of the ombudsman. This is an accountability mechanism that can be traced back to Swedish constitutional legislation, the *års regeringsform* of 1809. In the absence of direct remedies against the Swedish crown, this ombudsman was authorized to take cases to court on behalf of individuals if the ombudsman, after investigation, concluded that a public body had violated the law. In the twentieth century, the idea of an independent ombudsman spread to many other jurisdictions, but the concept has since been adapted to a variety of different situations, such as adjudicating conflicts between individuals and certain sectors of public-interest industries such as insurance, or between minorities and the central government.[7] The EU's own version of the institution, designed to combat maladministration by the Union's

[7] E.g. the Finish Ombudsman for Minorities (an institution established in 2001 by The Finish Anti-Discriminaition Act, <http://www.ofm.fi>); the Belgian Insurance Ombudsman ('Ombudsman pour les services des assurances Belge' set up under Art. 302 of the Loi relative aux assurances of 4 April 2014, Moniteur Belge du 30 Avril 2014) and the Canadian Public Procurement Ombudsman (http://opo-boa.gc.ca/lrpa-rarp-eng.html).

executive branch, was modelled in 1992 on the Danish ombudsman as a body mainly concentrating on the fight against maladministration, with a central problem-solving function to set things right between the administration and the citizenry (Hofmann 2017, 1–3).

48.3.4 Tools for Comparative Law as a Source

The main approach of the framework of comparative law as a source of law is to identify in a foreign legal system specific solutions to a question asked from outside that legal system. The foreign solutions can then be translated into the context of the receiving legal system or a legal system in the process of creation. Thereby the foreign law is re-situated in a different context, possibly highlighting aspects that have not been seen or identified in the same way in the 'home' legal system. This also allows the receiving system to change its perspective on what a specific legal problem is and what solutions might be available to deal with it.

The method most applied in this framework is generally known as the 'functionalist' approach. Although the functionalist method was developed by scholars classifying legal systems on an ad hoc basis by trying to identify common terminology and central traits of legal systems, it is also suitable for flexibly formulating research questions in search of suitable sources of law or inspiration for the creation of new law. The functionalist, comparative method facilitates identification of a legal problem for which a solution is sought, determination of the terminology needed to serve the function of comparison, and identification of various approaches to addressing the problems (Kischel 2015, 92–108).

Not only can the actual solutions chosen by a legal system provide inspiration for another legal system. Also, debates arising in the context of the creation or use of certain principles can be influential in the comparative search for sources of law. For example, with regard to codification of EU administrative law, although national codification experiences are not generally transferable directly to the EU level, they do offer valuable case studies and

inspiration when analysing codifying EU administrative procedures. Also, discussions within EU Member States on codifying administrative procedures—from first attempts at codification in Spain in 1889, to twentieth-century codifications starting with the Austrian code of 1925, to the most recent example of the French code that came into force on 1 January 2016—are relevant on the EU level. It is worthwhile to compare the debate that takes place before the adoption of an administrative procedure regulation with the situation after adoption of the regulation with a view to analysing whether expectations and concerns voiced in the legal literature have been met and addressed. This is particularly so because debates and arguments about codification at the national level tend to follow certain patterns. Whether an argument made at the European level has a long history at the national level, or, whether it is wholly novel, makes a difference. Comparative analysis shows that many of the arguments used at the national level for and against codification of administrative procedure codes were also repeated at the EU level.

48.4 Law as Variable

A third category of research frameworks for comparative administrative law, which one might distinguish, uses law as a 'variable' in comparative studies. This approach is possibly as old as structured comparative research: Arguably, the factor 'law' had already been used as the basis of Aristotle's method using concepts of comparative public law for identifying model-type constitutions and forms of government within classic Greek city states (Aristotle *Politics* III.7).[8] Using law as a variable in comparative research is today also commonly used

[8] Therein Aristotle developed a typology of public government based on two variables. The first was the number of rules distinguishing between a single ruler, few rulers, or the government of many. A second variable was the nature of the political regime by which Aristotle sought to identify whether

in fields such as political science. In the design of qualitative and quantitative studies, law may be used as variable—either in the context of a 'control variable', an 'independent variable', or a 'dependent variable'.[9] Unlike the other research frameworks discussed so far, the framework of law as 'factor' or 'variable' of comparative legal research may not be primarily oriented towards creating categories or taxonomies (as described in Section 48.2), or necessarily aimed at using law as a source for legislation, regulation or case law (as described in Section 48.3). Instead, comparative frameworks using law as a variable will generally serve as a method to study various phenomena in which law is a factor but not necessarily the end of the research. Accordingly, the use of law as a variable within a research framework for comparative administrative research can be found in the design of very different types of research questions. For example, regulatory theory seeking to offer explanation about why regulatory differences exist and what effect they have in reality, are

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the political regime should be understood as 'good' or 'corrupted'. From this juxtaposition, Aristotle drew conclusions by distinguishing three good types of 'constitutions' (monarchy, aristocracy, and polity) from three bad, corrupted types (tyranny, oligarchy, and democracy). The term democracy today would be used in a different sense.

[9] The control variable is the feature that remains the same for all cases examined—and thus cannot explain variation in the dependent variable. The independent variable represents the focus of the study and, in qualitative studies generally involving only a small number of cases, the cases to be studied are selected because they show variation on the independent variable(s) being tested (e.g. what happens if there is more or less citizen participation in a decision-making procedure). The dependent variable is the situation to be explained (e.g. the varying rate of compliance with administrative decisions). The definition of a framework of research under this approach involves the selection of control, independent, and dependent variables.

generally tested and benchmarked along legal factors as variables for the evaluation of structures and procedures in a given policy area (Morgan and Yeung 2007, 8).

Two examples of comparative administrative law using law as a variable illustrate this point further. One of these focuses on conditions of accountability and legitimacy of administrative governance models (Section 48.4.1). Another example is the use of administrative law in the context of benchmarking and ranking (Section 48.4.2).

48.4.1 Comparative Models of Legitimacy and Accountability

Studies developing theories about the legitimacy of administrative are a good example for the use of law as a variable. The reason is that establishing legitimacy and accountability generally requires a multi-factorial assessment combining questions of which values are pursued by a specific regulatory or administrative regime with conditions of delegation of powers, and the modes of exercise of powers. Comparative studies reviewing legitimacy of administrative action will often study the design of the interface between administrative law and science or between agencies, regulated industries, and the public.

Comparative research into conditions of legitimacy has used research designs based on reviewing various factors of an administrative law structure or a regulatory area as variable for testing criteria of legitimacy of a specific regulatory structure. Morgan and Yeung, for example, describe ‘model claims’ to legitimacy in systems of administrative law as variables. They identify as one such variable whether administrative bodies can base their powers on a clear legislative mandate, a claim to legitimacy based on an idea of legitimation arising from a chain of delegation of powers (usually from a parliamentary law-maker, via a central executive structure organized in governmental departments, to specific administrative agencies). Another variable is the type of accountability mechanisms to which the administrative body is subject, such as obligations of transparency and openness, and rights

of citizen participation. A claim to legitimacy is the role of guarantees of due process or procedural justice, and the type of interest representation (e.g. predominantly corporatist or more pluralist, input-oriented, or deliberative) they provide. A fourth variable is related to the design of the interface between administrative agency decision-making and scientific expertise (Morgan and Yeung 2007, 239). Other comparative studies have used the variable of 'efficiency' in the sense of identifying the least cost mechanism in terms of time, resources, and damage to competing interests as criteria for legitimacy of a system (Majone 1996, 284–301).

Using a variables-based research design supports testing competing models as well as the inter-acting of various factors to such concepts as legitimacy or accountability of a system. Further, it allows us to study whether and how various variables can be accumulative and do not always require tradeoffs. The use of law as a variable in research is also conducive to studying the interaction of various factors in decision-making phases (such as initiation, investigation, evaluation, adoption, and implementation) For example, modes of legitimacy can be 'layered' in that the legitimacy of more general administrative rule-making procedures may require different forms of legitimation than single case decisions. Equally, the use of law as a variable in research also allows for a comparison of forms of legitimization applicable to different regulatory settings (e.g. self-regulation, agency rule-making, etc.) or diverging value judgements which are sometimes explicit and other times implicit in different claims to legitimacy.

From the perspective of the design of quantitative and qualitative studies, comparative research into modes of accountability face similar problems and challenges as those studying legitimacy. For example, comparative studies that focus on accountability relationships between public administration and various actors from society build on variables to measure these relations. The identification of the variables needed to analyse administrations and their

complex relations with other actors in society sets the research framework for the comparative work undertaken including, for example, accountability relations such as those between administrations and elected representatives and organized interests, general pluralist interest, and judicial accountability mechanisms (Bignami 2011, 10). In this context, assessing the action and the accountability modes of the administrative state and its *appareils administratifs* (Ziller 1993, 270–1) is set by the definition of variables of comparison.

48.4.2 Comparative Administrative Benchmarking and Rankings

Law is frequently used as a variable in research frameworks based on managerialist approaches aiming at measuring the effectiveness or goal-orientation of legal constructs. Comparisons thereby take place on the basis of quantification of factors and their subsequent benchmarking. Such exercises aim at comparing various regulatory models to their ability to perform on a range of indicators. Administrative law, for example will thereby be used as a variable in the context of cost-benefit analysis of regulatory approaches often combined with comparative impact assessments. Designing quantitative research frameworks has thus become a widely-adopted tool in large-scale comparisons between regulatory systems alongside the creation of benchmarks and scorecards and the eye-catching rankings associated with such approaches.

Benchmarking by using features of various regulatory and administrative systems as variables in a comparative study is an approach widely used by international organizations. This approach, for instance, is at the heart of many studies published by the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF) (Schäfer 2006). The World Bank's 'Doing Business' reports might be one of the best-known of such rankings, claiming to 'compare measures of business regulation in 190 economies' thereby investigating 'regulations' that the World Bank identifies as variables

able to explain which ones ‘enhance business activity and those that restrain it’. The purpose of such quantitative comparative exercises are quite openly communicated by the World Bank, as to foster regulatory change, since, ‘as in sports, once you start keeping scores, everyone wants to win’ (World Bank 2006).

In a very different context, the EU has used ‘soft-law’ tools based on comparative benchmarking and performance audit to further common policies on the European level. The so called ‘Open Method of Coordination’ (OMC) generally consists of a blend of guidelines and objectives the achievement of which is evaluated; the evaluation reports are then published in rankings and scoreboards. The publication of the outcomes of these processes is intended to convince Member States, in areas where the EU has no legislative competencies to harmonize national law, to mutually learn from one another’s experience and to develop best practice in an ongoing way (Szyszczak 2006, 493–5; Zeitlin 2008, 441–4).

Apart from international and regional organizations, various NGOs have adopted the methodology of benchmarking based on comparative studies in order to influence the design of public policies and procedures. An example is the Corruption Perception Index published by Transparency International. This is an index based on surveys and assessments of comportment of administrators and regulators in various jurisdictions used as the variable in the comparative rankings.

Not surprisingly, there is much discussion about the merits of the usefulness of each of the approaches to the framework of law as a variable. Critique is sometimes based on general approach to the use of law as a quantifiable variable in a broader comparison, sometimes on the formulation of the framework and the question underlying the research (e.g. Arcuri 2012,

315–32).[10] Irrespective of this, the debate is also lively, because the research has the advantage of offering a clear definition of which kind of law is compared and for which objective—the very definition of a research framework—becomes more clearly and transparently formulated.

48.5 Identifying Comparative Frameworks

This chapter has discussed major types of comparative frameworks, which are not mutually exclusive: comparison as categorization; comparison as source of law; and comparisons using law as variable. Each of these three, it was shown, is associated with a different set of objectives and methods for undertaking comparative law. In application of these frameworks, comparisons can bear fruit when reviewing different systems—be they national, sub-national, supra-national, international; purely public or mixed public-private structures. The research frameworks presented here can also be adapted to comparisons within a legal system, for example between regulatory solutions developed to different specific policy areas or general concepts of an administrative law system.

Frameworks are thus lenses through which to view the matters to be compared. They identify which kind of law to compare, how to undertake the comparison, and to what end. The definition of the framework of comparison structures the process of choosing the method of comparison makes such choices transparent. It thereby has a dynamizing effect by enhancing ‘contestedness’ and re-igniting requirements of reasoning and possibly

[10] Key problems of quantification have been described in legal literature on regulation. Often, factors which need to be taken into account will be difficult, if not impossible to quantify, since they are based on value choices in society rather than on strict cost-benefit analysis.

justification of a given status quo and the assumptions made of it within a legal system (Wiener 2007, 1).

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