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Abstract: This contribution deals with the critical-contextual method, which is a critical evolution of functionalism and introduced as a specific comparative law approach to migration law. Critical-contextual comparison draws upon three established methods/approaches: functionalism, contextualism and critical approaches. It fuses them to qualify as 'thick' comparison per Frankenberg. Comparisons are 'thick' if they are context-sensitive, critical and reflexive. To contribute to the operation and application of the critical-contextual approach generally, the present article carves out the method of critical-contextual comparison relying on certain findings of a case study on regularisations of irregularly staying migrants in the EU, in particular in Germany, Austria and Spain. The aim is to demonstrate how critical-contextual comparison can be undertaken in the area of migration law and the problems and challenges that may arise.

Keywords: comparative migration law; contextual comparison; contextualism; critical approaches; critical legal studies; EU law; functionalism; functional method; irregularly staying migrants; migration law; public law; regularisations; return directive.

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Biographical notes: Kevin Fredy Hinterberger is an Expert on Asylum and Migration Law in the Austrian Federal Chamber of Labour and a re:constitution Fellow 2021/22. He studied law in Vienna and Madrid (2010–2014). In 2015, he received a Doctoral Fellowship of the Austrian Academy of Sciences (ÖAW) for his doctoral thesis at the Department of Constitutional and Administrative Law of the University of Vienna (2016–2019). During this time, he completed research stays in Giessen (Germany) and Madrid (Spain). His doctoral thesis deals with regularisations of irregularly staying migrants and compares the existing regularisations established in the domestic laws of Germany, Austria and Spain (https://doi.org/10.5771/9783748902720). The English version will be published in 2023 with Nomos and Hart (DOI: 10.5771/9783748912798). He publishes widely on issues of Administrative Law, Constitutional Law, Comparative Public Law, European and Austrian Migration and Asylum Law and International Refugee Law. He is teaching at the University of Vienna.

1 Introduction

The present contribution is part of a special issue that examines the purpose and methods of comparison in migration law for the first time. The special issue identifies key contemporary debates, takes stock of the current comparative migration law scholarship, and charts a path for future research.

Comparative migration law is an emerging field of scholarly enquiry [cf. Cope et al., (2023); Husa, (2021), p.768]. One method that falls within said field is critical-contextual comparison. The critical-contextual method is a critical evolution of functionalism.

This article introduces how the critical-contextual method can be used as a specific comparative law approach to migration law. In general, comparative approaches in migration law are rare. For example in the *Oxford Handbook of Comparative Law*, methodological chapters have been written regarding the functional method of comparative law and critical legal studies (CLS) (Michaels, 2019; Mattei, 2019), however, no chapter has been dedicated to comparative migration law or the application of said methods/approaches in this regard. Hence, the present contribution aims at closing this research gap, examines the critical-contextual approach to comparative law generally, and applies it to the field of migration law.

Nevertheless, the question arises, why the introduction of a 'new' approach is necessary. As will be shown, critical-contextual comparison draws upon three established methods/approaches: functionalism, contextualism and critical approaches (Section 2). It fuses them to qualify – in the best way possible – as 'thick' comparison per Frankenberg (2019, pp.225ff) [cf. Legrand, (1996a), p.56; Husa, (2015), p.155 who refer in a similar vein to the work of Geertz (1973)]. Comparisons are 'thick' if they are context-sensitive, critical and reflexive. To be more specific, taking account of the context helps to avoid the risk of making incorrect assumptions based on a too 'thin' understanding of law because contexts have an influence on the functioning and the interpretation of norms. Using a critical approach broadens the view and helps to see how different concepts yield different power structures. This is particularly relevant regarding the relationship between migrants and the state and the given power-political relations in migration law. Comparing reflexively addresses the risk of bias towards one's 'home' legal system.

Having said that and to contribute to the operation and application of the critical-contextual approach generally, the present article carves out the method of critical-contextual comparison relying on certain findings of a case study on regularisations of irregularly staying migrants in the EU, in particular in Germany, Austria and Spain by Hinterberger (2020, 2023). The aim is to demonstrate how critical-contextual comparison can be undertaken in the area of migration law and the problems and challenges that may arise (Section 3). Following this section, the conclusions address the potential of critical-contextual comparison in migration law (Section 4).

2 Introducing critical-contextual comparison

For a better understanding of critical-contextual comparison, picture a three-piece Matryoshka doll.[1] Using said picture, the basis and, consequently, the core of the Matryoshka doll constitutes functionalism. The second piece consists of contextualism. The third piece is critical approaches to comparative law. Critical-contextual comparison

draws upon all three methods/approaches and fuses them to qualify as 'thick' comparison per Frankenberg. He describes those comparisons as 'thick' that are context-sensitive, critical and reflexive.

2.1 The starting point: functionalism

Functionalism forms the basis of the three-piece Matryoshka doll and, hence, of critical-contextual comparison. Functionalists compare norms, in their function as solutions to particular problems [cf. Kischel, (2019), §3 paras.3f]. This allows the focus on the question of the function (role and contribution) of the norm or institution within the respective legal system and society [Ebert, (1978), p.29; Sommermann, (1999), p.1023]. According to the functional approach, different legal norms in different legal systems answer the question or solve the problem similarly or differently [Zweigert and Kötz, (1998), p.40; cf. Kamba, (1974), p.517]. The so-called presumption of similarity is necessary for the understanding of the functional method whereby it has to be noted that there is not one, but many functional methods [Michaels, (2019), p.347].

However, the functional method is not without its criticisms.[2] One fundamental critique is that it may be difficult or even impossible to ascertain the function the law strives to perform [Kischel, (2019), §3 para.7]. Although it is correct that a legal provision, depending on the perspective, may fulfil different functions, it does not mean that the provision cannot be examined with regard to a specific function. I am therefore of the opinion that the chosen function and perspective has to be clearly identified and outlined to tackle this criticism (Sections 3.1 and 3.3). Furthermore, if it is impossible to ascertain the function the law strives to perform, it should be explicitly pointed out and, consequently, taken into account when comparing.

2.2 Adding the context

Another criticism regarding the functional method is summed up neatly by Jackson (2012, p.66):

> "A number of scholars have cautioned against the misleadingly homogenising and obscuring perils of functionalism. It is all too easy, scholars such as Günter Frankenberg suggest, for a comparativist unconsciously to assume the categories of legal thought with which she is familiar, and thus to see foreign law only as either similar or different, without being able to grasp the conceptual or sociological foundations of other legal orders. Professor Bomhoff, in a similar vein, has shown how doctrines with a similar name and seemingly similar function actually mean quite different things in a practice that is shaped by more particular contexts."

In response to such critique, a contextualist approach has emerged within the functional method comprising the following: the law as a whole and thus its individual provisions and rules are to be viewed in the context of the historical, economic and political framework to obtain a more complete picture [cf. Bell, (2002), pp.235ff; Legrand, (1996b), p.236; Van Hoecke and Warrington, (1998), pp.532ff; Von Busse, (2015), p.344].

For example, the contextual method favoured by Kischel (2019, §3 paras.199ff), is at the core functionalist and, therefore, looks at the legal and non-legal environment in which a legal norm is situated. However, he proposes that the context has to be

considered in every comparison. To cut the chase, a comparatist has to recognise, in which conceptual, dogmatic/doctrinal or cultural environment a legal norm is situated.

Following Jackson (2012, pp.70–72) ('contextualised functionalism'), one should never fail to consider the context and the characteristics of legal systems and institutions, otherwise there is the risk of making false assumptions. Functions and concepts may appear to be the same at first glance, though can have very different (legal and actual) effects in different societies. An in-depth understanding of the subject is therefore only possible once the characteristics, the socio-political and historical contexts are understood. Bell (2002, p.241, p.247) argues in this regard that 'public law is particularly influenced by historical contingencies' and, therefore, the institutional setting is important to understand what social function it really entails.[3]

Depending on the subject matter, the necessary context that should be taken into account differs. One has to identify the environment the legal norms are situated. It is only after this step that a comparatist is able to grasp the relevant contextual elements – like the historical, economic and political framework – that are necessary for its understanding. As will be shown below regarding the case study (Section 3.2), understanding the different regularisations in Germany, Austria and Spain requires insights into the historical and political development of migration law. However, there is no single answer to the question concerning the contextual aspects to take into account.

To sum up, both Kischel from a comparative public law perspective and Jackson from a comparative constitutional law perspective advocate for a functionalist approach enhanced with contextual elements. So to speak, taking account of the context helps to avoid the risk of making incorrect assumptions based on a too 'thin' understanding of law because contexts have an influence on the functioning and the interpretation of norms.

Coming back to the picture of the Matryoshka doll, the two inner pieces are now laid out. However, to be able to speak of 'thick' comparison according to Frankenberg, apart from context-sensitive, the comparison has to further be critical and reflexive.

2.3 Critical approaches to functionalism

Critical comparison has already a long tradition in the field of constitutional law (cf. Bönnemann and Jung, 2017). It is closely linked to CLS approaches [cf. Mattei, (2019); Frankenberg, (2019), pp.17ff]. CLS cannot claim to be one coherent approach, but rather a broad variety of critical approaches to law. Hence, the question remains of the contribution made by the qualifier 'critical' to the already described contextualist approach. In my opinion, it has the potential to address another fundamental critique by Frankenberg, (2006, pp.444–446):

> "The functionalist comparatist picks a social problem, always already framed in terms of law, and then moves on to its legal solution. Overconfident that law is a self-contained and autonomous system of conflict management […]. The hermeneutic *fallacy* is built upon a double reduction of the approach that focuses on the interpretation and better, that is, more authentic, understanding of the law and the cultural analysis of law. [...] The hermeneutic fallacy, therefore, follows from a theory of law that is constitutive only in one direction and which denies the dynamic, dialectical law/power and law/culture relationship."

Consequently, using a critical approach broadens the view and helps to see how different concepts yield different power structures. Frankenberg (2019, p.ix) rightly stated that

"[c]ritique may help uncover and dismantle those hierarchies and asymmetries: it may deconstruct hegemony by unsettling settled knowledge". Therefore, by adding a critical approach to contextualism, the method can be developed further. Critical-contextual comparison may be used as a hegemony-critical approach and applied to analyse how different concepts are interpreted differently due to the different contexts they are situated in.

This is particularly relevant regarding the relationship between migrants and the state and the given power-political relations in migration law. To better understand said relationship, it is necessary to refer again to the perspective the comparatist takes (Section 2.1). Regarding migration law, one may take the position of the state or the migrant. In my opinion, it is particularly useful from a critical perspective to take a migrant-centred perspective as has been done in the case study (Section 3.3).

Finally yet importantly, the term 'reflexive' can be considered as another layer of comparing critically, hence, it does not have its own sub-heading like 'contextual' (Sections 2.2 and 3.2). It is understood as employing 'distancing to capture 'the other' most effectively' [Curran, (2020), p.305; cf. Frankenberg, (2019), pp.70ff, pp.229–231]. When comparing different legal systems, the risk of bias towards one's 'home' legal system is eminent [cf. Ebert, (1978), p.144]. From a critical perspective, an unbiased description and evaluation of such legal systems is (almost) impossible [cf. Frankenberg, (1985), pp.439f]. Hence, comparing reflexively means to 'start a *critical dialog* between the familiar and the unfamiliar legal cultures' according to Frankenberg (2019, p.230). I will show below regarding the case study, how this can be done (Section 3.3).

3 Case study – regularisations of irregularly staying migrants in the EU

This section aims foremost to further carve out the method of critical-contextual comparison relying on certain findings of a case study on regularisations of irregularly staying migrants in Germany, Austria and Spain. It is structured in accordance with the above-described picture of the Matryoshka doll (Section 2). Consequently, first the functional, followed by the contextual and then the critical layer of the case study is explained.

Regularisation is understood as each legal decision that awards legal residency to irregularly staying migrants when particular minimum requirements are fulfilled. The term migrant covers third-country nationals in the sense of the EU law, i.e., persons that are not Union citizens according to Art.20 Treaty on the Functioning of the EU (TFEU). It is noteworthy that aspects regarding applications for international protection (refugee or subsidiary protection) procedure are not analysed.

Framing the problem: According to Lutz (2018, p.50), 'combating' irregular immigration is and has been a key challenge at the EU migration level. Probably the most pressing aspect is the enforcement deficit of irregularly staying migrants [cf. Menezes Queiroz, (2018), p.4]. Hinterberger (2019, pp.739ff) shows that the EU's answer has been to enforce returns and deportations. However, these 'EU policies are not without alternative' which is why the case study 'explores a legal instrument that is already used rather extensively in national legislation to 'combat' irregular residence: regularisations' [Hinterberger, (2019), p.740].

The case study considers regularisations as an effective alternative to returns: they end the irregular residence of migrants, not by deporting them, but rather by granting a

right of residence. Therefore, I argue the following thesis in the case study: "Through regularisations laid down in EU law, which would complement the existing EU return policy, a more effective 'combating' of irregular immigration at EU level could be achieved" [Hinterberger, (2019), p.740]. The EU could take into account of the different domestic approaches of member states to regularise irregularly staying migrants. As I will show, the application of the critical-contextual approach helps to reach this conclusion.

3.1 Functional layer

As described above, first the functional layer of the case study is laid out. The case study compares particular real-life factual circumstances in which the associated legal problems serve as a common basis for comparison [cf. Bartels, (1982), pp.66f; Michaels, (2019), pp.347f]. The factual circumstances in question relate to the presence of irregularly staying migrants in EU member states who are seeking a right to reside. Many of these migrants cannot be deported for legal or factual reasons in particular in long-term. The irregular stay gives rise to various problems, such as the denial of rights, and often such migrants are in an especially vulnerable position [cf. Cholewinski, (2006), pp.900f; European Commission, (2009), p.22; Raposo and Violante, 2021]. As a social, political and legal phenomenon, irregular migration presents the EU and the individual member states with significant (legal) challenges. Generally, it is only with the right to reside that irregularly staying migrants are 'integrated' into the state system for the first time, which is typically followed by the (limited) access to the labour market, welfare benefits and healthcare.

The case study focuses on the legal possibilities for regularisation in Germany, Austria and Spain. It analyses formal, written legislation, 'law in debate', i.e., the different legal opinions [cf. Kischel, (2019), §3 paras.44 and 234] and case law (decisions from superior courts). Michaels (2019, pp.347f) accurately describes 'judicial decisions as responses to real life situations'. Consequently, the analysis looks further at the 'law in action' (Pound, 1910; cf. Neumayer, 1997). This concept describes how the law is practised and implemented in everyday life. Großfeld (1996, pp.117f) refers to the latter as the study of legal effect – to paraphrase Rehbinder (2014, p.2, para.3), law that is not alive in practice remains dead in the books [cf. Ehrlich, (1913), p.394, p.405]. Accordingly, non-legal approaches are also examined alongside the legislative provisions [cf. Trantas, (1998), pp.72ff with further references; Kischel, (2005), pp.17ff and 24f with impressive examples]. An approach or solution is 'non-legal' if it is not formally stipulated in law. For example, below it is shown that Austria and Germany stipulate toleration in their respective laws, whereas in Spain those persons who cannot be deported are *de facto* but not legally tolerated (Section 3.2). In comparison to other areas of law, public law is influenced far greatly by non-legal solutions [Schwarze, (2005), p.83; cf. Kaiser, (1964), p.396; Kischel, (2019), §3 para.201; Krüger, (1997), pp.1398ff]; an assessment that is especially noticeable in migration law (cf. Einwallner, 2010). In the case study, the variety of legislation, case law, studies, newspaper articles, statistics and implementation regulations have been examined to best paint a picture of the legal reality and non-legal practices [cf. Schmid-Drüner, (2007), p.47]. Furthermore, the information on the law and legal reality in Germany, Austria and Spain was linked, acquired through

research periods in each. Nonetheless, it has to be emphasised that a complete picture of 'law in action' can never be painted.

It is particularly interesting to see how regularisations are actually working in practice [cf. Ebert, (1978), p.149]. From a migrant-centred perspective, this is central because – as described below (Section 3.3) – many other rights are attached to the right to residence. In Spain, regularisations, i.e., extraordinary residence permits, constitute almost 20% of all residence permits – ordinary and extraordinary – that are issued each year [Hinterberger, (2020), p.267 with further references and p.283]. In Spain, the residence permit 'social settlement' (*arraigo social*)[4] is issued most frequently and can be considered as the most important regularisation [Cerezo Mariscal, (2015), pp.677f and 680]. Persons must demonstrate that they have been living in Spain – whether irregularly or lawfully – for at least three years. Additionally, an employment contract with a term of at least one year must be submitted (cf. Triguero Martínez, 2014; Carbajal García, 2012). Hence, the Spanish authorities issue a residence and work permit according to Art. 129(1) Royal Decree No. 557/2011 to a migrant, if he/she has been living on the Spanish territory for the last three years and has agreed a future employment contract.

In Austria, regularisations do not play a significant role [Hinterberger, (2020), pp.234f and 283]. There are less regularisation possibilities and those that do exist are not or should not be so effective in practice. The most important is the residence permit on the grounds of Art. 8 European Convention on Human Rights (ECHR) (cf. Austrian Supreme Administrative Court 4.8.2016, Ra 2015/21/0249). The general prerequisite is that the return decision is permanently inadmissible for reasons of private and family life.[5] The competent Austrian authority has to weigh the private or family interests of the alien in remaining in Austria against the interests of Austria in bringing him/her outside the country (cf. Austrian Constitutional Court 29.9.2007, B 1150/07 and Austrian Supreme Administrative Court 12.11.2015, Ra 2015/21/0101).

In Germany, the figures show that a not insignificant number of migrants are in possession of one of the 'humanitarian residence permits' which are considered as regularisations [Hinterberger, (2020), p.207]. The German regularisation system is just as differentiated as the Spanish and has numerous regularisations. The residence permit in the case of permanent integration and the residence permit in the case of well-integrated juveniles and young adults[6], both of which can be derived from Art. 8 ECHR and can be granted to tolerated persons, should be emphasised. In this way, German legislation has for the first time introduced a residence perspective for this target group that is independent of age and deadline, which is an expedient approach due to the ongoing problem of 'chain tolerations' (*Kettenduldungen*). Further, 'a foreigner who is enforceably required to leave' Germany may be granted a temporary residence permit according to §25(5) German Residence Act 'if departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future'. Said residence permit represents the quantitatively most important regularisation in German law [Hinterberger, (2020), p.341] and is again derived from Art. 8 ECHR.

The results from the comparison may be especially useful and may serve as a source of inspiration in the search for new solutions [cf. Schmidt-Aßmann and Dagron, (2007), p.467; Von Busse, (2015), p.40]. Accordingly, the comparisons between legal systems can contribute to solving legal issues [cf. Trantas, (1998), p.29]. In the end, comparing in a functional manner may be about finding 'better' solutions to a legal or factual 'problem'. Following Michaels, (2019, p.348) and also in my opinion, 'functionality can serve as an evaluative criterion. Functional comparative law then becomes a 'better-law

comparison' – the better of several laws is that which fulfils its function better than the others'.

However, according to critical approaches, there are no 'better' solutions because who defines 'better' and according to which standard? I disagree that it is generally impossible to compare in order to find 'better' solutions. Nevertheless, I take this criticism seriously, which is why some comparisons may not be possible because they would otherwise be too subjective unless at least a standard is defined. Hence, one limit of critical-contextual comparison is to make clear how 'better' is defined to rebut this criticism. In the case study 'better' is considered from a normative perspective. The 'better'-law is evaluated according to a specific standard: International law, in particular human rights, and EU law.

The legal regimes in the EU's area of freedom, security and justice are partly harmonised and, consequently, similar problems arise. This is why the presumption of similarity applies and critical-contextual comparison seems to be a particularly fruitful approach in the EU [cf. Örücü, (2004), pp.24f]. The EU member states enjoy legislative freedom and a margin of discretion regarding regularisations. Art. 6(4) Return Directive 2008/115/EC leaves member states the possibility to regularise irregularly staying migrants instead of issuing a return decision. Consequently, Germany, Austria and Spain adopt different legal approaches with regard to regularisations, which is also one reason why the description of contextual elements is necessary to fully understand regularisations (Section 3.2). Each of the three countries is an EU member state and part of the same supranational legal system. Accordingly, they must each follow the same EU constitutional requirements pursuant to Art. 79(1) TFEU. In other words, through their membership in the EU they have the same programmatic objectives. For instance, the objective of tackling irregular migration – one of the core elements of EU migration policy.

To sum up, the critical-contextual comparison plays a key role as I examine whether a common EU solution can be found with regard to regularisations. The results of the comparison are used to propose a Regularisation Directive at the EU level. Taking international and EU law as the standard is thus key as a Regularisation Directive would have to satisfy the requirements in international and EU law.

3.2 Contextual layer

To be able to effectively describe regularisations, contextual elements had to be taken into account. The historical and political development of migration law in each of the three member states – and the already mentioned margin of discretion according to Art. 6(4) Return Directive 2008/115/EC (3.1.) – contributed to the formation of different regularisations. Understanding these contexts is key to outlining regularisations and allowing an integrated comparison.

Spain used regularisation programs as an extraordinary legal measure in the 90s. The background to such an approach lies, *inter alia*, in viewing regularisations as an 'alternative to immigration policy' [Baldwin-Edwards and Kraler, (2009), p.39]. The high demand for workers in the service industry could be covered by migrants who were in employment, but who were residing irregularly [cf. Baldwin-Edwards and Kraler, (2009), pp.39f; Kraler, (2019), pp.99, p.102]. However, as in Austria and Germany, regularisation mechanisms, which permanently form part of the legal order of member

states, as opposed to ad-hoc programs [Baldwin-Edwards and Kraler, (2009), pp.8f], are now the standard. Regularisations in Germany and Austria are linked to different requirements that are below described and systematised in purposes of regularisation such as 'non-returnability' or 'social bonds' (Section 3.3). The comparison answers the question whether the different legal approaches indeed achieve the same legal function whereby contextual elements play an especially important role in this analysis. Baldwin-Edwards and Kraler (2009, p.8, p.42) have described Germany and Austria as 'ideological opponents' of regularisations [more cautious Kraler, (2019), pp.99 and 102], however the comparison in the case study shows that this is no longer a valid assessment as both use regularisations to bring an irregular residency to an end. These findings were also one of the reasons why Germany, Austria and Spain were chosen as member states for the comparison. Examining all 27 EU member states would have been simply not feasible.

Another example of a contextual element that was taken into account is the different legal status of irregularly staying migrants in Germany, Austria and Spain that leads to differences in their factual living situations. Failing to present the (legal) contexts in question would mean overlooking that irregularly staying migrants in Spain have access to the welfare system, whereas such migrants in Germany and Austria do not, at least in principle. This is also particularly important from a migrant-centred perspective (Section 3.3) and its implications on the social conditions of these people.

The need to include the legal context is also clear with regard to a further example, namely toleration. Germany and Austria recognise toleration, though in different legal forms.[7] Although it does not constitute legal residency – and is thus not a regularisation – toleration is often the first level towards gaining a residency right. Including this approach therefore enriches the comparison and has to be included due to the context to provide a full picture of the factual and legal problem. The situation is different in Spain as there is no comparable legal concept. Accordingly, those persons who cannot be deported are tolerated, though not as a result of the law itself. It is necessary nonetheless to present this non-legal approach in order to understand the Spanish regularisations in full.

Prior to the actual comparison, the case study deals with the just described contextual elements that are taken into account: more specifically, the development of migration law, the legal status of migrants and of each of the relevant regularisations. The contextual elements show the special position of regularisations in the migration law of the member states. The partly different and partly similar historical developments have led to the crystallisation of a special category of decisions establishing residence rights in all three member states. In sum, the described contextual elements create the framework for the integrated comparison in which the individual regularisations can be linked and described in detail. The integrated comparison can then refer to general aspects that are relevant to understanding the measures in place.

Hence, the comparison in the case study does not have the usual descriptive element composed out of individual national reports.[8] The legislative provisions and non-legal solutions in the selected member states are related, analysed and evaluated in an integrated approach [cf. Ebert, (1978), pp.145ff; Kischel, (2019), §3 paras.50 and 242ff; Trantas, (1998), pp.48f with further references; Zweigert and Puttfarken, (1976), p.343]. Using the relationship between the provisions and solutions allows one to determine changes in function, which may not be readily apparent at first sight [cf. Ebert, (1978), p.154, p.158; Lachmayer, (2010), p.170]. In addition, separate treatment of the

regularisations can also give rise to unnecessary repetitions, which are to be avoided. As Kischel quite rightly notes, comparison and presentation should melt together form a whole [Kischel, (2019), §3 para.243].

The point of comparison is referred to as *tertium comparationis* [cf. Örücü, (2004), p.21; Piek, (2013), pp.67f; Sommermann, (1999), p.1017]. The systematisation in the case study is based on a specific criterion that was designed for the case study, the below-described purpose of regularisation (Section 3.3).

3.3 Critical layer

Finally yet importantly, the case study has also a (hegemony-) critical layer. A research perspective that is migrant-centred most accurately serves above-described hegemony-critical approach (Section 2.3). This is particularly relevant to deal with the relationship between migrants and the state and the underlying power relations in migration law. 'Migrant-centred' is defined as looking at the relevant legal and non-legal approaches through the lens of migrants. Therefore, the perspective shifts from the state to the migrants. Thereby, one can look at the law and how it constitutes legality/illegality in migration law [Menezes Queiroz, (2018), pp.11ff] and, consequently, social conditions. Klarmann (2021, p.31) accurately pointed out in his work on the deconstruction of migration-specific illegalities that 'illegal' migrants are not factual realities.

One approach that takes a migrant-centred perspective and may be applied in a hegemony-critical manner is transnational law. In principle, provisions of (European) migration law are to be found at three levels: international law, EU law and national law. The case study considers all three levels and shows that an isolated view of one single level is no longer appropriate.

In this respect, the notion 'transnational law' must be emphasised. The notion refers, *inter alia*, to law applicable to acts and circumstances beyond national borders [Jessup, (1956), pp.1ff; cf. Goodwin-Gill and Lambert, (2010); Miller and Zumbansen, (2012); Zumbansen, (2012)]. One purpose of transnational law is to clarify the interrelationship and links between these three levels when apparent in a particular case [Farahat, (2014), p.12]. Attention must also be drawn to one aspect of the methodology of transnational research: selected case scenarios are examined, categorised and analysed from the perspective of the addressee of the norm [cf. Farahat, (2014), pp.12f; Jessup, (1956), pp.11f].

The right of residence, which determines the legal or irregular residence of migrants, is therefore at the heart of the case study.[9] Present research on this topic has often focused on deportation law and only considered the perspective from the state (cf. Thym, 2008). This study looks at it from the other side of the coin by viewing irregularity and regularisations from a 'migrant-centred perspective' [cf. Handmaker and Mora, (2014), p.287]. This casts (new) light on the various national, EU and international provisions and the given power-political relations, as I have shown above with regard to the legal and factual situation of irregularly staying migrants in the three different member states (Section 3.2).

The migrant-centred perspective is also expressed by the starting point for the comparison, the so-called purpose of regularisation. The purpose of regularisation centres around the decisive legal reason for awarding a residency right, whereby with regard to

regularisations six purposes can be derived from the three relevant levels of legal sources [Hinterberger, (2019), pp.754ff]. The first four purposes of regularisation ('non-returnability', 'social bonds', 'family unity', 'vulnerability') are derived from international and/or EU law. For example, at the core of the purpose of regularisation 'non-returnability' is the principle of non-refoulement, which is enshrined prominently in Arts.2 and 3 ECHR. The regularisations within the purpose of regularisation 'social bonds' and 'family unity' derive primarily from Art. 8 ECHR. Regularisations within the category of 'vulnerability' deal with residence permits granted to irregularly staying migrants in a particular vulnerable situation. Within this purpose of regularisation, the regularisations within the subcategory 'protection of victims' are stipulated in EU law, whereas the regularisations within the subcategory 'other situations of emergency' are not derived from higher-ranking rules. The last two purposes of regularisation ('employment and education', 'other national interests') are, as of yet, only stipulated in domestic law. In other words, no relevant international or EU legal rules exist in this field yet, but the EU could issue legal acts in the future.

The outcome of the comparison according to the purpose of regularisation is that in each of the three analysed member states there exists a highly differentiated system of regularisations [Hinterberger, (2019), p.762]. Consequently, I propose in the case study a Regularisation Directive. Different granting requirements could be stipulated, reflecting the current practice of member states to regularise irregularly staying migrants. To best address the fragmented regularisations measures at the national level, a two-phase approach seems best suited. In my opinion, this proposal for harmonisation would fit coherently within the current immigration policy of the EU (respectively the member states). The EU could find a balance between the interests of the EU, its member states and irregularly staying migrants and lay down a clear framework. An EU Regularisation Directive would further develop the European immigration policy and make it more effective. Even though it does not seem likely that the EU will adopt such a directive in the near future, this paper seeks to contribute to the discussion by offering a different approach. The EU has already legislated extensively on return and is still confronted with low return rates. Now it is time to move a step forward. The EU should therefore make use of this legal steering instrument to tackle the enforcement deficit of returns effectively.

Another important aspect of the critical layer of the case study is the already mentioned risk of bias towards one's 'home' legal system – in this case: Austria – is addressed by comparing reflexively (Section 2.3). Comparing reflexively broadens the view and helps to start a dialog between ones 'home' and the 'other' legal systems and in this way to see how different concepts yield different power structures. In order to address this issue in the best manner possible, generic terms are used [cf. Starck, (1997), pp.1026f] and the knowledge acquired during research trips in the three states is, as mentioned above (Section 3.1), linked back. The terms ('irregular stay', 'migrant', 'regularisation' and 'residency right') were specifically chosen to – or to be able to – include the context and also to reflect precise legal concepts. This allows to attempt in the best possible manner to adopt an outside position and to view the selected legal systems from a sufficient distance [cf. Trantas, (1998), p.41]. The case study also takes into consideration that, in so far as terms particular to the national legal systems are used, the different meanings require explanation.

4 Conclusions: the potential of critical-contextual comparison in migration law

In the present contribution, I have shown the potential of critical-contextual comparison in migration law. Depending on the research field, there is not one correct method and that it is better to speak of a 'toolbox of comparative law' methods [Husa (2015), p.206]. Critical-contextual comparison is one of them and useful in specific circumstances. Therefore, critical-contextual comparison can be applied to and in every region worldwide, including the Global South (cf. Dann et al., 2020), even though the case study has focused on the EU and its member states (Section 3). However, the particularities of the analysed topic and region must be taken into account here – as with any comparative legal analysis. For example, critical-contextual comparison could be applied to the transnational effects of migration in transit and countries of origin.

For a better understanding of critical-contextual comparison, I have painted the picture of a three-piece Matryoshka doll. Using said picture, the basis and, consequently, the core of the Matryoshka doll constitutes functionalism. The second piece consists of contextualism. The third piece is critical approaches to comparative law. Critical-contextual comparison draws upon all three methods/approaches and fuses them to qualify as 'thick' comparison per Frankenberg, which is context-sensitive, critical and reflexive.

Taking account of the context helps to avoid the risk of making incorrect assumptions based on a too 'thin' understanding of law because contexts have an influence on the functioning and the interpretation of norms. Using a critical approach broadens the view and helps to see how different concepts yield different power structures. This is particularly relevant regarding the relationship between migrants and the state and the given power-political relations in migration law. Comparing reflexively addresses the risk of bias towards one's 'home' legal system.

The application of the critical-contextual approach in the case study has shown that there exists, in each of the three analysed member states (Austria, Germany and Spain), a highly differentiated system of regularisations. Particularly regarding the regularisations that fall within the last two purposes of regularisation ('employment and education', 'other national interests'), different national contexts have led to the adoption of the respective regularisations. While applying the critical-contextual method, certain problems and challenges have arisen.

Regarding the functional layer, it is necessary that the chosen function and perspective has to be clearly identified and outlined. Hence, a 'better'-law comparison is possible, if the 'better'-law is evaluated according to a specific normative standard. In the case study, the standard was international law, in particular human rights, and EU law. Consequently, one limit of critical-contextual comparison is to make clear how 'better' is defined to rebut the criticism of critical approaches.

Regularisations fall within the EU's area of freedom, security and justice. These legal regimes are partly harmonised which is why similar problems arise. Consequently, the presumption of similarity applies and critical-contextual comparison seems to be a particularly fruitful approach in the EU. The EU member states enjoy legislative freedom and a margin of discretion regarding regularisations. Art. 6(4) Return Directive 2008/115/EC leaves member states the possibility to regularise irregularly staying migrants instead of issuing a return decision. Germany, Austria and Spain adopt different

legal approaches with regard to regularisations, which is also one reason why the description of contextual elements is necessary to fully understand regularisations. This aspect has to be taken into consideration when applying the critical-contextual approach. Such critical-contextual comparison is only useful, however, if states enjoy a certain margin of discretion. Conversely, in certain areas like international refugee law it might not be such a useful method. The Geneva Refugee Convention leaves little margin to discretion to States in terms of the refugee definition [cf. Frei et al., (2022), paras.1f]. In such ambits, therefore, the context should not play a considerable role due to the restricted state power.

In the contextual layer, I have shown that to be able to effectively describe regularisations, contextual elements have to be taken into account. The historical and political development of migration law in each of the three member states – and the margin of discretion according to Art. 6(4) Return Directive 2008/115/EC – contributed to the formation of different regularisations. Understanding these contexts is key to outlining regularisations and allowing an integrated comparison.

Depending on the subject matter, the necessary context that should be taken into account differs. One has to identify the environment the legal norms are situated. It is only after this step that a comparatist is able to grasp the relevant contextual elements that are necessary for its understanding. So to speak, taking account of the context helps to avoid the risk of making incorrect assumptions based on a too 'thin' understanding of law because contexts have an influence on the functioning and the interpretation of norms.

Regarding migration-related topics, the historical and political development of migration law and the legal status of migrants – one aspect of the sociology of immigration – is of particular relevance. These contextual elements show the special position of regularisations in the migration law of the member states. The partly different and partly similar historical developments have led to the crystallisation of a special category of decisions establishing residence rights in all three member states. The different legal status of irregularly staying migrants in Germany, Austria and Spain leads to differences in their factual living situations. Failing to present the (legal) contexts in question would mean overlooking that irregularly staying migrants in Germany and Austria are, at least in principle, denied such access to the welfare system, unlike in Spain.

The comparatist has to also think about how the context is taken into account and which sources are relied upon: the variety of legislation, case law, studies, newspaper articles, statistics, implementation regulations, empirical or quantitative analysis, etc. Furthermore, knowledge of other disciplines like political sciences, sociology, history or economy is helpful, sometimes even necessary.[10] Contextual understanding is definitely more time-consuming than pure functionalism. Hence, it is also a question of resources.

In the critical layer, I have elaborated a migrant-centred perspective, which most accurately serves a hegemony-critical approach. 'Migrant-centred' is defined as looking at the relevant legal and non-legal approaches through the lens of migrants. Thereby, one can look at the law and how it constitutes legality/illegality in migration law and social conditions. One approach that incorporates such a migrant-centred perspective and may be applied in a hegemony-critical manner is transnational law. In principle, provisions of (European) migration law are to be found at three levels: international law, EU law and national law. The case study considers all three levels and shows that an isolated view of one single level is no longer appropriate.

The right of residence, which determines the legal or irregular residence of migrants, is therefore at the heart of the case study. Present research on this topic has often focused on deportation law and only considered the perspective from the state. The case study looked at it from the other side of the coin by viewing irregularity and regularisations from a migrant-centred perspective. Thereby casting (new) light on the various national, EU and international provisions and the given power-political relations like the legal and factual situation of irregularly staying migrants in the three different member states.

The migrant-centred perspective is also expressed by the starting point for the comparison, the so-called purpose of regularisation. As explained, the purpose of regularisation centres around the decisive legal reason for awarding a residency right, whereby with regard to regularisations six purposes, can be derived from the three relevant levels of legal sources. The outcome of the comparison according to the purpose of regularisation is that in each of the three analysed member states there exists a highly differentiated system of regularisations. Consequently, I propose in the case study a Regularisation Directive at the EU level. Different granting requirements could be stipulated, reflecting the current practice of member states to regularise irregularly staying migrants.

Finally yet importantly, the risk of bias towards one's 'home' legal system – in this case: Austria – was addressed by comparing reflexively. Comparing reflexively broadens the view and helps to start a dialog between ones 'home' and the 'other' legal systems and in this way to see how different concepts yield different power structures. In the case study, terms like 'irregular stay' or 'migrant' were specifically chosen to – or to be able to – include the context and also to reflect precise legal concepts. This allows to attempt in the best possible manner to adopt an outside position and to view the selected legal systems from a sufficient distance.

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Notes

1 According to Wikipedia, it is typically 'a set of wooden dolls of decreasing size placed one inside another', https://en.wikipedia.org/wiki/Matryoshka_doll. The Encyclopædia Britannica defines it as 'a wooden nesting doll like the type thought to have been created originally by Abramtsevo artist Sergey Malyutin, c. 1890', https://www.britannica.com/topic/matryoshka (accessed 31 March 2022).

2 For a useful overview see Piek, (2013, pp.62ff) and Kischel (2019, §3 paras.6ff).

3 Cf. Tushnet, (2009, pp.10ff), with regard to the particularities of constitutional law.

4 Art. 124(2) Royal Decree No. 557/2011, BOE 103 from 20 April 2011, last Amendment 20 October 2021 [online] https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=070_Codigo_de_Extranjeria&modo=2 (accessed 31 March 2022).

5 §55 Austrian Asylum Act 2005, Federal Law Gazette I No.100/2005 as amended by Federal Law Gazette I No. 234/2021 and §9(2) Federal Office for Immigration and Asylum Procedures Act, Federal Law Gazette I No.87/2012 as amended by Federal Law Gazette I No.234/2021. All the Austrian laws can be found at https://www.ris.bka.gv.at/.

6 §§25b and 25a German Residence Act, in the version promulgated on 25 February 2008 (Federal Law Gazette I p.162), most recently amended by Art. 3 of the Act of 9 July 2021 (Federal Law Gazette I p.2467) [online] https://www.gesetze-im-internet.de/englisch_aufenthg/index.html (accessed 31 March 2022).

7 See §46a Austrian Aliens Police Act, Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 206/2021 and §60a German Residence Act.

8 Cf. for an example of a structure like Von Busse (2015, pp.36ff), portrays see Schmid-Drüner (2007, pp.49ff).

9 Menezes Queiroz (2018, p.8) analyses in the same vein illegality at the EU level from the perspective of the illegal stay.

10 See in this context the contributions by Cope (2022) and Ghezelbash (2022) in this Special Issue on Comparative Migration Law: Methods, Debates and New Frontiers.