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Constitutionalisation and deconstitutionalisation of administrative law in view of Europeanisation and emancipation

Prof. Dr. iur. Ferdinand Wollenschläger*

The author holds a chair for Public Law, European Law and Public Economic Law at the University of Augsburg (Germany)

Abstract

Constitutionalisation constitutes a common phenomenon of European administrative legal orders, and also EU administrative law is increasingly influenced by its constitutional framework, notably after entry into force of the EU Charter of Fundamental Rights explicitly guaranteeing a right to good administration. With reference to German administrative law, probably the most constitutionalised administrative law system, culminating in Fritz Werner's understanding of 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' ('administrative law as concretised constitutional law'), the article in a first step not only elaborates on the phenomenon of constitutionalisation, but also qualifies the widespread constitutionalisation thesis. The latter has moreover been questioned by two megatrends impacting all European administrative legal orders, namely their Europeanisation and their alleged emancipation from the Constitution. Whether this means a deconstitutionalisation of administrative law and how these tendencies might be reconciled, will be discussed in further parts of the article. The insights generated by notably using the example of German administrative law are of pan-European relevance and might serve as an analytical tool from a comparative perspective and in view of the further development of EU administrative law.

1. General administrative law, constitutionalisation and deconstitutionalisation

The relationship between general administrative law and constitutional law is fraught with tension. Whilst, at the end of the 1950s, *Fritz*

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Werner still considered the orientation of administrative law towards the Basic Law (*Grundgesetz*) as auspicious ('administrative law as concretised constitutional law'),[1] it was only a short time later that constitutionally-founded demands (some of which were realised) to strengthen the statutory reservation in administrative law found themselves confronted with the accusation of 'boundless constitutional purism',[2] and these are reservations which continue to reverberate to the present day in the critique of constitutionalisation.[3] Conversely, however, a paucity of Constitution in general administrative law also draws criticism to itself. The latter is provoked not only by the *Neue Verwaltungsrechtswissenschaft* (New Administrative Law School),[4] but also by a constitutionally-'unbridled' administration, given processes of informalisation, autonomisation and privatisation (*Peter M. Huber*[5]).[6] The underlying emancipation hypothesis moreover illustrates that the finding that administrative law is constitutionalised, already stressed by *Otto Bachof* in 1953[7] and which is still the predominant understanding,[8] is no longer unarguable. This particularly also applies with regard to the advancing Europeanisation of general administrative law, which is inter-

1 F. Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' [1959] *DVBl.* 527 (528f.).

2 H. Schneider, 'Über den Beruf unserer Zeit für Gesetzgebung' [1962] *NJW* 1273 (1275).

3 Breuer, 'Konkretisierungen des Rechtstaats- und Demokratiegebotes', in: E. Schmidt-Aßmann (Ed.), *Festgabe 50 Jahre Bundesverwaltungsgericht* (Köln: Heymann 2003), 223 (224); further Badura, 'Verwaltungsrecht im Umbruch', in: Z. Kitagawa & J. Murakami & K.W. Nörr & T. Oppermann & H. Shiono (Ed.), *Das Recht vor den Herausforderungen eines neuen Jahrhunderts: Erwartungen in Japan und Deutschland* (Tübingen: Mohr Siebeck 1998), 147 (157ff.); Möllers, 'Methoden', in: W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle (Ed.), *GVwR I* (2nd edition München: Beck 2012), § 3 para. 13; Schönberger, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht', in: M. Stolleis (Ed.), *Das Bonner Grundgesetz* (Berlin: Berliner Wissenschafts-Verlag 2006), 53 (57).

4 Cf. e.g. B. Grzeszick, 'Anspruch, Leistungen und Grenzen steuerungswissenschaftlicher Ansätze für das geltende Recht' [2009/42] *Die Verwaltung* 105 (112ff.).

5 Taking up the title of P.M. Huber's article 'Die entfesselte Verwaltung' [1997/8] *StWStP* 423.

6 Cf. only Grimm, 'Ursprung und Wandel der Verfassung', in: J. Isensee & P. Kirchhof (Ed.), *HStR I* (3rd edition Heidelberg: C.F. Müller 2003), § 1 para. 72; H. Hofmann, 'Vom Wesen der Verfassung' [2003/51] *JöR n. F.* 1 (15ff.).

7 O. Bachof, 'Begriff und Wesen des sozialen Rechtsstaates' [1954/12] *VVDStRL* 37 (37).

8 Cf. only Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in: *GVwR I* (n. 3) § 5 para. 1 qualifying the democratic, rule of law and fundamental rights standards as well as the principle of legality as conceptual cornerstones of administrative law; R. Wahl, *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte* (Berlin 2006), 31ff. Reservedly: Ruffert, 'Rechtsquellen und Rechtsschichten des Verwaltungsrechts', in: *GVwR I* (n. 3) § 17 para. 175. Too radical L. Michael, 'Verfassung im Allgemeinen Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation' [2015/75] *VVDStRL* 131, who denies any significant impact of the Basic Law on general administrative law; even if some concepts of general administrative law might have developed without reference to the constitutional background, this does not convince as a general perspective, as will be shown here.

preted as a (partial) marginalisation and neutralisation of constitutionalisation,[9] or indeed as 'deconstitutionalisation'.[10]

In view of alleged tendencies towards erosion, both from within and from outside, it is therefore worth placing the hypothesis of the dependence of general administrative law on the Constitution on the test bed. As a basis the phenomenon of constitutionalisation of general administrative law is not only explored, but a nuanced understanding of constitutionalisation will also be proposed (2). A first subsection explains the institutional background having promoted the high degree of constitutionalisation of German administrative law (2.1.1) and the consequences in substantive terms, notably its primarily rule-of-law- and fundamental rights-led permeation; hereby, also the dangers of an over-constitutionalised administrative legal order are highlighted (2.1.2). Notwithstanding the high degree of constitutionalisation of general administrative law, a second subsection qualifies the widespread constitutionalisation thesis and calls for a differentiated conceptualisation. For if understanding 'administrative law as concretised constitutional law' one must not overlook that general administrative law is, firstly (2.2.1), already found in the Constitution (*administrative constitutional law*), and is, secondly (2.2.2), in view of the bi-perspectivity of the formation of the system of administrative law, and, thirdly (2.2.3), given the framework character of the Constitution, more than concretised constitutional law, and, fourthly (2.2.4) as well as inversely to the hierarchy of norms, has an impact on constitutional law.

The next two sections explore the issue of an alleged 'deconstitutionalisation' of administrative law: they trace the relativisation, but also the assertion of the Constitution in view of the processes of Europeanisation (3) and emancipation (4).

With regard to Europeanisation, there is no denying the fact that this process relativises the standard-setting function performed by the Constitution (3.1.1 and 3.1.2), its function to orientate the administrative law system (3.1.3) and with it its function as a comprehensive but residual framework for administrative law (3.1.3); moreover, concepts and institutes of constitutional law are undergoing a reshaping (3.1.4). Despite these relativisation and erosion tendencies, we do not witness a complete deconstitutionalisation, though, since scope remains for a Constitution that functions as a comprehensive order (3.2.1). Furthermore, the Constitution also gains in significance by influencing the process of Europeanisation (3.2.2) as well as by receiving external modernisation impulses allowing to break up path dependencies, e.g. with regard to a more open ap-

9 Jestaedt, 'Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts. Eine deutsche Perspektive', in: O. Jouanjan & J. Masing (Ed.), *Verfassungsgerichtsbarkeit* (Tübingen: Mohr Siebeck 2011), 37 (64).

10 Hofmann (n. 6) 15.

proach towards standing before courts or independent administrative authorities (3.2.3).

A further section discusses whether and to what extent recent developments in administrative law loosen its tie to the Constitution. Such emancipation tendencies may be identified in the autonomy of administrative law (4.1.1), of administrative law science (4.1.2) and of the administration (4.1.3). Yet, the primacy of a thematically-broad administrative constitutional law, on the one hand (4.2.1), and shortcomings in administrative law legislation, on the other hand (4.2.2), result in general administrative law being only relatively independent from the Constitution so that the latter is able to assert itself towards emancipation tendencies. Moreover, even if the latter challenge the Constitution, they also offer modernisation opportunities by opening up new perspectives so that the Constitution is also able to gain in significance in confrontation with them, e.g. by triggering a re-thinking of overstated requirements derived from the rule of law and from fundamental rights (4.2.3).

2. The constitutional dimension of general administrative law: administrative law as concretised constitutional law!?

'Administrative law as concretised constitutional law'– this dictum of *Fritz Werner*[11] stands for the dependence of administrative law on the Constitution, particularly when contrasted with *Otto Mayer's* 'constitutional law passes away, administrative law remains'[12].[13] The dependence of administrative

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11 Werner (n. 1) 527. Cf. for a critical view n. 78.

12 O. Mayer, *Deutsches Verwaltungsrecht vol. 1* (3rd edition München 1924), foreword to the 3rd edition.

13 This common contrast [cf. only J. Ipsen, *Allgemeines Verwaltungsrecht* (9th edition München 2015), para. 71ff.] is doubtful, though. For, Otto Mayer's statement (which is placed in quotation marks) was made in the context of the revision of Otto Mayer's textbook with regard to the constitutional upheavals of 1914 and 1917, and may be correct for a (certain, temporary) continuity of administrative law when it comes to constitutional upheavals [see O. Bachof, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' (1972/30) *VVDStRL* 193 (204); Heuschling, 'Verwaltungsrecht und Verfassungsrecht', in: A. von Bogdandy & P.M. Huber & S. Cassese (Ed.) *IPE III* (Heidelberg: C.F. Müller 2011), § 54 para. 15f.] and reflect traditional lines [see Heuschling, ibid.; E. Kaufmann, 'Nachruf Otto Mayer' (1925/30) *VerwArch* 378 (390)], however contradicts, when understood in absolute terms, the dependence of administrative law on the Constitution – see Bachof, ibid., 204f.; Heuschling, ibid., para. 11ff.; Stolleis, 'Verwaltungsrechtswissenschaft in der Bundesrepublik Deutschland', in: D. Simon (Ed.), *Rechtswissenschaft in der Bonner Republik* (Frankfurt am Main: Suhrkamp 1994), 227 (227): 'even back then at best a partial truth, basically more a refusal to take a dramatically-changed reality into account'; R. Schmidt-De Caluwe, *Der Verwaltungsakt in der Lehre Otto Mayers* (Tübingen 1999), 114ff., 262ff. Cf. on the criticism of the time: M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland vol. 3* (München 1999), 203f. When placing Otto Mayer's dictum into its context, it can even not be presumed that he assumed such a radical separation, cf. e.g. Bachof, ibid., 204f. Cf. for an emphasis of the dependence of administrative law on the Con-

law on the Constitution is neither a new finding under the Basic Law, as documented by works from authors from the constitutional monarchy and from the Weimar Republic (such as *Friedrich Franz von Mayer, Robert von Mohl, Ludwig von Rönne, Lorenz von Stein* or *Fritz Fleiner*),[14] nor is it a German *Sonderweg*, i.e. a unique path taken in the post-war administrative law of the Federal Republic of Germany,[15] but a common feature of European administrative legal orders.[16] This notwithstanding the Basic Law has had a particularly profound impact on German administrative law.[17] The constitutionalisation of administrative law, which was orientated primarily along rule-of-law and fundamental rights lines, is first of all to be developed (2.1), but the understanding of administrative law as concretised constitutional law will then be qualified (2.2).

With regard to terminology, the monograph of *Folke Schuppert* and *Christian Bumke* (Die Konstitutionalisierung der Rechtsordnung, 2000) has been influential, defining constitutionalisation as 'permeation of non-constitutional law and of the political process creating this non-constitutional law with constitutional law contents' and as 'adjustment, orientation and reshaping of the legal order to the stipulations of the Constitution which do not exhaust themselves in strict and simple commands and prohibitions'.[18] Moreover, *Rainer Wahl* has introduced the distinction between constitutionalisation as process (concretising constitutional law in statutes) and as result (statutes as concretised constitutional law).[19] It has to be added that the phenomenon of constitutionalisation is neither

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stitution in the work of Otto Mayer idem, *Deutsches Verwaltungsrecht vol. 1* (1st edition Leipzig 1895), 3f. (cf. also 3rd edition München 1924, 1f., 18, 55).

14 See von Bogdandy & Huber, 'Staat, Verwaltung und Verwaltungsrecht: Deutschland', in: *IPE III* (n. 13) § 42 para. 36ff.; Schönberger (n. 3) 58f.

15 Assumed by Möllers (n. 3) § 3 para. 11, 13; Röhl, 'Verfassungsrecht als wissenschaftliche Strategie?', in: H.-H. Trute & T. Groß & idem & C. Möllers (Ed.), *Allgemeines Verwaltungsrecht* (Tübingen: Mohr Siebeck 2008), 821 (825); Schönberger (n. 3) 57; Wahl (n. 8) 25, 35f. (fundamental rights), 40f.

16 Huber, 'Grundzüge des Verwaltungsrechts in Europa – Problemaufriss und Synthese', in: A. von Bogdandy & P. Huber & S. Cassese (Ed.), *IPE V* (Heidelberg: C.F. Müller 2014), § 73 para. 17f. For a comprehensive study: Heuschling (n. 13) § 54 para. 11ff. with a similar conclusion, but emphasising the varying degree of constitutionalisation in different countries and epochs (para. 44; in detail para. 45ff.: no relevance in Sweden, strong influence in Germany, ambivalent finding for France).

17 Cf. only von Bogdandy & Huber (n. 14) § 42 para. 62ff.; Stolleis, Verwaltungsrechtswissenschaft (n. 13) 241ff.; R. Wahl, 'Der Vorrang der Verfassung und die Selbständigkeit des Gesetzesrechts' [1984] *NVwZ* 401 (401ff.).

18 G.F. Schuppert & C. Bumke, *Die Konstitutionalisierung der Rechtsordnung* (Baden-Baden 2000), 25 and 57; further Wahl (n. 8) 32.

19 Wahl, 'Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff ?', in: C.-E. Eberle (Ed.), *Der Wandel des Staates vor den Herausforderungen der Gegenwart. Festschrift für Winfried Brohm zum 70. Geburtstag* (München: Beck 2002), 191 (193f. m. n. 8) – while questioning the innovative character of the notion 'constitutionalisation'; similarly Jestaedt (n. 9) 39. Cf. on the process of constitutionalisation further Gerhard, 'Verfassungsgerichtliche Kontrolle der Verwaltungsgerichtsbarkeit als Parameter der Konstitutionalisierung des Verwaltungsrechts', in: *Allgemeines Verwaltungsrecht* (n. 15) 735 (735); Heuschling (n. 13) § 54 para. 49; Schmidt-Aßmann (n. 8) § 5 para. 1f.; U. Volkmann, *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland* (Tübingen 2013), 317ff.

limited to administrative nor to domestic law (in fact this concept is used to describe the emergence of a constitutional order on the international level).[20]

2.1 Administrative law as concretised constitutional law!

Specific features of the new constitutional framework established with the Basic Law, namely the primacy of the Constitution notably vis-à-vis legislation (Art. 1 para. 3 and Art. 20 para. 3 of the Basic Law), which prior to its coming into force was still controversial and at best weakly manifested,[21] now safeguarded by a strong constitutional court system,[22] as well as a constitutional development, which was by no means a matter of course, corresponding to the path that was opened up,[23] have brought about a profound constitutionalisation of administrative law on a primarily rule-of-law- and fundamental rights-led basis.[24] This section will first explain the institutional background having promoted the high degree of constitutionalisation of German administrative law (2.1.1) and then the consequences in terms of substance (2.1.2).

2.1.1 Institutional aspects

From an institutional perspective, the far-reaching jurisdiction of the *Bundesverfassungsgericht* (Federal Constitutional Court; BVerfG) has played a decisive role in this development.[25] Its competence to review also with regard to parliamentary statutes (Art. 93 para. 1 No. 4a and Art. 100 para. 1 of the Basic

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20 A. Tschentscher & H. Krieger, 'Verfassung im Völkerrecht: Konstitutionelle Elemente jenseits des Staates?' [2016/75] *VVDStRL* 407 (439).

21 See only W. Heun, 'Verfassungsrecht und einfaches Recht' [2002/61] *VVDStRL* 80 (95ff.). Cf. on the debate regarding the applicability of fundamental rights to the legislature in the Weimar Republic Dreier, 'Die Zwischenkriegszeit', in: P. Badura (Ed.), *HGR I* (Heidelberg: C.F. Müller 2004), § 4 para. 39ff.

22 Cf. on the development Kingreen, 'Vorrang und Vorbehalt der Verfassung', in: J. Isensee & P. Kirchhof (Ed.), *HStR XII* (3rd edition Heidelberg: C.F. Müller 2014), § 263 para. 21ff.

23 For many aspects, like the comprehensive applicability of fundamental rights, were new, thus uncertain and open to various interpretations – see on this only Schönberger (n. 3) 59f.

24 See only Bogdandy & Huber (n. 14) § 42 para. 62ff.; Jestaedt (n. 9) 37; Pauly, 'Wissenschaft vom Verwaltungsrecht: Deutschland', in: A. von Bogdandy & S. Cassese & P.M. Huber (Ed.), *IPE IV* (Heidelberg: C.F. Müller 2011), § 58 para. 16; E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin 2004), chap. 1 para. 17ff.; F. Schoch, 'Gemeinsamkeiten und Unterschiede von Verwaltungsrechtslehre und Staatsrechtslehre' [2007/7] *Die VerwaltungBeih.* 177 (199ff.); Schönberger (n. 3) 53; Stolleis, Verwaltungsrechtswissenschaft (n. 13) 227; Wahl (n. 8) notably 16ff., 35ff.

25 See only Jarass, 'Die Konstitutionalisierung des Rechts, insbesondere durch die Grundrechte', in: R. Scholz (Ed.), *Realitätsprägung durch Verfassungsrecht. Kolloquium aus Anlass des 80. Geburtstages von Peter Lerche* (Berlin: Duncker & Humblot 2008), 75 (77ff.); comprehensively on the 'Federal Constitutional Court as an instance for reviewing the administration' Schoch, 'Gerichtliche Verwaltungskontrollen', in: W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle (Ed.), *GVwR III* (2nd edition München: Beck 2013), § 50 para. 104ff.

Law) has allowed an effective scrutiny of (administrative law) legislation. Moreover, the *Verfassungsbeschwerde* (constitutional complaint) permits everyone (claiming an infringment of her/his fundamental rights) to challenge all forms of state action and thus secures a wide access to the BVerfG (Art. 93 para. 1 No. 4a of the Basic Law); particularly the possibility of a constitutional complaint against judgements means not only a constitutional review of ordinary administrative law cases, but also encourages the specialist courts to take constitutional implications into account when applying and interpreting non-constitutional law.[26]

Next, the fact that the review standard of the BVerfG – unlike for instance that of the US Supreme Court (Art. III Sect. 2 US Const.) or of the Swiss Federal Court (Art. 189f. Swiss Constitution) – is restricted to a violation of constitutional law (see only Art. 93 para. 1 No. 4a and Art. 100 para. 1 of the Basic Law), initially presupposed the development of figures of constitutional law related to non-constitutional (administrative) law, since this was the only way in which it was possible to scrutinise administrative law cases; with *Rainer Wahl* there arose a 'maelstrom in substantive law in favour of the expansion of priority constitutional law',[27] and hence a permeation of non-constitutional law by it.[28] This also applies mutandis mutatis to the *Bundesverwaltungsgericht* (Federal Administrative Court = BVerwG), the review competence of which is largely restricted to violations of federal law [§ 137 (1) No. 1 of the Code of Administrative Court Procedure (*VwGO*)], so that only by utilising federal constitutional law was it possible to review matters that were governed by the law of the German *Länder*, such as the law on the police or on schools;[29] the BVerwG consistently took this path, and hence made a major contribution towards the constitutionalisation of administrative law, admittedly then increasingly in the shadow of the BVerfG.[30]

Scholars and legal practitioners have also amplified this effect since an assessment of administrative law in terms of constitutional law made it not only possible to exercise criticism of it, as a legal policy view, but at the same time can effectively orientate it, or even place it into question by claiming the unconstitutionality of certain provisions.[31] A further institutional aspect is to be found

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26 Jestaedt (n. 9) 46ff.; Schuppert & Bumke (n. 18) 23, 55f.

27 Wahl, 'Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich', in: *HGR I* (n. 21) § 19 para. 20.

28 Bryde, 'Soziologie der Konstitutionalisierung', in: M. Mahlmann (Ed.), *Gesellschaft und Gerechtigkeit. Festschrift für Hubert Rottleuthner* (Baden-Baden: Nomos 2001), 267 (268f., 271); Jarass (n. 25) 75 (76f.); Schönberger (n. 3) 65. See also Schuppert & Bumke (n. 18) 58ff. Cf. on France as a counterexample Heuschling (n. 13) § 54 para. 21.

29 BVerwGE (German Federal Administrative Court – reports) 1, 303; E 133, 347 (350).

30 In more details Schönberger (n. 3) 61ff.

31 Cf. also – with a title to the point – Röhl (n. 15) 835f.; further Bryde (n. 28) 271; idem, 'Einfaches Recht und Verfassungsrecht', in: S. Machura (Ed.), *Recht, Gesellschaft, Kommunikation. Festschrift für Klaus F. Röhl* (Baden-Baden: Nomos 2003), 228 (239). Emphasising the close link between legal policy and constitutional law aspects in debates Wahl (n. 8) 90f.

in the unity of public law among scholars, which is subject to differentiation processes, but which still exists, particularly supported by the common organisation of all public law scholars in the *Staatsrechtslehrervereinigung*.[32] From a historical perspective, finally, the upheaval situation of the post-War period, in which the Basic Law promised to provide orientation,[33] the motivating function of constitutions in founding years,[34] as well as the 'return to the rule of law' as a decided process of turning away from the Third Reich[35] should be considered.

2.1.2 Substantive aspects

In terms of content, the most important influence of the German Constitution on the development of post-war administrative law, which in many cases dated back to before the entry into force of the Basic Law, was the fundamental rights-rule of law permeation of administrative law.[36] The foundation for this was laid by an extensive interpretation of fundamental rights which was able to comprehensively capture administrative law: As a result of an understanding of the Basic Law as a Constitution which is not only liberal-rule of law, but at the same time a programmatic constitution,[37] the Lüth judgement[38] established a multidimensional interpretation of the fundamental rights, comprising not only negative, but also positive obligations such as a duty to protect,[39] participative and social rights,[40] as well as procedural[41] and organisational requirements.[42] Moreover, the Elfes judgement, and its (wide) understanding of Article 2 paragraph 1 of the Basic Law as general freedom of action,[43]

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32 See also Eifert, 'Lernende Beobachtung des Verwaltungsrechts durch das Verfassungsrecht', in: M. Bäuerle (Ed.), *Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde zum 70. Geburtstag* (Tübingen: Mohr Siebeck 2013), 355 (357); Pauly (n. 24) § 58 para. 30; H. Schulze-Fielitz, 'Staatsrechtslehre als Wissenschaft: Dimensionen einer nur scheinbar akademischen Fragestellung' [2007/7] *Die Verwaltung Beih.* 11 (32ff.).

33 See Werner (n. 1) 528f.; further Schönberger (n. 3) 67ff.

34 Wahl (n. 8) 29ff.

35 Cf. only Stolleis, Verwaltungsrechtswissenschaft (n. 13) 236ff.; Schönberger (n. 3) 61, 84.

36 Schmidt-Aßmann (n. 24) chap. 2. para. 32; idem (n. 8) § 5 para. 9; idem, 'Grundrechtswirkungen im Verwaltungsrecht', in: B. Bender (Ed.), *Rechtsstaat zwischen Sozialgestaltung und Rechtsschutz. Festschrift für Konrad Redeker zum 70. Geburtstag* (München: Beck 1993), 225 (225).

37 Jestaedt (n. 9) 45; Schuppert & Bumke (n. 18) 25f.; U. Volkmann, 'Verfassungsrecht zwischen normativem Anspruch und politischer Wirklichkeit' [2008/67] *VVDStRL* 57 (63ff.).

38 BVerfGE (German Federal Constitutional Court – reports) 7, 198 (205). Cf. on its significance only Wahl (n. 27) § 19. See already before BVerfGE 6, 55 (71ff.).

39 Cf. only BVerfGE 39, 1 (42); E 121, 317 (356); Schmidt-Aßmann (n. 24) chap. 2 para. 35ff.

40 BVerfGE 33, 303 (330); P. Häberle, 'Grundrechte im Leistungsstaat' [1972/30] *VVDStRL* 43 (69ff.); F. Wollenschläger, *Verteilungsverfahren* (Tübingen 2010), 67ff.

41 BVerfGE 53, 30 (65); Wollenschläger (n. 40) 82ff.

42 Cf. on the multidimensionality of fundamental (liberty) rights Dreier, 'Vorbemerkung', in: idem (Ed.), *Grundgesetz* (3rd edition Tübingen: Mohr Siebeck 2013), Vorb. para. 82ff; Wollenschläger (n. 40) 46ff.

43 BVerfGE 6, 32.

subjected all onerous acts to the totality of constitutional law (including to objective constitutional law) since they constitute an interference (at least) with that fundamental right and have to be justified accordingly;[44] as a result of a relatively broad understanding of possible 'limitations' on the exercise of fundamental rights, indirect and/or de facto interferences additionally came into the focus of fundamental rights.[45] This resulted in an expansion of the statutory reservation which originally, i.e. when established in constitutional law in the times of constitutional monarchy, was still restricted to encroachments on 'freedom and property', with the consequence of it extending to parts of the welfare administration,[46] important decisions[47] and indirect and/or de facto interferences.[48]

Major consequences of the fundamental rights-rule of law permeation consisted in a 'wave of juridification' in areas such as the law on schools and on higher education, or in economic administrative law,[49] or in the abolition of the doctrine of *besonderes Gewaltverhältnis*, which allowed exceptions from the statutory reservation and the applicability of fundamental rights if the individual has entered into a close relationship with the state (e.g. civil service, school, military).[50] Furthermore, actionable subjective-public rights vis-à-vis the administration were increasingly recognised, the latter development being understood as a 'Copernican turning point in the system of administrative law',[51]

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44 Schuppert & Bumke (n. 18) 60f.

45 Cf. in detail and with diverging emphases BVerfGE 105, 252 (273); E 105, 279 (300f.); E 110, 177 (191); E 113, 63 (76); E 116, 202 (222); BVerwGE 71, 183 (191f.); Dreier (n. 42) Vorb. para. 126f.; Wollenschläger (n. 40) 58ff.

46 BVerfGE 8, 155 (165ff.); Grzeszick, 'Art. 20 III', in: T. Maunz & G. Dürig (Ed.), *GG* (München: Beck 12/2007), Art. 20 III para. 117ff. – stricter D. Jesch, *Gesetz und Verwaltung* (Tübingen 1961), 171ff.; H.H. Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre* (Tübingen 1965), 113ff.

47 Cf. on the *Wesentlichkeitstheorie* BVerfGE 40, 237 (249f.; 'fundamental issues'); E 47, 46 (78f.); E 49, 89 (126f.); E 95, 267 (307f.) – for a critical assessment G. Kisker, 'Neue Aspekte im Streit um den Vorbehalt des Gesetzes' [1977] *NJW* 1313 (1317ff.); Reimer, 'Das Parlamentsgesetz als Steuerungsmittel und Kontrollmaßstab', in: *GVwR I* (n. 3) § 9 para. 57ff.

48 BVerfGE 105, 279 (303ff.); E 105, 252 (268ff.); H.-U. Gallwas, *Faktische Beeinträchtigungen im Bereich der Grundrechte* (Berlin 1970), 94ff.; P.M. Huber, 'Die Informationstätigkeit der öffentlichen Hand – ein grundrechtliches Sonderregime aus Karlsruhe?' [2003] *JZ* 290 (294f.). Nuanced: Schmidt-Aßmann, Grundrechtswirkungen (n. 36) 234ff.

49 Stolleis, Verwaltungsrechtswissenschaft (n. 13) 242. Critically Badura (n. 3) 157f.: 'The Constitution, previously understood more as a barrier to and limitation on the State's activity, is frequently interpreted today as a mandate and a plan for the State's actions, particularly for social policy. Promoted by the jurisprudence of the Constitutional Court, densified principles for norming are increasingly being taken from the Constitution which disempower the legislature, permit the "flood of norms" to swell up and tie up the independent decision-making activity of the public administration, but at the same time multiply the time required for and the bureaucratisation of administrative activity'.

50 Overruled in 1972 by BVerfGE 33, 1 (9ff.) – cf. on this development only Bogdandy & Huber (n. 14) § 42 para. 70; Schönberger (n. 3) 76ff.

51 Ossenbühl, 'Die Weiterentwicklung der Verwaltungswissenschaft', in: K.G.A. Jeserich et. al. (Ed.), *Deutsche Verwaltungsgeschichtevol. 5* (Stuttgart: Deutsche Verlags-Anstalt 1987), 1143 (1146); further idem, '40 Jahre Bundesverwaltungsgericht. Bewahrung und Fortentwicklung des Rechtsstaates' [1993] *DVBl.* 753 (756); A.K. Mangold & R. Wahl, 'Das europäisierte deutsche

be it because of fundamental rights impacting the interpretation of administrative law with regard to its (individual) enforceability (*norminterne Wirkung der Grundrechte*),[52] or directly from the fundamental rights themselves (*normexterne Wirkung der Grundrechte*).[53] The BVerwG's welfare judgement from 1954 constitutes a paradigm shift for this, and stands for the corresponding conceptualisation of the individual no longer as a subject, but as a citizen:[54] Accordingly, a 'model idea' of the Basic Law is a specific 'view of the relationship between the individual and the State: The individual is subject to public power, but is not a subject, but a citizen. He or she may therefore as a rule not be the simple object of state acts. Rather, he or she is recognised as an independent personality with moral responsibility, and hence as a holder of rights and obligations. This must particularly apply when it comes to his/her welfare.' Thus, it is said not to be permissible to retain the interpretation from before the Basic Law that 'welfare was to be granted to the needy merely for reasons of public order, but not for the sake of the individual [...] The interpretation of public welfare corresponding to the basic concepts of the Constitution has, rather, the result that, where the law imposes obligations on the welfare authorities in favour of the needy, the needy have corresponding rights, and therefore have standing before the administrative courts against the violation of their rights'.[55]

Furthermore, the guarantee of legal protection (Art. 19 para. 4 of the Basic Law) called not only for comprehensive access to the courts, but also for effective legal protection before the latter.[56] This has had a profound impact on legal protection in administrative law: examples are the requirement of legal review

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Rechtsschutzkonzept' [2015/48] *Die Verwaltung* 1 (1ff., 24ff.). Cf. for a similar emphasis Bumke, 'Die Entwicklung der verwaltungsrechtswissenschaftlichen Methodik in der Bundesrepublik Deutschland', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (Ed.), *Methoden der Verwaltungsrechtswissenschaft* (Baden-Baden: Nomos 2004), 73 (95): 'silent revolution'. See on the development also Stolleis, Verwaltungsrechtswissenschaft (n. 13) 242f.

52 BVerfGE 15, 275 (281f.); *NJW* 2005, 273 (273ff.); BVerwGE 101, 364 (371); E 132, 64 (68f.) – despite the statute in question excluded standing (§ 8 para. 2 KHG); E 133, 347 (350ff.). Nuanced E. Schmidt-Aßmann, 'Art. 19 IV', in: *GG* (n. 46) para. 121ff.; Schoch (n. 25) § 50 para. 138.

53 BVerfGE 96, 110 (114f.); E 113, 273 (310); E 116, 1 (11ff.); E 116, 135 (150, 153f.); implicitly also E 78, 214 (226, 229); E 83, 182 (195); U. Ramsauer, 'Die Dogmatik der subjektiv-öffentlichen Rechte – Entwicklung und Bedeutung der Schutznormlehre' [2012] *JuS* 769 (772f.). Cf. on the exceptional character of a direct recourse to the Constitution in order to grant standing if a statute applies to the case: H. Dreier, 'Grundrechtsdurchgriff contra Gesetzesbindung' [2003/36] *Die Verwaltung* 105 (121f.); Schmidt-Aßmann (n. 24) chap. 2 para. 61f. Cf. for a nuanced view also Scherzberg, 'Subjektiv-öffentliche Rechte', in: H.-U. Erichsen & D. Ehlers (Ed.), *Allgemeines Verwaltungsrecht* (14th edition Berlin: de Gruyter 2010), § 12 para. 14ff.

54 See only J. Masing, 'Rechtsstatus des Einzelnen im Verwaltungsrecht', *GVwR I* (n. 3) § 7 para. 98; Schoch (n. 25) § 50 para. 8; further on the liberation from concepts of an authoritarian state Bachof (n. 13) 206f.

55 BVerwGE 1, 159 (161f.).

56 See for an overview C. Bumke, 'Verfassungsrecht in der Rechtsprechung des Bundesverwaltungsgerichts in den Jahren 2003 bis 2011' [2012/45] *Die Verwaltung* 81 (97f.); Schoch (n. 25) § 50 para. 108f.

of executive ordinances,[57] the need for a preventive remedy if ex-post judicial review is excluded (notably in civil service law, a different stance is taken in public procurement law)[58] or the scrutiny of the requirements with regard to the admissibility of appeals (§ 124 VwGO).[59] Admittedly, it also resulted in a stance which is strict all in all vis-à-vis discretionary powers of the administration.[60] This formation of 'a momentous phobia against administrative discretion' is seen as a 'notable particularity of German public law'[61] which is represented by a qualification of discretion as 'the Trojan horse' in a rule of law-orientated administrative law, as an 'alien body in a rule of law-orientated constitutional state', as a 'relic of absolutist latitudes of the Monarchist executive' or as a 'precarious exclave within the principle of legality'.[62]

It is also possible to add to the loss list of an administrative law which is centred on the individual a certain one-sidedness, such as a focus of administrative law scholarship on legal protection issues.[63] Moreover, a constitutionalisation primarily oriented towards fundamental rights (despite the importance of this perspective) runs the risk of neglecting the further aim of administrative law to enable (and not only to discipline) administrative action.[64] Furthermore, difficulties when it comes to addressing aggregated interests are mentioned, as well as certainly the risk of sliding into an overindividualisation,[65] resulting in circumventing the binding nature of statutes, the idea of equal treatment, rooted as it is in the generality of the law, as well as the power of generalisation of the legislature.[66] Because of the primacy of the Constitution, statutes prove

57 BVerfGE 115, 81 (91ff.).
58 BVerfG, *DVBl.* 2003, 1524, on the one hand, E 116, 135 (156f.), on the other.
59 BVerfG, *DVBl.* 2000, 1458 (1458f.); *NVwZ-RR* 2011, 963 (964).
60 BVerfGE 83, 130 (147f.), E 84, 34 (49ff.), E 84, 59 (77ff.), overruling BVerwG, *DÖV* 1984, 804 (805), E 77, 75 (78f.), *NJW* 1987, 1431 (1432); cf. for an overview Schmidt-Aßmann (n. 24) chap. 4 para. 61ff. and recently summarised by BVerfGE 129, 1 (20off.).
61 Wahl (n. 8) 24.
62 Quotes by Huber, 'Niedergang des Rechts und Krise des Rechtsstaats', in: M. Imboden et. al. (Ed.), *Demokratie und Rechtsstaat. Festgabe zum 60. Geburtstag von Zaccaria Giacometti* (Zürich: Polygraphischer Verlag 1953), 59 (66), M. Bullinger, 'Das Ermessen der öffentlichen Verwaltung' [1984] *JZ* 1001 (1003), W. Schmidt, *Einführung in die Probleme des Verwaltungsrechts* (München 1982), 46 and H. Faber, *Verwaltungsrecht* (4th edition Tübingen 1995), 100.
63 Cf. e.g. Ossenbühl (n. 51) 1146. For a first criticism because of exaggerations E. Schmidt-Aßmann, 'Art. 19 IV als Teil des Rechtsstaatsprinzips' [1983] *NVwZ* 1.
64 E. Schmidt-Aßmann & S. Dagron, 'Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen. Zur Geschlossenheit, Offenheit und gegenseitigen Lernfähigkeit von Rechtssystemen' [2007] *ZaöRV* 395 (424).
65 Cf. on this danger W. Leisner, *Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit* (Berlin 1997); further Ossenbühl, 'Maßhalten mit dem Übermaßverbot', in: P. Badura & R. Scholz (Ed.), *Wege und Verfahren des Verfassungslebens. Festschrift für Peter Lerche zum 65. Geburtstag* (München: C.H. Beck 1993), 151. Cf. further on legislative abstinence with regard to solving conflicts because of relying on the Constitution J.H. Klement, *Wettbewerbsfreiheit: Bausteine einer europäischen Grundrechtstheorie* (Tübingen 2015), 293f.
66 Schmidt-Aßmann (n. 24) chap. 2 para. 64f.

no longer to be the ultimate basis for administrative action, but are subject to the proviso of conformity with the Constitution, and hence it is said that there has been a development from the statutory reservation (established in the constitutional monarchy) to the reserve of the law that is in conformity with the Constitution.[67] A highly-constitutionalised legal system moreover entails a risk of pursuing legal policy in the guise of constitutional law arguments[68] and of damaging the independence of non-constitutional law which constitutes a normative and a functional requirement.[69] The fundamental rights-rule of law permeation of administrative law also shows open flanks, for instance in the field of the administration acting in the forms and/or organisations of private law,[70] for which the BVerfG has only affirmed the binding nature of fundamental rights in the past decade,[71] the informational activity of public authorities[72] or – despite the acknowledgement that fundamental rights have a procedural dimension – in the field of the consequences of administrative acts which go against the procedure.

Rule of law-fundamental rights concerns have been located in the foreground of the constitutionalisation process and formed perspectives.[73] *Wolfgang Kahl*, for instance, sees up to the present day consequences of the expansion of the rule of law in Germany in the 19th Century as compensation for failed democratic participation of the bourgeoisie, namely an understanding of the administration as a state power standing in opposition to and posing a threat to the liberty of the citizens, which needs to be tamed with the rule of law, but not as a power to execute Acts of Parliament embodying the will of the people, and hence as the 'continuation of democratic self-determination'.[74]

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67 Cf. Wahl (n. 8) 35, 37; further idem (n. 17) 407f.

68 See also Wahl (n. 17) 407.

69 Cf. Wahl (n. 17) 409.

70 See for public procurement BVerfGE 116, 135 (152); for subsidies BVerwGE 65, 167 (174); for public undertakings BVerwGE 71, 183 (193); Wollenschläger, 'Wettbewerbliche Vorgaben für öffentliche Unternehmen', in: G. Kirchhof & S. Korte & S. Magen (Ed.), *Öffentliches Wettbewerbsrecht* (Heidelberg: C.F. Müller 2014), § 6 para. 57ff.

71 In 2006: BVerfGE 116, 135 (153) with regard to Art. 3 GG, left open with regard to Art. 12 GG (151f.); generalised then in 2011 E 128, 226 (244ff.). Limitations derived from fundamental rights were already stressed by Bachof (n. 7) 61f.; disagreeing G. Dürig, 'Verfassung und Verwaltung im Wohlfahrtsstaat' [1953] *JZ* 193 (199).

72 Questionable BVerfGE 105, 252 (265).

73 Huber (n. 16) § 73 para. 24, for instance stresses as a common European phenomenon the shortcoming existing despite constitutionalisation as to the democratisation of the administration. Accordingly, Schmidt-Aßmann, 'Das Demokratieprinzip. Ein Plädoyer für seine noch bessere Entfaltung in der verwaltungsrechtlichen Lehrbuchliteratur', in: P.F. Bultmann et. al. (Ed.), *Allgemeines Verwaltungsrecht. Festschrift für Ulrich Battis zum 70. Geburtstag* (München: Beck 2014), 85, calls for a 'better elaboration [of the principle of democracy] in textbooks on administrative law'. In general terms on this phenomenon of curtailed, asymmetric constitutionalisation Jestaedt (n. 9) 63.

74 Kahl, 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Deutschland', in: *IPE V* (n. 16) § 74 para. 93.

However, the Basic Law admittedly also takes on relevance for general administrative law beyond these aspects related to rule of law-fundamental rights. First of all the strict demands for the legitimation of the administration derived from the principle of democracy have to be mentioned: According to the BVerfG, the sovereignty of the people 'is contingent on the people exerting an effective influence on the exercise of state power through these bodies. Their acts must therefore be traceable back to the will of the people and be justified to them. This attributability context between the people and the exercise of state power is primarily created through parliamentary elections, through the laws which Parliament adopts as the standard of the executive power, by means of Parliament's influence on the Government's policy, as well as through the right of the Government to direct and guide the administration'; this strict understanding of the principle of democracy has entailed a restrictive stance on the constitutionality of establishing independent authorities (because of not being subject to ministerial guidance).[75] This jurisprudence has been criticised as 'chain of legitimation fetishism',[76] a criticism which *Ernst-Wolfgang Böckenförde*, for instance, rebuts by emphasing the goal of the orthodox view: 'It is not a matter of legitimation fetishism, but of the existence and retention of a structural framework for authoritative state action securing its effective and not merely virtual retraceability to the will not of individuals or groups, but to the will of the totality of individuals, that is to the people'.[77]

2.2 Administrative law as concretised constitutional law?

Despite the considerable influence exerted by the Basic Law on administrative law, as developed above, a conceptualisation of 'administrative law as concretised constitutional law' requires four qualifications, given that the relationship between these layers of the law in fact reveals itself to be more complex than is suggested by the dictum of *Fritz Werner*.[78] For, general admin-

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75 BVerfGE 83, 60 (71ff.); further E 83, 37 (50ff.); E 93, 37 (66ff.); E 107, 59 (87f.); E 111, 191 (217ff.); E 130, 76 (123f.); Böckenförde, 'Demokratie als Verfassungsprinzip', in: *HStR I* (n. 6) § 24 para. 11ff.

76 B.O. Bryde, 'Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie' [1994/5] *StWStP* 305 (notably 314ff.; quote 324); see further Trute, 'Die demokratische Legitimation der Verwaltung', in: *GVwR I* (n. 3) § 6 para. 15ff. Nuanced Wißmann, 'Verfassungsrechtliche Vorgaben der Verwaltungsorganisation', in: *GVwR I* (n. 3) § 15 para. 59ff.

77 Bockenförde (n. 75) § 24 para. 23.

78 Too critical Möllers (n. 3) § 3 para. 13. Equally negative with regard to the nature of the Constitution as a framework (Administration and legislator act not to concretise the Constitution, but to realise political goals within the framework of the Constitution) Masing (n. 54) § 7 para. 63 with n. 136: 'The much-quoted dictum of *Fritz Werner* [...] is an example of the risk of becoming misled by rhetorically memorable phrases; *Werner* himself did not mean what his title claimed, but rather was only addressing the immunisation of administrative law vis-à-vis the Constitution.' Opposing this because of the significance of the Constitution for administrative law Battis, 'Die Zukunft des Verwaltungsrechts', in: S. Grundmann et. al. (Ed.), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin* (Berlin: De Gruyter 2010), 1315 (1318);

istrative law is, firstly (2.2.1), already found in the Basic Law (*administrative constitutional law*), and is, secondly (2.2.2), in view of the bi-perspectivity of the formation of the system of administrative law, and, thirdly (2.2.3), given the framework character of the Constitution, more than concretised constitutional law, and, fourthly (2.2.4) as well as inversely to the hierarchy of norms, has an impact on constitutional law.

2.2.1 General administrative law as part of constitutional law: administrative constitutional law

The contrasting of constitutional and administrative law disregards the fact that the Basic Law already contains a set of rules relating to the administration. These can be referred to as *administrative constitutional law* ('*Verwaltungsverfassungsrecht*'; '*droit administratif constitutionnel*').

As far as can be seen, this term is employed in the context of the Basic Law only – with no further elaboration – in the sub-title of an article by *Martin Burgi*;[79] an analogous use may also be found on EU level.[80] It has been further elaborated for Swiss law, however, by *Pierre Moor*: 'Parmi les règles de droit constitutionnel, il y en a qui lient l'administration directement [...] Il y a donc un droit constitutionnel de l'administration, ou un droit administratif constitutionnel. En d'autres termes, sous cet angle, une partie des règles de droit constitutionnel relève en même temps du droit administratif'.[81] This conceptualisa-

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further M. Kloepfer, 'Was kann die Gesetzgebung vom Planungs- und Verwaltungsrecht lernen?' [1988] *ZG* 289 (294).

79 M. Burgi, 'Privat vorbereitete Verwaltungsentscheidungen und staatliche Strukturschaffungspflicht. Verwaltungsverfassungsrecht im Kooperationsspektrum zwischen Staat und Gesellschaft' [2000/33] *Die Verwaltung* 183.

80 E.g. M. Ruffert, 'Institutionen, Organe und Kompetenzen - der Abschluss eines Reformprozesses als Gegenstand der Europarechtswissenschaft' [2009/1] *EuR Beih.* 31 (43).

81 P. Moor, *Droit administratifvol. 1* (2nd edition Berne 1994), 29. See on overlappings between constitutional and administrative law also Heuschling (n. 13) § 54 para. 4ff., 7. This concept has to be distinguished from the term of constitutional administrative law, used in the sense of taking over contents (e.g. Art. 13 paras. 3–6 and Art. 16a paras. 2–5 of the Basic Law), techniques (deadline setting, Art. 76 paras. 2f. of the Basic Law) and dogmatic concepts (proportionality) of administrative law in constitutional law, which is criticised because of the freedom-restricting levelling of the different functions and methods of constitutional and administrative law [see J. Kersten, 'Was kann das Verfassungsrecht vom Verwaltungsrecht lernen?' (2011) *DVBl.* 585 (587ff.)]. P. Moor, (ibid., 29), however, proposes a different understanding of a 'droit constitutionnel administratif': 'Inversement, le développement du droit administratif remplit, dans une certaine mesure, les concepts de droit constitutionnel, les concrétise, les fait évoluer [...] Plus généralment, le droit administratif porte une réalité de l'Etat – ici l'administration de prestation et de gestion – qui est, ou devrait être aussi celle du droit constitutionnel. Il y a donc également un droit administratif de la Constitution, ou un droit constitutionnel administratif. En d'autres termes, sous cet angle, une partie des règles de droit administratif relève en même temps du droit constitutionnel'. Finally, the concept of '<administrativisation> du droit constitutionnel' is employed by Vedel, 'Foreword', in: B. Stirn (Ed.), *Les sources constitutionnelles du droit administratif* (7th edition Paris: L.G.D.J 2011), VIII.

tion (of an *administrative constitutional law*) corresponds to the identification and bundling of sector-specific constitutional stipulations established in the German constitutional law doctrine, such as of an economic constitution.[82] Such a concept of 'Teilverfassungen' (i.e. of elaborating distinct areas of constitutional law) is criticised by *Rainer Wahl* because of blurring the boundaries between Parliamentary statutes and constitutional law and because of tendencies towards autonomisation as a consequence of which the whole (a specific area of constitutional law) becomes more than the sum of its parts;[83] if one is aware of these dangers, it is convincing to bundle the stipulations of the Constitution related to the administration as 'administrative constitutional law', which moreover emphasises their rank as constitutional law. Finally, the distinction between general and specific Administrative Law may be transferred to the constitutional level [cf. the varying degree of generalisation of Art. 1 para. 3 GG on the one hand and Art. 16a para. 4 GG on the other hand, moreover the elaboration of constitutional standards of police law ('Sicherheitsverfassungsrecht')].[84] Special administrative law is primarily influenced by specific fundamental rights standards as well as by objectives set by the Constitution.

The *administrative constitutional law* reflects the many different functions of the Constitution, namely organising, legitimising and harnessing governance, exerting a stabilising effect, as well as formulating guiding principles and mandates.[85] Essential elements[86] are the obligation that is incumbent on the administration to abide by fundamental rights (Art. 1 para. 3 of the Basic Law) and by the law (Art. 20 para. 3 of the Basic Law), the guarantee of legal protection (Art. 19 para. 4 of the Basic Law) as well as requirements of a substantive and procedural nature under the rule of law and fundamental rights, particularly the principles of proportionality, of the protection of legitimate expectations and of legal certainty, as well as of procedural standards such as the right to a

82 E.g. Kaiser, 'Die Verfassung der öffentlichen Wohlfahrtspflege', in: H. Ehmke & W.A. Kewenig (Ed.), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Berlin: Duncker & Humblot 1973), 241 (242ff.), and – for the economic Constitution – Wollenschläger, 'Verfassungsrechtliche Vorgaben für das Öffentliche Wirtschaftsrecht', in: R. Schmidt & idem (Ed.), *Kompendium Öffentliches Wirtschaftsrecht* (4th edition Heidelberg: Springer 2015), § 2 para. 3ff.

83 R. Wahl, 'Der Vorrang der Verfassung' [1981/20] *Der Staat* 485 (508ff.); further Lang, 'Funktionen der Verfassung', in: *HStR XII* (n. 22) § 266 para. 20.

84 Cf. only Würtenberger, 'Entwicklungslinien des Sicherheitsverfassungsrechts', in: M. Ruffert & C. Backes (Ed.), *Dynamik und Nachhaltigkeit des öffentlichen Rechts. Festschrift für Professor Dr. Meinhard Schröder zum 70. Geburtstag* (Berlin: Duncker & Humblot 2012), 285.

85 See on the different functions of a Constitution only Lang (n. 83) § 266 para. 5ff. and Volkmann (n. 19) 15ff., 39ff.

86 Cf. for a list of general principles of EU administrative constitutional law D.-U. Galetta & H.C.H. Hofmann & O. Mir Puigpelat & J. Ziller, *The General Principles of EU Administrative Procedural Law* (2015), www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA%282015%29519224_EN.pdf (9.9.2015), 15ff.

hearing and reasoning.[87] Added to this are the stipulations for the organisation of the administration in terms of competences, fundamental rights and the rule of law, democracy and human resources, which had long been neglected,[88] but which have increasingly been focussed on (Art. 20 para. 2, Art. 28, Art. 33 paras. 2ff. and Art. 83ff. of the Basic Law)[89] and for executive rule-making (Art. 80 of the Basic Law).[90] With its focus on the individual (Art. 1 paras. 1f. of the Basic Law),[91] the constitution of Germany as a democratic and social state based on the rule of law, which is not devoid of tension (Art. 20 paras. 1 and 3 of the Basic Law and Art. 28 para. 1, sentence 1, of the Basic Law),[92] the option for a system of legal protection focusing on the enforcement of individual rights (Art. 19 para. 4 of the Basic Law) or the model which is anchored in the 1990s of the State as a guarantor of key infrastructures (Art. 87e and f of the Basic Law), the Basic Law has furthermore formulated influential guiding principles for developing administrative law. This model function of constitutional law specifically for administrative law has been stressed by *Pierre Moor*: 'Plus généralement encore, le droit constitutionnel porte une image de l'Etat – ici, l'Etat social fondé sur le droit – qui est, ou devrait être aussi celle du droit administratif';[93] likewise *FolkeSchuppert* and *Christian Bumke* understand the 'Constitution as [...] expression of a "grand" design'.[94]

To elaborate on one of these examples, namely the right to effective legal protection enshrined in Article 19 paragraph 4 of the Basic Law: Its significance is not exhausted in guaranteeing access to courts in case of a violation of subjective rights; rather, it also assumes significance for the system of administrative law by taking up a position in the conflict regarding the objective of legal protection in administrative law between the Prussian model of a primarily objective legal review of the administration and the Southern German model of individual

87 See BVerfGE 53, 30 (59ff.); E 116, 135 (150ff.); D. Ehlers, 'Verfassungsrecht und Verwaltungsrecht', in: *Allgemeines Verwaltungsrecht* (n. 53) § 6 para. 23.

88 A. Köttgen, 'Das Bundesverfassungsgericht und die Organisation der öffentlichen Verwaltung' [1965/90] *AöR* 205 (215), even excluded the rules on organisation from administrative constitutional law. Disagreeing Krebs, 'Verwaltungsorganisation', in: J. Isensee & P. Kirchhof (Ed.), *HStR V* (3rd edition Heidelberg: C.F. Müller 2007), § 108 para. 60; Wißmann (n. 76) § 15 para. 6ff. Cf. on the limited elaboration of constitutional law standards for the organisation of the administration H.J. Wolff & O. Bachof & R. Stober & W. Kluth, *Verwaltungsrecht II* (7th edition München 2010), § 80 para. 54.

89 In detail Krebs (n. 88) § 108 para. 60ff.; Wißmann (n. 76) § 15 para. 6ff.; Wolff & Bachof & Stober & Kluth (n. 88) § 80.

90 See only U. Stelkens & V. Mehde, 'Rechtsetzung der europäischen und nationalen Verwaltungen' [2012/71] *VVDStRL* 369 (418).

91 See only BVerwGE 1, 159 (161f.); Kahl (n. 74) § 74 para. 9.

92 See only Bachof (n. 7) 37ff., notably 44ff.; further (for an overview) R. Schröder, *Verwaltungsrechtsdogmatik im Wandel* (Tübingen 2007), 55ff.

93 Moor (n. 81) 29; further Wißmann (n. 76) § 15 para. 3a, and from a general perspective BVerfGE 34, 269 (287); Lang (n. 83) § 266 para. 13, 17; Volkmann (n. 37) 67ff.

94 Schuppert & Bumke (n. 18) 27ff., 39f. (quote 39).

legal protection, that is in favour of the latter,[95] whilst trends towards convergence are admittedly being increasingly emphasised. Moreover, the choice for an objective legal review would not imply permitting popular actions, but would still require an individual interest to be at stake in order to grant standing (*Interessenklage*).[96] The 'system decision for subjective legal protection' is illustrated by BVerfG, NVwZ 2009, 1426 (1427): 'Art. 19 para. 4 of the Basic Law, however, only grants standing to a party whose rights have been violated by a public authority. Neither a violation of only economic interests is sufficient, nor is a violation of legal rules serving only a public interest (even if beneficial to the individual), which therefore only have a reflexive impact [...] Art. 19 para. 4 of the Basic Law does not guarantee to citizens a general review of lawfulness with regard to the administration, but takes a system decision in favour of the protection of individual rights'.[97] The presumption of such a system decision is, however, criticised by *Oliver Lepsius* as stylised 'by concerted action on the part of the legislature, of scholars and not lastly of the legislature amending the Code of Administrative Court Procedure'.[98] A concrete consequence of this system decision is the corresponding orientation of procedural law, cf. only section 42 subsection (2) of the Code of Administrative Court Procedure: 'Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission.' This norm is even extended beyond its direct scope of application in view of the aforementioned system decision: With regard to the action for a declaratory judgement (§ 43 of the Code of Administrative Court Procedure) the *BVerwG* has held in its established case-law that an analogous application would be necessary to 'avoid a popular action, which is alien to the administrative process'.[99] As a further example one may mention the assumption (derived from Art. 19 para. 4 of the Basic Law) of an entitlement of the in-

95 Cf. on this F. Weyreuther, *Verwaltungskontrolle durch Verbände?* (Düsseldorf 1975), 82f.; and for a comparison of both models only Schoch (n. 25) § 50 para. 5. Cf. on the development of the system of legal protection in Germany only S. Schlacke, *Überindividueller Rechtsschutz* (Tübingen 2008), 31ff.

96 Breuer, 'Entwicklungen des Rechtsschutzes im Umweltrecht', in: C. Franzius (Ed.), *Beharren, Bewegen, Festschrift für Michael Kloepfer zum 70. Geburtstag* (Berlin: Duncker & Humblot 2013), 315 (320f.); A. Schwerdtfeger, *Der deutsche Verwaltungsrechtsschutz unter dem Einfluß der Aarhus-Konvention* (Tübingen 2010), 52ff., 67f.

97 See further BVerwGE 147, 312 (316); *NVwZ* 2012, 567 (568); von Bogdandy & Huber (n. 14) § 42 para. 77; J. Krüper, *Gemeinwohl im Prozess* (Berlin 2009), 143; Schlacke (n. 95) 54ff.; Schmidt-Aßmann (n. 24) chap. 4 para. 59; Schoch (n. 25) § 50 para. 2, 5.

98 O. Lepsius, 'Hat die Europäisierung des Verwaltungsrechts Methode? Oder: Die zwei Phasen der Europäisierung des Verwaltungsrechts' [2010/10] *Die Verwaltung Beih.* 179 (186f.).

99 BVerwGE 130, 52 (56). In greater detail and critical Glaser, '§ 43', in: K.F. Gärditz (Ed.), *Verwaltungsgerichtsordnung* (Köln: Heymann 2013), § 43 para. 84ff.

dividual if the specific rule is unclear on standing.[100] In this regard, Article 19 paragraph 4 of the Basic Law has also played a role in granting subjective rights, and did not exhaust itself in a provision supposing subjective rights granted elsewhere.[101] This system decision can also (partly) explain resistance against modifications demanded by EU law: For instance, the system decision in favour of the protection of individual rights is said to have led to a 'barrier to thought' which made it more difficult to implement diverging EU law standards (objective concept of legal protection), and first required infringement proceedings.[102]

Coming back to administrative constitutional law in general, it is partially written, partially unwritten, only rarely contains rules and more often principles. With regard to administrative organisation, the precise rules for the federal administration (Art. 87ff. of the Basic Law) may be contrasted with the requirement of adequate democratic legitimation (Art. 20 para. 2 of the Basic Law). Moreover, the directive force of the individual principles of administrative constitutional law differs which becomes evident when comparing objectives stipulated by the Constitution with liberties as defensive rights.[103] In some cases, as with the requirements of the protection of legitimate expectations or of democratic legitimation, administrative constitutional law is the result of concretising general constitutional stipulations (sometimes also contrary ones[104]). This illustrates that a first concretisation has already to take place at constitutional level.[105] Thus, *Peter Lerche* distinguishes between concretising the Constitution at constitutional level and by means of legislation, whereby the latter does not generate constitutional law, but non-constitutional administrative law

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100 BVerfGE 15, 275 (281f.); cf. further E 113, 273 (311); O. Bachof, 'Anmerkung' [1961] *DVBl.* 128 (131); Masing (n. 54) § 7 para. 100, 111. Nuanced Schmidt-Aßmann (n. 52) Art. 19 IV para. 143ff. Disagreeing Schulze-Fielitz, 'Art. 19 IV', in: *Grundgesetz* (n. 42) Art. 19 IV para. 62.

101 Cf. further Schönberger (n. 3) 66f.

102 See M. Hong, 'Subjektive Rechte und Schutznormtheorie im europäischen Verwaltungsrechtsraum' [2012] *JZ* 380 (388). On the *Trianel* case-law in the context of collective actions n. 236; on the law on public procurement Wollenschläger, 'Europäisches Vergabeverwaltungsrecht', in: J.P. Terhechte (Ed.), *Verwaltungsrecht in der Europäischen Union* (Baden-Baden: Nomos 2011), § 19 para. 80ff.

103 See from a general perspective Badura, 'Die Verfassung im Ganzen der Rechtsordnung und die Verfassungskonkretisierung durch Gesetz', in: *HStR XII* (n. 22) § 265 para. 44.

104 See F. Reimer, *Verfassungsprinzipien. Ein Normtyp im Grundgesetz* (Berlin 2001), 495ff.

105 See on the process of concretising the Constitution Breuer (n. 3) 227; Reimer (n. 104) 458ff. – notably 484ff. on the formation of 'sub-principles'. See with regard to the rule-of-law principle only Schmidt-Aßmann, 'Der Rechtsstaat', in: J. Isensee & P. Kirchhof (Ed.), *HStR II* (3rd edition Heidelberg: C.F. Müller 2004), § 26 para. 2ff., 69ff. See with regard to the concretisation of the Constitution as judge-made law M. Albers, 'Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen' [2012/71] *VVDStRL* 257 (286f.); Jestaedt, 'Selbstand und Offenheit der Verfassung gegenüber nationalem, supranationalem und internationalem Recht', in: *HStR XII* (n. 22) § 264 para. 69.

implementing, respecting or concretising constitutional law;[106] in the same vein, *Matthias Jestaedt* introduces – with a further detailed differentiation – the distinction between formal and substantive concretisation, hence as to whether concretising the Constitution leads to 'more constitutional law' or to 'constitutional compatibilisation of sub-constitutional law'.[107]

Administrative constitutional law stands alone as a constitutional framework of the administration, and as a standard for review for the BVerfG and BVerwG (supra, 2.1). At application level, however, it comes into play only mediatised, i.e. in the guise of its concretisation in non-constitutional administrative law (like the Administrative Procedure Act), which moreover enjoys priority (over a direct recourse to constitutional law) when it comes to application; other than with regard to the relationship of specific and general administrative law, this principle of primacy of application does not result from the lex-specialis-rule, but from the primacy of the democratically legitimated legislator.[108] In this case, the Basic Law then functions as a standard and a directive for interpretation.[109] One example that could be referred to would be the provisions on the rescission of administrative acts (§§ 48ff. of the Administrative Procedure Act) which balance out the constitutional principles of legality and of the protection of legitimate expectations. Administrative constitutional law becomes directly relevant as a comprehensive but residual order in case of norming under non-constitutional law which contains gaps[110] and[111] as a provider of general orientation and a trigger for innovations, what has been the case in the *Volkszählungs*-judgement[112] entailing the development of data protection law.

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106 Lerche, 'Facetten der "Konkretisierung" von Verfassungsrecht', in: I. Koller & J. Hager & M. Junker & R. Singer & J. Neuner (Ed.), *Einheit und Folgerichtigkeit im Juristischen Denken* (München: Beck 1998), 7 (7 ff., 9).

107 Jestaedt (n. 9) 39ff.

108 Cf. on the principle of primacy of application only H. Maurer, *Allgemeines Verwaltungsrecht* (18th edition München 2011), § 4 para. 58, § 8 para. 11. For a critical view: Heuschling (n. 13) § 54 para. 59.

109 This is the foundation for the independence of administrative constitutional law vis-à-vis (non-constitutional) administrative law and administrative acts. Stressing the clarity of standards as a major function of the concept of the independence of layers of the law Jestaedt (n. 105) § 264 para. 40f. Cf. further on the autonomy of constitutional law Isensee, 'Verfassungsrecht als "politisches Recht"', in: idem & P. Kirchhof (Ed.), *HStR VII* (3rd edition Heidelberg: C.F. Müller 2009), § 162 para. 52.

110 See already Bachof (n. 7) 53f. Positive: Mußgnug, 'Das allgemeine Verwaltungsrecht zwischen Richterrecht und Gesetzesrecht', in: G. Reinhart (Ed.), *Richterliche Rechtsfortbildung: Erscheinungsformen, Auftrag und Grenzen. Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprechts-Karls-Universität Heidelberg* (Heidelberg: C.F. Müller 1986), 203 (227). See generally on the residual character of constitutional principles Reimer (n. 104) 458ff.

111 Cf. on the specific problem of constitutional provisions containing issues belonging to administrative law Waldhoff, 'Kann das Verwaltungsrecht vom Verfassungsrecht lernen?', in: *Festschrift Kloepfer* (n. 96) 261 (268f.). Art. 16a GG constitutes an example. For a critical view Kersten (n. 81) 587f.

112 BVerfGE 65, 1.

A major characteristic of administrative constitutional law is its comprehensive scope of application (*Allbezüglichkeit*), i.e. its relevance for all administrative actions and its rich content in terms of substantive, procedural and organisational standards, which finds its expression notably in the multidimensionality of fundamental rights (see on this supra, 2.1). Thus *Otto Bachof* has been right in stressing that 'every administrative law case is at the same time potentially a constitutional law case'.[113] Although enjoying the rank of constitutional law, administrative constitutional law belongs in functional terms to the General Part of administrative law because of its primacy and comprehensive scope of application as well as because of comparable tasks, such as its rationalisation and disciplining function and its comprehensive but residual character.[114] Finally, administrative constitutional law, in view of its comprehensive but residual character and its orientation function, has at times taken on the role of the traditional general legal principles of administrative law.[115]

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113 Bachof (n. 7) 51; further on the Basic Law's function as a comprehensive order Hofmann (n. 6) 4ff.; Hollerbach, 'Ideologie und Verfassung', in: W. Maihofer (Ed.), *Ideologie und Recht* (Frankfurt am Main: Klostermann 1969), 37 (51f.); Isensee (n. 109) § 162 para. 42, further 51; Schuppert & Bumke (n. 18) 58; Volkmann (n. 37) 66. Particularly with regard to the administration and administrative law Schröder (n. 92) 61f.

114 Cf. Lepsius, 'Themen einer Rechtswissenschaftstheorie', in: M. Jestaedt & idem (Ed.), *Rechtswissenschaftstheorie* (Tübingen: Mohr Siebeck 2008), 1 (28f.) – who, however, [idem (n. 98) 196] rejects an understanding of the Constitution as General Part of Public Law because of the Constitution's relevance for all areas of law [cf. on this also T. Hollstein, *Die Verfassung als "Allgemeiner Teil"* (Tübingen 2007), 212f.]; cf. further Schoch, 'Entformalisierung staatlichen Handelns', in: J. Isensee & P. Kirchhof (Ed.), *HStR III* (3rd edition Heidelberg: C.F. Müller 2005), § 37 para. 127. Cf. for a qualification of the constitutional principles of Administrative Law as part of General Administrative Law also T. Groß, 'Die Beziehungen zwischen dem Allgemeinen und dem Besonderen Verwaltungsrecht' [1999/2] *Die Verwaltung Beih.* 57 (79). See further Moor (n. 81) 29: 'Parmi les règles de droit constitutionnel, il y en a qui lient l'administration directement [...] Il y a donc un droit constitutionnel de l'administration, ou un droit administratif constitutionnel. En d'autres termes, sous cet angle, une partie des règles de droit constitutionnel relève en même temps du droit administratif', 29f. Cf. for a more restrictive understanding, e.g. drawing a distinction between constitutional and administrative law Schoch (n. 24) 182.

115 See e.g. Schmidt-Aßmann & Dagron (n. 64) 416; further idem, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben* (Tübingen 2013), 47ff.; Mußgnug (n. 110) 207; Ossenbühl, 'Allgemeine Rechts- und Verwaltungsgrundsätze – eine verschüttete Rechtsfigur', in: *Festgabe 50 Jahre Bundesverwaltungsgericht* (n. 3) 289 (297f.); Ruffert (n. 8) § 17 para. 53.

2.2.2 More than concretised constitutional law I: Bi-perspectivity of system formation in administrative law

The bi-perspectivity[116] of system formation in administrative law implies that general administrative law[117] is more than just concretised constitutional law.[118] Rather, the fields of reference of special administrative law form the pool from which terms, institutes and rules of general administrative law are inductively coined by means of comparison and of generalisation.[119] This significance of special administrative law for system formation in general administrative law has already been stressed by *Klaus Stern* according to whom general administrative law develops 'inductively from positive law by abstracting, reducing and generalising, institutions, definitions, forms, modi and types of administrative law concepts'.[120] As examples one may mention environmental law with its development of informal and cooperative structures or distribution procedures which teach one how to deal with multipolar competition conflicts, as well as planning which cannot be found only in construction law, but also for instance in the law on health or telecommunication.

Yet, the very point of system formation in German administrative law is that, unlike encyclopaedic methods from the early development stages of ad-

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116 Cf. on the bi-perspectivity only Schmidt-Aßmann (n. 24) chap. 1 para. 1ff.; Wollenschläger (n. 40) 13ff.

117 According to the traditional distinction, general administrative law encompasses common concepts, legal institutes as well as legal rules, and special administrative law encompasses their area-specific manifestations, see e.g. Burgi, 'Rechtsregime', in: *GVwR I* (n. 3) § 18 para. 97; Kahl (n. 74) § 74 para. 3; K. Stern, 'Das Allgemeine Verwaltungsrecht in der neueren Bundesgesetzgebung' [1962] *JZ* 265 (267). Critical with regard to such an understanding of general administrative law and qualifying the latter as an academic project [as already A. Merkl, *Allgemeines Verwaltungsrecht* (Wien 1927), Vf. and 95ff.] with competing approaches, but all in all too modest in terms of its claim Möllers, 'Allgemeines Verwaltungsrecht in einer doppelt gegliederten Rechtsordnung', in: *Festschrift Battis* (n. 73) 101 (103f.). Cf. for an overview over the development of distinguishing general and special administrative law and with a reference to the pioneering work of *Friedrich Franz Mayer*: Groß (n. 114) 58ff.; further Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft', in: *GVwR I* (n. 3) § 2 para. 53ff.; idem, *Geschichte des Öffentlichen Rechts in Deutschland vol. 2* (München 1992), 394ff.

118 Admittedly, the particular dependence of general administrative law on the Constitution is stressed by many authors – also in comparison to special administrative law, critically insofar J. Kersten & S.-C. Lenski, 'Die Entwicklungsfunktion des Allgemeinen Verwaltungsrechts' [2009/42] *Die Verwaltung* 501 (526ff.) – and the latter is qualified as the 'drive belt' of administrative constitutional law, see only Wahl, 'Die Aufgabenabhängigkeit von Verwaltung und Verwaltungsrecht', in: W. Hoffmann-Riem & E. Schmidt-Aßmann & G.F. Schuppert (Ed.), *Reform des Allgemeinen Verwaltungsrechts. Grundfragen* (Baden-Baden: Nomos 1993), 177 (212); further idem (n. 8) 38f.

119 See for working with *Referenzgebieten* (fields of reference) only Schmidt-Aßmann (n. 24) chap. 1 para. 12ff.; further Voßkuhle, 'Neue Verwaltungsrechtswissenschaft', in: *GVwR I* (n. 3) § 1 para. 43ff.; Wollenschläger (n. 40) 13ff.

120 Stern (n. 117) 267.

ministrative law,[121] this process does not persist at the level of observation, systematising, abstracting and legal-policy criticism of special administrative law; rather, the inductively-obtained findings are reflected in view of general standards and doctrines.[122] The Basic Law takes on a vital significance here. Firstly, it determines the general orientation and development of general administrative law:[123] The very formation of a general administrative law, motivated by promoting rationality and transparency, is a democratic and rule-of-law programme.[124] Its dual mandate consists of not only disciplining administrative action in terms of rule-of-law standards, but also of enabling administrative action.[125] Secondly, constitutional law provides for categories for concept formation, such as rule-of-law requirements or democratic legitimation.[126] Thirdly, the Basic Law functions as a yardstick for rules and institutes of general administrative law.[127]

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121 Cf. for an overwiew Groß (n. 114) 58ff.; further Stolleis, Geschichte (n. 117) 395. Contrary to this, *Otto Mayer's* innovative approach consisted in developing general administrative law from the rule-of-law principle and thus in adopting a deductive perspective, cf. Bumke (n. 51) 86ff.; A. Hueber & O. Mayer, *Die "juristische Methode" im Verwaltungsrecht* (Berlin 1982), 61ff.; Kersten & Lenski (n. 118) 508ff.; Schmidt-De Caluwe (n. 13) 118f.; Groß, ibid., 63, 75. See also, albeit emphasising the need for a synthetic approach, Kaufmann (n. 13) 381, 388ff.; further Stern (n. 117) 265f.

122 Schmidt-Aßmann (n. 24) chap. 1 para. 1, 12f.; Wollenschläger (n. 40) 13f. Stressing the challenging of general teachings by developments in special administrative law Möllers (n. 117) 107.

123 See Schmidt-Aßmann (n. 24) chap. 1 para. 1, 21ff.; idem, 'Zur Reform des Allgemeinen Verwaltungsrechts. Reformbedarf und Reformansätze', in: *Reform des Allgemeinen Verwaltungsrechts. Grundfragen* (n. 118) 15, 17ff. The guiding function of constitutional law for developing administrative law constituted the context for F. Werner's famous dictum of 'administrative law as concretised constitutional law', cf. idem (n. 1) 528f.

124 Cf. Möllers (n. 3) § 3 para. 54; further, on the development of administrative law as an instrument for securing the rule of law C. Franzius, *Die Herausbildung der Instrumente indirekter Verhaltenssteuerung im Umweltrecht der Bundesrepublik Deutschland* (Berlin 2000), 18ff.; further Hesse, 'Der Rechtsstaat im Verfassungssystem des Grundgesetzes', in: idem (Ed.), *Staatsverfassung und Kirchenordnung. Festgabe für Rudolf Smend zum 80. Geburtstag* (Tübingen: Mohr 1962), 71 (73).

125 Cf. on the two-fold aim of administrative law to discipline as well as to enable administrative action, which is why the Constitution must also secure the functioning of the administration: Schmidt-Aßmann (n. 24) chap. 1 para. 30ff.; idem (n. 8) § 5 para. 6; Huber (n. 16) § 73 para. 9. Cf. on the latter goal of administrative law already Bachof (n. 7) 76: 'The rule-of-law principle implies essentially: a orderly, clear, accessible and accelerated procedure leading to the desired result'; further BVerfGE 61, 82 (116).

126 Cf. on this Groß (n. 114) 74ff.; Möllers (n. 3) § 3 para. 13, 54 – and simlarly idem (n. 117) 111 –, who understands the fundamental constitutional principles, like democracy and rule-of-law, as parameter for systemising administrative law, but at the same time distinguishes this academic approach from the process of constitutionalisation (which is seen critically). Cf. on the significance of the work of *Otto Mayer* in this respect n. 121.

127 Vgl. K.F. Gärditz, *Hochschulorganisation und verwaltungsrechtliche Systembildung* (Tübingen 2009), 3 ('hierarchially influencing the system of administrative law by constitutional law enjoying primacy'), 6; W. Kahl, 'Die Europäisierung des Verwaltungsrechts als Herausforderung an Systembildung und Kodifikationsidee' [2010/10] *Die Verwaltung Beih.* 39 (45); Schmidt-Aßmann (n. 24) chap. 2 para. 1f., 19; Wollenschläger (n. 40) 13f. Cf. from a general perspective also Schuppert & Bumke (n. 18) 38ff.; Ruffert (n. 8) § 17 para. 49f.

Admittedly, the development paths may run differently: The starting point can be special administrative law, which reacts to specific regulatory problems and creates specific solutions; these are then frequently further developed in confrontation with constitutional law requirements, whereby also constitutional law can learn, and are also received and reflected by general administrative law. As is for instance shown by the example of the law on public procurement, which was only wakened from its long sleep by Europeanisation, it is however also conceivable to largely ignore parts of special administrative law by constitutional law and general administrative law. Constitutional law may however also be the starting point, as it reacts to political and social developments, such as by recognising fundamental-rights-based duties to protect, and procedural as well as organisational standards and social rights which then need to be concretised by administrative law. It is also possible that such developments in constitutional law are ignored by administrative law. Furthermore, constitutional and administrative law may also develop in parallel, influencing one another. Finally, it has to be kept in mind that the institutes and rules of general administrative law show a differing degree of constitutional relevance. For instance, the doctrine on the forms of action is an expression of the rule of law, just as of the competences system and procedural requirements (namely rationalisation and limitation of the exercise of power by the State),[128] but for instance the institute of the administrative act as such is not formed by the Constitution, only individual manifestations, such as the questions of the protection of the status quo or legal protection.

The bi-perspectivity of system formation may be illustrated by the stability which attaches to some administrative decisions in multipolar conflict situations, such as appointments of civil servants, or the award of public procurement contracts. This stability rules out a retrospective court challenge.[129] If it is mirrored in general doctrines, it proves to be a derogation from the standard model of retrospective legal protection, and hence to be in need of reasoning. At the same time, however, it is more than this: It also constitutes a restriction on the constitutional guarantee of legal protection, which requires priority to be attached to primary legal protection, i.e. the availability of actions to quash illegal allocation decisions,[130] and is hence in need of justification under constitutional law. The corresponding reflection of stability has then led to distinctions being created depending on the respective subject-matter, such as in the law on civil servants with regard to the requirement of advance information of un-

128 See on this only Badura (n. 3) 152; Schmidt-Aßmann (n. 105) § 26 para. 75.

129 Cf. on this with further references only Wollenschläger (n. 40) 621ff.

130 Cf. insofar only and with further references Wollenschläger (n. 40) 89ff.; idem, 'The Allocation of Limited Rights by the Administration: Challenges of Legal Protection', in: P. Adriaanse & F. van Ommeren & W. den Ouden & J. Wolswinkel (Ed.), *Scarcity and the State I* (Cambridge: Intersentia 2016), 93 (96ff.).

successful competitors in order to enable substituting the ex-post remedy by an accelerated preventive remedy.[131] The different models of stability which have emerged by confronting models established in special administrative law with constitutional standards now form an element of general administrative law.[132]

Hence, the rationalising power of general administrative law is enhanced by its orientation towards the Constitution: This orientation disciplines special interests, just as tying special administrative law to general administrative law,[133] guarantees a transparent, rational and coherent formation of the system of administrative law,[134] and has a stabilising effect.[135] Finally, the higher-ranking constitutional law constitutes a metalevel of administrative law, which is also attractive for academia, for it allows continually observing, reviewing and reorientating administrative law.[136] Thus, scholars may 'attract attention via the production of normative hypotheses in the legal system'[137] and constitutionalisation 'carries out the important task of "never entirely releasing" the (non-constitutional) legal order "from a state of productive unrest"[138] as well as promotes "awareness creation" in order to "counter the law of inertia in the administration and in the judiciary"'.[139]

A final remark on system formation under administrative law: the fact that it is, given fragmentation processes and breaks in content, which result from the plurality, competition and heterogeneity of law-makers, as well as from law-making not always following systematic standards, not (any longer) based on the substantive unity of all law – such a system definition is employed by *Friedrich Carl von Savigny* according to whom the legal system consists of the 'inner relationship which links all legal institutes and legal rules to form a large

131 In more detail Wollenschläger (n. 40) 621ff.; idem (n. 130) 109ff.

132 See only Wollenschläger (n. 40) 625ff.; idem (n. 130).

133 Cf. on the various functions of general administrative law in terms of legal practice, doctrine, legal policy and leading the reception Schmidt-Aßmann, 'Das Allgemeine Verwaltungsrecht vor den Herausforderungen neuerer europäischer Verfassungsstrukturen', in: H. Haller et. al. (Ed.), *Staat und Recht: Festschrift für Günther Winkler* (Berlin: Springer 1997), 995 (998ff.). See also Burgi (n. 117) § 18 para. 107f.; T. von Danwitz, *Verwaltungsrechtliches System und europäische Integration* (Tübingen 1996), 27, 34ff.; Gärditz (n. 127) 3f.; Groß (n. 114) 71f.; Kahl (n. 127) 46ff.; Möllers (n. 117) 103; Schmidt-Preuß, 'Das Allgemeine des Verwaltungsrechts', in: M. Geis (Ed.), *Staat, Kirche, Verwaltung. Festschrift für Hartmut Maurer zum 70. Geburtstag* (München: Beck 2001), 777 (778).

134 Schmidt-Aßmann (n. 24) chap. 1 para. 9ff.; idem (n. 8) § 5 para. 2.

135 Von Danwitz (n. 133) 58f. Cf. on the stabilising function of a Constitution Lang (n. 83) § 266 para. 27.

136 Schmidt-Aßmann (n. 24) chap. 1 para. 19.

137 Röhl (n. 15) 835f.

138 Schuppert & Bumke (n. 18) 39.

139 Gerhard (n. 19) 737; further 748.

unit'[140] –, does not constrict its fundamental significance for the doctrine of administrative law, although the theoretical claim must be formulated more modestly.[141] Yet, particularly a disparate legal material such as special administrative law demands compilation, order and critical reflection, which is where the task of systematisation in administrative law lies; thus a 'pragmatic systematic thinking' is called for.[142] Admittedly correct is the warning of *Thomas Groß* that system formation must 'not become a tool of amending the law without a democratic mandate'.[143]

2.2.3 More than concretised constitutional law II: The framework character of the Constitution

The concept of administrative law as concretised constitutional law must not give rise to the misconception that provisions of administrative law could be simply derived from the Basic Law and that they constituted an execution of the Constitution pure and simple.[144, 145] Such an understanding disregards not only the standard-setting function of the Basic Law which demands distance to non-constitutional administrative law, and the framework nature of constitutional law, but above all the mandate of the democratically-legitimised legislature to make policy.[146] Moreover, the Basic Law's choices for a horizontal and vertical separation of powers, for federalism and decentralisa-

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140 F.K. von Savigny, *System des heutigen römischen Rechts I* (Berlin 1840), 214; further Möllers (n. 3) § 3 para. 36: 'As a system one will understand a largely consistent and axiomatically reducible reconstruction of the law as it stands, using a deductive argumentation mode'.

141 In this vein rightly von Bogdandy, 'Grundprinzipien', in: idem & J. Bast (Ed.), *Europäisches Verfassungsrecht* (2nd edition Berlin: Springer 2009), 13 (20); P. Hilbert, *Systemdenken in Verwaltungsrecht und Verwaltungsrechtswissenschaft* (Tübingen 2015), 91ff.; Möllers (n. 3) § 3 para. 36. However sceptical: Lepsius (n. 114) 36ff.; further idem (n. 98) 194; M. Jestaedt, *Das mag in der Theorie richtig sein …* (Tübingen 2006), 81; Möllers (n. 117) 103; idem (n. 3) § 3 para. 36.

142 Schmidt-Aßmann (n. 8) § 5 para. 2, further von Bogdandy (n. 141) 19f.; von Danwitz (n. 133) 27ff.; Groß (n. 114) 72, 80; Kahl (n. 127) 44ff., 51ff.; Schmidt-Aßmann (n. 24) chap. 1 para. 1ff.

143 Groß (n. 114) 78f. Holding on to the system definition Bachof (n. 13) 224ff.; Schmidt-Aßmann (n. 24) chap. 1 para. 1; Schoch (n. 24) 191f. Monographically, and opening up perspectives on the basis of a differentiated system concept Hilbert (n. 141). In general terms on the approach of the legal act-related administrative jurisprudence Bumke (n. 51) 75f., 88f.; further idem, *Relative Rechtswidrigkeit* (Tübingen 2004), 23ff.

144 See, however, Stolleis, Verwaltungsrechtswissenschaft (n. 13) 243; more reservedly, however, idem (n. 117) § 2 para. 110. Similarly Bryde (n. 31) 229, and passim, according to whom 'the distinction between non-constitutional law and constitutional law […] is impossible but necessary'.

145 Badura (n. 103) § 265 para. 43.

146 Kloepfer (n. 78) 294f.; Lang (n. 83) § 266 para. 20f.; Lepsius (n. 114) 30f.; Möllers (n. 3) § 3 para. 13; Ossenbühl (n. 115) 299f.; Reimer (n. 104) 486ff.; G. F. Schuppert, 'Rigidität und Flexibilität von Verfassungsrecht. Überlegungen zur Steuerungsfunktion von Verfassungsrecht in normalen wie in "schwierigen" Zeiten' [1995/120] *AöR* 32 (48); Wahl (n. 17) 407ff.; idem (n. 19) 193f. m. n. 8. Cf. generelly on the margin of appreciation of the legislator Badura (n. 103) § 265 para. 20ff.

tion, imply different ways of concretising constitutional law.[147] Finally, *Rainer Wahl* is right in stressing that an increasing juridification restricts the space for constitutional contents not formulating standards for judicial review (programmatic and political-appellative function of the constitution).[148]

True, in view of its comprehensive scope of application and its rich content in terms of substantive, procedural and organisational standards, administrative constitutional law completely permeates general administrative law, and is hence more than a framework pure and simple. As such a framework order (*Rahmenordnung*), according to *Ernst-Wolfgang Böckenförde*, the Constitution 'typically only establishes basic conditions and a procedural framework for the political decision-making process and takes fundamental decisions for the relationship between individuals, society and the State, but does not contain any specific provisions which could already be enforced in a judicial or administrative sense'.[149] This would mean 'also and particularly in terms of its substantive provisions' that the Constitution was 'to be understood firstly as a binding boundary on the political decision-making power – the classical exclusion function – and secondly as a binding determination of the direction for the political power of action and decision-making by setting specific goals for action and design principles which have to be transposed into the legal system and administrative action (admittedly without already containing sufficiently specific provisions for this)'.[150] By contrast, as a fundamental order (*Grundordnung*), the Constitution comprises 'all legal principles and possibilities for balancing competing principles for designing the legal order in nuce [...] It is then a directing Constitution pushing for the realisation of the principles which it contains. This corresponds to an understanding of fundamental rights as multidimensional provisions which influence all areas of the law.'[151]

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147 Kloepfer (n. 78) 294; further Badura (n. 103) § 265 para. 19, 30.

148 Wahl (n. 83) 486ff., 502ff., 514ff.; further idem, 'Die Rolle staatlicher Verfassungen angesichts der Europäisierung und der Internationalisierung', in: T. Vesting & S. Korioth (Ed.), *Der Eigenwert des Verfassungsrechts. Was bleibt von der Verfassung nach der Globalisierung?* (Tübingen: Mohr Siebeck 2011), 355 (361ff.).

149 E. Böckenförde, 'Die Methoden der Verfassungsinterpretation – Bestandsaufnahme und Kritik' [1976] *NJW* 2089 (2091).

150 Ibid., 2099; similarly idem, 'Grundrechte als Grundsatznormen' [1990/29] *Der Staat* 1 (30f.): no 'foundation of the legal system as a whole'.

151 Ibid., 31. See also (and in favour of the latter) Wahl (n. 83) 505ff.; in the same vein (in order to guarantee 'political freedom in a democratic order') Masing (n. 54) § 7 para. 76 (further 62f., 77f.). Similarly, the concepts of 'concretisation' and 'framework order' are contrasted, see Wahl (n. 83) 505ff. The abandonment of a liberal understanding of the Constitution has already been rejected by E. Forsthoff, critising the understanding of the Constitution as 'juristic cosmic egg' [*Staat der Industriegesellschaft* (München 1971), 143f.; further idem, 'Zur heutigen Situation der Verfassungslehre', in: H. Barion (Ed.), *Epirrhosis. Festgabe für Carl Schmitt* (Berlin: Duncker&Humblot 2002), 185 (186ff., 207ff.). More open Isensee (n. 109) § 162 para. 43ff.]. Finally, R. Alexy, ['Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002/61) *VVDStRL* 7 (14f.)] dissolves the contrast between framework and fundamental order on the basis of an understanding of the concept of basic order as a qualitative (and not quantitative) concept.

Nonetheless, because of the Constitution's necessary openness, administrative rule-makers enjoy a certain discretion the extent of which depends on the subject-matter in question.[152] An example of this is the understanding of the rule-of-law principle by the BVerfG: It 'does not [...] contain any commands or prohibitions with constitutional status which are clearly determined in all their details, but it is a constitutional principle which needs to be concretised depending on the specific circumstances, albeit fundamental elements of the rule-of-law principle, and the rule of law itself, must be maintained in their totality'.[153] In this sense, (legislative) provisions of general administrative law may be understood as concretised constitutional law.

With regard to the process of concretising the constitution *Rüdiger Breuer* stresses that concretising is not a 'purely reconstructive and declaratory', but a 'normative, at least provision-complementing and hence decisionist' act.[154] Likewise, according to *Peter Lerche*, the Constitution is 'not so much concrete as concentrated law; it demands not so much interpretation as mediation, not so much reconstructive interpretation following legal logic as comprehensibly ordered, "skilful" concretisation'.[155] The concept of concretisation is criticised by *Johannes Masing* (it seems only a matter of perspective, though) who, in spite of the comprehensive scope of application of fundamental rights, understands the latter only as yardstick for administrative law, but not as standards to be concretised by the administration and administrative law; rather administrative law and the administration implement policy decisions.[156]

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152 Von Danwitz (n. 133) 58f.; Ehlers (n. 87) § 6 para. 3; Schuppert & Bumke (n. 18) 46f.; Wahl (n. 19) 193f. m. n. 8.

153 BVerfGE 7, 89 (92f.); further E 57, 250 (276); E 65, 283 (290f.); E 90, 60 (85); E 116, 24 (52f.); further with regard to the guarantee of judicial protection E 101, 106 (123f.). Similarly Schmidt-Aßmann (n. 105) § 26 para. 2; idem (n. 24) Vorwort, chap. 2 para. 1; idem (n. 8) § 5 para. 2. A material and procedural dimension of the issue of discretion have to be distinguished, what cannot be examined in more detail here, cf. on this Alexy (n. 151) 8ff., and G. Hermes, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' [2002/61] *VVDStRL* 119 (131, 141); Cf. on the players in the process of constitutionalisation Schuppert & Bumke (n. 18) 45ff., and specificially on the role of constitutional jurisprudence Gerhard (n. 19) 735; Hofmann (n. 6) 12ff.; Jestaedt (n. 9) 44ff.; P. Kunig, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' [2002/61] *VVDStRL* 34. Cf. on the distribution of competences with regard to concretisation Reimer (n. 104) 460ff.

154 Breuer (n. 3) 227, further 234; further K. Hesse, *Grundzüge des Verfassungsrechts der Bundes- republik Deutschland* (20th edition Heidelberg 1995), para. 45f., 60ff.; Kahl (n. 127) 57f. m. n. 101.

155 P. Lerche, 'Stil, Methode, Ansicht. Polemische Bemerkungen zum Methodenproblem' [1961] *DVBl.* 690 (692); idem (n. 106) 15ff.; Reimer (n. 104) 458ff.; Schmidt-Aßmann (n. 8) § 5 para. 7: concretisation as a 'process combining hierarchical and coordinatively-determined methodical steps and which itself is structured recursively'; idem (n. 24) chap. 1 para. 18.

156 Masing (n. 54) § 7 para. 62f. (further 76ff.). Disagreeing W. Hoffmann-Riem, 'Gesetz und Gesetzesvorbehalt im Umbruch. Zur Qualitäts-Gewährleistung durch Normen' [2005/130] *AöR* 5 (10f.). Cf. for an understanding of legislation as concretising the Constitution also BVerfGE 7, 89 (92f.); E 59, 128 (166f.); E 69, 315 (372); E 116, 24 (52f.); further E 49, 304 (319).

To conclude with an example, the provisions on the rescission of administrative acts [§§ 48ff. of the Administrative Procedure Act (*VwVfG*)] constitute a compromise between the constitutional principles of legality and of protection of legitimate expectations,[157] without the legislature being precluded from balancing these conflicting principles in a different way. Hence, it is questionable to assume that in the process of 'constitutionalisation [...] the distance between constitutional law and non-constitutional law is levelled out. More and more law is at the same time and in identical form constitutional law as well as non-constitutional law'.[158] Rather, as *Michael Kloepfer* has put it, 'a law concretising the Constitution illustrates an abstract constitutional principle, applied to a specific regulatory problem'. Thus, 'a constitutional content becomes tangible for a specific field of regulation' without ruling out 'other kinds of concretisation in other areas, but possibly also other possibilities of concretisation in the same area'.[159]

2.2.4 Reversing the perspective: Administrative law impacts constitutional law

In contrast to conceptualising administrative law as concretised constitutional law, administrative law, finally and inversely to the hierarchy of norms, impacts on constitutional law: 'L'arbre généalogique se lit en sens contraire du schéma déductif', as *Georges Vedel* has tangibly put it with regard to the French legal order.[160] Whilst not denying that there are overlaps, it is possible to distinguish between administrative law serving as a trigger for developments, and administrative law serving as a model and interpretative guideline.

Comparable classifications are proposed by *Martin Eifert*, distinguishing between adaptation, reception and concretising fundamental rights,[161] *Jens Kersten*, distinguishing between a receiving and reactive learning of constitutional law from administrative law (reception of contents, techniques and dogmatic concepts of administrative law or developing the law as a consequence of new developments in administrative law, such as with regard to the doctrine regarding the right of property, the modern concept of restrictions on fundamental rights or the welfare state),[162] *Markus Ludwigs*, referring to the reception of non-constitutional norms, transfer of functions between the levels, reception of in-

157 See for the constitutional pre-determination of § 48 of the Administrative Procedure Act BVerfGE 116, 24 (55).
158 Bryde (n. 31) 238 – references deleted.
159 Kloepfer (n. 78) 297. See also Jestaedt (n. 105) § 264 para. 75f.; Wahl (n. 19) 191 (193f. m. n. 8).
160 Vedel (n. 81) VII; see further ibid., VIII, on the concept of '<administrativisation> du droit constitutionnel'.
161 Eifert (n. 32) 359ff.
162 J. Kersten, 'Was kann das Verfassungsrecht vom Verwaltungsrecht lernen?' [2011] *DVBl.* 585 (587ff.).

stitutes of administrative law,[163] or *Eberhard Schmidt-Aßmann*, distinguishing a historical dimension (e.g. principle of proportionality, cf. § 10 II 17 ALR = General State Laws for the Prussian States), a practical dimension ('test case') and a dogmatic dimension (shaping the 'outline for constitutional guarantees itself in need of concretisation', e.g. the right to property).[164]

Firstly, new developments in administrative law may not only attract the verdict of unconstitutionality to themselves, but may also trigger further developments in constitutional law:[165] One may refer to the acknowledgement of a social dimension of fundamental rights and of a corresponding extension of the statutory reservation in confrontation with the phenomenon of the welfare administration (supra, 2.1), as well as to further developing the standards of democratic legitimation of the administration in light of the phenomenon of functional self-administration,[166] or to the refinement of the standards of legal protection when dealing with multipolar administrative procedures[167].[168] At times, provisions of non-constitutional law which have been regarded as or declared to be unconstitutional may trigger a modification of the wording of the Constitution or of its interpretation by the BVerfG in order to safeguard it (naturally within the limits of the 'eternity clause' contained in Art. 79 para. 3 of the Basic Law), as took place for instance in the law on administrative organisation for the cooperation between the Federation and the *Länder* in respect

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163 M. Ludwigs, 'Verfassung im Allgemeinen Verwaltungsrecht – Bedeutungsverlust durch Europäisierung und Emanzipation?' [2015] *NVwZ* 1327 (1328).

164 Schmidt-Aßmann (n. 24) chap. 1 para. 20; further von Bogdandy & Huber (n. 14) § 42 para. 68; Gärditz (n. 127) 8f., 623ff.; Heuschling (n. 13) § 54 para. 44 (see ibid., para. 49f. on the strong emphasis on this in the French debate on constitutionalisation); Klement (n. 65) 23ff.; Maurer (n. 108) § 2 para. 2; Pauly (n. 24) § 58 para. 30; F. Shirvani, 'Innovationsimpulse des Verwaltungsrechts für das Verfassungsrecht', [2012] *BayVBl.* 197 (197); Volkmann (n. 37) 80; Schuppert & Bumke (n. 18) 38; Waldhoff (n. 111) 261, with a typology of learning processes (266ff.).

165 Cf. Gerhard (n. 19) 737 who stresses 'the dynamics of generating constitutional standards by the Constitutional Court and the process-based nature of their enforcement, and hence the backing of administrative action in constitutional law particularly proven in light of changing circumstances' (further 741ff., namely 743: constitutionalisation as a 'detailed, interrelated, ongoing process'); Kersten (n. 81) 589ff.: reactive learning processes; Moor (n. 81) 29 (quotation in n. 114); Schuppert & Bumke (n. 18) 38; Wißmann (n. 76) § 15 para. 6a: The impact of priority constitutional law on administrative law can 'not follow from abstract deductions [...] Here, constitutional law is, rather, first of all of necessity determined in terms of its approach and impact by the existing (possibly reformed) administrative system with its differentiated institutes and contexts'; further 75. See also Pauly (n. 24) § 58 para. 30.

166 See BVerfGE 107, 59; moreover Kersten (n. 81) 590f.

167 BVerfGE 115, 205 (234); E 116, 1 (19ff.); E 116, 135 (154ff.). In more detail Wollenschläger (n. 40) 89ff.

168 See further Gärditz (n. 127) 626ff., according to whom the reception of aspects of the concept of the state as guarantor of key infrastructures promotes the development of objective dimensions of fundamental rights; Kersten (n. 81) 589: modern concept of interference with fundamental rights; Waldhoff (n. 111) 271ff.: procedural standards.

of basic support for persons seeking employment, which was initially declared unconstitutional (Art. 91e of the Basic Law).[169]

Second, constitutional law may absorb and hence constitutionalise tried and tested concepts, institutes and figures of general administrative law, of which the principle of proportionality imported from police law constitutes a paramount example [cf. § 10 Part 2 Title 17 of the General National Law for the Prussian States (*ALR*)].[170] The concept of abstraction was introduced by *Michael Kloepfer*.[171] According to *Christoph Möllers*, the concept of 'constitutional law as abstracted administrative law' describes the constitutionalisation of solutions previously developed in administrative law and considered to be 'suitable and generalisable'; for examples it is referred to Article 20a of the Basic Law (environmental law), to Article 87f of the Basic Law (telecommunication law) – questionable, though, and to the treatment of third party interests.[172]

Third, administrative law may guide the interpretation of constitutional law which is of necessity abstract, such as the neutrality rules under administrative law [see for instance §§ 20f. of the Administrative Procedure Act and § 6 of the Award of Contract Ordinance (*Vergabeverordnung – VgV*)] with regard to the development of the rule-of-law principle of neutrality. For the first time, this aspect has been stressed by *Michael Kloepfer*, who regards a method of interpreting the Constitution as consisting in the 'abstraction from concretisations of constitutional principles in non-constitutional law', which must be aware of the potential unconstitutionality of non-constitutional law, as well as of the fact that not every single non-constitutional norm concretises constitutional principles, and requires a reflection in view of constitutional standards. This method is said to facilitate 'the discovery of heretofore hidden constitutional contents and also developments of the Constitution', and to constitute a more satisfactory alternative to 'the more decisionistic and ultimately unfounded interpretations of the Constitution as however can be found in the case-law and the literature at times'.[173] It is particularly here that the independence of constitutional law also needs to be respected: In exactly the same way as it is prohibited to regard any provision contained in general administrative law as being required

169 BVerfGE 119, 331 (363ff.). Cf. for a critical view Kingreen (n. 22) § 263 para. 37.

170 Nuanced with regard to the principle of proportionality Kersten (n. 81) 588f.

171 Kloepfer (n. 78) 295ff.; further idem, 'Die Entfaltung des Verhältnismäßigkeitsprinzips', in: *Festgabe 50 Jahre Bundesverwaltungsgericht* (n. 3) 329 (330f.).

172 Möllers (n. 3) § 3 para. 13; further Waldhoff (n. 111) 266 – for the concept of taxes, 269.

173 Kloepfer (n. 78) 295ff.; further Möllers (n. 117) 110; Reimer (n. 104) 482ff.; F. Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure. Identifying Substantive and Procedural Standards and Developing a New Type of Administrative Procedure' [2015/8] *REALaw* 205 (245f.).

by the Constitution, it is misguided to equate the content of the Constitution with its concretisations in non-constitutional administrative law.[174]

3. Relativising and asserting the Basic Law in view of the Europeanisation of general administrative law

Whilst *Ulrich Scheuner* continued to emphasise in 1963 the relatively closed nature of national administrative law, since the latter 'formed part of those legal areas in which the national particularity of a people and of a state were expressed most strongly',[175] developments since that time have refuted this assessment.[176] Moreover, it was not even shared by all: Already at the beginning of the 20th century, *Otto Mayer* stressed that '[l]e droit administratif, dans les différentes nations qui représentent la vieille civilisation européenne, a pour base certains principes généraux qui sont partout les mêmes.'[177] Today we are witnessing advancing Europeanisation,[178] understood as 'influencing, overlapping and re-shaping the nation-states' systems of administrative law by means of European legal thinking and actions' (*Eberhard Schmidt-Aßmann*).[179] This

174 Reservedly Badura (n. 103) § 265 para. 58f.; further, also stressing the dangers for primacy, Isensee (n. 109) § 162 para. 52 (as well as interdependencies, para. 106); Kloepfer (n. 78) 295ff.; W. Leisner, *Von der Verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung* (Tübingen 1964); Reimer (n. 104) 483f.; Wahl (n. 83) 514.

175 U. Scheuner, 'Der Einfluß des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung' [1963] *DÖV* 714 (714). See Schmidt-Aßmann & Dagron (n. 64) 395.

176 See also von Danwitz (n. 133) 1: 'copernican change of perspective'.

177 O. Mayer, *Le droit administratif allemand vol. 1* (Paris 1903), XIII. Cf. on the development, emphasising common traits Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa', in: *IPE III* (n. 13) § 41 para. 1ff.

178 See for a periodization into three main phases W. Kahl '35 Jahre VwVfG – 35 Jahre Europäisierung des VwVfG' [2011] *NVwZ* 449 (449).

179 Schmidt-Aßmann (n. 24) chap. 1 para. 50; similarly already idem, 'Zur Europäisierung des allgemeinen Verwaltungsrechts', in: *Festschrift Lerche* (n. 65) 513 (513). Literature on Europeanisation is abundant, see only von Danwitz (n. 133); J.H. Jans & R. de Lange & S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2015); Ruffert, 'Europäisierung des Verwaltungsrechts', in: *IPE V* (n. 16) § 94 para. 16ff.; J. Schwarze, *Das Verwaltungsrecht unter europäischem Einfluss* (Baden-Baden 1996); J. Sirinelli, *Les transformations du droit administratif par le droit de l'Union européene* (Paris 2011); Wahl, 'Europäisierung: Die miteinander verbundene Entwicklung von Rechtsordnungen als ganzen', in: *Allgemeines Verwaltungsrecht* (n. 15) 869; idem (n. 8) 94ff. See further for an overview of the development and important contributions Mayer, 'Die Europäisierung des Verwaltungsrechts', in: *Festschrift Battis* (n. 73) 47 (47). Some authors stress that not only the content of the law has to be considered, but all dimensions of the legal order (dogmatics, methodology, systematics, theory), see Wahl (n. 179) 875ff.; similarly idem (n. 8) 101f.; further A.K. Mangold, *Gemeinschaftsrecht und deutsches Recht* (Tübingen 2011), 21ff. D.H. Scheuing, ['Europarechtliche Impulse für innovative Ansätze im deutschen Verwaltungsrecht', in: W. Hoffmann-Riem & E. Schmidt-Aßmann (Ed.), *Innovation und Flexibilität des Verwaltungshandelns* (Baden-Baden: Nomos 1994), 289 (298)] distinguishes two forms of Europeanisation of national law, namely its instrumentalisation (for an effective implementation of EU law) and its re-orientation in view of the introduction of new concepts. E. Schmidt-Aßmann, ['Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht', in: W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle (Ed.), *GVwR II* (2nd

development encompasses general administrative law in all its substantive, procedural and organisational breadth, is increasingly relevant to the system[180] and considered to be of equal significance to constitutionalisation.[181] Thus, the question which must be answered today is whether Europeanisation puts an end to the dependence of general administrative law on the Basic Law hitherto considered a key characteristic. A positive response suggests itself, given that primary EU law is increasingly at least taking on major constitutional functions[182].[183]As a consequence of Europeanisation, there is talk of 'deconstitutionalisation',[184] of 'the impossibility of maintaining the process of constitutionalisation'[185] or, in modification of the dictum of *Fritz Werner*, of administrative law as concretised EU law.[186] And indeed, there is no denying a loss of signific-

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edition München: Beck 2012), § 27 para. 71] adds the reorganisation as third dimension which relates to the emergence of a European composite administration calling for rules on cooperation. It is not surprising that the assessment of the process of Europeanisation varies – for a positive view: Kahl (n. 74) § 74 para. 7; idem, 'Über einige Pfade und Tendenzen in Verwaltungsrecht und Verwaltungsrechtswissenschaft – ein Zwischenbericht' [2009/42] *Die Verwaltung* 463 (475f.); Wahl (n. 8) 100, 103, 105. For a critical view: F. Ossenbühl, '40 Jahre Bundesverwaltungsgericht. Bewahrung und Fortentwicklung des Rechtsstaates' [1993] *DVBl.* 753 (758); J. Salzwedel & M. Reinhardt, 'Neuere Tendenzen im Wasserrecht' [1991] *NVwZ* 946 (947). Emphasising the transition from a sceptical to an open-minded attitude: O. Lepsius, 'Hat die Europäisierung des Verwaltungsrechts Methode? Oder: Die zwei Phasen der Europäisierung des Verwaltungsrechts' [2010/10] *Die Verwaltung Beih* 179 (183ff.).

180 This dynamic also corresponds to the general perception among scholars, which initially identified sporadic influences [cf. E. Schmidt-Aßmann, 'Deutsches und Europäisches Verwaltungsrecht' (1993) *DVBl.* 924 (928)], then emphasised an increasing, but not only a quantitative, but also a qualitative, namely system-defining leap, cf. F. Schoch, 'Die Europäisierung des Allgemeinen Verwaltungsrechts' [1995] *JZ* 109 (111): 'Foundations of the national system of administrative law touched on'; 'structural penetration'; further Wahl (n. 179) 870f., 877. More restrictive: Jans & de Lange & Prechal & Widdershoven (n. 179) 365ff.: far reaching, but no systemic-fudamental impact.

181 Cf. for an understanding of the Europeanisation as second phase of the development of Public Law in Germany and for a parallelisation of Constitutionalisation and Europeanisation as prominent features of this development Wahl (n. 8) 94ff.; further idem, 'Die zweite Phase des Öffentlichen Rechts in Deutschland. Die Europäisierung des Öffentlichen Rechts' [1999] *Der Staat* 495 (495).

182 Cf. on the debate of whether the EU treaties may be considered a Constitution and with further references only Wollenschläger, 'Art. 23', in: H. Dreier (Ed.), *Grundgesetz II* (3rd edition Tübingen: Mohr Siebeck 2015), Art. 23 para. 10f.

183 That the process of Europeanisation relativises the impact of the national Constitution and hence the constitutionalisation of administrative law does not constitute a recent observation, see only Ehlers (n. 87) § 6 para. 2; Gerhard (n. 19) 736; Schuppert & Bumke (n. 18) 67ff.

184 Gerhard (n. 19) 745; further Hofmann (n. 6) 15.

185 Schuppert & Bumke (n. 18) 70; further Jestaedt (n. 9) 64: Supranationalisation has partially 'neutralised or marginalised' constitutionalisation; 'EU law has relegated the Constitution from the first row to the second' (65); Ruffert (n. 8) § 17 para. 175; Volkmann, 'Geltungsanspruch und Wirksamkeit des Grundgesetzes', in: *HStR XII* (n. 22) § 256 para. 27 (also beyond the sphere of administrative law).

186 For the first time, as it appears, von Danwitz (n. 133) 7; further Stober, '§ 17', in: H.J. Wolff & O. Bachof & idem (Ed.), *Verwaltungsrecht I* (München 1999), § 17 para. 6; taken up by e.g. U. Battis, 'Verwaltungsrecht als konkretisierendes Gemeinschaftsrecht' [2001] *DÖV* 988 (988).

ance for the Basic Law as a result of Europeanisation (3.1). It can nonetheless assert itself (3.2).

From a methodological point of view it shall be stressed that in view of the scope of this article, namely to elaborate on the relativisation of the Basic Law as a consequence of Europeanisation,[187] this article will focus on the implementation of EU law by national authorities. For, in this case national administrative law and thus the Basic law – next to competing stipulations of EU law enjoying primacy – apply and national authorities act as 'codependent organisms'.[188] This is different for the EU administration exercising administrative authority also with regard to the German administrative space, which is, however, not directly subject to the Basic Law (since EU authority is exercised) – the Basic Law plays a role only as guarantor of minimum constitutional standards. The composite administration has an intermediary position since EU and national authorities (bound by EU law duties to exchange information, cooperate and recognise non-national administrative decisions) act. Finally, the standards of the ECHR are not examined here.[189]

3.1 Relativising the Basic Law

Europeanisation of general administrative law means a loss of (3.1.1) and additions to, which frequently lead to a de facto loss of (3.1.2), the standard-setting function performed by the Basic Law and to the displacement of its function to orientate the administrative law system (3.1.3). To the extent that the Basic Law no longer constitutes the standard, its function as a comprehensive but residual framework order is also lost. Finally, individual institutes are undergoing a reshaping (3.1.4).

3.1.1 The loss of the standard-setting function

The Basic Law is losing its standard-setting function as a result of Europeanisation insofar as mandatory stipulations of EU law determine a specific design of national administrative law.[190] This immunisation[191] has

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187 Cf. on the multidimensionality of EU administrative law Schmidt-Aßmann (n. 180) 924ff.

188 S. Cassese, 'Der Einfluß des gemeinschaftlichen Verwaltungsrechts auf die nationalen Verwaltungsrechtssysteme' [1994] *Der Staat* 25 (26); further A. Hatje, *Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung* (Baden-Baden 1998), 353ff.: national authorities as institutions with a 'double loyality', i.e. national institution, but task to implement EU law.

189 For an overview Schoch (n. 25) § 50 para. 43ff., 278. See for procedural minimum standards when restricting ECHR-guarantees ECtHR of 15.9.2009, *Moskal v. Polen* Nr. 10373/05, para. 51; moreover, the softlaw instruments of the Committee of Ministers of the Council of Europe have to be mentioned, notably Recommendation CM/Rec(2007)7 on good administration.

190 Ludwigs (n. 163) 1329.

191 This term is also used by Ludwigs (n. 163) 1329.

structural and sporadic consequences. In structural terms, the binding nature of fundamental rights for the administration and for the legislature passing administrative law is subject to the proviso of contrary stipulations of EU law;[192] furthermore, information, cooperation and recognition obligations emanating in the ever-closer EU composite administration[193] are no longer subject to the Basic Law. The countless examples of sporadic consequences include the increasing independence of data protection supervision[194] and regulatory agencies[195] required by EU law, and hence no longer to be measured by the national principle of democracy (Art. 20 para. 2 of the Basic Law), the EU's stipulations for interim legal protection in the context of the enforcement of EU law,[196] as

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192 Cf. also Wollenschläger, 'Grundrechtsschutz und Unionsbürgerschaft', in: A. Hatje & P.-C. Müller-Graff (Ed.), *Enzyklopädie Europarecht vol. 3* (Baden-Baden: Nomos 2014), § 8 para. 19, 24.

193 Cf. on the European composite administration only W. Kahl, 'Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene' [2011] *Der Staat* 353; De Lucia, 'Strumenti di cooperazione per l'esecuzione del diritto europeo', in: idem & B. Marchetti (Ed.), *L'amministrazione europea e le sue regole* (Bologna: il Molino 2015), 171; E. Schmidt Aßmann & B. Schöndorf-Haubold, *Der Europäische Verwaltungsverbund* (Tübingen 2005); J.P. Schneider & F. Velasco Caballero, *Strukturen des Europäischen Verwaltungsverbunds* (Berlin 2009).

194 Art. 28 para. 1 subpara. 2 of Data Protection Dir. 95/46/EC, OJ L 281/31, as amended most recently by Reg. (EU) 2016/679, OJ L 119/1, as interpreted by ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 17ff.; further Case C-614/10 *Commission v. Austria* ECLI:EU:C:2012:631, para. 36ff.; Case C-288/12 *Commission v. Hungary* ECLI:EU:C:2014:237, para. 50ff. Criticism is sparked off by the relativisation of democratic influence and control [cf. only E. M. Frenzel, '"Völlige Unabhängigkeit" im demokratischen Rechtsstaat' (2010) *DÖV* 925 (929ff.)] as well as by the questionable general assumption of an improper exercise of supervision [cf. only Frenzel, ibid., 927f., 930; rejecting such an assumption AG Mazak in Case C-518/07, ibid., para. 34; disagreeing e.g. A. Roßnagel, 'Anmerkung zu EuGH, Rs. C-518/07' (2010) *EuZW* 299 (299f.)]. For a positive assessment e.g. Classen, 'Unabhängigkeit und Eigenständigkeit der Verwaltung – zu einer Anforderung des Europarechts an das nationale Verwaltungsrecht', in: P.-C. Müller-Graff (Ed.), *Europäisches Recht zwischen Bewährung und Wandel. Festschrift für Dieter H. Scheuing* (Baden-Baden: Nomos 2011), 293 (300ff.).

195 See in the context of the regulation of the telecommunication sector: Art. 3 para. 3a subpara. 1 of the Framework Dir. 2002/21/EC, OJ L 108/33, as amended most recently by Art. 1 Dir. 2009/140/EC, OJ L 337/37, with recital 13 of Dir. 2009/140/EC – ambivalent, though, because the prohibition of seeking or taking instructions from other bodies 'shall not prevent supervision in accordance with national constitutional law'; this is nonetheless interpreted as a strict prohibition of seeking or taking instructions, whereby the referral to national constitutional law is understood in terms of parliamentary and judicial control: M. Ludwigs, 'Die Bundesnetzagentur auf dem Weg zur Independent Agency. Europarechtliche Anstöße und verfassungsrechtliche Grenzen' [2011] *Die Verwaltung* 44, 41 (45f.). The same applies to energy regulation [see only Kahl (n. 74) § 74 para. 44]: Art. 35 para. 4 and para. 5a Dir. 2009/72/EC, OJ L 211/55, with recital 33 sentences 1 and 2 as well as with recital 34 sentences 1 and 2 (electricity); Art. 39 para. 4 and para. 5a Dir. 2009/73/EC, OJ L 211/9, with recital 30 (natural gas).

196 Cf. on the obligation to exclude the suspensory effect of remedies with regard to the execution of EU law: ECJ, Case C-217/88 *Commission v. Germany* [1990] ECR I-2879, para. 26; Case C-232/05 *Commission v. France* [2006] ECR I-10071, para. 41ff. – relativised by Schoch, '§ 80', in: idem & J.-P. Schneider & W. Bier (Ed.), *Verwaltungsgerichtsordnung* (München: Beck 10/2016), § 80 para. 23, 218ff.: no automatism (09/2011). Cf. on the strict requirements of EU law with regard to its suspension by administrative courts in interim procedures: ECJ, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415, para. 23ff.; Case C-465/93 *Atlanta* [1995] ECR I-3761, para. 32ff.; in more detail Wollenschläger, '§ 123', in: *Ver-*

well as for the granting of discretion for the administration,[197] which suspend the strict requirements of the national guarantee of legal protection (Art. 19 para. 4 of the Basic Law), or the protection of legitimate expectations when reclaiming state aid incompatible with the internal market, which is only reservedly granted under EU law, such protection in turn no longer being subject to requirements in terms of the national rule of law and of fundamental rights.[198]

The fact that the Basic Law is losing its status as a standard certainly does not mean that no constitutional standards now apply to Europeanised general administrative law; in fact, the task is incumbent on the EU's administrative constitutional law functioning as the primary yardstick. Neither does the loss of the standard-setting function mean that constitutional standards are necessarily suspended. Given the discretion for concretising constitutional principles (see supra, 2.2.3), reshapings of general administrative law induced by EU law can be reflected and reconstructed in terms of constitutional principles of the Basic Law, but these reshapings rather concern the way in which these principles are to be concretised at the level of non-constitutional administrative law, more than modifying mandatory constitutional contents.[199] For instance, the guarantee of legal protection (Art. 19 para. 4 of the Basic Law) is – beyond a core bound-

waltungsgerichtsordnung (n. 99) § 123 para. 36ff. Cf. for an overview also von Danwitz (n. 133) 297ff.

197 See e.g. BVerwGE 131, 41 (45ff.); *NVwZ* 2012, 1047 (1050); Ludwigs (n. 163) 1330f.; Schmidt-Aßmann (n. 24) chap. 4 para. 67.

198 See notably ECJ, Case C-24/95 *Alcan* [1997] ECR, I-1591, para. 24ff.; Joined Cases C-183/02 P and 187/02 P *Demesa* [2004] ECR I-10609, para. 44ff.; Joined Cases C-346/03 and C-529/03 *Atzeni* [2006] ECR I-1875, para. 63ff.; Case C-81/10 P *France Télécom* [2011] ECR I 12899, para. 59ff. Cf. for a positive assessment of the EU law standards: Huber (n. 16) § 73 para. 36: relativisation of the principle of legality problematic; Schmidt-Aßmann (n. 8) § 5 para. 97: EU law 'reduces, and rightly so, exaggerated protection of legitimate interests in German law to a reasonable standard'. Cf. for a critical view R. Breuer (n. 3) 251; Schoch (n. 180) 111.

199 Cf. on the concept of effective scope of protection ('effektiver Garantiebereich') of a fundamental right G. Lübbe-Wolff, *Die Grundrechte als Eingriffsabwehrrechte* (Baden-Baden 1988), 25ff., 230f.; further P.M. Huber, *Konkurrentenschutz im Verwaltungsrecht* (Tübingen 1991), 179 and passim.

ary[200] – open for the introduction of collective claims,[201] and the provisions on the protection of vested rights for administrative acts modified by EU law (§§ 48ff. of the Administrative Procedure Act) constitute no more than one possible way of balancing the conflicting constitutional principles of protection of legitimate expectations and of legality,[202] but do not modify any mandatory constitutional standard. Even given the presumably most intensive encroachment on administrative constitutional law, namely the independence of (data protection supervision and regulatory) agencies that is required under EU law, it should be borne in mind that their compatibility with the national principle of democracy is the subject of some controversy.[203] In view of the 'relativity of assessments in terms of (mandatory) requirements of constitutional law' (*Christian Bumke*),[204] the content that is assigned to the Basic Law ultimately decides on the finding of loss. The heated debate regarding the protection of legitimate expectations when rescinding subsidies which are in breach of the

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200 The boundary which is derived from the guarantee of legal protection and from fundamental rights, namely not to endanger the mandate incumbent on the administrative courts to protect individual rights by assigning further tasks [see only Schlacke (n. 95) 63ff., 497ff.], is rather wide [see only idem, 'Zur fortschreitenden Europäisierung des (Umwelt-)Rechtsschutzes. Schutznormdoktrin und Verfahrensfehlerlehre erneut unter Anpassungsdruck' (2014) *NVwZ* 11 (17). Tending to be more strict (rule-exception ratio without excluding the possibility of a broad understanding of subjective legal positions) Krüper (n. 97) 145f., 167ff.]; the same applies to the further constitutional boundaries (prohibition of an infringement on the executive by the judicative; inadmissible inclusion of private individuals with no democratic mandate in the performance of public tasks, which is however restricted to initiate a review; violation of fundamental rights positions of the beneficiary of the impugned decision) – cf. on this Schlacke (n. 95) 490ff. See for a critical view (with regard to the inclusion of private individuals) e.g. Ipsen, 'Der Einfluß des Verfassungsrechts auf das Verwaltungsrecht', in: C. Starck (Ed.), *Die Rolle der Verfassungsrechtswissenschaft im demokratischen Verfassungsstaat* (Baden-Baden: Nomos 2004), 177 (179).

201 See only BVerwGE 87, 62 (72); Masing (n. 54) § 7 para. 95, 107; Schlacke (n. 95) 61ff.; E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben* (Tübingen 2013), 47ff., 112; B.W. Wegener, *Rechte des Einzelnen. Die Interessentenklage im europäischen Umweltrecht* (Baden-Baden 1998), 271f. More restrictive Weyreuther (n. 95) 82ff.

202 The Federal Constitutional Court has not held this modification as a violation of the Constitution BVerfG, *NJW* 2000, 2015 (2015f.). Cf. on the constitutional obligation to protect legitimate interests BVerfGE 59, 126 (152).

203 Disagreeing K. Faßbender, 'Die Umsetzung der EG-Datenschutzrichtlinie als Nagelprobe für das Demokratieprinzip deutscher Prägung' [2009] *RDV* 96 (99ff.); Kahl, 'Kooperative Rechtsangleichung', in: J. Bernreuther (Ed.), *Festschrift für Ulrich Spellenberg* (München: Sellier European Law Publ. 2010), 697 (711); Wolff, 'Die "völlig unabhängige" Aufsichtsbehörde', in: V. Mehde (Ed.), *Staat, Verwaltung, Information. Festschrift für Hans Peter Bull zum 75. Geburtstag* (Berlin: Duncker & Humblot 2011), 1071 (1077ff.). Articulating doubts I. Spieker gen. Döhmann, 'Anmerkung zu EuGH, Rs. C-518/07' [2010] *JZ* 787 (787, 790). Agreeing T. Petri & M.-T. Tinnefeld, 'Völlige Unabhängigkeit der Datenschutzkontrolle. Demokratische Legitimation und unabhängige parlamentarische Kontrolle als moderne Konzeption der Gewaltenteilung' [2010] *MMR* 157 (160f.); Schmidt-Aßmann (n. 201) 162. The necessity of certain factors of legitimation is rightly qualified as core of the constitutional debate: Wißmann (n. 76) § 15 para. 62 n. 341; further Wolff & Bachof & Stober & Kluth (n. 88) § 80 para. 163f.

204 Bumke (n. 56) 113.

EU law on state aid[205] reflects a certain tendency to exaggerate mandatory constitutional standards.[206]

Nonetheless, it would appear to be mistaken to question the category 'loss of status as a standard' by calling on the fact that a broad congruency of constitutional standards was prevalent and that a Basic Law that was interpreted in a manner favourable to European integration could easily cope with Europeanisation.[207] For, such a view disregards the fact that the Basic Law's standards cease to apply, and is based on a questionable understanding of the normativity of the Basic Law, if this were then to be subject to the proviso of conformity to EU law. Given that the Basic Law does not entirely lose its standard-setting function, but that the original standard of administrative constitutional law is replaced by the minimum constitutional standard required in the context of European integration by Article 23 paragraph 1 of the Basic Law, it would be possible to also simply speak of a relativisation of the Basic Law's standards. Talk of loss is however to make it clear that the Basic Law is displaced as the primary standard in this regard by the EU's administrative constitutional law, and to mark possible changes to the standards.

3.1.2 Supplementing the standard-setting function

As a result of Europeanisation, furthermore, standards of EU law apply in juxtaposition to those of the Basic Law.[208] If EU law reveals itself to be more strict, the Basic Law de facto loses its standard-setting function.[209] This affects primarily, but not only, the protective function of the Constitution, and hence national fundamental rights.[210] The competing EU law standards which are to be mentioned are the fundamental freedoms, particularly in their broad understanding as prohibitions of restrictions,[211] and in their multidimensionality as not only substantive, but also as procedural and legal protection

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205 Assuming an infringement of fundamental rights R. Scholz, 'Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht' [1998] *DÖV* 261 (266f.). The constitutionality has been confirmed by BVerfG, *NJW* 2000, 2015 (2015f.); BVerwGE 106, 328 (333ff.); D. Ehlers, 'Die Vereinbarkeit der "Alcan"-Rechtsprechung des EuGH mit dem deutschen Verfassungsrecht' [1998] *DZWiR* 491 (492f.). Nuanced C. Krönke, *Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union* (Tübingen 2013), 267ff. Cf. on this debate further n. 190.

206 Cf. from a general perspective Ruffert (n. 179) § 94 para. 17, further 30.

207 See for such a view Röhl (n. 15) 834; D. Thym, 'Vereinigt die Grundrechte!' [2015] *JZ* 53 (57ff.).

208 S. Unger, 'Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?' [2015] *DVBl.* 1069 (1074f.), refers to the phenomenon of parallel constitutions.

209 Cf. for a parallel application with an identical result BVerwGE 124, 11 (17f.); E 136, 231 (243ff.); *NVwZ* 2011, 549 (552); E 140, 1 (6ff.); similarly in substance *DVBl.* 2011, 354 (355ff.).

210 See also Unger (n. 208) 1074f.

211 See only ECJ, Case C-415/93 *Bosman* [1995] ECR I-4291, para. 92ff., and with further references F. Wollenschläger, *Grundfreiheit ohne Markt* (Tübingen 2007), 54ff.

requirements;[212] furthermore, the EU fundamental rights, which are being brought into position more and more vis-à-vis the Member States even in the discretionary field,[213] as well as secondary law concretising fundamental rights and fundamental freedoms, such as the EU's service or procurement directives or its data protection provisions.[214] Examples of momentous supplementary standards are the domestication of the administration acting in the forms and/or organisations of private law, namely public procurement and the granting of subsidies, as well as the commercial activities of public authorities, by EU law on procurement and state aid,[215] the expansion of actionable legal positions, such as in the context of dust particles,[216] or the increased relevance of procedural errors.[217] The Basic Law has completely or partially failed to provide protection in any of these cases, for instance because the administration acting in the forms and/or organisations of private law was considered to be only weakly bound by fundamental rights,[218] because of a restrictive understanding of fundamental rights obligations to provide protection,[219] or because of accepting the impact doctrine, according to which an infringement of fundamental rights can only be established if the procedural error had an impact on the content of the administrative decision,[220] despite the fact that a procedural dimension of fundamental rights has been recognised.[221] This may be illustrated by referring to the award of public contracts beyond the scope of application of the EU procurement directives (§§ 97ff. GWB). In view of the weak standards derived from the Constitution (at least in praxi, such as the denial of an obligation to advertise the contract)[222] the transparency standards derived from the EU fundamental

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212 Cf. on the multidimensionality only Wollenschläger (n. 40) 126ff.

213 Cf. on the applicability of EU fundamental rights to the Member States only Wollenschläger (n. 192) § 8 para. 16ff.

214 Services Dir. 2006/123/EC, OJ L 376/36; Concessions Dir. 2014/23/EU, OJ L 94/1, amended by OJ 2015 L 114/24; Public Procurement Dir. 2014/24/EU, OJ L 94/65; Utilities Directive 2014/25/EU, OJ L 94/243; Data Protection Directive 95/46/EG (n. 194).

215 Cf., as examples, on the Europeanisation of public procurement Wollenschläger (n. 102) § 19 para. 79ff., and on the regime for public undertakings idem (n. 70) § 6 para. 40ff.

216 See in more detail infra 3.1.3 and the references in n. 238. A considerable loss of significance of (national) constitutional standards is assumed by von Bogdandy & Huber (n. 14) § 42 para. 91. Cf. for a more cautious view Huber (n. 16) § 73 para. 179.

217 See most recently S. Schlacke, 'Zur fortschreitenden Europäisierung des (Umwelt-)Rechtsschutzes. Schutznormdoktrin und Verfahrensfehlerlehre erneut unter Anpassungsdruck' [2014] *NVwZ* 11 (16f.).

218 See with regard to public procurement BVerfGE 116, 135 (152); to subsidies BVerwGE 30, 191 (197); E 65, 167 (174); to public undertakings BVerwGE 71, 183 (193); *NJW* 1995, 2938 (2939); Wollenschläger (n. 70) § 6 para. 57ff.

219 See for more details and with further references Scherzberg (n. 53) § 12 para. 20.

220 BVerfGE 73, 280 (299); *NVwZ-RR* 2000, 487 (488). Cf. in more detail Wollenschläger (n. 40) 82ff.

221 See on the procedural dimension of fundamental rights only BVerfGE 53, 30 (65); BVerwGE 118, 270 (274f.); Wollenschläger (n. 40) 82ff.

222 Cf., however, on the constitutional requirements only Wollenschläger (n. 40) 34ff., 198ff.

freedoms[223] have taken the lead. Moreover, the need for a legal provision with an external effect for the implementation of EU directives granting rights to individuals has exacerbated the standards of the statutory reservation;[224] an administrative guideline would have been sufficient for the Basic Law.[225] Conversely, more generous standards are to apply with regard to the requirements of the empowerment to enact an administrative act,[226] as well as to the level of detail of the foundation for the empowerment to issue executive ordinances.[227]

3.1.3 The displacement of the function to re-orientate the administrative law system

The loss of significance of the Basic Law continues at system level, and hence relates not only to its function to formulate standards for individual provisions of administrative law. Europeanisation implies the impact of administrative law which is not impregnated by the Basic Law, and hence introduces new concepts. Examples which can be mentioned include the 'democratic' role of the citizen in the administrative procedure, which is strengthened by EU law, but which the Basic Law left underexposed,[228] the accentuation of procedural correctness in administrative decision-making by EU law[229] or the

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223 Cf. on these Wollenschläger (n. 40) 114ff., 204f.; idem, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure. Identifying Substantive and Procedural Standards and Developing a New Type of Administrative Procedure' [2015/8] *REALaw* 205 (209ff.).

224 ECJ, Case C-131/08 *Commission v. Italy* [1991] ECR I-825, para. 70ff.; Case C-361/88 *Commission v. Germany* [1991] ECR I-2567, para. 16; Case C-262/95 *Commission v. Germany* [1996] ECR I-5729, para. 17; Case C-297/95 *Commission v. Germany* [1996] ECR I-6739, para. 9; Case C-298/95 *Commission v. Germany* [1996] ECR I-6747, para. 16. See for an overview T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin 2008), 508f. Reservedly F. Ossenbühl, 'Der verfassungsrechtliche Rahmen offener Gesetzgebung und konkretisierender Rechtsetzung' [1999] *DVBl.* 1 (6). Critical von Danwitz (n. 133) 220ff.

225 BVerfGE 129, 1 (21). Cf. on this Ludwigs (n. 163) 1333.

226 OVG Berlin-Brandenburg (Administrative Court of Second Instance for Berlin-Brandenburg) *NVwZ* 2006, 104 (105); disagreeing OVG Weimar *DVBl.* 2011, 242 (244f.). Disagreeing e.g. Ludwigs (n. 163) 1332. Balanced ECJ, Case C-527/12 *Commission v. Germany* ECLI:EU:C:2014:2193, para. 55 – on this Ludwigs (n. 163) 1332.

227 See on the reduction of the standards of determinedness of statutes granting rule-making power to the executive (Art. 80 para. 1 of the Basic Law) if EU law to be implemented is sufficiently detailed (one example is § 6a para. 1 WHG): BVerwGE 121, 382 (386ff.); I. Härtel, 'Demokratie im europäischen Verfassungsverbund [Verordnungsermächtigung]' [2007] *JZ* 431 (432ff.). Disagreeing J. Saurer, 'Rechtsverordnung zur Umsetzung europäischen Richtlinienrechts' [2007] *JZ* 1073 (1074ff.).

228 Von Bogdandy (n. 141) 66ff.; idem & Huber (n. 14) § 42 para. 92ff.; Huber (n. 16) § 73 para. 154f.; Masing (n. 54) § 7 para. 95f.

229 See only Huber (n. 16) § 73 para. 28, 130; W. Kahl, 'Über einige Pfade und Tendenzen in Verwaltungsrecht und Verwaltungsrechtswissenschaft – ein Zwischenbericht' [2009/42] *Die Verwaltung* 463 (472ff.); Schmidt-Aßmann (n. 8) § 5 para. 88f.; Schwerdtfeger (n. 96) 92ff.; Wahl (n. 8) 102. This concept finds an expression in the Environmental Impact Assessment Dir. 2011/92/EU, OJ 2012 L 26/1, as amended most recently by Art. 1 amending Dir. 2014/52/EU, OJ L 124/1, which guarantees the protection of the environment essentially by granting (judicially

expansion of the concept of judicial protection centred under Article 19 paragraph 4 of the Basic Law on the enforcement of individual rights[230] towards stressing the objective control task of the courts.[231]

In that regard, first, the possibility to file collective actions has to be mentioned.[232] Admittedly, also German administrative law knew collective actions before its Europeanisation [see on the Länder level for the first time § 44 BremNatSchG (1979); and on the federal level from 2002 only § 61 BNatSchG (previous version = § 64 BNatSchG current version); § 13 BGG; § 3 Abs. 1 UklagG].[233] However, in particular in the areas of protection of the environment and of consumers, EU law has been a key stimulus for modernisation and helped to break resistance against introducing collective actions which resulted notably from an understanding of the function of administrative review to protect individual rights, as it is explained by *Thomas von Danwitz*.[234] The Trianel-case is a good illustration for this restrictive position. In its judgement, the ECJ has held the requirement for environmental associations to have standing before administrative courts that a norm granting rights to individuals has been infringed (cf. the previous and current version of § 2 para. 1 Nr. 1 UmwRG) not in line with EU law.[235] In her opinion, AG Sharpston emphasised: 'The German Government explicated that its system of judicial review involves a careful and detailed scrutiny of administrative decisions and results in a high level of protection of individual rights. However, like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action [...] No one can act on behalf of the environment itself. There are nevertheless circumstances – for example, where a project [...] is located on a virgin site well away from human habitation – where effective participation in environmental decision-making and effective monitoring of the implementation of the EIA Directive make it

enforceable) rights of information and participation in the context of administrative proceedings to the public (in a wide sense) (see on this Schwerdtfeger, ibid., 94f.).

230 See supra, 2.2.1.

231 Cf. for a modified understanding of the role of the individual when challenging administrative decisions, who does not only defend her/his rights against the administration as *bourgeois*, but also contributes as *citoyen* to an enforcement of the legal order in the common interest: Masing (n. 54) § 7 para. 95f., 104. See also Schmidt-Aßmann (n. 24) chap. 1 para. 60.

232 Mangold & Wahl (n. 51) 18ff.; Masing (n. 54) § 7 para. 95f., 112, 119; Schoch (n. 25) § 50 para. 174ff.

233 Cf. on the development Schlacke (n. 95) 162ff.

234 T. von Danwitz, 'Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten' [2004] *NVwZ* 272 (278); see also Hong (n. 102) 388.

235 ECJ, Case C-115/09 *Trianel* [2011] ECR I-3673.

essential that an environmental NGO should have *locus standi* to bring an action for judicial review.'[236]

Second, EU law triggered a push towards subjectivisation: On the basis of the EU law concept of functional subjectivisation,[237] where individual interests are affected, a lack of the specific individualisation of the plaintiff or a supraindividual protection purpose (such as the protection of health, competition or consumers) is not deleterious. This contrasts with the orthodox German approach, as *Angela Schwerdtfeger* observes to the point: 'The particularity of the ECJ's normative method within Community law thus lies in the individualisation and subjectivisation of interests of a totality, something which is alien to the German understanding.'[238]

As an example for the wide EU law concept one may refer to the ECJ's judgement on fine dust; the Court held that 'whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives [...] It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.'[239] This has to be contrasted

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236 AG Sharpston, in: ECJ, Case C-115/09 *Trianel* [2011] ECR I-3673, para. 77. Similarly T. Groß, 'Die Klagebefugnis als gesetzliches Regulativ des Kontrollzugangs' [2010/43] *Die Verwaltung* 349 (364f.); disagreeing von Danwitz (n. 224) 521f.

237 Vividly J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts* (Berlin 1997). Cf. on the concept of functional subjectivisation ('funktionale Subjektivierung') M. Ruffert, *Subjektive Rechte im Umweltrecht der EG* (Heidelberg 1996), 220ff.

238 Schwerdtfeger (n. 96) 182ff., 223ff. (quote 185); further on the irrelevance of the 'normative bundling of individual interests as a part of aggregated interests', which is namely relevant with regard to precautionary measures: Schoch (n. 25) § 50 para. 155ff.; further von Danwitz (n. 224) 513f.; Mangold & Wahl (n. 51) 7f.; M. Nettesheim, 'Subjektive Rechte im Unionsrecht' [2007/132] *AöR* 333 (373f.); Ruffert (n. 237) 224ff.

239 Case C-237/07 *Janecek* [2008] ECR I-6221, para. 38f. Similarly already Case C-131/88 *Commission v. Germany* (ground water) [1991] ECR I-825, para. 7; Case C-361/88 *Commission v. Germany* (air quality limit values and guide values for sulphur dioxide and suspended particulates) [1991] ECR I-2567, para. 16; Case C-58/89 *Commission v. Germany* (drinking water) [1991] ECR I-4983, para. 14; Case C-59/89 *Commission v. Germany* (lead content in the air) [1991] ECR I-2607, para. 19; Case C-298/95 *Commission v. Germany* (fresh waters and shellfish waters) [1996] ECR I-6747, para. 15f.; Case C-178/94 *Dillenkofer* (consumer protection) [1996] ECR I-4845, para. 33ff. For a wide understanding of the required individualisation Case C-97/96 *Daihatsu* [1997] ECR I-6843, para. 17ff. (right to apply for imposition of the penalty provided for by the law of that Member State in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts laid down by the First Directive 68/151); further from competition law and with a focus on the effective enforcement ECJ, Case C-453/99 *Courage und Crehan* [2001] ECR I-6297, para. 26f.; Case C-557/12 *Kone* ECLI:EU:C:2014:1317, para. 18ff. The foundations have already been laid as early as in Case 26/62 *van Gend en Loos* [1963] ECR 3 (13): 'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision [entrusted by the infringement procedure] to the diligence of the Commission and of the Member States'.

with the orthodox German approach for which a ruling of the BVerwG on the precautionary principle is a good example: 'However one interprets the precautionary principle contained in [section 5 No. 2 of the Federal Immission Control Act (*BImSchG*)], [...] this does not in any case give rise to individual legal positions. This is already comprehensible in a resource economical understanding and in the (also) ecologically-founded understanding of the precautionary principle because in both cases interests of specific individuals are not at stake. Insofar as section 5 No. 2 of the Federal Immission Control Act should also prescribe a risk prevention irrespective of dangers and nuisances, this takes place in the general interest, and not in order to make situations which as such are acceptable less risky or more pleasant for one's neighbours'.[240] That said, there are also openings, such as with regard to the broad circle of persons entitled to challenge traffic signs[241] or recently in the law on nuclear power; here the BVerwG has rightly stressed that '[t]he individual risk is neither increased nor reduced by the number of individuals affected by this risk' and that '[t]he character of the provisions on precautionary measures as norms protecting individuals cannot be denied by arguing that measures against risks resulting from design basis accidents served to avert a collective risk. In order to grant standing, it is both necessary and sufficient for the relevant provision to also protect the rights of the individual. The fact that it primarily serves the interests of the general good changes nothing in this regard.'[242]

What is more, there is a corresponding subjectivisation of procedural positions, as is also shown by the example of the environmental impact assessment,[243] and of fields of national law which according to traditional concepts do not grant individually enforceable rights, including for instance the law on public procurement.[244]

The differences between EU and German law should not be overstated, though. For, despite employing the concept of functional subjectivisation and a broad recognition of standing before the courts, judicial review under EU law firstly does not encompass a popular action or an action defending mere individual interests (*Interessenklage*) for which it was sufficient to assert being affected

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240 BVerwGE 65, 313 (320); further E 119, 329 (332).

241 BVerwGE 27, 181 (185); E 92, 32 (35); *NJW* 2004, 698 (698).

242 BVerwGE 131, 129 (139f. and 146); further BVerfG, *NVwZ* 2009, 515 (517f.) – see insofar also Groß (n. 236) 357f.

243 ECJ, Case C-131/88 *Commission v. Germany* (ground water) [1991] ECR I-825, para. 61; further – in the context of the obligation to undertake an Environmental Impact Assessment understood as a procedural obligation – Case C-201/02 *Wells* [2004] ECR I-723, para. 54ff., 61; Case C-420/11 *Leth* ECLI:EU:C:2013:166, para. 32. See for more details Schoch (n. 25) § 50 para. 170ff.; further S. Neidhardt, *Nationale Rechtsinstitute als Bausteine europäischen Verwaltungsrechts* (Tübingen 2008), 75; Schwerdtfeger (n. 96) 185; Wegener (n. 201) 189ff.

244 ECJ, Case C-433/93 *Commission v. Germany* [1995] ECR I-2303, para. 19. See on this Wollenschläger (n. 102) § 19 para. 80ff.

in de facto terms, but not in legal terms;[245] rather EU law requires contoured actionable legal positions (cf. also Art. 263 para. 4, Art. 340 para. 2 TFEU).[246] Secondly, efforts can be observed to contour actionable legal positions, namely by distinguishing between substantive and procedural requirements lying in the general and in the individual interest.[247] Neither does EU law subject the individual to an integration teleology: For instance, the system of EU law marks from the beginning, as is already shown by the case of van Gend and Loos [ECJ, Case 26/62, ECR 1963, 3 (13): If direct applicability of EU law was denied 'each direct legal protection of the individual rights would be excluded'], and particularly recently increasingly emphasis on the role of the individual.[248] As an example in terms of standing, it is worth mentioning that the ECJ advocates an interpretation of norms possibly granting standing in the light of fundamental rights.[249] The exercise of procuratory rights also does not constitute any instrumentalisation of the individual, as it is based on a decision made by the individual.[250] It is also a misunderstanding to regard judicial review in administrative law as primarily serving to safeguard the principle of legality; the fact that, rather, the system of EU law is also centered around individual rights is proven with *Eberhard Schmidt-Aßmann* by the understanding of fundamental freedoms as subjective rights and the development of the Union's fundamental rights protection (see para. 2 of the preamble and Art. 47 CFR).[251]

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245 See only Schoch (n. 25) § 50 para. 153; Schwerdtfeger (n. 96) 230f.; disagreeing von Danwitz (n. 133) 176, 230ff., 364ff.; Schlacke (n. 95) 94.

246 Cf. only von Danwitz (n. 224) 513ff., 586f.; Mangold & Wahl (n. 51) 26f.; Schmidt-Aßmann (n. 52) Art. 19 IV para. 152.

247 See ECJ, Case C-222/02 *Paul* [2004] ECR I-9425, para. 25ff.: No subjective rights in banking supervision (lying in the general interest) over and above a deposit guarantee; Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD)* [2000] ECR I-3743, para. 96ff.: The Member States' obligation to notify the Commission in the law on waste does not protect individual interests, since it covers the relationship between the Commission and the Member States. See further Case C-201/02 *Wells* [2004] ECR I-723, para. 57: no mere effects on rights sufficient; Case C-510/13 *E.ON Földgáz Trade* ECLI:EU:C:2015:189, para. 37ff.: Standing in the law on regulation.

248 Similarly von Bogdandy (n. 141) 39f.; K.F. Gärditz, 'Verwaltungsgerichtlicher Rechtsschutz im Umweltrecht' [2014] *NVwZ* 1 (2): Functionalisation and reduction of shortcomings in enforcement 'motives which have certainly not found their way into the structure of the doctrine of standing in EU law'; M. Nettesheim, 'Subjektive Rechte im Unionsrecht' [2007/132] *AöR* 333 (353ff.) – emphasising, however, the recentness of this change (334ff.); by contrast, very strongly emphasising the aspect of instrumentalisation of the individual von Danwitz (n. 133) 230ff., 364ff.

249 Cf. ECJ, Case C-104/13 *Olainfarm* ECLI:EU:C:2014:2316, para. 35ff.; see on this U. Gassner, 'Anmerkung' [2015] *EuZW* 33 (34).

250 See Hong (n. 102) 381 – disagreeing Ibler, 'Zerstören die neuen Informationszugangsgesetze die Dogmatik des deutschen Verwaltungsrechts?', in: *Festschrift Brohm* (n. 19) 405 (412).

251 Schmidt-Aßmann (n. 24) chap. 2 para. 55 – emphasising, however, the diverging focus ibid., chap. 1 para. 58ff. See also Schoch (n. 25) § 50 para. 22.

Moreover, the Union's administrative law also encompasses the principle of a balanced regime of the consequences of procedural errors.[252] This is first of all illustrated by the fact that the requirement of the relevance of procedural errors to the result of the procedure,[253] may – unlike stated at times[254] – also be found in the EU's procurement law;[255] in the EIA-context one may refer to the Altrip-jurisprudence as a further example.[256] It is furthermore worth mentioning the distinction between procedural requirements which protect individuals and those which are merely in the general interest, which is also known to EU law, as may be seen in the aforementioned Cases Paul and FFAD.[257]

Despite these modernisation impulses resulting from EU law, it seems mistaken, finally, to construct from this a finding of decline suggesting a lack of innovativeness for the Basic Law as it is argued by *Oliver Lepsius* according to whom all significant reforms of recent years are to be traced back to EU law (participation of the citizen; strengthening the procedural concept; organisation law; orientation of administrative action towards goals; information administration, procurement and regulation law).[258] The very comparison of administrative constitutional law requiring concretisation (and also now relatively well consol-

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252 Nuanced and rightly so C. D. Classen, 'Das Nationale Verwaltungsverfahren im Kraftfeld des Europäischen Gemeinschaftsrechts' [1998/27] *Die Verwaltung* 307 (318ff.); Hindelang, 'Die mittelbare Unionsverwaltung durch die Mitgliedstaaten', in: *Enzyklopädie Europarecht vol. 3* (n. 192) § 33 para. 52ff.; Wollenschläger (n. 40) 601ff., 692ff.; J. Ziekow, 'Verfahrensfehler im Umweltrecht – notwendige Nachjustierungen im deutschen Verwaltungsrecht' [2014] *NuR* 229 (230): a strong contrast between the German and European procedural concepts is a consequence of 'overaccentuations of the orientation towards results and of the doctrine of subjective rights in German public law'.

253 Cf. from a general perspective Gundel, 'Verwaltung', in: R. Schulze & M. Zuleeg & S. Kadelbach (Ed.), *Europarecht* (3rd edition Baden-Baden: Nomos 2015), § 3 para. 178.

254 S. Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss* (Tübingen 1999), 425 ('non-accessory procedural rights'; but also 424); Mangold & Wahl (n. 51) 11f.; Röhl, 'Ausgewählte Verwaltungsverfahren', in: *GVwR II* (n. 179) § 30 para. 8: Judicial review in public procurement 'aims at enforcing procedural rights (§ 97 para. 7 GWB) and is based on a rigid consequence of nullity as a sanction'.

255 See only ECJ, Case C-249/01 *Hackermüller* [2003] ECR I-6319, para. 18; Case C-538/13 *eVigilo* ECLI:EU:C:2015:166, para. 39f.; Wollenschläger (n. 40) 692f.

256 ECJ, Case C-72/12 (LS 3) *Altrip* ECLI:EU:C:2013:712. Cf. on this Schmidt-Aßmann (n. 52) Art. 19 IV para. 158b. Stricter before F. Schoch, 'Verwaltungsgerichtsbarkeit, quo vadis?' [2013] *VBlBW* 361 (369f.); Schwerdtfeger (n. 96) 132ff., 201ff., 231ff., 245ff. (see, however, 282f.). See for a strict approach also AG Wathelet, in: Case C-137/14 *Commission v. Germany* ECLI:EU:C:2015:683, para. 88 ff. See, moreover, ECJ, Joined Cases C-129/13 and C-130/13 *Kamino* ECLI:EU:C:2014:2041, para. 78ff. [similarly Case T-44/00 *Mannesmannröhren-Werke* (2004) ECR II-2223, para. 55].

257 See further A. Epiney, 'Primär- und Sekundärrechtsschutz im Öffentlichen Recht' [2002/61] *VVDStRL* 362 (404). Admittedly, the broad understanding of legal positions granting standing to individuals also becomes manifest here.

258 Lepsius (n. 98) 190f. Similarly with regard to the relationship of constitutional and administrative law: Waldhoff (n. 111) 263f., 275.

idated[259]) with the detailed stipulations of secondary EU law is falling behind;[260] deriving similarly detailed and innovative standards by way of constitutional interpretation would pose a risk of encroachments on the legislature's competences by the BVerfG or by scholars.[261] Furthermore, the Basic Law continues to create momentum, such as – in addition to the ongoing fundamental rights-rule of law impeti[262] – for instance the containment of the administration acting in the forms and/or organisations of private law in terms of fundamental rights, which for example has been expanded in recent years,[263] the requirement of clarity of responsibility in the context of administrative cooperation,[264] the development of fundamental rights standards for multipolar situations (such as allocation conflicts),[265] the development of limitations on privatisation[266] or the paradigm shift regarding the State as guarantor of key infrastructures expressed in Article 87e and f of the Basic Law (which is however increasingly underpinned by EU law)[267].[268]

3.1.4 Reshaping/modifying concepts and institutes of constitutional law

Finally, a reshaping of concepts and institutes of the Basic Law can be observed. As a consequence, a true picture of administrative consti-

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259 Thus, the reformatory power of higher-ranking law is primarily characteristic of upheaval situations, and hence relates more closely to the unreducedly advancing process of Europeanisation than the relatively consolidated constitutionalisation, after almost 70 years of application of the Basic Law, which now has a more stabilising effect. See also Bumke (n. 51) 109; Jestaedt (n. 9) 38, who as an explanation of the phenomenon of constitutionalisation regards the 'clash of the old statutory and the new constitutional law' – causing divergingly strong adjustment reactions –, the need to harmonise the primacy of the Constitution with the primacy of application of statutory law, as well as the adjustment of statutory law to changing constitutional law.

260 Cf. also von Danwitz (n. 133) 358; Röhl (n. 15) 830f.

261 Cf. only the proposal to derive the obligation to introduce associational claims from Art. 3, 9 and 20a GG [cf. on this the proposals mentioned and rejected by Schlacke (n. 95) 65ff.; similarly rejecting a constitutional obligation to introduce collective actions: BVerfG, *NVwZ* 2001, 1148 (1149); BVerwGE 101, 73 (81f.)]. Cf. on all this also Masing (n. 54) § 7 para. 77.

262 See e.g. on recent stimuli towards subjectivisation: BVerfGE 116, 135 (150, 153f.); BVerwGE 132, 64 (68f.); E 133, 347 (349ff.). Cf. on the relevance of the guarantee of effective judicial protection with regard to appeals BVerfG, *DVBl.* 2000, 1458 (1458f.); *NVwZ-RR* 2011, 963 (964), or to judicial review of executive ordinances BVerfGE 115, 81 (91ff.).

263 BVerfGE 116, 135 (151, 153), and notably E 128, 226 (244ff.).

264 BVerfGE 119, 331 (366).

265 BVerfGE 115, 205 (232ff.); E 116, 1 (15f.); E 116, 135 (155ff.).

266 BVerfGE 130, 76 (123ff.). Far-reaching BVerwG, *NVwZ* 2009, 1305 (1306ff.); for a critical view F. Schoch, 'Das gemeindliche Selbstverwaltungsrecht gemäß Art. 28 Abs. 2 Satz 1 GG als Privatisierungsverbot?' [2009] *DVBl.* 1533 (1534ff.).

267 Möstl, 'Art. 87f', in: *GG* (n. 46) Art. 87f para. 4.

268 A further example would be the development of the data protection law triggered by the 'Volkszählungs'-judgement (BVerfGE 65, 1).

tutional law may only be generated when considering both constitutional layers, i.e. the Basic Law and EU constitutional law.[269] For instance, binding the administration to primary EU law goes hand in hand with an expansion of the principle of legality (now also comprising EU law; Art. 20 para. 3 of the Basic Law) – including a strict obligation not to apply national law in violation of EU law[270].[271] Furthermore, an adequate understanding of the constitutional provisions for the organisational structure of the administration requires considering modification stemming from EU law, particularly with regard to the emerging EU composite administration which is becoming increasingly elaborate.[272]

The text of the Constitution does usually not reflect this reshaping as a consequence of Europeanisation since, according to Article 23 paragraph 1 sentence 1 of the Basic Law, the obligation to amend the text of the Basic Law in case of constitutional amendments stipulated for by Article 79 paragraph 1 sentence 1 of the Basic Law does not apply in the context of European integration.[273] Exceptions to this finding are Article 28 paragraph 1 sentence 3 of the Basic Law (Union citizens' right to vote in municipal elections) and Article 87d paragraph 1 sentence 2 of the Basic Law for the air traffic administration.

3.2 Asserting the Basic Law

Despite the relativisation and erosion tendencies that have been outlined, scope nonetheless remains for a Basic Law that functions as a comprehensive order (3.2.1). Its influence on the process of Europeanisation (3.2.2) and internal modernisation opportunities (3.2.3) furthermore suggest an increase in significance related to Europeanisation.

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269 Cf. on this from a general perspective P.M. Huber, 'Europäisches und nationales Verfassungsrecht' [2001/60] *VVDStRL* 194 (208ff.), according to whom 'the fundamentals of the Union's political and social life' can only be 'captured' by 'combining' national and European Constitutional law.

270 For the executive: ECJ, Case C-103/88 *Fratelli Costanzo* [1989] ECR 1839, para. 28ff. For the judiciary: Case C-106/77 *Simmenthal* [1978] ECR 629, para. 24; Case C-103/88 *Fratelli Costanzo* [1989] ECR 1839, para. 28ff. Agreeing Kahl (n. 74) § 74 para. 112. Disagreeing Breuer (n. 3) 239. On the danger of 'selectively applying of the principle of legality' because of the duty not to apply national law in violation of EU law Schmidt-Aßmann (n. 180) 932ff.

271 H. Dreier, 'Die drei Staatsgewalten im Zeichen von Europäisierung und Privatisierung' [2002] *DÖV* 537 (540f.); Schmidt-Aßmann (n. 24) chap. 1 para. 57, chap. 2 para. 12, chap. 4 para. 8; with a critical undertone Huber (n. 16) § 73 para. 139.

272 See on this only J. A. Kämmerer, 'Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung' [2015] *NVwZ* 1321 (1323f.).

273 Cf. Wollenschläger (n. 182) Art. 23 para. 60.

3.2.1 The Basic law as a comprehensive order and erosion tendencies

Primacy as well as the effective judicial enforcement by supreme courts (ECJ/BVerfG), and the far-reaching impact of the Basic Law and of EU law,[274] mean that Europeanisation and constitutionalisation appear as structurally comparable processes.[275] It would however be mistaken to simply conclude from the primacy of EU law also vis-à-vis national constitutional law that constitutionalisation is being replaced by Europeanisation. Whilst the process of constitutionalisation is rooted in abstract constitutional principles that are applicable to all administrative action, the Europeanisation of general administrative law takes place on the basis of specific stipulations, but not of an administrative EU constitutional law claiming a comprehensive scope of application to all national administrative action.[276] True, EU law does also have corresponding stipulations of the rule of law, democracy or the protection of fundamental rights (cf. Art. 2 TFEU); however, these do not apply at Member State level – apart from the homogeneity requirements which however do not demand more than a minimum standard (Art. 7 in conjunction with Art. 2 TFEU)[277] – as stand-alone standards, but largely only accessorily where there is an EU law connection.[278] For instance, general requirements do not emerge from the Union's principle of democracy as to the legitimation of national administrative authorities, nor are the Union's fundamental rights comprehensively binding on national administrative action (cf. Art. 51 para. 1, sentence 1, of the Charter of Fundamental Rights). Neither is there codified general administrative EU law as a 'drive belt' of administrative EU constitutional law[279] repla-

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274 Huber (n. 16) § 73 para. 26; Jestaedt (n. 9) 64f.; Kahl (n. 229) 469; Mangold (n. 179) 11, 235; Mangold & Wahl (n. 51) 4f.; Schoch (n. 25) § 50 para. 106; Wahl (n. 8) 96ff.

275 See for an understanding of the Europeanisation as 'further constitutionalisation of the whole legal order' Kunig (n. 153) 59f.; further Gärditz (n. 127) 3; Jestaedt (n. 9) 64f.; Wahl (n. 8) 98ff.

276 Röhl (n. 15) 830f.; Schwarze, 'Die Europäisierung des nationalen Verwaltungsrechts', in: *Das Verwaltungsrecht unter europäischem Einfluss* (n. 179) 798 (823). See also K.H. Ladeur, 'Supra- und transnationale Tendenzen in der Europäisierung des Verwaltungsrechts – eine Skizze' [1995] *EuR* 227, 803f.; Möllers (n. 3) § 3 para. 31. This is underestimated by Jestaedt (n. 9) 64, who parallelises the concepts of primacy and the character of the Constitution as a comprehensive order.

277 Hoffmann-Riem, 'Kohärenzvorsorge hinsichtlich verfassungsrechtlicher Maßstäbe für die Verwaltung in Europa', in: *Allgemeines Verwaltungsrecht* (n. 15) 749 (761ff.).

278 Also stressing the limited scope of application of the general principles of EU law Jans & de Lange & Prechal & Widdershoven (n. 179) 124; Galetta & Hofmann & Mir Puigpelat & Ziller (n. 86) 8. See further Eifert (n. 32) 359; Waldhoff (n. 111) 263f.

279 See on general administrative law as 'drive belt' of administrative constitutional law Wahl, 'Die Aufgabenabhängigkeit von Verwaltung und Verwaltungsrecht', in: *Reform des Allgemeinen Verwaltungsrechts. Grundfragen* (n. 123) 177, 212. See further already supra n. 118 and Schneider, 'Single case decision-making and the ReNEUAL codification project: Book III in particular', in: M. Ruffert (Ed.), *The Model Rules on EU Administrative Procedures: Adjudication* (Groningen: Europe Law Publishing 2016), A.

cing national general administrative law – the EU also has no competence for the former.[280] Hence, administrative EU constitutional law, because of its accessory nature, does not (completely) replace the Basic Law. Rather, in addition to the existence of areas which are hardly Europeanised, scope also remains for constitutionalisation in Europeanised areas. Added to this is the latitude permitted by EU law.

For instance, the guarantee of self-administration (of municipalities) provided for in the Basic Law continues to apply and to determine their legal position even when they are implementing EU law, or scope remains to apply the national fundamental rights beyond mandatory provisions of Union (fundamental rights) law. Moreover, according to the ECJ, the independence to be granted to certain agencies under EU law (network industries, data protection supervision) 'in no way makes such an absence of any parliamentary influence obligatory for the Member States',[281] which leaves the national principle of democracy in the game. Furthermore, the guarantee of legal protection provided for in the Basic Law also remains relevant for interim proceedings which relate to the enforcement of EU law, beyond the strict standards set by EU law for its suspension, even with regard to the balancing of interests itself.[282]

Finally, questionable tendencies to fade out EU law standards also manifest themselves, frequently to avoid a preliminary reference to the ECJ. As an example, one may refer to a robust ruling of the BVerwG which held: 'It has not

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[280] See only Kahl (n. 127) 59ff. Open: Stelkens, 'Europäisches Verwaltungsrecht, Europäisierung des Verwaltungsrechts und Internationales Verwaltungsrecht', in: P. Stelkens & H.J. Bonk & M. Sachs (Ed.) *Verwaltungsverfahrensgesetz* (8th edition München: Beck 2014), para. 1ff., 143. Admittedly, an EU competence for a specific area does not only encompass substantive rules, but also rules regarding organisational and procedural aspects, see only ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 47ff.; Gundel (n. 253) § 3 para. 111, with an emphasis on the principle of subsidiarity; Krönke (n. 205) 49ff. Restrictively in view of the principle of subsidiarity H.W. Rengeling, 'Deutsches und europäisches Verwaltungsrecht – Wechselseitige Einwirkungen' [1994/53] *VVDStRL* 202 (231f.); further T. von Danwitz, 'Die Eigenverantwortung der Mitgliedstaaten für die Durchführung von Gemeinschaftsrecht' [1998] *DVBl.* 421 (428ff.); for a wider understanding of EU competencies, however, D. Kugelmann, 'Wirkungen des EU-Rechts auf die Verwaltungsorganisation der Mitgliedstaaten' [2007/98] *VerwArch* 78 (82). Advocating, as a consequence of Art. 291 para. 1 TFEU, for a 'rule-exception ratio in the sence of the principle of subsidiarity' Ruffert (n. 179) § 94 para. 20. Disagreeing and with further references Stelkens, ibid., para. 133ff. Reservedly also Hindelang (n. 252) § 33 para. 5ff.

[281] ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 43. See for comparable trends at national level Huber (n. 16) § 73 para. 148.

[282] BVerfGK 3, 331 (335). See also Wollenschläger (n. 196) § 123 para. 51; BVerwGE 124, 47 (61f.); further – with regard to the scope of judgement evaluation – E 148, 48 (61f.): 'EU law only grants discretion to the regulatory agency, without making any stipulations over and above this with regard to the extent of judicial review. According to the case-law of the Court of Justice of the European Union, it is solely a matter for the Member States to determine as a consequence of their procedural autonomy, while maintaining the principles of equivalence and effectiveness of judicial legal protection, the court which has jurisdiction, the type of proceedings, and hence the nature of the judicial control of decisions', similarly *NVwZ* 2012, 1047 (1050f.).

yet been clarified to what degree boundaries for the European legislator itself also follow from the EU's fundamental right to effective legal protection. This does not however mean that the matter needs to be brought before the European Court of Justice for a preliminary ruling. The EU's fundamental rights are primarily based on the common constitutional traditions of the Member States (Art. 6 para. 2 TFEU). There is therefore much to favour the EU's fundamental right to effective legal protection certainly not reaching further than the German fundamental right to effective legal protection according to Art. 19 para. 4 of the Basic Law. Granting scope of judgement evaluation for the organoleptic test of wine (solely) by the German legislature would however be compatible with Art. 19 para. 4 of the Basic Law.'[283] Thus, the existence of parallel constitutions[284] may promote a life in parallel worlds.

Admittedly, this is only half the truth: The function of the Basic Law as a comprehensive order becomes eroded as Europeanisation becomes continually more broadened, densified and potentiated. This leads to an increasing perforation of the mantle which is the Basic Law.[285] *Broadening* since the advancing transfer and exercise of EU competences signifies increasing Europeanisation of (national) administrative law. *Densification* since the regulatory programme of many acts of EU secondary law no longer covers only substantive stipulations, but also extends to aspects of administrative organisation and procedure, as well as of legal protection, and establishes composite administrative structures. Examples of this are the EU's procurement directives, the law on network regulation, the data protection provisions or the Services Directive.[286] *Potentiation* since the enactment of EU law for specific areas opens the door to the applicability of the EU's administrative constitutional law in the national context. In addition to the two fundamental principles of equivalence and ef-

283 BVerwGE 129, 27 (37); further E 131, 41 (47f.). The standard (Art. 19 para. 4 of the Basic Law or only control whether the boundaries of constitutional identity have been respected, which is not mentioned, though) remains unclear in BVerfGK 3, 331 (335) – see for the necessary distinctions Wollenschläger (n. 196) § 123 para. 49. Neglecting standards of the Basic Law BVerwGE 124, 47 (56f.).

284 Concept by Unger (n. 208) 1074.

285 See only Lang (n. 83) § 266 para. 43.

286 See on the law on organisation of the administration only Art. 28 para. 1 subpara. 2 of Data Protection Dir. 95/46/EC as interpreted by ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 17ff. or Art. 3 para. 3a subpara. 1 of Framework Dir. 2002/21/EC with recital 13 of Dir. 2009/140/EG; on procedural requirements Art. 5 of Services Dir. 2006/123/EC; on judicial review standards the requirements set by Procurement Remedies Dir. 89/665/EEC, OJ L 395/33, last amended by Art. 46 Dir. 2014/23/EU, OJ L 94/1; on the structures of EU composite administration Art. 7ff., 15ff. of Framework Dir. 2002/21/EC.

fectiveness,[287] levelling coherence requirements[288] apply in some cases, as do also general legal principles to an increasing and in some cases also expansive[289] degree,[290] such as the EU's fundamental rights.[291] Considerable potential for unitarisation is also slumbering in the EU's fundamental right to good administration (Art. 41 of the Charter of Fundamental Rights) in view of its non-exhaustive character (cf. para. 2: 'includes'), the far-reaching concept of 'good administration' and the right to have one's affairs handled impartially (which constitutionalises also non-normative standards of administrative decision-making);[292] moreover, parts of the literature advocate a binding of the Member States contra legem.[293] What is more, efforts at EU level to codify administrative

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287 See on these ECJ, Joined Cases C-205–215/82 *Deutsche Milchkontor* [1983] ECR 2633, para. 30ff., and in lieu of all Krönke (n. 205) 228ff. Emphasising, with regard to conflicts between EU and national law, the difference between impacts qua effectiveness and qua primacy Ladeur (n. 276) 803f.

288 See for a critical view on the ECJ's jurisprudence going beyond securing an equivalent and effective application of EU law and demanding (without being able to rely on a EU competence) uniform standards by requiring a coherent application of EU law [see in the context of interim proceedings: ECJ, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* (1991) ECR I-415, para. 33; Case C-465/93 *Atlanta* (1995) ECR I-3761, para. 32ff.; and of damages: Case C-46/93 *Brasserie du Pêcheur* (1996) ECR I-1029, para. 71f.] Schoch (n. 25) § 50 para. 30; idem, 'Die Europäisierung des Verwaltungsprozeßrechts', in: *Festgabe 50 Jahre Bundesverwaltungsgericht* (n. 3) 507 (512f., 529). Nuanced R. Streinz, 'Primär- und Sekundärrechtsschutz im Öffentlichen Recht' [2002/61] *VVDStRL* 300 (337ff.) This critique is also rebutted by Wollenschläger (n. 196) § 123 para. 42ff.

289 See on the one hand ECJ, Case C-617/10 *Fransson* ECLI:EU:C:2013:280, para. 17ff., and on the other hand Case C-206/13 *Siragusa* ECLI:EU:C:2014:126, para. 26f., Case C-198/13 *Hernández* ECLI:EU:C:2014:2055, para. 35, Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para. 87ff. and Case C-117/14 *Nisttahuz Poclava* ECLI:EU:C:2015:60, para. 27ff. Cf. from a general perspective Wollenschläger (n. 192) § 8 para. 29ff.

290 See for an overview of the general principles of EU law recognised by the ECJ: Stelkens (n. 280) para. 91ff.; further Galetta & Hofmann & Mir Puigpelat & Ziller (n. 86) 22; Kadelbach (n. 254) 115ff.

291 See for the dynamics created by the application of EU fundamental rights ECJ, Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para. 49; Case C-510/13 *E.ON Földgáz Trade* ECLI:EU:C:2015:189, para. 50. Referring to the potential scope, but also to the restrictive activation von Danwitz (n. 133) 227ff.; further – for an overview and nuanced – idem, ibid., 476ff.

292 See for a wide understanding Efstratiou, 'Der Grundsatz der guten Verwaltung als Herausforderung an die Dogmatik des nationalen und europäischen Verwaltungsrechts', in: *Allgemeines Verwaltungsrecht* (n. 15) 281 (299ff.); the potential is also stressed by Hoffmann-Riem, 'Juristische Verwaltungswissenschaft – multi-, trans- und interdisziplinär', in: J. Ziekow (Ed.), *Verwaltungswissenschaften und Verwaltungswissenschaft* (Berlin: Duncker & Humblot 2003), 45 (49); Huber (n. 16) § 73 para. 223f. For a restrictive reading (limited guarantee of individual procedural rights) Hoffmann-Riem (n. 277) 763f. Cf. on the central role of Art. 41 CFR within the EU administrative constitutional law Ruffert (n. 179) § 94 para. 21ff.

293 See only Schmidt-Aßmann (n. 8) § 5 para. 17, 37; cf. also ECJ, Case C-277/11 *M.* ECLI:EU:C:2012:744, para. 83ff. Disagreeing e.g. (applicable only to EU bodies) Gundel (n. 253) § 3 para. 183 (stressing the identical content of Art. 41 CFR and the unwritten principles of EU primary law). With regard to the 'danger that, by relying on the diffuse ("tentacle-like") concept of good administration, the boundaries of the adaptability of the national systems of administrative law could be lost from sight and the change of administrative law, its institutions and system requirements can no longer be dealt with in a sense which guarantees the freedom, equality and self-determination of all citizens': Huber (n. 16) § 73 para. 224.

law, more recently for instance the ReNEUAL project,[294] may be potentially momentous as the 'drive belt' of the EU's administrative constitutional law, and pursue in part this aim. In this vein, the EP's resolution of 15.1.2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union stresses that 'a European Law of Administrative Procedure could strengthen a spontaneous convergence of national administrative law, with regard to general principles of procedure and the fundamental rights of citizens vis-à-vis the administration, and thus strengthen the process of integration'.[295] Finally, common European constitutional principles and specific stipulations may create spill over effects, be it by means of a voluntary reception of an EU set of rules which is regarded as worthy of being applied also beyond its original scope of application,[296] but be it also in order to avoid two-tier administrative law[297].[298] This can lead to a de facto loss of significance of administrative constitutional law.

3.2.2 Increase in significance by setting standards for Europeanisation

Beyond all relativisation, the Basic Law is also gaining in significance as a consequence of Europeanisation by setting standards for this process: Not only does it defensively formulate final boundaries for Europeanisation via its structure safeguard clause (Art. 23 para. 1 of the Basic Law) – ad-

294 See on the issue of codification also A. Guckelberger, 'Gibt es bald ein unionsrechtliches Verwaltungsverfahrensgesetz' [2013] *NVwZ* 601; Kahl (n. 127) 55ff., 82ff.; Ruffert (n. 179) § 94 para. 54ff.; R. Widdershofen, 'Developing Administrative Law in Europe: Natural Convergence or imposed Uniformity?' [2014/7] *REALaw* 5. Specifically with regard to the ReNEUAL-draft [cf. www.reneual.eu (8.3.2017)] H.C.H. Hofmann & J.-P. Schneider & J. Ziller, 'The Research Network on European Administrative Law's Project on EU Administrative Procedure – Its Concepts, Approaches and Results' [2014/7] *REALaw* 45.

295 2012/2024(INL), lit. S; clearly in that direction also Galetta & Hofmann & Mir Puigpelat & Ziller (n. 86) 13.

296 Cf. on this only Wahl (n. 179) 876, 886ff.; further on 'undirected processes of adaptation' Mangold (n. 179) 480ff. Reservedly on its relevance Schwarze, 'Deutscher Landesbericht', in: *Das Verwaltungsrecht unter europäischem Einfluss* (n. 179) 123 (209f.).

297 On this E. Schmidt-Aßmann, 'Allgemeines Verwaltungsrecht in europäischer Perspektive' [2000/55] *ZÖR* 159 (165f.); Wahl (n. 179) 875, 885f. In favour of such a parallelisation e.g. Schwarze (n. 179) CXXXIII. Against Classen, 'Die Europäisierung des Verwaltungsrechts', in: K.F. Kreuzer & D.H. Scheuing & U. Sieber (Ed.), *Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union* (Baden-Baden: Nomos 1997), 107 (129f.).

298 Examples from German general administrative law are the extension of the rules on the intra-EU cooperation of national administrations beyond the scope of application of the Services Directive (§§ 8aff. VwVfG) – on this Gundel (n. 253) § 3 para. 145ff.; Kahl (n. 74) § 74 para. 51ff. –, of the rule that an authorisation shall be deemed to have been granted after the elapse of a certain period of time (§ 42a VwVfG) and of the procedure through points of single contact (§§ 71aff. VwVfG). The rules on the consequences of procedural errors (§§ 45f. VwVfG) might undergo a similar development.

mittedly only demanding minimum constitutional standards[299, 300] – and in the shadow of the same, but it also actively claims to shape the integration process.[301] No progress in integration has yet failed because of this;[302] having said that, the Solange jurisprudence stands for the impact of the Basic Law, which has lent momentum to the development of the protection of fundamental rights at EU level.[303] A positive aspect can even be derived from the weakly-reasoned ECJ judgement on the independence of data protection supervision agencies: In confrontation with the requirements of the Basic Law regarding the democratic legitimation of the administration, the ECJ has interpreted the Union's principle of democracy as formulating normative standards – which, from a comparative perspective, could not be taken for granted[304] – and has marked out boundaries for establishing independent agencies.[305] True, and inevitably, this does not lead to a complete mirroring of the Basic Law's democratic standards, particularly since many other Member States acknowledge independent administrative agencies: 'That principle does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts.'[306]

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299 See only Schmidt-Aßmann (n. 8) § 5 para. 4; Wollenschläger (n. 182) Art. 23 para. 63. See also, emphasising that the relativisation of the Basic Law's standards has not been compensated by the safeguard clause of Art. 23 para. 1 of the Basic Law because the original constitutional standards were stricter Schuppert & Bumke (n. 18) 68f. (see, however, the finding of convergence at 70). The difference in standards is neglected by Kersten (n. 81) 590 who advocates a duty to interpret the Basic Law in light of EU law requirements.

300 See on this clause only Wollenschläger (n. 182) Art. 23 para. 61ff.

301 Cf. for an understanding of the Grundgesetz as projection screen for assessing European integration: Volkmann (n. 19) 78; cf. further Unger (n. 208) 1072f., 1075f.

302 The strict standards for interim relief required by EU law when the latter's suspension is at stake have been held constitutional: BVerfGK 3, 331 (335f.); the same is true for the reduced protection of legitimate interests when revoking administrative acts granting subsidies contrary to EU state aid law: BVerfG, *NJW* 2000, 2015 (2015f.), and BVerwGE 106, 328 (333ff.).

303 See in lieu of many and with further references Wollenschläger (n. 192) § 8 para. 13.

304 See Masing, 'Organisationsdifferenzierung im Zentralstaat – unabhängige Verwaltungsbehörden in Frankreich', in: *Allgemeines Verwaltungsrecht* (n. 15) 399 (423f.); further Schmidt-Aßmann & Dagron (n. 64) 430ff., 447ff.

305 See on limits to transfer decision-making power on EU agencies ECJ, Case 9/56 and Case 10/56 *Meroni* [1958] ECR 11, para. 53; Case C-301/02P *Tralli v. ECB* [2005] ECR I-4071, para. 41, 44; Case C-270/12 *United Kingdom v. Parliament and Council* ECLI:EU:C:2014:18, para. 41ff. On this issue in lieu of many Ruffert, 'Die neue Unabhängigkeit: Zur demokratischen Legitimation von Agenturen im europäischen Verwaltungsrecht', in: *Festschrift Scheuing* (n. 194) 399 (403f.).

306 ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 42. See for a comparative overview: R. Caranta & M. Andenas & D. Fairgrieve (Ed.), *Independent Administrative Authorities* (London 2004); Ruffert, 'Verselbständigte Verwaltungseinheiten: Ein europäischer Megatrend im Vergleich', in: *Allgemeines Verwaltungsrecht* (n. 15) 431 (433ff.). Specifically on France: Masing (n. 304).

Nonetheless, the ECJ rammed pillars in with the requirement of sufficient parliamentary influence;[307] moreover, a need for justifying the establishment of independent administrative agencies might have been formulated by the judgement when it stresses that '[s]uch independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. That is precisely the case with regard to the tasks of the supervisory authorities relating to the protection of data'[308].[309]

Also beyond potential dark skies, the Basic Law inspires the development of the EU's administrative constitutional law by providing convincing concepts and institutes – to be imparted by academia and legal practice. For, the common constitutional traditions of the Member States constitute an important source of legal reasoning for developing EU constitutional standards (cf. Art. 6 para. 3 TFEU).[310] For instance, in its early jurisprudence, the ECJ has recognised the right to a hearing on the basis of a comparative approach.[311] This is moreover represented by the spread of the principle of proportionality, but also by the impact had by institutes, doctrines and concepts of general administrative law, coined by the Basic Law, on European administrative law. A recent example regards the relevance of procedural errors in the context of the environmental impact assessment: Here, and in confrontation with the requirement of causality of the error for the content of the administrative act resulting from the procedure contained in section 46 of the Administrative Procedure Act[312] and with the constitutional model of a serving function of the procedure which underpins it, in the Altrip judgement the ECJ adopted the causality requirement into EU

307 ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 43ff.

308 ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 42.

309 An approximation to the established German model is assumed by K.F. Gärditz, 'Die gerichtliche Kontrolle behördlicher Tatsachenermittlung im europäischen Wettbewerbsrecht zwischen Untersuchungsmaxime und Effektivitätsgebot' [2010/135] *AöR* 251 (281).

310 Cf. from a general perspective on the 'function' of the Basic Law 'to trigger developments in the external world' Volkmann (n. 37) 57 (79), and on 'processes of transculturation' Ruffert (n. 179) § 94 para. 46; further 48, 51. See also Sommermann, 'Veränderungen des nationalen Verwaltungsrechts unter europäischem Einfluß – Analyse aus deutscher Sicht', in: J. Schwarze (Ed.), *Bestand und Perspektiven des Europäischen Verwaltungsrechts* (Baden-Baden: Nomos 2008), 181, 197f.; further with examples Neidhardt (n. 243) 18ff.

311 See AG Warner, in: Case 17/74 *Transocean Marine Paint Association v. Commission* [1974] ECR 1063 (1090f.), further the judgement, para. 15; similarly for the protection of legitimate interests when revoking favourable administrative acts Joined Cases 7/56 and 3–7/57 *Algera* [1957] ECR 81 (118f.).

312 This provision reads: 'Application for annulment of an administrative act which is not invalid under section 44 cannot be made solely on the ground that the act came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter.' Translation available at www.bmi.bund.de/SharedDocs/Downloads/EN/Gesetzestexte/VwVfg_en.pdf?__blob=publicationFile (8.5.2017).

administrative law, albeit with reservations which are beneficial to the development of German administrative law;[313] moreover, by demonstrating that also EU administrative law is based on a balanced regime of the consequences of procedural errors, this judgement warns of over-exaggerating the procedural concept of EU law.[314]

Against this background, the challenge lies in ensuring a constitutionalisation of EU law which keeps up with Europeanisation, and which may not one-sidedly stress effectiveness.[315] Such a tendency towards over-emphasising effectiveness often draws criticism, such as by *Friedrich Schoch* identifying a 'relative one-dimensionality of Community law', that is a paucity of substantive standards combined with a high degree of effectiveness when it comes to enforcing EU law.[316] The finding is however more differentiated than it is frequently stigmatised which already results from the structurally comparable constitutional structure at EU and national level (cf. Art. 2 TEU).[317] At times, EU law has always offered stronger protection than the Basic Law, as the examples of the protection of competitors in the context of public procurement and public undertakings demonstrate (supra 3.1.2), whilst at other times the criticism has been based on an exaggeration of mandatory constitutional standards allegedly required by the Basic Law, which applies to the protection of legitimate interests when revoking administrative decisions infringing EU state aid law (supra 3.1.1). At other times again, a higher constitutional standard cannot be made out at all, if one considers that constitutional standards are often developed by balancing conflicting constitutional principles. For, taking again the example of the pro-

313 ECJ, Case C-72/12 *Altrip* ECLI:EU:C:2013:712, LS 3.

314 Cf. on this already supra, 3.1.3; see also Ludwigs (n. 163) 1334; Schmidt-Aßmann (n. 52) Art. 19 IV para. 158b. Stricter before e.g. Kahl (n. 178) 451; Schwerdtfeger (n. 96) 132ff., 201ff., 231ff., 245ff. (see, however, also 282f.). Insofar, this judgement may be generalised – cautiously in this direction Schmidt-Aßmann ibid.; further Schlacke (n. 217) 17; rather reservedly Gärditz (n. 248) 10. Restrictive AG Wathelet, in: Case C-137/14 *Commission v. Germany* ECLI:EU:C:2015:683, para. 94ff.; see also the ECJ's judgement, para. 54ff.

315 Battis (n. 186); von Bogdandy (n. 141) 19f.; Mangold & Wahl (n. 51) 4f.; Schmidt-Aßmann (n. 24) chap. 7 para. 20ff.; idem (n. 8) § 5 para. 11ff. Reservedly on such a possibility Röhl (n. 15) 830ff. Exemplified with regard to the guarantee of legal protection: Streinz (n. 288) 342.

316 F. Schoch, 'Die Europäisierung des Allgemeinen Verwaltungsrechts und der Verwaltungsrechtswissenschaft' [1999/2] *Die Verwaltung Beih.* 135 (142f.); Ossenbühl (n. 179) 761f.; Schmidt-Aßmann (n. 180) 931. The focus on the effectiveness of EU law may be explained by the need to secure its primacy and deficits with regard to its implementation [cf. Schmidt Aßmann, 'Strukturen Europäischer Verwaltung und die Rolle des Europäischen Verwaltungsrechts', in: A. Blankenagel & I. Pernice & H. Schulze-Fielitz (Ed.), *Verfassung im Diskurs der Welt. Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck 2004), 395 (405); Thym (n. 207) 58]; this does not justify inadequate constitutional standards, though.

317 See also Bumke (n. 51) 112f.; Schmidt-Aßmann (n. 24) chap. 1 para. 65: in spite of diverging standards, the EU is a community governed by the rule of law, which is why we do not witness a 'categorial caesura'; further idem (n. 8) § 5 para. 49ff.; Hoffmeister, 'Die Wirkweise des europäischen Rechtsstaatsprinzips in der Verwaltungspraxis', in: C. Calliess (Ed.), *Verfassungswandel im europäischem Staaten- und Verfassungsverbund* (Tübingen: Mohr Siebeck 2007), 141 (141ff.); Kahl (n. 74) § 74 para. 7f.; Unger (n. 208) 1070 n. 14.

tection of legitimate interests when revoking administrative decisions, its lowering means strengthening the principle of legality and vice versa. What would constitute a higher constitutional standard in this context? What is more, the constitutionalisation of EU administrative law has recently gained momentum: one may refer to the strengthened protection of fundamental rights, notably since the entry into force of the EU Charter of Fundamental Rights,[318] the increasing recognition of the importance of legal certainty in rescinding administrative decisions which were in breach of EU law,[319] or in the development of democratic standards with regard to the legitimation of administrative agencies.[320] Shortcomings do persist, sporadically for instance still in the protection of fundamental rights[321]; [322] and granting independence to administrative agencies merits a reflection.[323] A particular challenge is posed, finally, by the need to secure clear responsibility and legitimation structures and effective legal protection in the EU composite administration.[324]

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318 Cf. only ECJ, Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, para. 48ff.; Case C-101/12 *Schaible* ECLI:EU:C:2013:661, para. 29ff.; further CFI, Case T-629/13 *Molda v. Commission* ECLI:EU:T:2014:834, para. 57ff. For a positive assessment Wollenschläger (n. 192) § 8 para. 96; von Danwitz, 'Rechtsschutz in der Europäischen Union', in: *Enzyklopädie Europarecht vol. 3* (n. 192) § 13 para. 34; ambivalent Cornils, 'Schrankendogmatik', in: C. Grabenwarter (Ed.), *Enzyklopädie Europarecht vol. 2* (Baden-Baden: Nomos 2014), § 5 para. 6ff., 10ff. However, also in the pre-Charter era examples for attention to fundamental rights issues could be observed, cf. only ECJ, Case C-5/88 *Wachauf* [1989] ECR 2609, para. 22; Case C-68/95 *T. Port* [1996] ECR I-6065, para. 40ff.; Joined Cases C-37/02 and C-38/02 *Di Lenardo und Dilexport* [2004] ECR I-6911, para. 83ff.; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health et al.* [2005] ECR I-6451, para. 127f.; CFI, Case T-82/99 *Cwik v. Commission* [2000] ECR FP-I-A-00155, para. 50ff.

319 A positive conclusion is drawn by Kahl (n. 178) 451, and Ludwigs (n. 163) 1331. See moreover with regard to the exclusion of the suspensory effect measured against the guarantee of effective legal protection: ECJ, Case C-232/05 *Commission v. France* [2006] ECR I-10071, para. 55ff.; further with regard to judicial review in the context of decisions on the recovery of state aid Case C-527/12 *Commission v. Germany* ECLI:EU:C:2014:2193, para. 44f.

320 See ECJ, Case C-518/07 *Commission v. Germany* [2010] ECR I-1885, para. 39ff. On this supra, 3.2.1.

321 Summarising Wollenschläger (n. 192) § 8 para. 94ff.; idem, 'Die unternehmerische Freiheit (Art. 16 GRCh) als grundrechtlicher Pfeiler der EU-Wirtschaftsverfassung' [2015] *EuZW* 285 (287f.).

322 Moreover, the absolute obligation of administrative authorities not to apply national law in conflict with EU law draws criticism, see e.g. von Danwitz (n. 133) 209ff.; for a positive evaluation: Ludwigs (n. 163) 1331f.

323 See also Gärditz (n. 309) 277f., 282.

324 See also Schmidt-Aßmann (n. 201) 157f., 163f.; idem (n. 8) § 5 para. 54, 80ff.; further E. Pache & T. Groß, 'Verantwortung und Effizienz in der Mehrebenenverwaltung' [2007/66] *VVDStRL* 106 (136ff.) bzw. 152 (169ff.).

3.2.3 Increase in significance by internal modernisation opportunities

Finally, Europeanisation is able to trigger learning processes, thus to modernise the Basic Law's *acquis*, and hence also to ensure its future significance.[325] Given the difficulty of breaking up path dependencies, motivations to reform coming from the outside prove to be particularly significant.[326]

In view of diverging concepts,[327] EU law questions the high weighting of the protection of legitimate expectations in the rescission of favourable administrative acts (§§ 48f. of the Administrative Procedure Act),[328] the strict requirements as to democratic legitimation of administrative agencies,[329] a restrictive doctrine of standing before the courts, namely in the context of aggregated interests,[330] the constitutionalisation of the suspensive effect,[331] the primarily individual-centred legal protection concept,[332] the weak constitutional standards with regard to the administration acting in the forms and/or organisations of private law (such as when awarding subsidies and contracts, or public undertakings),[333] the relative lack of consequences had by procedural errors[334] or the expandable understanding of administrative transparency,[335] as well as of the orientation towards efficiency.[336]

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325 See from a general perspective and with a positive assessment Ludwigs (n. 163) 1332ff.; Rengeling (n. 280) 209, further 221: Europeanisation as means to combat excrescences of constitutionalisation.

326 Cf. on the persistence of an established interpretation of the Constitution U. Volkmann, 'Rechts-Produktion oder: Wie die Theorie der Verfassung ihren Inhalt bestimmt' [2015/54] *Der Staat* 35 (62). Seminal on path dependencies W. B. Arthur, 'Competing Technologies, Increasing Returns, and Lock In by Historical Events' [1989/99] *The Economic Journal* 116.

327 See supra, 3.1.1, 3.1.2, 3.1.3 and 3.1.4.

328 See on the German *Sonderweg* of an extensive protection of legitimate interests: Huber (n. 16) § 73 para. 131; § 94 para. 41; Schmidt-Aßmann (n. 8) § 5 para. 97.

329 See the references in n. 75.

330 See already supra 3.1.3.

331 On the rule-exception ratio of suspensory effect and immediate enforcement for administrative practice BVerfGE 35, 382 (401f.); E 35, 263 (273); E 51, 268 (284f.); *NVwZ* 1996, 58 (59). For a critical assessment K.A. Bettermann, 'Die Rechtsweggarantie des Art. 19 Abs. 4 GG in der Rechtsprechung des Bundesverfassungsgerichts' [1971/96] *AöR* 528 (554); Papier, 'Rechtsfragen des Sofortvollzugs', in: J. Burmeister (Ed.), *Rechtsfragen der Genehmigung von Kraftwerken* (Düsseldorf: Handelsblatt-GmbH 1978), 76 (110): 'glorification'; Schmidt-Aßmann (n. 52) Art. 19 IV para. 274ff.; Schoch (n. 196) § 80 para. 23.

332 See supra 2.2.1.

333 See supra 3.1.2.

334 See supra 3.1.2.

335 See supra 3.1.3.

336 As examples for the orientation of EU administrative law towards efficiency one may mention the duty to process applications as quickly as possible (see Art. 13 para. 3 of the Services Dir. 2006/123/EC [N. 214] and its implementation in § 42a VwVfG) or the duty to 'ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them' (Art. 3 para. 3 sentence 2 of Framework Dir. 2002/21/EC [N. 195] and Art. 35 para. 5 sentence 1a of Internal Market in Electricity Dir. 2009/72/EC [n. 195]).

This places areas on the test bed which are frequently already subject to criticism in the national context. Reference may be made by way of example to the questioning of the traditional doctrine of legitimation of the administration.[337] Some reforms can be read as a consistent continuation of constitutionalisation processes for which the Basic Law has paved the way, but which have not been completed, such as an extension of the doctrine of standing before the courts which may be understood as a continuation of the momentum of the Basic Law as to subjectivisation,[338] the strengthening of objective administrative control as lending concrete form to the principle of the division of powers set in the principle of legality,[339] modifications in the legitimation doctrine as a continuation of gradual openings, namely those which have already been completed for the functional self-administration,[340] the taming of the administration acting in the forms and/or organisations of private law as an effectivisation of the application of fundamental rights in this area,[341] the orientation towards efficiency as emphasising the (rule of law-based) mandate of administrative law to enable administrative action[342] or strengthening the administrative procedure as rounding off the procedural dimension of fundamental rights.[343] Some reforms may also be regarded as restoring a legal situation that is in conformity with the Basic Law, such as not treating certain administrative guidelines as binding concretisations of statues, which might be considered a consequence of the Basic Law's system of sources of the law (Art. 80 para. 1 of the Basic Law)[344] or the reduction of the protection of legitimate expectations

337 See n. 329.

338 Cf. from a general perspective Gärditz (n. 248) 1f.; Ludwigs (n. 163) 1333f.; Mangold & Wahl (n. 51) 8; Schoch (n. 25) § 50 para. 161; Schönberger (n. 3) 75; Schwerdtfeger (n. 96) 226ff. See for a plea for relying on duties to protect in order to grant standing F. Ekardt, 'Verfassungs- und verwaltungsrechtliche Gründe für eine liberalere Klagebefugnis' [2005/44] *Der Staat* 622. Reservedly in view of future generations Krüper (n. 97) 188ff. Cf. for tendencies towards a more generous approach in national law already supra, 3.1.3.

339 Groß (n. 236) 375.

340 See on the openness of the principle of democracy for further developments (also beyond EU law influences): BVerfGE 107, 59 (91), however with regard to the functional self-administration and with an explicit exclusion of the state administration and the local self-administration (92ff.). Nonethess, a further model of democratic legitimation of the administration (standing next to the hierarchical model) is emerging, since legitimation is not derived from the totality of the population, see only Wißmann (n. 76) § 15 para. 60 m. n. 334. See further the dissenting opinion in BVerfGE 119, 331 (392f.).

341 See for such tendencies supra 3.1.2.

342 Von Bogdandy (n. 141) 38f. Similarly already Bachof (n. 7) 76.

343 Cf. Lepsius (n. 98) 184ff.; Ludwigs (n. 163) 1334. It is rightly stressed that the importance the Constitution attaches to administrative procedure (and organisational structures) has not always been fully respected in legislation: Gärditz (n. 127) 151f. m. n. 406.

344 See for a critical view Ludwigs (n. 163) 1333; further M. Zuleeg & H.-W. Rengeling, 'Deutsches und europäisches Verwaltungsrecht – Wechselseitige Einwirkungen' [1994/53] *VVDStRL* 154, 175ff. The conformity with the Constitution has been confirmed by BVerfGE 129, 1 (21), though; further Ossenbühl (n. 224) 4ff.

as an expression of the principle of legality (Art. 20 para. 3 of the Basic Law).[345] The evaluation is, admittedly, a question of the interpretation of the Constitution which is regarded as being the correct one. At any rate, the gains from and the cost of a reinterpretation need to be carefully weighed up in each individual case, for instance contrary efficiency-related interests when strengthening the procedural concept,[346] legal protection burdens when expanding access to the courts[347] or a loss of democratic influence when establishing independent agencies.[348] There is a need to warn against overstating the standards of EU law – for instance by assuming a procedural concept of absolute standards when it comes to consequences of errors in the procedure.[349]

4. Relativising and asserting the Basic Law in view of the emancipation of general administrative law

Whilst Europeanisation which has just been discussed described a phenomenon which is many-faceted, but established, only seldom[350] is there talk of the emancipation of general administrative law. This concept raises the question of releasing general administrative law from a state of de-

345 For such pleas E. Forsthoff, *Lehrbuch des Verwaltungsrechts* (10th edition München: Beck 1973), 263; M. Bullinger, 'Vertrauensschutz im deutschen Verwaltungsrecht in historisch kritischer Sicht' [1999] *JZ* 905 (911). Disagreeing with such an obligation derived from constitutional law BVerfGE 20, 230 (235); E 117, 302 (315); cf. also E 116, 24 (55).

346 See only Ludwigs (n. 163) 1334; Schmidt-Aßmann, Grundrechtswirkungen (n. 36) 231; Wollenschläger (n. 40) 82ff., 601f., 692ff.

347 K.-F. Gärditz, 'Klagerechte der Umweltöffentlichkeit im Umweltrechtsbehelfsgesetz' [2014] *EurUP* 39 (43f.); idem, (n. 248) 6 – this approach is criticised by Ekardt (n. 338) 639f. See for a positive view also Ludwigs (n. 163) 1333f.

348 See for a defense of the orthodox view Böckenförde (n. 75) § 24 para. 23 (quotation in the text to n. 81). A critical stance on the independence of administrative agencies is taken by e.g. Frenzel (n. 194) 929f.; Huber (n. 16) § 73 para. 213; Spieker gen. Döhmann (n. 203) 789ff. For a positive view, however Classen (n. 194) 293; J. Masing, *Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden? Gutachten 66. Deutscher Juristentag D* (Stuttgart 2006), 73ff. Cf. on this debate from the point of view of political sciences only M. Döhler, 'Das Modell der unabhängigen Regulierungsbehörde im Kontext des deutschen Regierungs- und Verwaltungssystems' [2001/34] *Die Verwaltung* 59; Heine & Mause, 'Delegation und demokratische Kontrolle: Können Behörden politisch zu unabhängig sein?', in: T. Theurl (Ed.), *Unabhängige staatliche Institutionen in der Demokratie* (Berlin: Duncker & Humblot 2013), 85; Kruse, 'Unabhängige staatliche Institutionen: Funktionalität und demokratische Legitimation', in: ibid., 19.

349 See already supra, 3.1.3.

350 For an explicit use of this term with regard to the *Neue Verwaltungsrechtswissenschaft* Lepsius (n. 98) 183f.: Specifically, the *Neue Verwaltungsrechtswissenschaft* is said not to be seeking a 'connection between its new conception and constitutional law [...]; in this regard, the "reform movement" shares the trend, also tangible in administrative scholarship, towards independence and towards emancipation of this area of the law from influences by higher-ranking provisions'.

pendency on the Constitution.[351] Such emancipation tendencies manifest themselves (4.1); the Basic Law is however not only able to assert itself towards them, but to gain in significance in confrontation with them (4.2).

4.1 Relativising the Basic Law

4.1.1 Emancipation of general administrative law

The framework nature of the Constitution elucidated at the outset, and the latitude that is open to the legislature when concretising constitutional principles, both emancipate general administrative law.[352] What is more, general administrative law is also emancipating itself: firstly via its biperspectivity, on the basis of which its definitions, institutes and rules are not only deduced from the Constitution, but are also largely fed from the *acquis* of special administrative law. Secondly, as a result of its partial codification, general administrative law lives a life of its own, independent from constitutional law.[353] This promotes, already in view of many specific questions which need to be answered, the taking up of an internal perspective among scholars and on the part of practitioners.[354] For instance, the need for a hearing of those affected by an administrative decision is determined in accordance with the differentiated provision contained in section 28 of the Administrative Procedure Act, but not by deducing standards from constitutional law (fundamental rights and rule of law requirements). What is more, developments in administrative law itself trigger developments in constitutional law, and hence relativise the hierarchy of norms.[355]

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351 See for the common understanding of emancipation as 'the act or process of emancipating' and of the verb 'to emancipate' as '1) to free from restraint, control, or the power of another; especially: to free from bondage; 2) to release from paternal care and responsibility and make sui juris; 3) to free from any controlling influence (as traditional mores or beliefs)' the Merriam-Webster online-dictionary and thesaurus, www.merriam-webster.com/dictionary (27.12.2016).

352 See also Ludwigs (n. 163) 1328ff.

353 Jestaedt (n. 105) § 264 para. 10: 'A statute, albeit lower in rank than the Constitution and subject to adhere to the stipulations contained in constitutional law, develops a kind of "life of its own" in normative terms – autonomy in the truest sense of the word –, which makes it appear as more and something else than a completely third-party-programmed law enforcing the Constitution, the existence and content of which are accessory to the Constitution. In this interpretation, the independence of statutes vis-à-vis the Constitution is an expression and consequence of the "political freedom of the legislature"'.

354 Lepsius (n. 98) 180ff.; further Waldhoff (n. 111) 263f., 275.

355 See also Kersten (n. 81) 586f., who considers constitutional and administrative law, from a functional and methodological point of view, to be at the same time close to and distant from each other (the proximity results from their interdependence, their distance from diverging functions and methodology).

4.1.2 Emancipation tendencies in academia

Emancipation tendencies in academia stood at the beginning of the establishment of general administrative law as a separate discipline in the 19th Century. According to *Otto Mayer*, '[i]f the administrative law scholarship is to stand as an equal legal discipline next to its elder sisters, it must be a system of specific legal institutes of the state administration'.[356] These tendencies are also continued under the Basic Law:[357] The criticism of constitutionalisation which has been articulated since the beginning of the 1960s constituted a first liberation movement. This criticism generally countered an over-interpretation of constitutional standards notably when curtailing legislative latitude and in particular exaggerations of the rule-of-law- and fundamental rights-driven permeation of administrative law, namely in the form of hypertrophic understandings of the statutory reservation, of limitations to administrative discretion and of legal protection requirements.[358] More recently, the *Neue Verwaltungsrechtswissenschaft*, which was differentiatedly discussed notably at the Freiburg conference of the Staatsrechtslehrervereinigung in 2007,[359] was added with its methodical reorientation[360] of administrative law scholarship 'from an application-related interpretation science to a legislation-orientated action and decision science'.[361] Its steering perspective on the law, the associated need for an analysis of the factual background, its impact orientation, the opening towards neighbouring sciences, the work with reference fields and its interest in non-normative

356 O. Mayer, 'Zur Lehre vom öffentlichrechtlichen Vertrage' [1888/3] *AöR* 3 (3); further F. Fleiner, *Über die Umbildung zivilrechtlicher Institute durch das Öffentliche Recht* (Tübingen 1906), 8; for an overview: Stolleis, Entwicklungsstufen (n. 117) § 2 para. 53ff.; idem (n. 13) 380ff.

357 Exaggerating Lepsius (n. 98) 182, asserting that, in order to promote a distinction of administrative law from constitutional law, the debate in academia has turned away from stressing the dependence of the former on the latter (which was still the case in the 1950s and 1960s) and elaborated on the autonomy of administrative law. Current treatises on general administrative law, however, are aware of its dependence on the Constitution – albeit with the necessary qualification –, see only Schmidt-Aßmann (n. 24) chap. 1 para. 17ff.; this view is also shared by standard textbooks on administrative law: Ehlers (n. 87) § 6 para. 1ff.; Ipsen (n. 13) para. 71ff.; Maurer (n. 108) § 2 para. 1ff.

358 See only Lepsius (n. 98) 182. Pleading for an autonomy of administrative law Klement (n. 65) 294; Wahl (n. 17) 401.

359 See I. Appel's & M. Eifert's lectures on 'Das Verwaltungsrecht zwischen klassischem dogmatischem Verständnis und steuerungswissenschaftlichem Anspruch' [1998/67] *VVDStRL* 226 and 286.

360 Reservedly with regard to an understanding as fundamental re-orientation Gärditz (n. 127) 95, 99f.; Wahl (n. 8) 87ff.

361 Voßkuhle (n. 119) § 1 para. 15; see for a further distinction Schuppert (n. 146) 99. See on the aim of conceptualising administrative law scholarship as a governance-oriented scholarship also Appel (n. 359) 241ff.; Bumke (n. 51) 103ff.; idem, Relative Rechtswidrigkeit (n. 143) 259ff.; Hoffmann-Riem, 'Eigenständigkeit der Verwaltung', in: *GVwR I* (n. 3) § 10 para. 11ff.; Schmidt-Aßmann (n. 24) chap. 1 para. 34ff.

standards of administrative action[362] in fact draw attention beyond the constitutional horizon of administrative law.[363]

The consequences of such an approach are summarized by *Arno Scherzberg* and seen in questioning various fundamental traditional assumptions, namely the 'two-fold logic of the law in the sense of the possibility to reduce each legal issue to the difference between lawful/unlawful, its fundamental, albeit limited, subsumption rationality, its unrestricted normativity in the sense of the existence of "one correct" decision, conceived at least *in nuce*, the merely heuristic function of dogmatics in investigating it, its unity vis-à-vis executive and judicative addressees, the authoritativeness of the "Juristische Methode" in its definitional-systematic origination and, associated with this, the irrelevance of extralegal decision-making premises for analysing the law.'[364]

4.1.3 The emancipation of the administration

The gain of the administration in terms of independence vis-à-vis the legislature and the judiciary, increasingly stressed since the end of the 1970s, may be understood, finally, as a further trend towards emancipation, if relying on a broad understanding limiting emancipation not only to the relationship between constitutional and administrative law.[365] This process affects the entire breadth of general administrative law: In terms of substantive law, one may refer to administrative discretion,[366] to the increasing insight into the

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362 See on this programme: Voßkuhle (n. 119) § 1 para. 16ff.

363 See for an (exaggerated) understanding as process of emancipation Lepsius (n. 98) 183f.

364 Scherzberg, 'Das Allgemeine Verwaltungsrecht zwischen Praxis und Reflexion', in: *Allgemeines Verwaltungsrecht* (n. 15) 837 (840).

365 See only E. Schmidt-Aßmann, 'Verwaltungsverantwortung und Verwaltungsgerichtsbarkeit' [1976/34] *VVDStRL* 221 (229ff.); further H. Peters, *Die Verwaltung als eigenständige Staatsgewalt* (Krefeld 1965); U. Scheuner, 'Das Gesetz als Auftrag der Verwaltung' [1969] *DÖV* 585ff., insb. 593. See for a bilance H. Dreier, 'Zur "Eigenständigkeit der Verwaltung"' [1992/25] *Die Verwaltung* 137; further M. Brenner, *Der Gestaltungsauftrag der Verwaltung in der Europäischen Union* (Tübingen 1996), 197ff. – for an overview of the positions of Arnold Köttgen, Hans Peters, Ernst Forsthoff and Werner Weber; Hoffmann-Riem (n. 361) § 10 para. 2ff.; Schmidt-Aßmann (n. 24) chap. 4 para. 36ff.
Independence is also expressed in the specific task of the administration in the system of powers [cf. Huber (n. 16) § 73 para. 44; Schmidt-Aßmann (n. 24) chap. 4 para. 37]. This task consists of 'imparting democratically-enacted statutes by a gradual concretisation in a multi-layered process of application of the law which also creates law' [Kahl (n. 74) § 74 para. 10, with a reference to C. Möllers, *Gewaltengliederung* (Tübingen 2005), 112ff.; Schmidt-Aßmann (n. 24) chap. 4 para. 38; further Wahl, 'Zur Lage der Verwaltung Ende des 20. Jahrhunderts', in: Jeserich et al (n. 51) 1197 (1211)].

366 See on the 'changing understanding of administration from an institution executing statutes to an institution which also enjoys formative and regulatory powers' Schmidt-Aßmann (n. 24) Vorwort; further Hoffmann-Riem (n. 361) § 10 para. 9ff.; Huber (n. 16) § 73 para. 45ff., 212f.; Kahl (n. 74) § 74 para. 155ff.; Möllers, 'Verwaltungsrecht und Politik', in: *IPE V* (n. 16) § 93 para. 8f.; Ruffert (n. 179) § 94 para. 58.

task of the administration being more than merely a tool executing Parliament's will,[367] or to the overcoming of the traditional forms of administrative action lying in the emergence of informal administrative action. In procedural terms, one may refer to the increased value attached to administrative procedure, and in organisational terms to the independence of agencies, as well as to privatisations, including involvement in network and governance structures. With regard to legal protection, the power of the administration to take the final decision (with limited judicial review) should be mentioned.

Another issue not addressed here relates to de facto emancipation processes, such as the bureaucracy problem discussed by *Max Weber*[368] as summarised by *Rainer Wahl*: 'Administration as – in an ideal case – an expert, knowledgeable, effective, permanent performance of the State's tasks is to be a mere instrument; administration as a large-scale organisation and apparatus however of necessity has a considerable weight of its own, just as the large body of staff naturally has its own interests. According to the well-known dialectics of Master and Servant, it can de facto never be a mere instrument, but it can gain independence to differing degrees of intensity and on differing scales; it can "derail" projects of the constitutionally-legitimated principal and have them run into the ground or use the dependence of the "Master" on information and expertise in order to steer his actions.'[369]

4.2 Assertion of the Basic Law

Despite these findings on emancipation, the primacy of a thematically-broad administrative constitutional law, on the one hand (a), and shortcomings in administrative law legislation, on the other hand (b), result in general administrative law being only relatively independent from the Basic Law. Admittedly, emancipation processes challenge the Constitution, but they also offer modernisation opportunities (c).

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367 See only Dreier (n. 365) 155 – references have been deleted: Executing statutes 'does not mean a value-neutral implementation of will or a subsumption process which is fully automated to a certain degree, but an often creative process which is complementary to the statute [...], which in the frequent case of executing only weakly-programming statutes includes concretising norms, selection of an alternative, value preference, weighing up processes and practical compensation of interests.' See further Gärditz (n. 127) 150; Jestaedt, 'Maßstäbe des Verwaltungshandelns', in: *Allgemeines Verwaltungsrecht* (n. 53) § 11 para. 7f.; Schmidt-Aßmann (n. 24) chap. 4 para. 42; Trute, 'Methodik der Herstellung und Darstellung verwaltungsrechtlicher Entscheidungen', in: *Methoden der Verwaltungsrechtswissenschaft* (n. 51) 293 (303ff.). Cf. on the consequence of autonomy of the administration for the principle of legality Dreier ibid., 151: A statute is not the 'self-contained final product of the formation of the will of the state anymore'; Gärditz ibid., 126ff.

368 M. Weber, *Wirtschaft und Gesellschaft* (5th edition Tübingen 1976), 825ff.

369 Wahl (n. 365) 1199f.; further 1206ff. with a view to party politicking.

4.2.1 The inviolability of administrative constitutional law as a comprehensive order

The independence of general administrative law vis-à-vis the Constitution can from the outset only be relative, given the primacy of the Basic Law (Art. 1 para. 3 and Art. 20 para. 3 of the Basic Law).[370] From a normative perspective, therefore, neither an independent administrative law nor a steering-orientated *Neue Verwaltungsrechtswissenschaft*,[371] nor an independent administration,[372] is able to emancipate against the Basic Law. It is accordingly not permissible for instance to make the principle of legality subject to the proviso of maintaining the non-normative standard of the acceptance of administrative decisions.[373]

Tendencies towards emancipation are further constrained by the character of administrative constitutional law as a comprehensive order – which moreover should not be misunderstood as a self-neutralising 'pitfall of constitutionalisation'.[374] This order embraces general administrative law, which in any case shows a constitutional dimension and in content terms a particular affinity to constitutional law.[375] The Basic Law therefore determines the basis for and boundary of independence, such as the reserve of a sufficiently-detailed law determines the space for administrative discretion, or the guarantee of legal protection determines the permissibility of administrative final decision-making powers (with limited judicial review). Even the perspective of the *Neue Verwaltungsrechtswissenschaft*, over and above the law, on the factual background, neighbouring disciplines and non-normative standards reveals itself to be only

370 Jestaedt (n. 105) § 264 para. 10, 33.

371 See only Kahl (n. 229) 493; Schoch, 'Außerrechtliche Standards des Verwaltungshandelns als gerichtliche Kontrollmaßstäbe', in: *Allgemeines Verwaltungsrecht* (n. 15) 543 (546); idem (n. 25) § 50 para. 107, 110.

372 Schmidt-Aßmann (n. 24) chap. 4 para. 37: 'Independence justified by the Constitution [...] is not a natural state of pre-constitutional legitimacy, but is constituted by the law. The Basic Law's division of powers must not subsequently tame pre-existing, sovereign powers. It can rather use its different organisational structures and modi operandi in order to form a structure from them in which state decisions are gradually layered and taken in a way ensuring public responsibility and control.' To the point also Dreier (n. 365) 155. Cf. further Möllers (n. 366) § 93 para. 15. Cf. for the contrary understanding E. Forsthoff, *Staat der Industriegesellschaft* (München 1971), 105.

373 Affirmative Hoffmann-Riem, 'Methoden einer anwendungsorientierten Verwaltungsrechtswissenschaft', in: *Methoden der Verwaltungsrechtswissenschaft* (n. 51) 9 (47f.).

374 This metaphor of Jestaedt (n. 9) 58, expresses that a multiplication of positions protected by fundamental rights entails minimising the protection of fundamental rights; further Eifert (n. 359) 291f., according to whom the constitutional law categories for system formation in administrative law (fundamental rights and the rule-of-law principle) have lost their 'clarity' as a result of the insight into multipolarity and into the need for latitude of the legislature: 'All developments in administrative law can be discussed in terms of constitutional law, but fewer and fewer questions of administrative law can be decided on in terms of constitutional law'.

375 See already supra, n. 118.

seemingly constitutionally blind. The normative claim that has been asserted implies integrating these findings into the law. For instance, the opening to neighbouring disciplines that has been called for challenges the Constitution, given that it has a filter function, particularly in light of the variety of the standards with which the law is confronted.[376] It must guide the incorporation in terms of rule-of-law and democratic standards, namely in view of the frequently necessary delegation of rule-making powers, and must reflect the incorporated standards notably in terms of fundamental rights.[377]

To give an example from health law: The rule of law and democratic requirements initially determine how quality standards formulated in medical guidelines can be included in the legal system in terms of technique, for instance by means of a cross-reference or an incorporation. Fundamental rights stipulations then determine what scientific standard is to be demanded for the inclusion of specific guidelines into the legal order, and ensure compensation with conflicting interests, such as business interests of the service-providers or supply needs of the population.[378]

In harmony with this, methodical drafts of the *Neue Verwaltungsrechtswissenschaft* stress, despite the broadening of the perspective, the importance of the principle of legality with regard to constitutional and non-constitutional law: The re-orientation 'certainly does not mean that the dogmatic work in the tradition of the "Juristische Methode" becomes superfluous. In a democratic constitutional state, the law remains the standard determining factor for the decision-making system of the administration. It must therefore be possible to legitimise any change to the system coordinates (standard for action, organisation, procedure, staff, etc.) by the Constitution. Accordingly, each decision, and any proposed decision, must be reviewed as to whether it is compatible with the law.'[379] The critics of the *Neue Verwaltungsrechtswissenschaft* need to take this into account, even though boundaries may also threaten to be overstepped by an approach which has legal normative and legal policy aspirations; the latter is stressed by *Johannes Masing* according to whom the legal normative and gov-

376 See only Bumke (n. 51) 127ff.; Grzeszick (n. 4) 113; Schoch (n. 371) 554ff. See from a general perspective on the need for a differentiated integrative methodology Voßkuhle, 'Methode und Pragmatik im Öffentlichen Recht', in: H. Bauer et. al. (Ed.), *Wirtschaft im offenen Verfassungsstaat, Festschrift für Reiner Schmidt zum 70. Geburtstag* (München: Beck 2002), 171 (188ff.).

377 See also Gärditz (n. 127) 108ff., 116ff., 134ff.; Hoffmann-Riem (n. 292) 56, 59f.; Kahl (n. 229) 494f.; Schmidt-Aßmann (n. 201) 116f.; Schoch (n. 371) 555: The law determines 'the reasons, boundaries and conditions for reception'.

378 Cf. F. Wollenschläger & A. Schmidl, 'Qualitätssicherung als Ziel der Krankenhausplanung' [2014] *VSSR* 117 (158ff.). See for a parallel example in the context of freedom of sciences Fehling, 'Das Verhältnis von Recht und außerrechtlichen Maßstäben', in: *Allgemeines Verwaltungsrecht* (n. 15) 461 (467f.); Gärditz (n. 127) 107, 117. See with regard to co-operation structures (between the individual and the administration) Volkmann (n. 37) 77.

379 Voßkuhle (n. 119) § 1 para. 15 (moreover para. 24, 71); further Eifert (n. 359) 300f.; Hoffmann-Riem (n. 373) 47f.

ernance perspectives are in a tense relationship, which was 'challenging [...] to put up with', since there was a risk of equating the two perspectives: 'The temptation to directly shape and re-shape the law from the elite claim of better knowledge – past the mills of political opinion forming – is just as considerable as is the leaning to conclude from analyses of reality to legal structures'[380].[381]

4.2.2 Administrative constitutional law as a residual order

The thematically comprehensive superstructure of general administrative law constituted by the Basic Law stands furthermore in opposition to an incomplete legislation, since general administrative law is only partially codified and has shortcomings at times. The legislature hence has, to freely quote *Immanuel Kant*, not always coped with the 'departure of administrative law from its self-incurred tutelage', which is vital to emancipation.[382] This activates the function of the Basic Law as a residual order, as is in turn illustrated by the requirement for a hearing stipulated by section 28 of the Administrative Procedure Act: Its field of application restricted to burdening administrative acts gives rise to the question of requirements to hear beyond such acts which may be directly derived from the Constitution, for instance in the context of real acts such as informational activities;[383] likewise, the rules on making good

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380 Masing (n. 54) § 7 para. 17; further Bumke (n. 51) 261f.; Grzeszick (n. 4) 119f.; F. Ossenbühl, 'Grundlagen des Verwaltungsrechts' [2007/40] *Die Verwaltung* 125 (128, 130); S. Rixen, 'Taking Governance Seriously. Metamorphosen des Allgemeinen Verwaltungsrechts im Spiegel des Sozialrechts der Arbeitsmarktregulierung' [2009/42] *Die Verwaltung* 309 (312); further already W. Brohm, 'Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung' [1972/30] *VVDStRL* 245 (251ff. with n. 24). These dangers are not neglected by advocates of the *Neue Verwaltungsrechtswissenschaft*, cf. Voßkuhle (n. 119) § 1 para. 28.

381 Emphasising the need to focus on the impact of administrative decisions, although the consequences for administrative law remain unclear: Franzius, 'Modalitäten und Wirkungsfaktoren der Steuerung durch Recht', in: *GVwR I* (n. 3) § 4 para. 68 [similarly idem, 'Funktionen des Verwaltungsrechts im Steuerungsparadigma der Neuen Verwaltungsrechtswissenschaft' (2006/39) *Die Verwaltung* 335 (346f.)]: 'To the extent to which the democratic constitutional state has assumed a responsibility for shaping the social order and legal standards are supplemented by extra-legal standards, administrative law must (also) focus on its impact-orientation. As a guideline, one has to acknowledge that legal decisions are not (only) made by processing facts of the past by means of set rules, but by taking account of expectations with regard to the effects of the decision.' The former edition reads even stricter – this approach is criticised in view of questioning the principle of legality: K. Lange, 'Grundlagen des Verwaltungsrechts' [2007/40] *Die Verwaltung* 135 (136f.); Schoch (n. 371) 546. Too critical, though, in view of the literature referred to: Grzeszick (n. 4) 110, and Masing (n. 54) § 7 para. 17.

382 The need to rely on constitutional law reflects in line with Wahl (n. 17) 407 the lacking independence of statutory administrative law and results from an inadequate regulation by the legislator. Cf. also Schulze-Fielitz, 'Grundmodi der Aufgabenwahrnehmung', in: *GVwR I* (n. 3) § 12 para. 138; Bachof (n. 7) 50ff.

383 See only Pünder, '§14', in: *Allgemeines Verwaltungsrecht* (n. 53) para. 27. This has been left open (because not relevant for the outcome of the ruling) in BVerwGE 82, 76 (96); *NVwZ* 1991, 1770 (1771f.). Reservedly also BayVGH (Administrative Court of Second Instance for Bavaria), *NVwZ* 2003, 998 (999).

defects in procedure or form and on the irrelevance of such errors (§§ 45f. of the Administrative Procedure Act), thought to go too far, demand a strict handling as required by the Constitution.[384]

4.2.3 Increase in significance by internal modernisation opportunities

Finally, emancipation processes are able to launch learning processes: For instance, the criticism directed towards constitutionalisation triggered a re-thinking of overstated requirements derived from the rule of law and from fundamental rights. In exactly the same way, the broadening of perspectives underlying the *Neue Verwaltungsrechtswissenschaft* and lying in transcending the analysis of the legal framework[385] leads to modernisation motivations.[386] If the principle of democracy requires an adequate level of legitimation,[387] administrative science analyses are able to decipher the performance of different arrangements, and for instance to reflect to what degree suppositions on the chain of legitimation (demanded by the orthodox understanding of the principle of democratic legitimation) such as its informational basis are correct.[388] The same applies with regard to generating knowledge regarding cooper-

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384 See only F. Hufen & T. Siegel, *Fehler im Verwaltungsverfahren* (5th edition Baden-Baden: Nomos 2013), para. 287f.

385 On this approach Voßkuhle (n. 119) § 1 para. 15: 'This framework analysis, which has been the original field of action of lawyers since the outset, is however, from a governance perspective (interested in administrative action and decision-making and orientated towards legislation), solely a (central) step in a complex cognitive process the other stages of which may not/may no longer be simply ignored. Admittedly, those administrative law researchers committed to the "Juristische Methode" never quite did this; analyses of the factual background, (theoretical) preconceptions, impact assessments, everyday knowledge and legal policy evaluations however frequently flow covertly and without methodical reflection into their own argumentation. Particularly in the (academic) rationalisation of non-normative decision-making factors also lies a central concern of the *Neue Verwaltungsrechtswissenschaft*.' On the follow-up problems of the methods of a legal policy evaluation Wahl (n. 8) 91f.

386 If one recognises this learning opportunity, a finding of decline becomes impossible; rather what is best from both worlds has to be combined, hence the way forward is 'to interrelate as profitably as possible the classical dogmatic approach and the governance perspective as well as the perspective related to legal acts and to conduct', and not to play the two methods off against one another, see Appel (n. 359) 254. Similarly Bumke (n. 51) 107, 127f.; idem, Relative Rechtswidrigkeit (n. 143) 262ff.; Eifert (n. 359) 314ff.; Gärditz (n. 127) 150ff., 265ff. (emphasising the importance of a focus on review); Kahl (n. 229) 498f.; Masing (n. 54) § 7 para. 18ff.; Pitschas, 'Allgemeines Verwaltungsrecht als Teil der öffentlichen Informationsordnung', in: *Reform des Allgemeinen Verwaltungsrechts. Grundfragen* (n. 118) 219 (222ff.); Scherzberg (n. 364) 868; Schoch (n. 24) 203.

387 See only BVerfGE 83, 60 (71f.).

388 Schmidt-Aßmann (n. 201) 151; idem, 'Das Demokratieprinzip. Ein Plädoyer für seine noch bessere Entfaltung in der verwaltungsrechtlichen Lehrbuchliteratur', in: *Festschrift Battis* (n. 73) 85 (97f.).

ation structures.[389] With the increasing insight into the dual task of administrative law not only to discipline administrative action, but also to enable it,[390] as well as in the autonomy and the discretionary powers of the administration,[391] modernisation continues in terms of the general orientation of administrative law: One-sided understandings of the Constitution are questioned, namely that of an administration which merely executes Parliament's will and enjoys no autonomy whatsoever, as described by *Horst Dreier*: 'It is this overall connection between a democratic state, the parliamentary system of government, an executive that is bound by the law and far-reaching judicial protection of individual rights which makes the administration appear not as an independent organisation, but [...] as a tool of the will of the people authentically interpreted in the law. Allegedly robbed of all political and discretionary elements, the executive had to present itself, in this perspective which is compelling in both democracy-theory and rule-of-law terms, as a hierarchically-organised, statutorily-programmed bureaucratic apparatus reviewed by supervisory bodies and by the judiciary, completely isolated from the world of politics without its own entitlement to form a will.'[392]

Equally questioned is the understanding of an administration whose task is to decide individual administrative law cases by executing the law,[393] and thus focusing (in the tradition of the *Juristische Methode*)[394] on the principle of legality and on judicial protection as the two key pillars of administrative constitutional law;[395] such a concept is often considered the model of general administrative law as pre-defined by the Constitution.[396]

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389 See Rixen (n. 380) 319f.; Volkmann (n. 37) 77.

390 See on the two-fold aim of administrative law supra, 2.2.2.

391 See supra, 4.1.3.

392 Dreier (n. 365) 145f.; further Schmidt-Aßmann (n. 24) chap. 4 para. 37; Trute (n. 367) 303f. See on the heteronomy of the administration Wahl (n. 365) 1199. – If emphasising the 'changing understanding of administration from an institution executing statutes to an institution which also enjoys formative and regulatory powers' (see supra, 4.1.3), one has to take account of the fact that neither an understanding of the administration as merely law-executing institution has ever been true [see only von Bogdandy & Huber (n. 14) § 42 para. 40; Hoffmann-Riem (n. 361) § 10 para. 9ff.] nor current administrative action merely consists in regulatory tasks implying wide discretion for policy-shaping, cf. Möllers (n. 366) § 93 para. 10.

393 See for an understanding of administrative law science as science orientated towards resolving cases emerging in practice Appel (n. 359) 233f.

394 Summarising this method Voßkuhle (n. 119) § 1 para. 2ff. On its genesis in opposition to an encyclopedic political science approach: Bumke (n. 51) 75ff.; on its merits Stelkens (n. 280) para. 220: 'core achievement of German administrative law scholarship'.

395 Cf. Appel (n. 359) 238 with n. 43; further, also in contrast to the *Neue Verwaltungsrechtswissenschaft*, Grzeszick (n. 4) 112f.

396 To the point Wißmann (n. 76) § 15 para. 8a: 'Vis-à-vis reforms of the administrative organisation, constitutional law therefore has not (only) the task of drawing defensive boundaries, but primarily the positive-constructive obligation to work out the conditions of a liberty-orientated administration obliged towards the law; insofar, it also has of necessity a policy function.' Admittedly, an exclusively governance-orientated understanding of administrative law fails to go far enough, see only Voßkuhle (n. 119) § 1 para. 28.

Openness vis-à-vis new developments and towards their integration into constitutional law admittedly constitutes a dilemma: On the one hand, understanding the emancipation processes exclusively as processes of decline does contribute only little towards satisfactorily dealing with them in constitutional law terms. In this regard, *Eberhard Schmidt-Aßmann* rightly stresses that '[r]isks can also be understood as challenges. It is not the conjuring up of crisis symptoms, but the willingness to deal with immanent changes in the economy and in society that is called for.' And further: 'The law and the state built on the rule of law will only lose their shaping force if they do not make an effort to retranslate the rationality criteria of the developments that have been revealed into legal structural categories.'[397] On the other hand, the criticism of such processes points to the danger of loosening constitutional guarantees: It stresses that fundamental rights, rule-of-law and democratic standards are at stake when orientating administrative action towards effectively performing tasks, in particular on the basis of parameters determined by social sciences.[398] It further identifies tears in the 'artistic fabric of the rule of law'[399] as a result of the drop in the statutory determination, and hence the fewer possibilities for a court review, a 'deconstitutionalisation' in the fraying of the 'parliamentary control of the constitutional state',[400] an irretrievable loss of the normative claim of the Constitution in informalisation processes,[401] a 'precarious exclave within the principle of legality' in administrative discretion[402] or the risk of a democratically no longer controllable system when moving away from the bureaucratic legitimation model.[403]

Whether and to what degree boundaries of constitutional law have been overstepped can admittedly only be judged on the basis of concrete examples, which cannot be discussed in greater detail here. Generally speaking, the challenge lies in asserting the normativity of the Basic Law particularly in view of

397 Schmidt-Aßmann (n. 105) § 26 para. 111. See further von Bogdandy & Huber (n. 14) § 42 para. 40: The ideal of an administration executing the law according to the 'Juristische Methode' 'is standing in the way of an adequate understanding of contemporary governance in the European legal area since it can only diagnose the current situation in which governments and bureaucracies perform regulatory tasks involving policy decisions as a 'process of decline in terms of constitutional law and constitutional policy'; Ladeur, 'Normqualität und Verbindlichkeit der Verfassungssätze', in: *HStR XII* (n. 22) § 261 para. 54ff.

398 Badura (n. 3) 152; Grzeszick (n. 4) 112f.; Huber (n. 16) § 73 para. 49; O. Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik* (Tübingen 1999), 7; Rixen (n. 380) 335f. This also applies to an understanding of the individual as co-operation partner of the administration, cf. summarising Masing (n. 54) § 7 para. 1ff.

399 Grimm (n. 6) § 1 para. 72.

400 Hofmann (n. 6) 15ff.

401 Grimm (n. 6) § 1 para. 86. See also L. Helms, 'Die Informalisierung des Regierungshandelns in der Bundesrepublik: ein Vergleich der Regierungen Kohl und Schröder' [2005] *ZSE* 70 (95f.).

402 Faber (n. 62) 100.

403 Huber (n. 16) § 73 para. 213.

new developments (such as privatisations, the informalisation of administrative action or the *Neue Verwaltungsrechtswissenschaft*; on the latter see already supra, 4.2.1). It is ideally equipped for this in view of its constituting a comprehensive order.[404] Emancipation processes, namely a loosening of constitutional ties associated therewith, have first of all to be analysed in their constitutional law dimension, and then measured in terms of the Basic Law. In doing so, an eye should be kept on the inviolability of the Constitution, on the need for (possibly compensatory) development of constitutional law and on the latitude of the legislature when concretising constitutional principles. Particularly the complex factual findings generated by the *Neue Verwaltungsrechtswissenschaft* require an assessment in terms of constitutional law; it is however not permissible to orientate the application of the law towards them by mistaking what is with what ought to be.

Thus, *Peter M. Huber* is right in qualifying the reflected integration of factual findings into the legal order as key task of Public Law: '[T]he question arises as to how the steering goals connected with the law can also be achieved under the conditions of a diversification of responsibility between different political levels which is hard to understand and in the dichotomy of the State and society. In this regard, the highly-complex factual findings, organisation-sociological, decision-theoretical and political science insights [...] are however frequently taken at face value in the vein of a reality-science view and the interpretation and application of the law are wrongly orientated by this. This is however where the actual task of public law begins. Factual findings and insights of the neighbouring disciplines must be linked to the normative steering stipulations and be implemented in legally-burdenable forms of action, institutes and procedures that can be abstracted and generalised. In line with the essence of the law, there is a need to think here in terms of delimitations, and not of transitions, and to domesticate the diversified action under the specific legal code of 'legal and illegal'. Starting with the dichotomy of the State and society, it comes down to recognising all actions which are attributable to the State as competence-tied actions in need of justification, and to ensure that effective responsibility can be taken over vis-à-vis citizens.'[405]

The Basic Law, for instance, guarantees as to administrative discretion that the latter is based on a corresponding statutory empowerment, that there is sufficient parliamentary steering (statutory reservation, determinedness), and that the relaxation of the principle of legality and legal protection does not take place referring to alleged material necessities, but that it is justified in terms

404 See in the context of informal administrative action also Schoch (n. 114) § 37 para. 115ff., 127.

405 Huber, 'Die Demontage des Öffentlichen Rechts', in: W. Kluth & P. Badura (Ed.), *Wirtschaft – Verwaltung – Recht. Festschrift für Rolf Stober* (Köln: Heymann 2008), 547 (556) – reference deleted; further Bumke (n. 51) 127ff.; Masing (n. 54) § 7 para. 17 (co-operation relationships).

of constitutional law.[406] The duty, derived from constitutional law, of the administration to develop concepts on how to act in areas in which it enjoys discretion is intended to ensure that discretion is exercised in a manner which is in conformity with equality and which maintains legal protection, and consequently compensate for the associated relaxation of the principle of legality;[407] this stands for innovations in constitutional law.

It is admittedly not always the case that such reactions occur appropriately or even quickly; learning processes require time, and may go wrong. For instance, recognising that restrictions on fundamental rights may also result from indirect and/or de facto interferences meant being able to cope with real acts in terms of fundamental rights; however, the Glykol ruling illustrates that open issues remain with regard to informational administrative action,[408] just as it took until recently for the applicability of fundamental rights to the administration acting in the forms and/or organisations of private law to be recognised (supra, 3.1.2).

5. Conclusion: Relativisation of the Basic Law, but no finding of constitutional decline

The fact that EU law has stepped into the breach in order to restrain the administration acting in the forms and/or organisations of private law makes it clear that Europeanisation and emancipation are connected: Not only can Europeanisation be interpreted as an emancipation process; rather, it simultaneously mitigates and promotes emancipation. By disciplining the administration acting in the forms and/or organisations of private law and by constitutionalising the (also non-normative) claim to have one's affairs handled fairly by the administration (cf. Art. 41 of the Charter of Fundamental Rights), EU law restricts tendencies towards an emancipation of the administration; such tendencies are however reinforced by requiring the existence of independent agencies. Areas also exist which do not influence one another.

The significance, and the loss of significance, of the Basic Law in general administrative law cannot be reduced to formulae pure and simple. As little as administrative law is only 'concretised constitutional law', it presents itself as 'concretised EU law' as a result of Europeanisation; neither may emancipation

406 See also Jestaedt (n. 367) § 11 para. 30.

407 See only Eifert (n. 359) 317ff.; Hoffmann-Riem (n. 361) § 10 para. 115ff.; Schmidt-Aßmann (n. 24) chap. 2 para. 24; B. Wollenschläger, *Wissensgenerierung im Verfahren* (Tübingen 2009), 202ff.; Wollenschläger (n. 40) 538ff., 691, 695.

408 Conceptualising this as partial de-constitutionalisation Kahl (n. 229) 469 n. 42. See for a critical view also Schoch (n. 114) § 37 para. 111ff.; F. Wollenschläger, 'Staatliche Verbraucherinformation als neues Instrument des Verbraucherschutzes' [2011/102] *VerwArch* 20 (38f.).

be equated with deconstitutionalisation. Moreover, the end of this paper presents a differentiated finding.[409]

Europeanisation and emancipation relativise the significance of the Basic Law. The former by restricting the Basic Law's function as a yardstick, residual order and general orientation for administrative law in favour of EU administrative constitutional law, and the latter by creating a subconstitutional space for general administrative law and opening it up to other orientations than only towards the Basic Law. There are however four reasons why this relativisation of the Basic Law is not a finding of constitutional decline.[410]

Firstly, the Basic Law relativises itself: This results from the Basic Law's openness for European integration, which becomes manifest in the will of constitution-establishing legislature,[411] and in the wording of the Constitution,[412] as well as from the framework nature of the Basic Law, leaving space for the development of general administrative law.[413]

Secondly, the Basic Law is not giving up the chase in view of Europeanisation and emancipation. Rather, it remains relevant for the Europeanisation process by virtue of its structure safeguard clause and in the shadow of it, just as its primacy and its inviolable content allow for only a relative independence of general administrative law. Admittedly, these safeguards may fail, above all externally, but also internally.[414] Then the Basic Law would have lost significance. A challenge therefore lies in promoting a further constitutionalisation of EU

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409 Cf. for the process of Europeanisation in general Häberle, 'Das Grundgesetz als Teilverfassung im Kontext der EG/EU', in: D. Dörr (Ed.), *Die Macht des Geistes. Festschrift für Hartmut Schiedermair* (Heidelberg: Müller 2001), 81 (92); and on the academic agenda following from this: Kahl (n. 178) 454: 'academic challenge to distinguish from a dogmatic perspective even more precisely between the different modi in which EU law influences national law and to further contour the concepts related to this'.

410 Cf. also Klein, 'Vereinheitlichung des Verwaltungsrechts im europäischen Integrationsprozeß', in: C. Starck (Ed.), *Rechtsvereinheitlichung durch Gesetze* (Göttingen: Vandenhoeck und Ruprecht 1992), 117 (144; further 126 n. 45).

411 See deputy Katz, *Parl. Rat* XIV/1, 172: The consequence of the openness of the Basic Law for European integration is to enable amendments of the constitutional order; further deputy Eberhard, *Parl. Rat* XIV/1, 862; Schmid, *Parl. Rat* IX, 40f.; H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen 1972), 58; Wollenschläger (n. 182) Art. 24 para. 5.

412 See Art. 23 para. 1 sentence 1 of the Basic Law: 'a level of protection of basic rights essentially comparable to that afforded by this Basic Law'; commitment 'to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity'.

413 See also Gerhard (n. 19) 745: 'The hypothesis of the national constitutional system "retreating" however disregards the openness of the Basic Law towards European integration, and appears to be stuck to an excessive degree in a static-abstract understanding of the State.' See further Unger (n. 208) 1072. Insinuated also by Rengeling (n. 280) 204, 217; Ruffert (n. 8) § 17 para. 54; Schmidt-Aßmann (n. 8) § 5 para. 3, 14.

414 To the point Unger (n. 208) 1072: chance to influence, but not necessarily to determine developments.

law keeping pace with the progress of EU administrative law[415] and in asserting the claim to control vis-à-vis trends towards emancipation. The finding for this is more differentiated than the critics sometimes presume (supra, 3.2.2).

Thirdly, given the current state of integration, the Basic Law remains relevant in light of its function as a comprehensive order and the merely accessory nature of EU administrative constitutional law, even in Europeanised general administrative law. There are admittedly erosion processes at work in this regard (supra, 3.2.1). A further challenge hence lies in facing up to the interaction of both constitutional law layers, particularly also in its complexity,[416] and in organising their coexistence and juxtaposition in line with the boundaries drawn by EU and national constitutional law.[417] Thus, relativisation is a consequence of the realisation of joint policy goals, and hence unavoidable; it is however influenceable in terms of its extent via exercising EU competences, and is indeed limited by the EU's constitutional principles which serve to preserve autonomy, such as the obligation to respect national identity (Art. 4 para. 2 TFEU).[418]

Fourthly, Europeanisation and emancipation are able in turn to provide momentum for further developments of the Basic Law, and hence to ensure its further significance. Construing from this the finding of decline of the Basic Law[419] admittedly ignores its framework nature and continuous stimuli for the development of administrative law (supra, 3.1.3).

In light of the above, finally, there is a need to bear in mind that the normativity of the Constitution is at risk, both with a rigid understanding which fails to do justice to the openness and dynamics of constitutional law standards,[420] and also with a hasty orientation towards alleged material necessities.[421] Maintaining the balance here remains a challenge, for instance with regard to

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415 Thus, we are witnessing two processes of constitutionalisation, namely the influence of EU law on national law (which may be compared to the process of constitutionalisation) and the constitutionalisation of EU law itself – see also Mangold (n. 179) 74.

416 See also – in the context of the protection of fundamental rights – J. Masing, 'Einheit und Vielfalt des Europäischen Grundrechtsschutzes' [2015] *JZ* 477 (485).

417 See also Schmidt-Aßmann (n. 201) 54; Unger (n. 208) 1069 (1074ff.).

418 Cf. also Masing (n. 416) 485; Nettesheim, 'Europäischer Verfassungsverbund?', in: O. Depenheuer et. al. (Ed.), *Staat im Wort. Festschrift für Josef Isensee* (Heidelberg: C.F. Müller 2007), 733 (751ff.); Rengeling (n. 280) 231f. See on the necessity of balancing the primacy of EU law and the principle of effectiveness with the duty to mutual respect Schmidt-Aßmann (n. 180) 931f.; further idem (n. 201) 64f. Also stressing national autonomy (with its limitation in the effective enforcement of EU law): Jans & de Lange & Prechal & Widdershoven (n. 179) 369f.

419 In this direction, however, Lepsius (n. 98) 190f.; considering in the meantime administrative law more innovative than constitutional law Waldhoff (n. 111) 263f., 275.

420 Gerhard (n. 19) 737, 746; D. Grimm, *Die Zukunft der Verfassung* (2nd edition Frankfurt am Main 1994), 17; Reimer (n. 104) 470; Schoch (n. 25) § 50 para. 120.

421 See on the danger for the normativity of the Constitution by neglecting its stabilising function Reimer (n. 104) 464f.

privatisations or informal administrative action,[422] and will thus continue to concern public law science.

[422] See n. 404.