THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW AND THE EVOLUTION OF GENERAL ADMINISTRATIVE LAW

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Abstract: The discussion on the emergence of global administrative law is centered around the question: "Is it law?" and problems of accountability. This is a narrow perspective which ignores the autonomy of the administrative "internal law" generated by administrative agencies themselves. This is shown for the evolution of domestic administrative law in the 19th century and its transformations in the 20th century. Domestic administrative law is only to a much lesser extent a product of courts or legislators than hitherto taken for granted. This is why it should not come as a surprise that the instruments and forms of global administrative law are generated by transnational administrative networks of agencies. The evolution of both domestic and transnational administrative law will allow for new heterarchical forms of accountability and legitimation once the focus on a hierarchical concept of delegation is given up.

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I. PRELIMINARY REMARKS

The discussion on “international administrative law” has been established – following the logic of its object – as an international topic for quite some time. However, this evolution does not exclude the differentiation of, so to speak, regional and methodologically approaches within the global network of legal research: in the US, one can observe a focus on “global administrative law” at the law faculty of NYU – and this shift of the accent to “global” instead of “international administrative law” is not without consequences. The focus is more on case studies and methodological questions. This approach corresponds with the ideas of an Italian group of researchers, which has been set up at Viterbo, and with other individual contributors to the international discussion. In as far as one can already talk about an established field of research in Germany, one can observe a different focus on a rather traditional systematic differentiation of certain “matters” which are undergoing a process of internationalisation. In the following, an approach will be developed which tries to build a bridge between global and domestic administrative law. It will be shown that there is a close link between the evolution of administrative law in postmodernity and the emergence of global administrative law, and that the basic institutions of administrative law are products of the autonomous rationality of administration. This sheds new light on the questions of both the accountability and the legitimation of transnational global networks.

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2 www.ricercaitaliana.it/prin/unita
3 See the contributions in: INTERNATIONALES VERWALTUNGSRECHT, (Christoph Möllers & Andreas Völkuhle, eds), 2007.
II. THE AUTOPOIESIS OF LAW AND THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW

II.1. No administrative law beyond delegation of power? The self-generative function of administrative law in the evolutionary process

In systems theory, the focus of the observation of the legal system shifts from norms to decision-making, i.e., the legal system is regarded as being composed of decisions, not of persons and not of norms as the object of application to specific cases. At least, this is constitutive of the difference between centre (decisions) and periphery (legislation) of the legal system. This may sound counter-intuitive to traditional approaches to law, and it may not do sufficient justice to the practice of contracting and other transactions, which do not take on the form of a binding decision. However, this discussion will not be taken up here.

The autopoietic construction of the legal system as processing from decision to decision is opposed to a more traditional conception of decision-making as deriving (specific) decisions for cases from a (general) norm which is integrated in a whole system of legal rules and – super-imposed at this level of norms – a set of principles which integrate the law in a system. For the purposes of this article, the difference between continental European and Anglo-American law will be left aside, because, as will be shown later, the blind spot of the most diffused approaches to the understanding of the self-transformation of the legal system that the law undergoes under the pressure of the evolution of modern society is the same in both traditions. The focus of the following assumption is more on the inevitable autonomy of not only judicial, but also administrative, decision-making, which allows for a recognition of the creative normative function of the processing of administrative decision-making. The traditional conception tends to reduce the creative norm-generating role beyond the legislative

4 See Jody Freeman, Collaborative Governance in the Contracting State, 45 UNIVERSITY OF LOS ANGELES LAW REVIEW, 1 (1998); ead., The Contracting State, 28 FLORIDA STATE UNIVERSITY LAW REVIEW, 155 (2001), (arguing that the rise of the contract in administrative action is a sign of a general transformation towards a more open type of “governance” and not a symptom of decline of democratic legitimation of administrative agencies); Alfred A. Aman jr., Globalization, and the Need for a New Administrative Law, 49 UNIVERSITY OF LOS ANGELES LAW REVIEW, p. 1687 (2002); for a critique, see Mark Seidenfeld, An Apology for Administrative Law in the “Contracting State”, 28 FLORIDA STATE UNIVERSITY LAW REVIEW, 215 (2001), (emphasising the flexibility that was already inherent in traditional administrative law); for the far advanced practices of the contracting state in the UK, see Peter Vincent-Jones, THE NEW CONTRACTING STATE: REGULATION, RESPONSIVENESS, RELATIONALITY (Oxford: Oxford University Press, 2006).


authority to the judiciary whereas the this normative role of the administration is left in the shadow. Modern administrative law cannot, of course, deny a creative element that is called/termed “discretion”, although this leeway for administrative autonomy is hidden within the idea of a legislative delegation of power.

“Delegation” includes the assumption that the domain of options within which the “delegated” power of administrative decision-makers can develop is defined by the legislator. However, global administrative law is confronted with the design of forms, instruments and procedures beyond the established rules of general administrative law and its inherent structuring function. As will be shown in more detail below, the fundamental forms and components of general administrative law have not been developed by the legislator nor by the judiciary (which has made some of its implicit rules explicit), but by an experimental search process of the administration itself. The ensuing “reverse” process of norm-generation – from administrative experimental rule generation to explicit stabilisation through courts and finally through legislation – appears to be incompatible with the traditional understanding of the separation of powers.

This unavoidable self-generative element of the legal system is due to the fact that we have to distinguish- from explicit rule-making - an evolutionary process of self-transformation of (not only administrative) law, which is due to the dynamic of society at large, including its knowledge basis and the social norms and expectations that try to cope with the societal complexity. As will be discussed later, the basic forms of both administrative and private law

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8 See Eberhard Schmidt-Aßmann, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE (2d ed., 2004).

9 The role of courts in the development of general administrative law is overstated when the latter is reduced to judge-made law. See Benedict Kingsbury, The Concept of ‘Law’ in Global Administrative Law, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (2009): from the absence of a legislative delegation of power to administrative deciders does not follow a supplementary norm generating role of courts alone, administration itself has to be regarded as the creator of the instruments and forms of administrative law; the role of the judges consisted rather in the doctrinal stabilisation of the institutions of general administrative law, for the role of doctrine in general administrative law see Eberhard Schmidt-Aßmann, ALLGEMEINES VERWALTUNGSRECHT ALS ORDNUNGSIDEE (2nd ed., 2006) 3 et seq. and Jens Kersten & Sophie-Charlotte Lenski, Die Entwicklungsfunktion des Allgemeinen Verwaltungsrechts, 42 DIE VERWALTUNG 503 (2009); Oliver Lepsius, Themen der Rechtswissenschaftstheorie, 1, 27, in:, RECHTSWISSENSCHAFTSTHEORIE (Matthias Jestaedt & id., eds., 2008) . For a critique of simplistic “functionalist” conception of legislation as the (generative) democratic will see Martin Loughlin, PUBLIC LAW AND POLITICAL THEORY 60 (2003); id., WHAT IS PUBLIC LAW?, 151 et seq. (2003).
are not created by the legislator, but are, instead, stabilised *ex post* by the formulation of historical “versions” in the legislative process which correspond to a societal challenge which is managed - in a first step - by administrative or judicial decision-makers (the latter in private law).

Neither administrative nor private law can be understood and practiced without the observation of social norms and cognitive assumptions of normality. The legal system is linked permanently to the “collective knowledge” of society and the basic forms of attribution of responsibility: in modernity, we can first observe the emergence of the “society of individuals,” which provokes the rise of a new administrative law based upon individual decisions. The next stage of the evolution of administrative law is characterised by the new paradigms derived from the requirements of the “society of organisations” and its consequences (such as planning law, the forms of the welfare state, etc.) The forms and procedures of this new stage of administrative law had to be found in an experimental process first, and could afterwards be integrated in new types of laws and legal procedures of decision-making. We are now confronted with a new change of paradigm, the rise of the “network society”, which, again, demands new administrative forms and procedures for decision-making in conditions of increasing complexity. With Jerry L. Mashaw, one might describe the evolution of administrative law as underlying a “cyclical oscillation between categorical and contextual norms.” Administrative law is deeply characterised by paradigmatic transformations which are initiated by administrative decision-makers in experimental processes and finally stabilised by court practice and the legislator.

The hypothesis which underlies the following reflections is based upon the assumption that the globalisation process does not invade a stable domestic administrative (or private) legal system from outside, but that it is also a consequence of an evolutionary process that disrupts the legal system from within. It goes without saying that this evolutionary model does not assume that the new paradigms replace the older ones completely, but that we have

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to conceive of the legal system of postmodernity as being multi-layered because the new paradigms are based upon a secondary respectively tertiary re-modelling of the preceding one. This hypothesis can explain the unavoidable and legitimate creative role of administrative agencies in the new transnational realm of decision-making, and allows for a more systematic self-reflection of the dynamic process of change in administrative and private law.

II.2. A side look at private law: Is Lex Mercatoria law?

Some legal theorists have put forward the claim that global law, the *Lex Mercatoria* as a self-organised practice of private law, in particular, has to be regarded as “less closed” and less autonomous. However, this would be a misunderstanding: as will be shown later, global law differs considerably from state-based law; this notwithstanding, the law should not be regarded as losing its autonomy under conditions of globalisation. Instead, the network paradigm can contribute to a better understanding of the new types of transnational legal practices: *Lex Mercatoria* lacks the coherence and methodological foundation of traditional private law, but this is not a problem, because the common frame of interests of (mainly) big transnational firms can compensate for the lack of guidance of the arbitration practices. Its openness is further attenuated by the practice of referring to clusters of arbitration decisions and the UNIDROIT-principles. A parallel might be drawn between this new type of

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entanglement of norms and contracts in private law, and the new creative function of administrative agencies, which consists of the design of new forms of action in transnational networks of public and private actors.

The disruptions and fragmentations emerging from the evolution of the “global law beyond a state” or, rather, from a heterarchical “network of networks” of law with varying combinations of characteristics according to actors, transactions, knowledge bases do not – according to systems theory – call into question the autonomy of law as a self-constructing system which operates with its own tool box and observes itself within its own horizon, which cannot but draw a distinction between itself and its environment (the other systems in particular) and is not just driven by external forces (like the political or the economic system).

However, it is not without consequence that it is not just from the point of view of systems theory that the question “is global law ‘law’?” has to be raised. The doubt that the question may be answered in the negative is one of the uncertainties which irritate the professional observers of the practices that are termed “global law” as opposed to international law. This is probably one of the reasons why N. Luhmann took the view that the “world society” - beyond the legally-structured nation state and the international public

373 (2008) See also INTERNATIONALES VERWALTUNGSRECHT (Christoph Möllers, Andreas Voßkuhle & Christian Walter, eds., 2007).
19 Kingsbury, supra, note 9; See also Alec Stone Sweet & Florian Grisel, L’arbitrage international: Du contrat dyadique au système normatif, 52 ARCHIVES DE PHILOSOPHIE DE DROIT 75 (2009) who focus on the judge-like stabilisation of a “dyadic” normative practice by a third party; this view underestimates the autonomous creative potential of a transsubjective practice.
20 See Eberhard Schmidt-Aßmann, Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen, 45 DER STAAT 315 (2006); Franz C. Mayer, DIE INTERNATIONALISIERUNG DES VERWALTUNGSRECHTS (2006); Auby, supra note 1; Stefano Battini, AMMINISTRAZIONI SENZA STATO. PROFILI DI DIRITTO AMMINISTRATIVO INTERNAZIONALE (2003); Sabino Cassese, LO SPAZIO GIURIDICO GLOBALE (2003); id., The Globalisation of Law, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 976 (2006); Richard B. Stewart, The Global Regulatory Challenge to U.S. Administrative Law, 695.
law as centred on the nation state as well - is increasingly governed by “cognitive” rules, and not in any traditional normative mode.

II.3. Global law – Is it law?
In the present discussion on global law, the question “Is it law?” has been raised in particular by G. Teubner, and, recently, by B. Kingsbury. The recognition of a possible “generation of norms as a spontaneous process” between equal private actors seems to be quite acceptable for traditional approaches to law. However, this is different with reference to public law, which seems to be based upon the will of an institutionalised legislator or a delegation of law-making power. Some authors even go so far as to deny any evolutionary dimension of public law that is said to be “intentionally steered”. Traditional public law still draws on the forms that have emerged in the realm of the nation state, and tends to deny the legal character of the new phenomena of global law when it seems to transcend the borders of international law. The uncertainties of the new legal order which no longer fit in the forms of law, which

24 Kingsbury, supra, note 9; for a critique see Ming-Sung Kuo, Inter-Public Legality or Post-Public-Legitimacy?, A Response to Professor Kingsbury’s Conception of Global Administrative Law, 20 EJIL 997 (2009); see also Ralf Michaels & Nils Jansen, Private Law Beyond the State? Europeanization, Globalization, Privatization, 55 AMERICAN JOURNAL OF COMPARATIVE LAW 843 (2007), who give an overview of the discussion and demonstrate the primarily semantic character of the controversy; Gralf-Peter Calliess & Peer Zumbansen, ROUGH CONSENSUS AND RUNNING CODE. A THEORY OF TRANSNATIONAL LAW 79, 113 (2010), take the view that elements of domestic law that are transplanted to the transnational sphere of law undergo a “transmutation” – one may think that this is but another version of the semantic controversy.
27 Möllers, supra, note 25, 330, 338.
28 For the sources of international law that are relevant in global administrative law See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, The Emergence of Global Administrative Law, 68 LAW AND CONTEMPORARY PROBLEMS 15, 29 (2005); for the necessity to go beyond these norms in the traditional sense see Christian Tietje, Recht ohne Rechtsquellen?, 24 ZEITSCHRIFT FÜR RECHTSPOSITIOLOGIE 27, 40 (2003).
have been moulded by, and with reference to, the state are expressed by the use of the term “soft law”. 29 Jerry L. Mashaw has convincingly argued that the doubts of the “lawness” of global administrative law stem from the same origin as the conventional ignorance of the generative power of administration that manifests itself in the emergence of the “internal administrative law” in the 19th century. 30 In the following, it will be shown that the basic transformations domestic administrative law has undergone in the last decades can only be explained if such an evolutionary dimension of public law, which opens a new perspective also on the emergence of global administrative law, is recognised.

In international private law, the question of whether Lex Mercatoria is law is controversial, as well. 31 In global administrative law, the question can – apparently - be left open according to many authors, because also domestic administrative practice have acknowledged a number of forms of preparation, of internal rule-making, procedures which have a strong impact on the legal processes without being (unanimously) regarded as being legal acts or legal norms in the stricter sense. 32 G. Teubner – as a private lawyer – is focused on private legal norms, and takes the view that it is “global civil society” to which the new forms of societal legal norms can, and, indeed, have to, be attributed as an authoritative “source” of law beyond the state. This approach pre-supposes a new “societal constitutionalism” 33 that stipulates a law-making potential beyond the traditional forms of the


30 Mashaw, supra note 6, 1470, 1476.

31 See Ralf Michaels, The True Lex Mercatoria: Law Beyond the State, 14 NDIANA JOURNAL OF GLOBAL LEGAL STUDIES 447 (2007) (that lex mercatoria can neither be reduced to “anational” law nor to a derivative of state law but has attained a new quality of a law beyond the state that combines diverse elements); see the documentation of the controversy in Klaus-Peter Berger, FORMALISIERTE ODER “SCHLEICHENDE KODIFIZIERUNG” DES INTERNATIONALEN WIRTSCHAFTSRECHTS (1996) (containing a differentiated discussion of all major pros and cons with reference to the question “Is it law?”); see also (skeptically) Jan Kropkoller, INTERNATIONALES EINHEITSRECHT 123 (1996); more positively: Ursula Stein, LEX MERCATORIA 211 et seq. (1996); Hans-Joachim Mertens, Das Lex Mercatoria Problem, in: FESTSCHRIFT ODERSKY 857, 860 (Reinhard Böttcher et al., 1996).


The spontaneously generated norms of transnational operations (not only commercial in the narrower sense, but also including the “Lex Digitalis” of the global communication order or Lex Sportiva as the law of the transnational sports organisations and their rule-making requirements) are not generally recognised as law by state-based tribunals, whereas, in fact, as long as this “law” can make use of its own institutions (the international mediation procedures), it is, at least, a functional equivalent to law in the stricter sense. G. Teubner takes a more principled approach and, as a consequence of the acknowledgment of the norm-giving power of the “global civil society”, attributes legal character in the stricter sense to Lex Mercatoria – following the terminology of H.L.A. Hart - because it has generated its own “secondary rules”, i.e., procedures of reflection, distinction and control, as opposed to non-institutionalised norms of morality, etc.

III. THE HISTORICAL EVOLUTION OF GENERAL ADMINISTRATIVE LAW

III.1. The essence of the “positive law” of the liberal society: its rule-like character

In a deeper sense, a law that – as one might rephrase the above-mentioned quotation from the recent book of Joyce Appleby – rests on the assumption that “nobody is in charge of the collective order”, is “positive”. As a consequence, it is “non-instrumental”, in the sense that it refers to a “relationship in terms of rules”. These rules are decoupled from substantive values, and allow for the co-ordination among agents who pursue their self-chosen goals. This assumption raises a lot of criticism about the collective and social character of the individual – a criticism which misses the point. Clearly, the individual is not - in a meaningful sense - to be pre-supposed as the creator of his or her own self. Individuality is - itself - a social form...
that underlies permanent change. The non-instrumentality of the “positive” law and its corresponding conception of individual freedom do not invoke the “voluntary disposition of self-interested economic actors”. They pre-suppose an acentric society the collective order of which resides in the permanent emergence of innovations that establish a “play of ideas”, a pool of variety that contains an excess of possibilities over reality generated from the practices of co-operation, competition, imitation, and experimentation in society. Clearly, this process generates not only spontaneously, but also in a reflexive form of second order observation of the very rules and patterns its own infrastructure, meta-rules and stabilising institutions. However, it is most important to underline that the individual as a merely “self-interested economic actor” is primarily not a myth of liberal society, but one of its critics. This can be demonstrated by referring to the present discussion of the protection of the “commons” of culture against private appropriation in the digital world and its equivalent in the genetic engineering. The relationship between privately-owned knowledge and the “intellectual commons” is a permanent problem of the liberal society, but one should not overlook the collective, albeit distributed, character of the core of the “common knowledge” of society, which was characterised by open access and restricted by patent law only to a limited extent. In the economic order of the liberal society, a “culture of improvement” is enshrined, which was always open to knowledge transfer which was, to a large extent, not only accepted as being unavoidable, but also as being productive for the permanent generation of technological innovation and competition. This process does not exclude “public intervention” – on the contrary, apparently, the public knowledge infrastructure in countries such as Germany in the 19th century had a positive impact on the culture of innovation.

42 Wolfgang Streeck, RE-FORMING CAPITALISM. INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 156 (2010).
43 Appleby, supra, note 39, 156.
44 See for this concept Herbert Gintis, Rationality and Common Knowledge, 22 RATIONALITY AND SOCIETY 259 (2010).
46 See generally Rainer Wolf, DER STAND DER TECHNIK (1986); Milos Več, RECHT UND NORMIERUNG IN DER INDUSTRIELLEN REVOLUTION 272, 367 (2006).
III.2. The generation of the “acte administratif” as the main form of administrative action in the “society of the individuals”

The focus on legitimation and the derivative logic of the “application” of norms to cases misses the internal dynamics of the legal system, which is due to the subjective right as an institution which not only opens the potential for societal self-organisation of the economy, politics, the arts, etc., but also opens society towards a distributed rationality of the continuous transformation because it changes the temporal orientation from the past (the “given” and its reproduction as the aim of society) to the future and the uncertainty that it generates. The legal norms basically do not “steer” society in modernity, but protect the self-organisational potential inherent in the unrest which it introduces in the “society of the individuals”. 47 This self-organisational potential comes to the fore when the legal system is challenged by the dynamic knowledge base which generates “experience” as a distributed type of knowledge which no longer accepts a central privileged point of observation of society which is either “given” by tradition or claimed to be possessed by the political sovereign power in the European absolutist states. 48 In Germany, this “sovereign” knowledge, which combines normative and empirical aspects in as much as it claims that the administrative state holds this privileged position which allows us to know what the requirements of the public order are, is termed “Polizeywissenschaft” (“police science”). 49

The new administrative law of the second half of the 19th century 50 undergoes a fundamental change when it accepts that the concept of order mainly refers to a factual normality and its description by societal experience, and is no longer based upon the traditional knowledge of the sovereign state. 51 This is why it would be superficial to take the “acte administratif” (“Verwaltungsakt”), the sovereign unilateral administrative decision that

47 See only Appleby, supra, note 39, 248.
48 See on the emergence of the public knowledge that is needed for the government of the absolutist state Michel Senellart, LES ARTS DE GOUVERNER. DU REGIMEN MEDIEVAL AU CONCEPT DE GOUVERNEMENT, 236 et seq. (1995).
50 See for the development in Germany Michael Stolleis, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VOL 2: 1800 – 1914, 410 et seq. (1992); the concept had found its contours only at the end of the 19th century; the same goes for France, See Philippe Belaval, Foreword, in: Cédric Milhat, L’ACTE ADMINISTRATIF: ENTRE PROCESSUS ET PROCEDURES ? (2007).
51 In a theoretical perspective See Pierre Macherey, Petits riens. Ornières et derives du quotidien 21 (2009); id., De Canguilhem à Foucault. La force des normes 77 (2009)
has binding force even if it is not in conformity with the law, at face value.\textsuperscript{52} It is meant to deliver “fixed points” in the “floating mass of administrative activities”.\textsuperscript{53} Both legislation and legal doctrine were more interested in very broad issues of the general legal order, whereas the operation with the increasing complexity of technical knowledge and industrial innovation were left to the discretion of administrators.\textsuperscript{54} The “\textit{acte administratif}” corresponds to the distributed logic of the “private law society” (\textit{Privatrechtsgesellschaft}) which processes innovation, experiment and social experience.\textsuperscript{55} The authoritarian character of the “\textit{acte administratif}” (Verwaltungsakt) should not be taken at face value; it is an extremely modern instrument that that has demonstrated its flexibility even under postmodern conditions of complexity.\textsuperscript{56} It is a form of a flexible public intervention that corresponds to the character of the positivist law “without a goal” of its own.

The “\textit{acte administratif}” has both an external function (in the limitation of subjective rights) and an internal function which allows administration to process rational decision-

\textsuperscript{52} The focus of German (and French) administrative law on the Verwaltungsakt (“\textit{acte administratif}”) is said to have focused on state intervention and to have neglected the role of the administration in the development of benefits administration and infrastructure in particular, Kersten & Lenski, \textit{supra}, note 9, at 504; but this is far from convincing because the American evolution follows the same track without being focused on the “administrative act”, Mashaw, \textit{supra}, note 7.\textsuperscript{53}


\textsuperscript{55} It is not a coincidence that one of the founders of modern public law in Germany, Carl Friedrich von Gerber (\textit{GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHTS}, 2nd ed., 1869) was first a private lawyer; his focus on the “will power” (“Willensmacht”) of the state and its putative “blindness” to political goal finds its reverse side in the openness toward the observation of the social dynamic of a liberal society; See also Carsten Kremer, \textit{DIE WILLENSMACHT DES STAATES. DIE GEMEINDEUTSCHE STAATSRECHTSLEHRE DES CARL FRIEDRICH VON GERBER}, 296 (2008) (for the relationship between goals and “willpower”).

\textsuperscript{56} The work by Reimund Schmidt-De Caluwe, \textit{DER VERWALTUNGSAKT IN DER LEHRE OTTO MAYERs} 63 et seq. (1999) and Michael Stolleis, \textit{GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND}, Vol. II, 332 et seq. (1992) overstate the political connotation of the emerging German administrative law in the 19th century and neglect its internal rationality; more differentiated Thomas von Danwitz, \textit{VERWALTUNGSRECHTLICHES SYSTEM UND EUROPÄISCHE INTEGRATION} 31 et seq. (1996); Roger Müller, \textit{VERWALTUNGSRECHT ALS WISSENSCHAFT}, FRITZ FLEINER 1867 – 1937, 100 (2006).

\textsuperscript{57} The focus on willpower fits in the general trend towards a social-darwinian “vitalism” as a far spread everyday philosophy in Germany that is neither liberal in a political sense nor democratic but not antimodern; See Jürgen Große, \textit{LEBENSPHILOSOPHIE} 89, 101 (2010), where the momentary expression of willpower in response to a situation is highlighted.

making on a case-by-case mode from which a structure emerges which can be deciphered both by the administrative practitioners themselves and by private actors. If this process is not in line with the experience diffused and reproduced by society, and if it comes into conflict with the rights of the private actors, it can be controlled by courts with reference to the rationality of the decision-making process itself. This conflict gives courts the opportunity to re-process the “actes administratifs” in a network of judicial decisions with a view to the legitimate expectations which can be formulated and further processed upon the basis of the “rights” of private actors. In this way, the “acte administratif” is “re-coded” as an infringement in personal rights while, at the same time, it is processed in the administrative decision-making procedures which contribute to the stabilisation of the impersonal inter-relationships which allow for the self-organisation of society. This evolution corresponds to the rise of “realism”, a social ideology that challenges the holistic conceptions of German idealism and opens a perspective on the dynamic of “will power as the point of departure for a new construction of society – as distinct from tradition.

Here, we are confronted with the blind spot of the legal system, which demonstrates difficulties in acknowledging the process-likeacentric character of the evolution of its own frames of reference. It is not by coincidence that Philippe Belaval, a member of the French Conseil d’Etat, in his preface to a book on the modern use of the “acte administratif” refers to the “plurality of the architects” of the concept - a view that pre-supposes that the elements of architectural design are pre-determined and given. From a postmodern perspective that takes into consideration the approaches of comparative research in literature which try to describe the text as a paradoxical effect of an anonymous intertextuality, the co-presence of other texts which interfere with the production of meaning beyond the will of the author, one might get an idea of how basic concepts of public law such as the “acte administratif” (Verwaltungsakt) in continental European law can only be regarded as the result of a process that writes itself

62 Belaval, supra, note 50, 7.
63 See from a perspective of the humanities Michel Charles, INTRODUCTION À L’ÉTUDE DES TEXTES 221 (1995).
64 Gérard Genette, Palimpsestes. La literature au second degré 8 (1982).
within an “environment of possibilities” (“environnement des possibles”).

It is the emergent product of a discontinuous process of variation of cases, the stabilisation of “local equilibria”, and of transcending them increses and of the search for new “local equilibria”. Certain possibilities are given up, others are retained and interwoven in a multitude of inclusive options and exclusive constraints. This inter-disciplinary approach sheds some light on the distribution of competencies between administration, administrative courts and the legislator. The focus on legitimation is misleading, because it tends to reduce the processing of the administrative act to its “would-be” origin in the Ancien Régime and to oppose it to the democratic will as the only acceptable source of legitimation. Without a “discursive memory” that links - in retrospect - the distributed intertextuality of the implicit construction of a basic legal institution to a prospective generative dimension within a domain of options that is only - to a limited extent - the object of explicit design, a productive role of the legislation is inconceivable.

This is why the requirement of a democratic legitimation for both private and public law can only be acknowledged to a very limited extent. The administrative law of the “society of individuals” is closely linked to the logic of private law and its reference to the self-organisation of differentiated societal systems (the economy in particular). It introduces a

65 Charles, supra, note 63, 102.
66 Charles, supra, note 63, 102.
67 This reference to the acentric intertextuality of the selftransformation of law may in fact be more adequate to legal theory than the focus on “evolution” which can only be used in a more or less metaphorical way because there is no functional equivalent to genes in the legal system; See for the observation of oscillatory processes at the “borders” of the legal system Fabian Steinhauser, GERECHTIGKEIT ALS ZUFALL. ZUR RHETORISCHEN EVOLUTION DES RECHTS 94 (2007); Marc Anstutz, EVOLUTORISCHES WIRTSCHAFTSRECHT 271 et seq. (2001); Gunther Teubner, AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 221 et seq., 226 (1988) (the focus on “pattern prediction” still remains vague and is ignorant of selftransformation processes that the system cannot control), Niklas Luhmann, DIE GESELLSCHAFT DER GESELLSCHAFT, Vol. 1, 549 (1997) takes the view that the “evolution of ideas” is context dependent and does not underlie the control by argumentation – what this means for the evolution of system remains unclear; critically Robert W. Gordon, Critical Legal Histories, 36 STANFORD LAW REVIEW 57, 81 (1984); also Lawrence Rosen, LAW AS CULTURE 56 et seq. (2006).
69 This does not mean that no radical reform is possible because the model that could only be briefly sketched cannot exclude that search processes end in a lock-in that blocks any productive experimentation; See the paper by Daron Acemoglu, Davide Cantoni, Simon Johnson & James A. Robinson, The Consequences of Radical Reform: The French Revolution, Discussion Paper 2010, http://econ-www.mit.edu/files/5644 (arguing plausibly that the Napoleonic reforms introduced in several German territories at the beginning of the 19th century had lasting positive effects on the economic development.
70 See Ralph Michaels, Umdenken für die UNIDROIT Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vortragsrechts, 73 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 866 (2009).
similar logic into public law because its cognitive frame of reference is now the society and its practical knowledge basis and not “police science” as in the past. Police power, which is the core of administrative decision-making, refers to a societal dynamic conception of the “normality”, – not to factual tradition and not to a privileged knowledge possessed by the state. However, the close link between the normative and cognitive elements of the definition and the protection of “public order” is preserved, even though it has to be observed and reflected in a much more sophisticated mode than in the past. This is all the more the case because knowledge takes on a dynamic character itself - in the same vein as the law. The state makes itself “understandable” by laying open the knowledge base which it wants to establish for administration and the world has to be made calculable. “Experience” is based upon self-transformation of society as is the legal system. This new perspective changes the status or the rule in general: it is generated “bottom up” from

71 Bohlender, supra, note 49; the mostly smaller German states in the late 17th and early 18th century had tried to epitomise an administrative rationality as the legitimization basis of public power, Yves-Charles Zarka, PHILOSOPHIE ET POLITIQUE À L’ÂGE CLASSIQUE 158 (1998); Michel Senellart, LES ARTS DE GOUVERNER. DU RÉGIME MÉDIÉVAL AU CONCEPT DE GOUVERNEMENT 282 (1995); id., “Juris peritus, id est politicus”? Bodin et les théoriciens allemands de la prudence civile politique au XVIIe siècle, 201, 216 et seq., in: JEAN BODIN. NATURE, HISTOIRE, DROIT ET POLITIQUE (Yves-Charles Zarka, ed.,1996) this allowed for the development of a compromise between an approached which remained focused on the state and an approach which described the state as a function of society. Because of the rise of a fragmented “special knowledge” as a basis for public decision making it seems doubtful that the concept of “police science” can be revitalized under conditions of postmodernity, See however the contributions in:THE NEW POLICE SCIENCE. THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE (Markus D. Dubber & Mariana Valverde, eds., 2006).

72 See the famous “Kreuzberg”-judgment of the Prussian Higher Administrative Court (Oberverwaltungsgericht) of June 14th, 1882, Reports (OVGE)) Vol. 9, 353; See Volkmar Götz, ALLGEMEINES POLIZEI- UND ORDNUNGSRECHT, 13th ed., 18 (2001); for the historical development in France, in particular the flexibility of the emerging police law See Paolo Napoli, NAISSANCE DE LA POLICE MODERNE: POUVOIRS, NORMES, SOCIÉTÉ 15 (2003).

73 Bohlender, supra, note 49; for the US See T. R. Powell, Administrative Exercise of the Police Power, 24 HARVARD LAW REVIEW 268 (1911); for France Senellart, supra, note 48.

74 Paolo Napoli, Misura di polizia. Un approccio storicoconcentraiale in età moderna, 44 QUADERNI STORICI 523 (2009).

75 For the broad conception of “police” in the ancien regime See Pasquale Pasquino, THEORIES OF THE STATE IN EARLY-MODERN EUROPE 42, 61, in: Dubber & Valverde (eds.), supra, note 71.


individual behaviour, and not from a totalising point of view, which would be incompatible with the experimental order established by private law. This new dynamism comes to the fore both in police law, which observes the new economic and technical dynamism referring to the distinction of “danger”/normality (in conformity with experience), and models its “control project” on the patterns of the societal self-understanding of technology (control of steam engines, gas containers, safety of buildings, etc.). The “normal” is not dangerous. The same is true for private law where, for example, the requirements of the conclusion of a contract or the definition of “negligent” (unlawful) behaviour refer to experience emerging in society.

The state even intervenes in the activities to distribute experience in society when its knowledge remains restricted to local or regional communities. It presses for the establishment of private self-organised organisations which are meant to evaluate and promote experience which can be regarded as reliable (Technischer Überwachungsverein, TÜV, Verein Deutscher Ingenieure, VDI, etc.). This shows that the legal system cannot be only/cognitively open on a case-to-case basis and adhere to stable legal rules at the general level: there is a continuous exchange between a normalised societal experience which is increasingly formulated in technical rules for the construction of machinery, or the construction of buildings. And both private law and public law have to refer to this “normal” knowledge” when it comes to the question of whether damage (caused by the explosion of a gas container, for example) was to be attributed to “negligence” (ex post) or whether it had to be regarded as “dangerous” by police (ex ante). This does not mean that the economic system or technology impose certain rules on the legal system and call its self-construction into question – not at all. Legal rules cannot be processed without a reference to societal rules and the self-generated “internal law” of administration – this constitutive link between recurring patterns of behaviour in society and the normative patterns which have to be constructed,

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81 The police power as a “governmental practice” of the state preserves its forms but it exchanges the cognitive schemes it draws on; see Paolo Napoli, “Police”. La conceptualisation d’un modèle juridico-politique sous l’Ancien Régime, 20 DROITS 183 (1994) and 21 DROITS 151 (1995).
83 Wolf, supra note 46.
84 Mashaw, supra note 7, 1413, 1461; the concept goes back to Bruce Wyman, THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903).
observed and tested in the legal system is essential to the legal rationality.\textsuperscript{85} This does not mean that normal knowledge is just blindly introduced into the legal system. On the contrary, the legal system can, and has to, observe whether these practical rules are sufficient, reliable, have to be modified upon the basis of new experience, \textit{etc}. Normality and normativity are closely linked, and this link is continuously observed, revised and re-modelled.

Administrative law is driven by two contradictory forces: on the one hand, the administrative agents behave as a “community of experimentalists”,\textsuperscript{86} which operates with a kind of implicit horizontal linking from case-to-case, whereas courts, on the other hand, have a tendency towards a type of explicit conceptual re-coding, which tries to limit the processes of self-organisation that are necessarily inherent in the administrative practice. There is a permanent interplay between these two types of internal and external stabilisation of the administrative legal process. However, it would be superficial to regard the judicial practice as the creator of the institutions of administrative law.\textsuperscript{87} Its stabilisation is the outcome of a co-operative process which is only moulded in statute law much later. This process can be regarded as a distributed evolutionary process\textsuperscript{88} which draws upon the different functions of administration and judiciary.\textsuperscript{89} The autonomy of the “relational rationality” of administrative decision-making should not be derived from “expertise”\textsuperscript{90} in a stricter analytical sense, but is due to the evolutionary character of the dynamic self-transformation of society: this evolutionary process which subsumes administrative law to a permanent unrest from which new patterns and instruments of decision-making are generated can be described as drawing on an “abductive” approach (following the terminology of Charles S. Peirce)\textsuperscript{91} which is a reasoning that creates a new meaning from the observation of “cases” and conflicting rationales, and leads to a broadening perspective on the societal pool of variety beyond the

\textsuperscript{85} Lefebvre, \textit{supra}, note 79, 59.
\textsuperscript{87} Mashaw, \textit{supra} note 7 1378.
\textsuperscript{90} See for this argument Long Island Care at Home Ltd. v. Coke, S. Ct. 127 2339, 2346-47 (2007).
\textsuperscript{91} Christiane Chauviré, \textit{PEIRCE ET LA SIGNIFICATION. INTRODUCTION À LA LOGIQUE DU VAGUE} 201 (1995).
possibility of inferring a new stable rule that can be “applied”.\(^{92}\) It is more a kind of a “move” within a game with incomplete rules which emerge from the game itself. This is a logic of incompleteness that is not accessible from a control-project which epitomises conformity to rules.

But to describe administrative law and its institutions in the 19th century as judge-made law misses the point: it is mainly an autonomous product of administration itself both in Europe and the US:

“The structures and processes of administrative adjudication were designed and built almost entirely by the administrative agencies themselves.”\(^{93}\)

This is true also for the US: Jerry L. Mashaw has epitomised the generation of “trans-substantive” internal rules of decision-making by administrative decision-makers in the 19th century.\(^{94}\) For the US, it is quite characteristic that the existence of much of this earlier administrative law was even denied at all,\(^{95}\) mainly because it did not fit in the model of accountability and legitimacy of law. The US administrative law is not based upon a focal construction like the French and German “acte administratif” (“Verwaltungsakt”); however, it is also centred on the search for the adequate forms of intervention into individual rights and the processes of self-organisation that their use unleashes.\(^{96}\)

### III.3. Intermediary remarks on the embeddedness of the legal system in the “epistemic knowledge base” of society

Historians of social and economic institutions, such as Joel Mokyr, have underlined - with good reasons - the hypothesis that one should not over-estimate the role of formal institutions in the evolution of modern western societies.\(^{97}\) Cultural beliefs and self-enforcing practices of trust-building and reputation were at least as important as formal institutions.\(^{98}\) The complex

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94 Mashaw, *supra*, note 7, 1377, 1466.
95 Mashaw, *supra*, note 7, 1378.
96 Frank J. Goodnow, *COMPARATIVE ADMINISTRATIVE LAW* 6 et seq., 371 et seq. (1905).
legal system is rooted in a broader “epistemic knowledge base”. We will see later that the one-sided perspective on the legal system in the stricter sense leads to futile questions on what the legal nature of “global administrative law” really is.99 This approach either leads to the fixation of a traditional static concept of law or the problematical assumption that a global civil society can be regarded as generating and “constitutionalising” its own legal system beyond the state.100 The focus should, instead, be on the permanent unrest inherent in the experimental acentric order of (post-) modern society which introduces an evolutionary “drift”101 into the cultural memory of society, which is also a challenge for the legal system, because there is a close inter-relationship between the cognitive and the normative rationality of society.

The knowledge order of society was (and is) constituted in a way which not only differentiates between general knowledge (“in the books” and in practical experience) and privately appropriated information (legally-protected by patents or practical processes of keeping know-how secret in firms) but also left open a broad range of operations of freely-sharing information (which seems to be regarded by many protagonists of the internet world as something completely new – which is definitely not the case). Robert C. Allen calls this phenomenon “collective invention”102 which includes, for example, the spread of the steam engine as a basic innovation of the 19th century. Especially in the UK and later also in Germany and other countries, social conventions and “self-enforcing modes of behaviour”103 were much more important for the stabilisation of the legal system than the formal adjudication by independent judges in single/individual cases of conflict. It is quite characteristic that the goals of policing in Germany included the preservation of “public order” (as opposed to “public security”,104 in the narrower sense) i.e., the observation of the

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100 for a critique see also Möllers, supra, note 25, 329; Christian Tietje, Transnationales Wirtschaftsrecht aus öffentlich-rechtlicher Perspektive, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTWSSENSCHAFT 404, 418 (2002); Rost, supra, note 35, 87.


102 Robert C. Allen, Collective Invention, 4 JOURNAL OF ECONOMIC BEHAVIOR 1 (1983); Mokyr, supra note 97, at 22.

103 Mokyr, ibid., 12.

“appropriate” behaviour in public and the respect for social conventions (below the level of formal law) such as disciplined and controlled self-presentation in public including basic norms of politeness, clothing, cleaning, sexuality, etc.  

These remarks should have made it clear that, in the “society of individuals” of the 19th century, both public and private law were based upon complex layers of social knowledge, conventions and professional practices, all of which were enshrined in the public order at large or in social and technical experience. Without reference to this cognitive infrastructure, neither private nor administrative decision-making can be understood.

The “administrative act” was, as seen in the perspective opened here, not a relict of the absolutist state, but a modern instrument of rationalising administrative practices and of co-ordination between the society of the individuals and the preservation of “public order”. It turns it into the new experimental order that can no longer draw on a fixed set of rules and traditions. Its new form is a product of the evolutionary “drift” of the development of administrative law, which can only ex post be stabilised by “judge made law” or later by the legislator.

III.4. The secondary re-modelling of the traditional administrative law of the society of the individuals

The exchange process between the law and the structured practical networks which generate and distribute societal experience is in constant flux. A distinction has to be made between the continuous flow of information which emerges from the permanent variation within societal knowledge basis, and the momentary suspension of normality by the rise of new factual paradigms which induce a kind of “break of symmetry” in the inter-relationship between technical normal knowledge and the feedback loops which have to be designed within the legal network of networks. This was, for example, the case when the knowledge process became more dynamic and, as a consequence, the concept of normality had to be re-framed: increasingly, this dynamic is reflected in the legal system when the question is raised as to whether bigger firms have a duty to take an active part in the creation of knowledge and

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106 Nobert Elias, supra, note 11.
107 Gauchet, supra, note 77.
108 For an overview of the function of the “Verwaltungsakt” in present day German administrative law see Christian Bumke, Verwaltungsakte, 1031, in: GRUNDLAGEN DES VERWALTUNGSRECHTS, VOL. 2 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle, eds., 2008).
are no longer allowed just to adapt to the current “state of the art” or when (in administrative law) the orientation on experience and “danger” (in the end: damage) is at stake.

The hitherto central unilateral administrative decision is in decline – not only in global administrative law. Things get more complicated to judge if one bears in mind that this is also true for domestic law. At the global level in particular, not only informal measures and procedures take the lead over the “acte administratif” as expression of the internal sovereignty of the state, but also the norms which are referred to in global law are mainly not legal norms which are part of international public law, but factual standards or, if one may put it this way, self-organised “norms in being”, procedural rules in particular.

The same goes for the concept of “person” as a cornerstone of the liberal positive legal order: this concept draws on the stability of roles and the attribution of future-oriented expectations to legal actors abstracted from the stability of tradition. Once the person is supplemented by the organisation and – recently – by networks of relationship, one may assume that the fundamental relevance of the person has changed, as well. The role of the person is mediated by its position in organisations and networks. Expectations can be multi-faceted under both conditions of complexity and the dynamic of self-transcendence of the liberal society. This dynamic allows for a new type of reflexivity of the legal order, which can operate with an open linkage between norms in the stricter sense and a whole range of different types of “social norms”, which, in the past, remained more or less hidden in the administrative practices. Both components of the normative order are permeable for a reflexive acentric modelling of “expectations of expectations” both by and between organisations that have more strategic potential, in as much as they can construct longer chains of actions.

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109 For the different bridging concepts that are used for the transfer of knowledge into the legal system See Ladeur, supra note 83..


111 The reverse side is to be seen in the fact that the natural person as opposed to the “legal person” in the stricter sense has also been transformed: Increasingly norms are integrated into the legal system that refer to the individual “personality” as the object of care and assistance.

112 Théry, ibid., 140.

113 It is not a coincidence that at the beginning of the 20th century neither doctrine nor legislation had taken much account of the relationship between legal and social norms, Več, supra, note 46, 281.

114 Calliess & Zumbansen, supra note 24, 250 et seq.
The new reflexivity gives sufficient space for a “management of rules” which re-models the distinction between legal and factual norms: the spontaneous character is replaced more and more by explicit “standards” that demonstrate a new fragmentation and heterogeneity within the social knowledge base: experience based knowledge has to distinguished from the “best available knowledge”,\textsuperscript{115} in particular. Knowledge is further dynamised. This development includes the necessity to find procedural meta-norms for the observation of the new versions of the “loops” between both types of rules because there are, of course, problems which raise the question of how a norm has to be characterised: this is the case when the rights of persons who did not participate in the creation of the norm are infringed. However, this is not often to be assumed, because, in the society of organisations,\textsuperscript{116} persons are, in many constellations, legally represented by organisations or are subsumed under new general patterns of expectations beyond the classical “no harm” principle (for example, protection by public insurance, transformation of liability, including strict liability, the creation of group rights, such as the rights of workers and consumers). Often, no external effect of norms can be observed because it is only the general framework of decision-making that is touched by an organisational process. Many social norms are more a kind of functional equivalent to the process of self-construction of experience as a collective, distributed knowledge base.

The more complex type of administrative decision-making that comes to the fore in the domains of planning, high technology (nuclear power, genetic engineering) and risk, in particular, demonstrate that the construction of a balancing decision in these fields is not equivalent to the classical type of a judgment based upon a “statutory interpretation”.\textsuperscript{117} This was the basis for the German legal conception of a structured process of planning that distinguishes the stable and the creative elements of decision-making. More often than not, the difference between public and private decision-making is not so fundamental: in both cases, the underlying legal norms are (mainly) not applied (when one can speak about a realm of discretion) but are referred to as limits to a self-organised practice of administration or a public-private “joint venture”.

\textsuperscript{115} For the meaning of this and other bridging concepts in environmental law See Ladeur, supra, note 83..
\textsuperscript{116} For the concept See James S. Coleman, Social Structure and a Theory of Action, in: Peter M. Blau (ed.), APPROACHES TO THE STUDY OF SOCIAL STRUCTURES (Peter M. Blau, ed., 1975) 76; Charles S. Perrow, COMPLEX ORGANIZATIONS. A CRITICAL ESSAY, 3rd ed. (1986).
The interplay between administrative decision-making and the law is historically changing: the external legislative norm or the judicial decision-making processes can exercise their stabilising role once a certain “internal” administrative practice has settled in a rule-like manner, while, in times of transformation, administrative horizontal-heterarchical approaches of processing from case-to-case in a creative way tend to experiment with new forms of administrative operation that do not follow rule-like patterns. This is creative function which one may call the “modernising mission”, which David A. Strauss attributes - with good reason - to the judiciary, but which includes - in a differentiated way - the administration, as well.

One has to accept that, from the outset, the public dimension of technical (and, later on, the more complex technological) risks and the private process of production are entangled. Technologies in postmodern society are more dependent on complex design and are “hybrid”, in as much as they often pre-suppose the development of a whole domain of options including far reaching potential side-effects on third parties or on human values (nuclear power, genetically modified organisms, nano-technology, etc.). However, technological questions have always had a societal dimension.

In environmental law, the pivotal role of the practical experience based upon the observation of damage is called into question, and the control project for high technology trajectories has to be adapted to risk management and the precautionary principle, upon which it is based. For our perspective, it is important to bear in mind that these deep transformations within the technological networks and the legal network of practices which try to learn from them find their repercussion in the legal system, albeit only partially.

One of its major transformations is to be seen – from the “cognitivist” point of view taken here, i.e., the observation of the emergence and transformation of rules and institutions

119 Frank Fischer, DEMOCRACY AND EXPERTISE. REORIENTING POLICY INQUIRY 143 et seq. (2009).
as elements of a societal memory – in the rise of the groups and organisations as the actors and as the generators of new types of knowledge in particular: the increasing importance of probabilities, groups with statistical regularities, the evolution of technologies of production and management (“expert knowledge” as opposed to distributed “experience” based upon action and upon the observation of its consequences) have had a strong impact even on administrative law. However, it would be an illusion to reduce the new discretionary power gained by reference to expertise to a mere delegation of power by parliament.

III.5. General administrative law as the product of administrative experimentation … and its judicialisation

Upon the basis of the theoretical reflections given above, one should, first of all, bear in mind that administrative law could not and cannot be conceived of as being mainly a product of the legislator. The same is valid for private law. Both legal domains are characterised by the challenge of enabling processes to cope with the fundamental uncertainty and the dynamic of the self-transformation of society and to generate forms of binding them in order to allow for co-operation, co-ordination, and learning. Both the development of the administrative law of the “society of the individuals” and the later/successive administrative law of the “society of organisations” could only be the emergent product of primarily administrative experimentation and of the retention of successful forms of action including the increasing importance of procedure as a resource for the creation and combination of knowledge for decision-making processes. Both in the private industry and in public administration, the

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122 Burkard Wollenschläger, WISSENSGENERIERUNG IM VERFAHREN (2009).
123 This is the view taken by Kenneth Bamberger, Regulation as Delegation: Private Firms, Decision Making and Accountability in the Administrative State, 56 DUKE LAW JOURNAL 377 (2006).
125 The role of procedure in administrative law should not be regarded as an illegitimate “ersatz” for appropriate democratic hierarchical empowerment, it is a necessary component of a procedural rationality of decision making which has to meet the challenge of uncertainty. See also Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 YALE LAW JOURNAL 1490 (2006).
126 Lefebvre, supra, note 79, 254, for the creative role of legal decisions.
127 For the U. S. administrative law in the 19th century this autonomous role of administration and the creation of its own “internal law” is epitomised in Mashaw, supra, note 7; 1413, 1461.
use of experience as the common societal knowledge basis was no longer sufficient. It is not by accident that, in a country such as Germany, since the early 1960s, a continuous process of broadening the scope of judicial control over the whole domain of the administration, which, in the past, had been reserved for non-legal administrative rationality (schools, status of public staff). In the same vein, discretion has been increasingly judicialised. As in the US, in Germany, too, there has been a permanent broadening of the acceptable arguments in legal controversies: more and more public decision-making is not only subject to strict control upon the basis of specific legal arguments, but also reference to the “principle of proportionality” or a broad understanding of constitutional liberties (which include “principles of protection” beyond the traditional conception of negative liberties) are commonplace today. This evolution is hailed by many as a phenomenon of “legalisation” of factual power. Upon closer inspection, this view appears to be superficial because it neglects the decline of the impact of the self-organised knowledge base and the set of social conventions which defined a collective understanding of a “common sake” of the public, while bargaining processes regarding the right of the individual upon an ad hoc basis have increasingly come to replace this collective element of the conventional infrastructure of the law as described above. This is, so to speak, the dark side of the change of paradigms in society: the emergent “society of organisations” tends to keep its rationality more or less


129 Again this does not differ much from the court restrain visa-vis administrative discretion in 19th century, Mashaw, supra, note 127.


131 Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2008), 72; Jacco Bomhoff, Genealogies of Balancing as Discourse, 4 LAW & ETHICS OF HUMAN RIGHTS 108 (2010), available at http://www.bepress.com/lehr/vol4/iss1/art6; the principle has found a philosophical preparation in the German “materiale Wertethik” (Nicolai Hartmann and Max Scheler) which has attributed to the facticity of values a normative foundation in the subjective act of valuing, See Nicolai Hartmann, Das Westproblem in der Philosophie der Gegenwart, in: KLEINERE SCHRIFTEN, 327 (1958), where the “type of situation” and its framing by the time of its emergence is regarded as essential for the attribution of values; Robert Spaemann, SCHRITTE ÜBER UNS HINAUS. GESAMMELTE REDEN UND AUFSÄTZE, VOL. 1 90 (2010); for a critique see also Karl-Heinz Ladeur, Das Bundesverfassungsgericht als ‘Bürgergericht’?, 31 RECHTSTHEORIE 267, 76 (2000).


invisible. Once self reflexive bargaining processes come into place which undermine the universalistic character of the liberal legal order, and the borderline of the “no harm” principle loses its cognitive and normative function (for example, the attribution of personal responsibility) any interest might re-enter the procedure of rule-making and put the bindingness of law at risk.

This decline is a repercussion of the emergence of a new paradigm of the legal infrastructure, i.e., the rise of the “society of organisations”. Again, the focus here is not on the comprehensive re-construction of this new societal formation and the transformation of the legal system which it provokes. Instead, the focus will be on the change of the societal knowledge basis which is characterised by a split between, on the one hand, the continuity of the self-reproduction of general experience distributed over the whole of society, and, on the other, the advanced knowledge which is generated by the big organisations both in the economic and the broader sense (including political parties, unions etc.). This new type of technological knowledge in particular has a far-reaching impact on the laws concerning the protection of health and the environment, because they introduce a prospective strategy (“the precautionary principle”, “risk”, instead of experience based “danger”, the balancing of interests in planning law, etc.). The differentiation of the new legal paradigm cannot be described in detail here. What is relevant for the intention of the present article is the hypothesis that both administrative action and judicial control change considerably – an assumption which does not rule out the continuity of the ongoing administrative practices of the past within a basic layer of decision-making on which a new layer of operations is super-

134 Nadia Urbinati, MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT 211 (2002).
135 See also Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 212 (2009), where the increasing juridification of political questions is correlated with the waning of confidence in technocratic governance: the judicial institutions replace the lessening integration of society by social norms.
136 See only Ladeur, supra, note 128.
137 Ladeur, supra, note 128.
138 See only for the precautionary principle Nicolas de Sadeleer, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 174 (2005).
imposed. It is structured by more complex and more sophisticated conventions and rules, which underlie a higher level of organised reflected observation, explicit formulation and revision: more and more implicit conventions which were co-ordinated and administered by large professional associations (VDI etc.) are replaced by explicit “standards”, and by private-public organised decisions (in multiple forms). For the New Deal, it can be shown, as well, that the emergence of a new type of expertise-based administration, deference to a type of knowledge that originated from the organised processes of cognitive specialisation beyond the general level of distributed experience, led to a reduction of judicial control which was later on compensated – once the new structure had settled and was organised by a new paradigm – by new approaches to a closer control of procedure, instead of the substance of decision-making. This shows that the participation of private parties in the regulatory process is inevitable and legitimate, as was the case in the private generation of experience in the “society of the individuals”.

One can summarise this evolution with the words of Noonan, Sabel and Simon as a transfer from “rule orientation” to the “formulation of plans”. This is, of course, a simplification, but it epitomises, with good arguments, the rise of a strategic component in both public and private decision-making: it is no longer the ideal of the continuity of the self-transformation of experience and the stability of public order which are both observed and preserved in a case-by-case mode via individual decisions (“acte administratif”). Instead, decisions increasingly have to be made in prospective “chains” of a plurality of actions both at

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141 See Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 260 (2008) for the problems related to the fragmentation of international environmental law: one way to deal with them consists in the reintegration of open principles of international law into the more elaborated structure of domestic environmental regulations.

142 For the evolution see Wolf, supra, note 46; Več, supra, note 46.


144 See the contributions in INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING (Christian Joerges, Karl-Heinz Ladeur & Ellen Vos, eds., 1997).


148 Legal Accountability in the Service based Welfare State, Columbia Public Law Discussion Paper 08-162
the same time level (co-ordination of plans) and with a view to an increasingly uncertain future. This leads to more fragmentation within administration, an evolution which finds its expression in the rise of independent agencies in the US, in particular, or in a loosening of the inter-relationship between the processed singular decisions: the “administrative act” loses its role of co-ordination among single decisions, while, at the same time, the fragmentation and the pluralisation of the types of decision-making rises. The focus on the processing of single acts and administrative discretion, on the one hand, and the observation and stabilisation of internal rules and doctrinal focal points as frames of reference in the processing of decisions on the other, vanishes and is replaced by the emergence of more loosely-coupled clusters and patterns of strategic comprehensive decision-making.

The complexity of planning procedures, social insurance and social assistance, and the supervision of technologies which developed beyond the horizon of practical communities and led to the establishment of more professional communities of specific knowledge (“expertise”) could primarily only be tackled by administration itself and not by steering laws.

III.6. Society of networks and the networks of law

The rise of the “society of networks”, a kind of a tertiary remodelling of the “society of the individuals” is the next step within the evolution of administration: it is characterised in/by the cognitivist approach developed here by the reaction to a further rise in complexity of the knowledge base of society. This evolution is due to the fact that the structuring capabilities of the second order model of modern society is changed by the rise of a new mode of production and organisation (supported by the importance of information as the principal resource of

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149 See for a conception of the cases of the U.S. Supreme Court as “nodes” within a network of interrelationships Timothy R. Johnson et al., Network Analysis and the Law: Measuring the Legal Importance of Supreme court Precedents, 15 POLICY ANALYSIS 324 (2007); in a similar vein David G. Post & Michael B. Eisen, How Long is the Coast Line of the Law?: Thoughts on the Fractal Nature of Legal Systems, 29 JOURNAL OF LEGAL STUDIES 584 (2000).


152 This does of course not exclude a more dominant role of the judiciary which tends to second guess the rationality of administrative decision-making, Martin S. Shapiro, Juridicalization of Politics in the US, 15 INTERNATIONAL POLITICAL SCIENCE REVIEW 101, 107 (1994) (for the “litigation-oriented style of rulemaking”).

production). The change to flat hierarchies and heterarchical self-organisation which process information in a new mode generates a third layer of the organisation of postmodern society. Technological knowledge, in particular, is no longer concentrated in stable expert communities, but is distributed in overlapping project-oriented “epistemic communities” which combine general and specific knowledge production in hybrid forms of communication; the primary examples are biotechnology, and computer technology both as a basis of production of new information programmes and as an organisational resource in other fields of production. More and more hybrid modes of organisation which blend forms of the market and organisational closure (“network contracts”) spread in society, and have a repercussion on the procedures of administrative decision-making which transcend traditional borders and stable separations. This transformation is driven by a disruptive change of information technology and the ensuing modes of communication that easily transcend the hitherto established borderlines between organisations, organisational departments and allow, for example, for hybrid forms of co-operation between people who remain, in one respect, strong competitors.

The rise of the concept of “governance” as a reflection of the transformation of the established “control projects” is referred to in both the private and the public sector. For

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155 Michel Gensollen, *Economie non rivale et communautés d’information*, RÉSEAUX 141 No. 124 (2004); id., *Biens informationnels et communautés médiatisées*, 113 REVUE D’ÉCONOMIE POLITIQUE, Special number, 8 (2003); see also, Ladeur, supra, note 146.


administration, this is equivalent to an even more intense involvement in knowledge generation processes, on the one hand, and the decrease of the privileged role of the “acte administratif” (“Verwaltungsakt”) as the “signifier” for the processing of the inter-relationships which allow for the weaving of knowledge-generating and knowledge-stabilising networks of decisions which bind uncertainty and allow for the linkage with private transactions. The relationship with private actors takes on an increasingly project-based orientation because it is the private sector which controls the knowledge processes in project-related networks as well. “Project”, in this sense, is not equivalent to a goal-oriented process – on the contrary, it refers more to a complex “mapping” of different co-operative ventures which are supposed to generate a domain of action first from which specific actions and strategies might emerge in an evolutionary way. Administrative networks of co-operation have to be set up both within the public sphere for the knowledge accumulation and outside it, i.e., via inter-relationships with networks of private actors. This is true for the support of technology (telecoms, high-tech) and also for the management of whatever risks which emerge from production processes which are set up beyond the realm of the traditional experience-based knowledge production. It should be epitomised that the basic “change agents” which produce a new deep process of self-transformation within the legal system and its infrastructure of social norms and practices have a cognitive nature: i.e., the

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162 This is why the explanation of the rise of the concept of “governance” as a repercussion of the subsumption of the state under the logic of the firm seems to be too simplistic, see Myriam Revault d’Allonnes, POURQUOI N’AIMONS PAS LA DÉMOCRATIE 125 (2010).
167 See also Eric A. Posner, LAW AND SOCIAL NORMS, 4 (2000) who points out that law operates always against a “background stream of nonlegal regulation” – however, game theory may be too thin to do justice to the productivity of social normativity.
knowledge used in production processes and their management underlie a disruptive change, and shatter the paradigm of co-ordination among the different layers of the rule system of society. The rapid transfer of knowledge enabled by information technology undermines the conceptual, organisational, legal and practical separations upon which the legal system is based, such as the institutional separation of the market (exchange processes) and organisation (which keep production and management processes partially insulated from markets). The use of sophisticated information technology allows for the establishment of hybrid co-ordination processes which show characteristics of both hitherto separated forms of order: for example, complex contracts on the co-ordination of firms and their suppliers make a close integration of production processes possible without a formal integration. This is one of the phenomena of a new network-like forms of generating order between stable organisational hierarchy and heterarchical “loose” co-ordination via the market and contracts. A further element is to be seen in the closer connection between technology and science in the development of high-tech products and procedures: the established stable mode of co-ordination between general science and specific product development undergoes a transformation which leads to a much closer reciprocal interrelationship between science and technology in both directions.  

168 i.e., on the one hand, joint-ventures on research of private firms react to the rapid transfer of scientific knowledge to product development (biotechnology). At the other extreme of the range of possibilities, one can observe even technological processes (Nano-technology) where there is no separation between these hitherto separated modes of knowledge and technological interventions into nature or the structure of materials creates new realities which lie beyond the abstract scientific observation of an outside reality. This need not be deepened here.  

169 At the middle range of technological evolution, the transformation of the network industries, in particular, have to be mentioned: the monopolistic hierarchical development of telecommunications services that followed a stable trajectory of technological improvement of “big networks”  

170 has been changed to a complex heterarchical opaque search process.

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168 This is the case for nanotechnology Jean-Pierre Dupuy & Alexei Grinbaum, Living with Uncertainty: Toward the Ongoing Normative Assessment of Nanotechnology, in: NANO TECHNOLOGY CHALLENGES: IMPLICATIONS FOR PHILOSOPHY, ETHICS AND SOCIETY 287 (Joachim Schummer & Davis Baird, eds., 2006).


under extreme uncertainty. This development has had considerable repercussions in the transformation of the legal structure of regulation: the state no longer claims to occupy a privileged observing position, instead, its position has been shifted to the periphery of a heterarchical network whose development can only be anticipated in a scenario-like mode.  

III.7. The changing “social epistemology” of the law and the fragmentation of society

The strategic “design” of such loosely-coupled networks is only imaginable as a co-operative venture in which the private actors have a stake themselves, because it pre-supposes the joint constructive contributions of more actors and information brokers, and includes the necessity to set up a self-reflexive component of a knowledge management: knowledge is not a neutral resource that can be conceived without paying attention to “social epistemology” as should have been made plausible by the examples of the knowledge basis of the “society of the individuals” and the “society of organisations”. This reflection should have shown that the form of networks that is - with good reasons - invoked when it comes to the description of administrative processes beyond the frames of territoriality is primarily a phenomenon which emerges from within the societal transformation of the nation states themselves. Global administrative law is not the product of the challenge of the state-based legal structure from outside, it is, instead, to be described as the outcome of a general shift from the paradigmatic forms of the “society of organisations” to the “society of networks”, which has a disruptive effect on the legal structure which found a new stability in the 1970s and 1980s of the 20th century after a long period of experimentation. The emergence of the fragmented network form is due to a new evolutionary transformation of the knowledge- and rule-base of society in the broad sense sketched in this article.

174 Eileen M. Milner, Managing Information and Knowledge in the Public Sector, 65, 164 et seq. (2000).
175 For the fundamental transformation and flexibilisation of “space” See Saskia Sassen, TERRITORY, AUTHORITY, RIGHTS, FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008); for the reconstruction of “space” as an outcome of complex formal and informal networks (as opposed to clear separation of “levels”) See Kevin R. Cox, Spaces of Dependence, Spaces of Engagement and the Politics of Scale, 17 POLITICAL GEOGRAPHY 1 (1998).
176 This transformation finds its repercussion in the rise of multiperspectivism in philosophy, in particular in
The rise of the concept of the network is a consequence of the fact that it is no longer a stable separation between the general experience as a distributed knowledge base, on the one hand, and the “best available” knowledge produced by big firms, on the other hand, which characterise the focal structure of the cognitive “pool of variety” but a much more heterarchically fragmented loosely-coupled cognitive network which is at stake in postmodernity. This new structure allows at the same time for more intense co-ordination among private actors themselves and between public and private actors in a way that blurs the hitherto-established separations that had already – if only to a limited extent – been severed by the institutions of the “society of the organisations”. The flexibility draws on the fact that the phenomenon of the “joint venture” established by firms which still compete with each other on the market demonstrates the potential of co-operation in new project based “epistemic communities”. This is valid both for the private and the public domain. In the realm of the latter, the state is able to co-ordinate its strategies with groups of firms in research processes which are no longer “steered” by stable technological trajectories and expectations.

Something similar goes, for example, for the co-ordination among transnational firms upon the basis of the new Lex Mercatoria which is self-organised by private operators; however, one should bear in mind that, in general, rather big enterprises are parties like a


For the use of knowledge in economy still fundamental Friedrich August von Hayek, The Use of Knowledge in Society, 35 AMERICAN ECONOMIC REVIEW 519 (1945).


Gensollen, supra, note 155.

See for the paradigm of “steering” private action through administrative law see Kersten & Lenski, supra, at 9, 530 et seq.; Wolfgang Hoffmann-Riem, Eigenständigkeit der Verwaltung, in: GRUNDLAGEN DES VERWALTUNGSRECHTS, Vol. 1, § 10 No. 13 (Eberhard Schmidt-Äßmann & Andreas Voßkuhle, eds., 2006).
“club,” to its processing while conflicts among smaller firms are still judged by state courts with reference to a generalised set of norms which have their origin in the realm of public transactions.

One has to admit that the cohesion of the new transnational law is (and can be) - to a much lesser extent - stabilised by public institutions; institutions (legal norms in particular): it is more driven by a network of dispersed strategic operations of big law firms (for transnational clients). This is not so much a non-democratic illegitimate form of law-making but, due to the advent of a new structural “drift” in the legal system, a phenomenon that is not new if we look back to the emergence of preceding legal paradigms.

Looking back on the internal self-transformation of the state-based legal system, one can - with good reason - ask whether the ensuing fragmentation of the cognitive basis of the postmodern society and its impact on the fragmented legal system does not challenge the role of the public at large and its participation in legal rule-making. However, one has to be aware of the fact that, even in the liberal “society of the individuals”, the central frame of reference for the generation of a collective order has been the spontaneously processed realm of experience and its societal rules, upon which the formal legal system was super-imposed as the second layer of the normative system of society. The legislator had only played a minor role in this system as has been shown above. Even in the “society of organisations” during its heydays in the 1970s, the democratic “steering” potential of the state could not primarily make use of legislation, but, in the so-called “golden age”, the nation state had to draw on the pre-structuring of society by the corporatist co-operation of the pluralistic social groups and the big firms and the “representative organisations” of both. This complex group-based

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186 For the legitimation function of participatory processes in decision making procedures See Esty, supra note 125, 1489.
infrastructure of the late modern nation state has left its traces in the legal system, which was composed of both an increasing number of laws and the regulation of more and more spheres of societal domains in the welfare state. However, a closer look at the norms themselves make it clear that their conception pre-supposed a moderating role of administration and in the legal system in the proper sense a new methodology that opened itself toward the “normalising” impact of the differentiated social spheres by reference to broad concepts which built a bridge between the pre-structured reality and the law. A prominent example for this new methodology is the rise “balancing”, and the “proportionality principle”: 189 both are fact ridden, in the same way as the understanding of the major concepts of liberal law had drawn on general experience and social norms 190 as the frame of reference for the legal practice. The state-based conception of the democratic statute 191 as the core of the legal system has always been normativistic wishful-thinking. 192 In this respect, no fundamental change has occurred in the postmodern society of the networks. This common limitation of legislation by its

189 See the overview in Tor-Inge Harbo, The Function of the Proportionality Principle in European Law, 16 EUROPEAN LAW JOURNAL 158 (2010); the “proportionality principle” can in my view not be interpreted as a judicial strategy to gain dominance over policy making or even the reform of constitution, as Alec Stone Sweet & Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 68 (2008), argue; this would be a much too broad assumption because this approach is often also chosen where courts could well follow more classical doctrinal strategies of argumentation (e.g. the judgments of the German Federal Constitutional Court on the constitutional limits of the freedom of expression or other constitutional liberties); even a rather politically active court such as this court is far from “dominating” policy making, it strengthens sometimes interests that are neglected by the consensus oriented political process but does not call its basis into question; reference to the proportionality principle is rather an expression of the increasing internal tensions within the postmodern legal order (Karl-Heinz Ladeur, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK (2004) and its overcomplexity due to the openness to any interest and its lack of “meta-rules of collision”; see Andreas Fischer-Lescano & Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 199 (2004); Robert Wai, Transnational Private Law and Private Ordering in a Contested Global Society, 46 HARVARD INTERNATIONAL LAW JOURNAL 471 (2005); and from a more pragmatic point of view Michelle Everson & Christian Joerges, Reconceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication, 512, in: Administrative Governance (Herwig C. Hofmann & Alexander H. Turck ,eds., 2006). This means does not have a stable orientation as was the case in the liberal society of the individuals; Lucien Jaume, LA LIBERTÉ ET LA LOI 259, 304 (2000). The growing importance of constitutional control of the law and decision making processes in more and more countries is one of the many symptoms of the fragmentation of the legal system and its “entangled” hierarchies but not a consequence of a shift of law making power to courts. Hirschl , supra note 135, 214, points out with good reasons that high courts only rarely call into question the established political power.

190 The focus on “social agents” as the main source of legal norms (and not the state as such) goes back to Philip Selznick, Philippe Nonet & Howard M. Vollmer, LAW, SOCIETY AND INDUSTRIAL JUSTICE, 1969, 244.

191 In the US “democratic” legitimacy of administrative action historically was based more on the authority of the president than democratic statutes, See Jerry L. Mashaw, Administration and The Democracy: Administrative Law from Jackson to Lincoln 1829-1861, 117 YALE LAW JOURNAL 1568 (2008).

192 The authority of public institutions is derived from a complex “overarching governance structure” and not legislation alone, see Esty, supra, note125.
dependence on the “framing” effects of societal norms notwithstanding, the challenge to the legal system and its difficulties in finding a consistent response is undeniable. The question has to be re-formulated, though, in the sense of a search for a new role of the legal system in the stricter sense and a re-formulation for the inter-relationships with the fragmented heterarchical type of loosely-coupled norms generated from segmented functionally-specified networks, instead of rather stable group-based and organisation-based links between the law and the societal knowledge base. Both the law of the society of the individuals and the pluralistic law of the society of (representative) organisations were characterised by broad comprehensive cognitive “pools of variety” which corresponded to the territorial logic of the nation state, whereas the fragmented functionally-ordered segmented cognitive network of postmodernity lacks this focal orientation, which implies a potential transparency, of mutual interference and co-ordination by common meta-rules and methods of argumentation and comparison.

The common reference to the proportionality principle both in domestic and European law is problematical: because of its vagueness, it tends to block the adequate conceptualisation of new challenges related to the heterogeneity of postmodern law and its concomitant “norm collisions”. It is only acceptable as a kind of “placeholder” for a new type of an emergent norm that is generated in an experimental mode *ex post* from the observation of new conflicts which cannot be solved with reference to traditional norms that are set *ex ante* and are “applied” to cases. This new type of norm which is generated “bottom up” is due to the high level of complexity of postmodern law.

The network like structure of the postmodern cognitive infrastructure is much less transparent and not easy to integrate into a comprehensive framework. This has an impact also on the self-understanding of citizenship which is not obviously compatible with the loose network of knowledge distributed not over society at large, but over differentiated webs.

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194 Crouch, *supra*, note 184, p. 32.

which are not easily accessible to individuals, which take on a fragmented and self-designed character themselves.

IV. THE RELATIONSHIP BETWEEN ADMINISTRATIVE AGENCIES AND COURTS

IV.1. The co-operative construction of a norm

The focus on legitimacy and the simplistic supposition of a deductive rationality of the legal process detracts the attention from the problems of “internal autopoiesis” of law, i.e., the requirements of maintaining the closure of the system at the micro-scale, which Luhmann seems to neglect as well. The legal system can be regarded as being composed of chains of decisions being produced by the tribunals – this is what Luhmann calls the “centre” of the legal system, whereas the processing of contracts and other private transactions is to be located at the periphery. In my view, this rather static internal differentiation does not give sufficient tribute to the internal “unrest” which is continuously moving the system and which prevents its acentric processing from coming to a halt.

The same is true for the conception of the legal system as composed of norms and their “application” to a case. Systems theory’s focus on decisions and transactions comes closer to a more productive view of the internal aspect of the self-construction of the legal system. The legal system not only has to reproduce its border lines in order to close its rationality off from the direct interference of other systems (religion, politics) but it also has to reproduce its unity both by the flow of “legal components” (decisions, contracts, etc.) and by the reflection and control of the internal rationality of the inter-relationships between operations: the process of decision-making or contracting cannot always start from zero, its internal experimentation has to weave connections between operations and to observe which patterns prove to be successful and which have to be “second guessed” in new trial and error processes. The functional

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196 Peter Fuchs, MODERNE KOMMUNIKATION 67 (1993).
197 Ladeur, supra note 128.
198 This seems true in spite of the fact that Luhmann takes into consideration that law is dependent on cases and is in search of a kind of “‘local’ rationality” alone, Niklas Luhmann, LAW AS A SOCIAL SYSTEM, 352 (2004).
199 Luhmann, ibid., 293 et seq., 304.
200 See in a theoretical perspective on the discontinuity within the search processes of self-organization Henri Atlan, L’émergence du nouveau et du sens, in: L’AUTO-ORGANISATION, DE LA PHYSIQUE AU POLITIQUE (PAUL DUMOUCHEL & JEAN-PIERRE DUPUY, 1983), 115, 122: “random perturbations” may be self-reinforced and provoke the emergence of a new paradigm of “order from noise”.
requirement to stabilise expectations under conditions of uncertainty pre-supposes not only autonomy vis-à-vis the other social systems, but also the internal management of rules. Rules have a paradoxical character in as much as they cannot just preserve the “given” (in this case, one does not need rules in the modern sense), they have to allow for orientation in a society which is continuously involved in processes of self-transformation that includes the subject himself or herself, who “fulfils the mysterious function of association lived experience of the individual with a communicable and social form of expression”. The rule has to be continuously re-worked and re-modelled by both new judgments and new operations as well as the generation of new patterns of public and private decision-making in order to be able to allow for co-ordination among individuals or other legal persons who have to struggle with the dynamics of self-transformation of society. This is why precedents (decisions) or patterns of contracting and a certain stability of expression guaranteed by referring to patterns of behaviour have to be reproduced by the legal system. The paradox of the decision is expressed quite convincingly by Russell Hardin, who takes the view that, in common law – not only there – the individual court decision is meant to produce a new rule for third persons, while the present litigants are simultaneously treated as though the rule had been in place when they acted. This includes the “docility” of the legal actors who have to adapt themselves to both factual and legal standards of behaviour. Against the background of these general assumptions, the concept of “network” may be helpful for the conceptualisation of the internal rationality of the legal system: this concept pre-supposes a complex infrastructure of the legal system and its internal inter-relationships which are managed and

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201 Luhmann, ibid., 263 et seq.
202 This is why a the “paradoxical co-existence of legal and non-legal” has to be presupposed, Peer Zumbansen, Transnational Legal Pluralism, 1 TRANSNATIONAL LEGAL THEORY 141, 159 (2010).
203 Neuman, supra, note 162,05.
204 See Sally Falk Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 LAW AND SOCIETY JOURNAL 719 (1973), who rightly underlines that the law is not an “entity capable of controlling that (social – KHL) context”.
207 For a theoretical perspective on the transsubjective character of procedures of standardisation as normalisation in the Foucauldian vein see Stéphane Legrand, LES NORMES CHEZ FOUCAULT, 2, 154 (2007); Macherey, supra, note 51, 81 et seq.; Albert Ogien, Du sens commun comme une sorte de faculté de juger, 445, in: NORMATIVITÉS DU SENS COMMUN (Claude Gautier & Sandra Laugier, eds., 2009).
re-arranged by different forms of feedback loops. The feedback loops re-inforce the connections between a cluster of operations which aggregate a “hub” and reproduce the closure of patterns of behaviour or a second order reflexive concept based upon the observation and justification of a pattern. At the same time, the network of patterned operations reproduces differentiation i.e., the separation between a pattern and a set of “exceptions” which are loosely-coupled with the pattern as a default mechanism which exerts a certain attraction on the acceptability of a certain construction, interpretation or argumentation in a legal process: for example, the freedom of a contract can, of course, always be called into question because “freedom” is a vague concept, but, in a traditional legal understanding, the possibility of bringing in this argument is kept separate from the pattern of normal contracting and restricted to invocation of mental illness, error, breach of boni mores, etc. This is not necessarily the case: the “hub which reproduces the pattern of a normal contract can be re-opened and the “structural hole”, as network analysis might put the relationship between the stabilised “hub” and the weaker node of exceptional operations which are kept separate in a smaller “hub”, can be overcome by introducing new types of “weak” individuals for whom the pattern is modified (consumers, dependent workers and employees, etc). A new mode of overcoming this structural hole in private law is the reference to the constitution, i.e., an analogy is drawn between a private law operation and the infringement of a constitutional right by the state. This re-opens the internal closure which was established in the past and demands new forms of closure which limit this inter-relationship in order to allow for stability within. The example shows that a/the complete/completely patternless openness of the legal system to arguments would block the internal autopoiesis even if the outer autopoiesis was not at stake, because it could just be an orientation crisis of the legal system and not a case of the/0 interference of a different social system.

The past and present status of administrative law is not a creation of judges. Law in the administrative system is to be understood primarily as a self-generated set of rules by administrative deciders, which is controlled or shaped by the legislator or judges only after

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209 Lefebvre, supra, note 79, 59.
the fact. 211 Judicial review can only be “sporadic and peripheral”.212 A different picture would lead to “institutional blindness”,213 and ignorance of the creative and experimental function of administrators themselves and of the “wider conception of administrative justice” that includes the impact of the *eigenrationality* of administrative practices.214 It would also overtax the unity of administrative law.215

It is not by chance that, in Germany, the general rules of administrative procedure have only been codified in 1976.216 The above-mentioned complex processes enacted by the administration of the “society of organisations” have also been tackled at first by the administrative agencies themselves and have only been the object of vague laws which draw on the experience of administrators later on. Administrative law emerges from the indetermination of a process which draws on the decision as that which creates new experimental “bindingness” from situation to situation - in a society which is no longer based upon the illusion of being able to reproduce a tradition - and not as deduced from a stable norm.217

This development, which was very similar in other countries such as France, UK, USA, is summarised by B. Kingsbury218 in the assumption that judges have, over time, been able to construct a system of administrative law without comprehensive specification in statutes or constitutional norms. The second part of this observation concerning the reduced involvement of the legislators is certainly correct. With the first part concerning judges, one might have difficulties, at least, as far as the “construction” of a system of administrative law

212 Poole, *ibid.* 157.
214 Poole, *ibid.*, 164, 167.
215 Poole, *ibid.*, 165.
216 This is very similar to the evolution of American administrative law: the APA has mainly codified administrative practices, see Mashaw, *supra*, note 7; for the political constellation that made possible the APA as a reaction to the New Deal See McCubbins, Noll & Weingast, *supra*, note 146.
217 For a theoretical perspective on “indetermination” as the rule to which “perfect knowledge” is only the exception see Albert Ogien, *LES RÈGLES DE LA PRATIQUE SOCIOLOGIQUE* 109 (2007); Christiane Chauviré, *PEIRCE ET LA SIGNIFICATION. INTRODUCTION À UNE LOGIQUE DU VAGUE* (2007), both draw on Charles S. Peirce.
is concerned. The main instrument of administrative law in France and Germany, the “administrative act”, has long been regarded as a remnant of the absolutist state. However, as was remarked earlier, this is a one-sided observation: this institution has been completely remodelled and been adapted to the conditions of the liberal state and society: it allows for objectivation, self-continuation, learning and transparency. However, it remains a construction of administration; it has been recognised, structured and formalised by the judiciary. To call this “judge-made law” is somewhat superficial, because it is more a product of a coupling between the networks of administration and the processing of a network of the judges which introduced stability (for the rights of individuals in particular) and specific rules for validity etc., into the administration law, although a major part of the rules relate to practices which have been generated by the administration itself. This true, in particular, for the broad range of administrative operations which are mainly self-referential, in the sense that the direct contact to the rights of the citizens is reduced or regarded as non-existent. In Germany, this is the world of the “special power relationships” (“besonderes Gewaltverhältnis”) dominating public schools, military service, the status of civil servants and “public assistance”, which implied a specific dynamic status allowing for administrative “creation”, as opposed to public services provided by the state (such as the telephone, water, electricity, etc.) or local agencies, which could be the object of a special public law regime but did not impose a status of continuous regulation.

The claim to preserve a continuity of public order by administrative decision-making (administrative acts in particular) involved a leeway of discretion because rights were regarded from the outset as being inherently limited by the rights of others and the comprehensive “general interest”. Notwithstanding this, this general interest was no longer that of the state, but of the “order” of society at large, which included - as mentioned before - continuous change.

This phenomenon does not differ much from the relationship between private law in a stricter sense and the practical networks of experience which process the cognitive infrastructure of the law.

219 For a critique See Mashaw, supra, note 9, 1378.
220 See in a theoretical perspective Kerchove & Ost, supra, note 14.
221 See Bohlender, supra, note 49, for the evolution of the concept of “Gemeinwohl” ("common interest") in Germany.
222 Powell, supra, note 73.
This is what is at stake when N. Luhmann regards “decisions” as the operation which is characteristic for the autopoietic process of reproduction of the legal system. One should go one step further and expand more on the idea of network as the infrastructure of the legal system. Luhmann himself also refers to the idea of network, but does not give much detail on what he means when referring to the phenomena of “networks” in the legal system. The shift from the hierarchical perspective on the legal norm as the steering element of the process of setting up the internal autopoietic structure of the legal system, to a heterarchical conception of the development based upon a processing of decisions not just from case-to-case but as a kind of management of inter-relationships and connection possibilities within a network of decisions, contracts and, above all, judgments might be more adequate as the reference to norms or “principles” as the “open source” of the legal system. Legal principles should not be regarded as being based upon the “nature of things” (G. Del Vecchio) or an abstract set of meta-rules for the generation and completion of norms, or their adaptation to specific cases. Instead, they are to be conceptualised as reflexive general experiences drawn from a vast amount of cases and linked to practices of legal decision-making. They have a distributed character themselves, in as much as they are processed within the networks as recurring patterns of the management of the inter-relationships and constraints which have been accumulated in the legal system. The autonomy of the legal system is not equivalent to being insulated from moral values, politics, economic interests, etc. Its autopoiesis consists, instead, in sustaining an impersonal “network of networks” of inter-relationships which generate patterns of operations, institutional constraints and beliefs (including the possibility of forming expectations and longer chains of actions) so as to make learning as a means of coping with uncertainty both possible and attractive. The autonomy of the legal system is a response to the “essential incompleteness” (“inachèvement essentiel”) of both individuals and society, which makes institutions the “engines of history” which retain a productive “pool of variety” of operations that shape

223 Luhmann, supra, note 198, 46, 78, 98, and passim.
224 Luhmann, supra, note 193, 17, 43.; id., DIE GESELLSCHAFT DER GESELLSCHAFT, 65, 851 (1997), refers to the “networked” (“netzwerkförmig”) interrelationships between communications and the generation of new opportunities for communication within systems; See also Tacke, supra, note 177.
225 Luhmann, ibid., 17, 43.
226 Luhmann, supra, note 198, 438.
227 North et al., supra, note 60, 261.
228 Gautier, supra, note 80, 242.
change by imposing constraints,\textsuperscript{229} and allow for an impersonal monitoring upon the basis of a systemic memory. This distributed memory which is processed by the complex “network of networks” of cases and the internal rules on the reflection of inter-relationships between cases and decisions allows for the “invention” of that which is not given \textit{a priori}\textsuperscript{230} and generates new structured “regular” action potentials which, at the same time, open a perspective for cooperation, co-ordination, and repetition. Order cannot be generated from a privileged rational totalising view on society from “outside”; in a civil society, it is the emergent property of individual and organised productive operations with and within chaos,\textsuperscript{231} which is retained and structured by an institutionalised memory beyond the individual.

IV.2. The new role of judicial control in postmodern societies

As has been shown in this article, the breaks of symmetry in the technological system which challenge the network structure within the legal system are not managed by the legislator first, and are then broken down to a new practice of decision-making in the legal system. On the contrary, the constant flux of operations in the networks within the legal system and the exchange processes with the knowledge-producing networks outside are themselves the “agents of change”.\textsuperscript{232} Apparently, the recent evolutionary transformations of administrative law are not well-reflected in legal theory, which tries to meet the challenge of complexity by new holistic approaches which abandon conceptual and doctrinal analysis of the change process.

German administrative law has been superseded in the last decades by a tendency to establish a monistic approach focused on rights\textsuperscript{233} and the proportionality principle.\textsuperscript{234} Interestingly, the same has been said recently about English administrative law, after the introduction of the European human rights into the English legal system.\textsuperscript{235} This is a

\textsuperscript{229}North et al., supra, note 60, 261; Greif, \textit{supra}, note 98, 380.

\textsuperscript{230}Gautier, \textit{supra}, note 80, 242.

\textsuperscript{231}Gautier, \textit{supra}, note 80, 233.

\textsuperscript{232}See also the approach developed by Mashaw, \textit{supra}, note 7, 1413, who also concentrates on practices of administrative agencies and not primarily its justification.

\textsuperscript{233}The same can be said for constitutional law; this seems to be a general tendency in western law, See Mark V. Tushnet, \textit{The Rights Revolution in the Twentieth Century}, in: \textit{THE CAMBRIDGE HISTORY OF LAW IN AMERICA}, Vol. 3, 337 et seq. (Michael Grossberg & Christopher Tomlins, eds., 2008),Cambridge: CUP, 2008, 377 (arguing that the concept of rights is shifting towards a broader understanding of the protection of “autonomy”).

\textsuperscript{234}See the references \textit{supra}, note 189.

\textsuperscript{235}Poole, \textit{supra}, note 211, 155; see also Richard B. Stewart, \textit{Administrative Law in the Twenty-First Century}, 78
reductionist perspective that ignores the complexity of the administrative tasks that cannot be accessed by a focus on the individual rights which are at stake in a decision-making process.

In global administrative law which is, in many respects, much more dependent on legitimation by state law in the stricter sense that the protagonists of a new look at a transnational legal sphere beyond the state tend to refer to general principles of law as – if not a source of legitimation – a limiting constraint, on the one hand, which serves as a legitimation basis, on the other hand. The role of these general principles remains rather unclear in modern legal theory, whereas, in more traditional approaches, the possibility of the deduction of such principles from the “nature of things” is focused in a way which is no longer plausible today. This construction is another version of the ignorance of the necessary responsive cumulative mode of law-making inherent in administrative processes of decision-making.

The recent evolution of new complex types of procedure and decision-making has had a strong impact on the coordination of administrative and judicial decision-making (and on the legislator, as well). Reference to the more structured and reflexive types of knowledge needs more procedural rules which re-construct the informational infrastructure of complex decision-making processes, instead of the more substantive, rule-based type of decision of the society of the individuals of the past. It should be born in mind that “rule-based”, in the sense intended here includes all the layers or the normative and cognitive rules and conventions which are processed by reference to the individual right in the “private law society” and the single “administrative acts” of public administration which follow a similar logic, despite the seemingly sharp difference between public and private law. A similar

NEW YORK UNIVERSITY LAW REVIEW 437 (2003), who identifies different paradigms in American administrative law.

236 Tarcisio Gazzini, General Principles of Law in the Field of Foreign Investment, 10 JOURNAL OF WORLD INVESTMENT AND TRADE 1 (2009); Axel Metzger, EXTRA LEGEM, INTRA IUS: ALLGEMEINE RECHTSGRUNDSATZE IM EUROPÆISCHEN PRIVATRECHT 483, 519 (2009).

237 A perspective which is more focused on the creative and generative elements of an autonomous legal system and its emergent character would lead to a procedural approach which regards general principles of law as a secondary layer of reflection of the inherent “unrest” of a system which is implied in a continuous process of self-transformation, See in this respect Metzger, ibid., 545 et seq.

238 Giorgio del Vecchio, GENERAL PRINCIPLES OF LAW, 10 (1956); for a critique see Luhmann, supra, note 198, 418.

239 Mashaw, supra, note 7, 1476.

evolution can be observed in private law, as well. This is, above all, true for tort law and liability for negligence, in particular.

With reference to court practice, the co-ordination between administration and judicial control becomes much more complex, as well. Whereas judicial control of administrative acts in the “society of individuals” could be focused on the doctrinal construction, variation and preservation of rules and mediating doctrinal inter-relationships between cases and decisions, judicial control of the administrative decision-making in the “society of networks” is much more complicated: one could re-conceive it more as a “web” or a network of judgments which revolve around a cluster of cases, and process information and orientation to administration in a more diffuse way. This evolution can lead to a more politicised control, both in a positive sense as an attempt by courts to set the substantive standards under conditions of uncertainty, or in the negative sense of leaving more room to administrative discretion, or it has to be re-considered and re-framed in a new way. As in the past, however, the steering function of the law and of the statutes, in particular, should not be over-estimated: the deliberation of this question should not be focused in a one-sided way on the legislator – assuming a delegation of discretion enshrined in a statute where no such thing is to be found. Instead, a parallel should be drawn to the relationship between the law and its cognitive infrastructure in the “society of individuals”: administration can no longer be oriented by the distributed sets of experience; instead, it draws on a multiplicity of

244 Miles & Sunstein, ibid.,
245 For the changing conception of the relationship between (active) administrative regulation and the judicial control in history see Foster H. Sherwood, Judicial Control of Administrative Discretion 1932 – 1952, 6 THE WESTERN POLITICAL QUARTERLY 730 (1953).
246 The ambiguity of the role of courts in complex cases of controlling administrative behaviour is a big issue in recent literature, see Strauss, supra, note 243, 815; Kenneth A. Bamberger & id, Chevron’s Two Steps, 95 VIRGINIA LAW REVIEW 611, 621 (2009): should courts act as guides for future administrative decision making procedures or rather respect the creative function of administration? See for the creative role of administrative agencies Dorit Rubinstein Reiss, Administrative Agencies as Creators of Administrative Law Norms: Evidence from the UK, France and Sweden, in: COMPARATIVE ADMINISTRATIVE LAW, 2010 (Susan Rose-Ackerman & Peter Linseth, eds., to appear).
self-organised societal knowledge types including self-generated “best practices”, which stand for the innovative dimension of experimental future-oriented administrative action under conditions of uncertainty.

The focus of control should as a consequence shift to a more network like mode, i.e., the rules for administrative decision-making in complex domains, planning law, environmental or high-technology law, or other types of strategic goal-oriented ways which comprise chains and networks of operations. The frame of reference for judicial control cannot be stable conceptions of the norm, individual rights, experience or doctrinal concepts, but, instead, the administrative decision-making process has to be formulated in a more comprehensive open way with a view to the limitations set by the challenge of action under conditions of uncertainty. As a consequence, the “control-project” should also be formulated in a more open way, which is focused more on the outside observation (with a view to administration) of the plurality of network like inter-relationships between the different steps of the decision-making process on the one hand, and the potential concatenation of several decisions on the same time-scale and with a view to potential future administrative operations. This means that, instead of the orientation on the “substantive rationality” of rules whose structures and goals can, more or less clearly, be pre-supposed, the “procedural rationality” of both the distributed network of administrative and the judicial decisions should be considered with regard to the learning of new practices.

247 See generally David Zaring, Best Practices, 81 NEW YORK UNIVERSITY LAW REVIEW 294 (2006);
248 The OECD plays also an important role in the search for transnational benchmarks Markku Lehtonen, OECD Benchmarking in Enhancing Policy Convergence. Harmonisation, Imposition and Diffusion Through the Environmental Performance Reviews, Ms. (2005).
249 Ladeur, supra note 82..
250 See White, supra, note 160, 220.
253 John S. Brown/Paul Duguid, Organizational Learning and Communities of Practice: Towards a Unified View of Working, Learning and Innovation, 2 ORGANIZATION SCIENCE 40 (1991); Frédéric Creplet,
Dorf & Sabel, one could talk about distributed practices of “experimentalism”\(^{254}\), which as I would like to add, replace or supplement distributed experience as a core element of the infrastructure of the law. The relationship between administration and judicial control could be phrased as “tangled web”\(^{255}\), instead of as a stable rule-orientation, as might seem adequate for the “society of the individuals”. As Joanne Scott and Susan P. Sturm\(^{256}\) have luckily formulated, one might regard the role of the judiciary in this tangled web of decisions somewhat as a “catalyst” which functions as “enabling”, blocking or setting conditions of new actions under conditions of uncertainty, and uses the interference in the administrative process rather as a monitoring function thereby strengthening the internal rationality and transparency\(^{257}\) of the informational process and the learning capabilities in the future. At the same time, the judicial system should consider whether its own learning capabilities can be improved and stabilised by considering the productive concatenation of a new judgment with the requirements formulated in former decisions, and with a potential new judgment in the future. In the analysis of judicial decision-making, reference has already been made to the

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\(^{255}\) Harlow & Rawlings, supra, note 241, 711; Bommarito et. al., supra note 242, epitomize the role of the “interconnectedness” of court decisions.

\(^{256}\) Courts as Catalysts: Rethinking the Judicial Role in New Governance, 13 COLUMBIA JOURNAL OF EUROPEAN LAW 565 (2007).

\(^{257}\) Esty, supra note 125.

\(^{258}\) See on the meaning of learning of general administrative law in jurisprudence, Carol Harlow, Changing the Mindset: The Place of Theory in English Administrative Law, 14 OXFORD JOURNAL OF LEGAL STUDIES 419 (1994); on learning through the development of „ordering ideas”, in the exchange between general and particular administrative law, Eberhard Schmidt-Abmann & Stéphanie Dagron, Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen, 45 ZEITSCHRIFT FUR AUSLÄNDISCHES ÖFFENTLICHES UND VÖLKERRECHT 395 (2007).
distributed rationality of a network of judgments which have to be read in a horizontal heterarchical mode of processing from case to case. This approach should not be read as a support for individualised situative decision-making, not at all. There has to be a flexible concatenation which allows for the creation of reflexive web of “similar” judgments that tries to learn from the practical response of actors to its previous “entries” in the network of judgments. This institutional arrangement is a kind of “judicial polycentricity” that corresponds to the polycentric processing of markets and its administrative observation and limitation (in the past with the help of the “actes administratifs” in particular).

The network based approach developed here would assume that there is also a process of coupling between the practical networks of administrative decision-making and the private processes of contracting or arguing about the limits of rights (damage, negligence, etc.) on the one hand, and the networks of court judgments which have to cope with the internal requirements of preserving consistency and the external requirement of keeping the practical networks of administration and private actors (in private law) productive and dynamic – this includes the respect for private autonomy in private law and discretion in public law, on the other. Robert Cover has regarded “jurisdictional redundancy” as a flexible strategy of avoiding errors. This idea is not to be confined to the plurality of courts in federal systems alone, but it should include the polycentric web of judgments that try to generate and manage the “density of experience”. Methodological “dissensus” can also be regarded as a productive element in a more experimental search for new rules and patterns.

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259 See in a theoretical perspective on the concept of network as a paradigm of conceptual construction Seth J. Chandler, *The Network structure of Supreme Court Jurisprudence*, University of Houston Law Center No. 2005-W-01.


261 At the same time there seems to be a structural limit to the intervention of courts into polycentric public-private networks, Noonan, Sabel & Simon, *supra*, note 205, 559.

262 For an Overview of the new relationship between systems theory and the new concepts of “network” see Tacke, *supra* note 177, 243.


265 Cover, *ibid.*, 30.

of co-ordination in both private an public law as long as a web-like structure of mutual
reference, reflection, and revision is preserved with a view to the proactive generation of a
common frame of judgment that loosely integrates a practice which is taken seriously.

IV.3. A comparative look at the network like structure of transnational court practice
in the field of (private) media law in particular

A closer look at *Lex Mercatoria* or the other private legal regimes shows that they have
formed a new legal order for a network of (regular) participants, transnational economic and
legal transactions in particular, which does not cover the whole of the arena of transnational
exchange. The bearers of this network of law are (in private law) big firms, which
continuously engage in an exchange of roles (they act both as sellers/providers and as buyers).
This engagement is the basis for the emergence of common interests which are shared by
transnational corporate actors in particular. At the other end of the range of action formats in
transnational affairs, we must not forget the smaller- and medium-sized firms (SMEs) which
only rarely engage in transnational transactions or the role of consumers. In this field,
transnational contracts are still judged in cases of conflict by state courts. And it seems to be
far from simple to develop a homogeneous stable court practice even upon the basis of a
uniform legal text such as the Convention on International Sale of Goods (CISG) and in
spite of a duty imposed on courts to consider the common interest in a homogeneous legal
practice. The networking in this latter case is done by courts and not by the participants
in transactional legal affairs, as in the field of *Lex Mercatoria*. This seems to be a common
denominator which might be productive in conceptualising global law – public and private:
The emergence of a global type of law “beyond the state” pre-supposes a network based
common interest of participants, which is not identical with the public interest of an

267 Teubner, supra, note 17.
268 For the rise of self-regulation of private actors See Virginia Haufler, *Globalization and Industry Self-
regulation*, 226, in: *GOVERNANCE IN A GLOBAL ECONOMY* (Miles Kahler & David A. Lake, eds.,
2003); Peter Gourevitch, *Corporate Governance: Global Markets, National Politics*, ibid., 305.
269 Schwenzer & Hachem, supra note 184. 468: who point out that the duty to refer to foreign judgments is no
equivalent to the integrative function of a common supreme court.
270 Kilian, supra note 184; Schwenzer & Hachem, ibid.
271 The “network” concept is often used in a loose way; it should specified with respect to „some combination
of informality, equality, and commitment” Paul DiMaggio, *Conclusion: The Futures of Business Organization
and Paradoxes of Change*, in: id. (ed.), supra note 158, 212 — I would add its functionality for a mode of
generation of knowledge and management of uncertainty, See for the concept of the “disaggregated State”
Anne Marie Slaughter, A NEW WORLD ORDER (2004); see also the contributions in: Ino Augsberg,
272 See The examples in Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View from
overarching community. This does not, from the outset, speak against the recognition of a new type of global law – far from it. It should, perhaps, warn us not to regard this phenomenon as just a transitory momentum which, in the long run, ends up in the “constitutionalised” world society. It would be preferable to distinguish more reflexive mechanisms in the practice of self-organised rules, which would – following the conception of the inter-relationship between law and different forms of social convention –include also rules of a practice which implicitly also formulate considerations about the balancing of competing interests of parties which are not involved in the network itself.

This is the case, for example, in the media, which continuously experiment with new formats of a construction of reality as they have to observe not only “reality”, but also the self-transformation of the “identity” of the recipients themselves. According to a more collective societal (and not only individualistic) understanding of civil rights, the freedom of the press, in particular, also comprises the autonomy of the press as a societal institution with the consequence that it implies the freedom to formulate and modulate conceptions of the

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274 See also Daniel J. Solove, UNDERSTANDING PRIVACY (2008): the contradictory relationship between privacy and publicity is also a consequence of the shaky ground on which the evolution of the media takes place.
public interest and modes of its “formatting”. At the same time, this implies a distributed tentative mode of considering competing interests such as the privacy of media stars and politicians. The role of courts should protect these rights, of course, but, at the same time, this implies a respect for the whole network of media communication and the logic of its functioning: the protection of conflicting rights should be fine-tuned to the rules and conventions of the media and not ignore its autonomy also with regard to the re-formulation of its understanding of, for example, what the public realm is (European Court of Human Rights, ECHR). This means that the constraints set by competing rights have to be formulated by courts, instead from a heterarchical point of observation which would be focused on “re-entering” a constraint into the network for a re-modelling which bears in mind the procedural rationality which epitomises the rules and requirements of processing information under conditions of uncertainty and not to be blinded by traditional substantive rule orientation. This means that courts, instead, fulfil the role of oversight which should try to irritate the self-organisational potential of the media network in order to broaden the productive range of possibilities of reaction of the media system and not focus on a case-to-case-based substantial rationality of stable rules. The same is true for other private net-based communication such as the eBay valuation system, or ICANN, a system with its

277 See with reference to the European judgments on the status of religion in public (schools) Ino Augsburg & Kai Engelbrecht, Staatlicher Gebrauch religiöser Symbole im Licht der Europäischen Menschenrechtskonvention, 65 JURISTENZEITUNG 450 (2010), who demonstrate the difficulties European courts have in managing the cultural pluralism in Europe.
278 This is true in particular for transnational law See Cinto Della Cananea, Beyond the State: the Europeanization and Globalization of Procedural Administrative Law, 9 EUROPEAN PUBLIC LAW 563 (2003).
280 James Q. Whitman, supra, note 276.
282 Milton L. Mueller, John Mathiason & Hans Klein, The Internet and Global Governance: Principles and Norms for a New Regime, 13 GLOBAL GOVERNANCE 237 (2007); see for the tension between domestic legal principles and the self organized global ICANN regulatory regime Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution, 50 DUKE LAW JOURNAL 17, 57 et seq. (2000); Jonathan Zittrain, Between the Public and Private. Comments before Congress, 14
own private formal organisation which also has to find a balance between conflicting rights and interests. These examples could be counted as versions of self-organisation which need a certain public oversight because of the involvement of outsiders who cannot participate in the process of generating self-organised rules. This is not so unusual if one considers even the traditional experience-based rules, which courts refer to when deciding on “negligence” or the preservation of the public order. The only major difference is to be seen in the fact that experience is more or less a spontaneously generated set of practical rules which has developed only a thin institutional layer in some fields (associations of engineers, etc.), whereas, in the case of a differentiated self-reflexive potential of observation and revision of rules of practice to be followed by big firms (even below the level of formalisation in explicit standards), the court has to consider the strategic effects of its decision-making practice in the search processes of the incumbent firms (duties to warn). These remarks should have demonstrated that private self-organisation and public oversight are not mutually exclusive. Law-making has always been process-driven, the institutionalised stable component used to be nested with the societal knowledge basis and with strategic action taken by legal practitioners.


Lefebvre, supra, note 79, 19; Gert Brüggemeier, HAFTUNGSRECHT. STRUKTUR, PRINZIPIEN, SCHUTZBEREICH 56 (2006); for the dependence of the concept of “negligence” on changing social norms See also Simon Deakin, Angus Johnston & Basil Markesinis, MARKESINIS AND DEAKIN’S TORT LAW, 8th ed., 113 (2008); Steven A. Hetcher, Creating Safe Social Norms in a Dangerous World, Vanderbilt Law School, Joe C. Davis Working Paper No. 99-5.(arguing that game theory misses the collective element of social norms in the process of concretizing negligence).

See the contributions in: MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE (Gerd Winter, ed., 2006); Martin Herberg, GLOBALISIERUNG UND PRIVATE SELBSTREGULIERUNG: UMWELTSCHUTZ IN MULTINATIONALEN UNTERNEHMEN (2007); also the contributions in: RESPONSIBLE BUSINESS, SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS (Olaf Dilling, Martin Herberg & Gerd Winter, eds., 2008), in particular Errol Meidinger, Multi-Interest Self Governance through Global Product Certification Chains, ibid., 259.

Quack, supra, note 185, 643, 644.
IV.4. After the experimental creation of new cooperative forms of administration...what? The codification?

The recent evolution of more complex administrative processes has raised interest in the internal procedures of generating information, knowledge, and evaluation of alternatives, etc., within the administration, which are no longer obvious, as was the case in the past. Administrative procedures of information as a side-effect of the increasing complexity of decision-making informal procedures of knowledge generation and forms of public-private co-operation (including contracting) have been developed – again from within the administration. Approaches to establish a legal structure for this version of “co-operative administration” have failed hitherto. This is symptomatic for the relationship between the legislator and the administration: the major instruments of administrative action as such are beyond the reach of general regulation. This is due to the fact that the relationships between “public” and “private” always contain an element of a “self-fulfilling prophecy”: what is accepted as “regarding all” is an emergent property of entangled processes of the observation of practices and of paradigmatic settlements that are dependent on experiment. They can only

287 Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 COLUMBIA LAW REVIEW 1749 (2007) (emphasizing the role of courts to create acceptable rules for administrative agencies); for a critique that emphasizes the role of courts in the protection of rights as opposed to public policies see McNollgast & Daniel B. Rodriguez, Administrative Law Agonistes, 108 COLUMBIA LAW REVIEW, SIDEBAR 2008; see generally Stuart Shapiro & David Guston, Procedural Control of the Bureaucracy, Peer Review, and Epistemic Drift, 17 JOURNAL OF PUBLIC ADMINISTRATION, RESEARCH & THEORY 535 (2007); (underlining the dependency of conceptions of administrative control on the transformation of “embodied” knowledge).

288 See for the difficulties to fit informal action into traditional legal administrative formats Kersten & Lenski, supra, note 9, 521.


290 See only Andreas Abegg, Die Vertragsfreiheit der Verwaltung – Verwaltungsverträge im Schatten des Rechts, 128 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 387 (2009).

291 This development concept is related to the rise of the “governance”, Lobel, supra, note 159.

292 Gunnar Folke Schuppert, Verwaltungs coop erationsrecht (Public Private Partnership): Regelungs- und Handlungsoptionen eines Rechtsrahmens für Public Private Partnership – Expertise for the Federal Minister of Internal Affairs, 2001, Attachment E (containing a proposal of an amendment to the Administrative Procedure Act); for the US See the proposal of a “Draft Collaborative Governance Executive Order”, appendix to Lisa Blomgren Bingham, The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance, WISCONSIN LAW REVIEW 297 (2010) (the focus is on administrative values); the attempt to legalize and formalize cooperation is probably a misleading idea; See Freeman, supra, note 4 (1998), because it is a version of what one may call with Michael C. Dorf & Charles F. Sabel, supra, note 254, 318: “democratic experimentalism” that does not allow for ex ante delegation of competencies and legislative formulation of goals; see in the same vein for American attempts to raise the level of transparency in new types of flexible administrative procedures, William Funk, Public Participation and Transparency in Administrative Law: Three Examples as an Object, 61 ADMINISTRATIVE LAW REVIEW 171 (2009).

293 See Lobel, supra note 159; Freeman, supra note 4.
be controlled on a case-to-case basis by the judges. The legislative form of rule-making is only compatible with administrative action if the networks of decision-making have developed contours – especially upon the basis of conflicting legal interests, subjective rights in particular. Notwithstanding this, this constellation is accessible only to a limited re-structuring by the legislator, which leaves enough potential for the shaping of different cases and the experimentation with different patterns of the management of inter-relationships.

The reflection on the evolution of modern law and its transformation during the 20th century have demonstrated the importance of the cognitive infrastructure of legal practice which has changed considerably, not only with regard to the character of the knowledge base itself upon which legal decision-making depends continuously. The law is not just super-imposed upon a cognitive base which allows it to be specified case-by-case, but the inter-relationship of both the cognitive and the normative layer of the law is not a passive one. The exchange is pre-structured by secondary normalising meta-rules which stabilise the regularity of the process of reproduction of the “pool of variety” for different types of practices, and, at the same time, the law itself develops its own set of internal rules of interpretation, of estimating probabilities, proof rules in cases of *non liquet*, rules of presumption, of co-ordinating societal conventions and the legal rules in particular. In addition to this, there is an intermediate layer in which the role of the producers of the knowledge base is institutionalised (from public distributed knowledge accumulation) via organised reproduction in big firms towards postmodern network-like “epistemic communities” which provoke a fragmentation of the knowledge production. This transformation finds its repercussion in the shifting focus of the generation of “order”: from substantive rationality which supports the reproduction of rules to the management of conflicting group- and organisation-based knowledge by principles of balancing and the respect of proportionality – which are both open to the valuation of factual interests and positions – and finally the emergence of proceduralisation, which consists of an increasing importance of the proactive stimulation of the process of generation of knowledge in private and public networks. This change ends in a process of fragmentation of different arenas and allows only a loose mode of coupling between the differentiated networks by broad rules which are oriented at the open co-

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294 See for the “internal law of administration” which is a necessary infrastructure of administrative operations and that is largely neglected or wryly looked at as being a type of non-law or illegitimate altogether Mashaw, supra, note 6, 1636; id., supra note 7, 1413, 1461.

ordination of the tangled web of the law within a complex “network of networks”. One should epitomise that the emergence of the “networks of law” in the postmodern society develops more and more different arenas for the construction of order in which the combination of cognitive and normative rules varies to a considerable extent. The close co-ordination in fragmented networks excludes outsiders, while, at the same time, the complexity and future orientation of the postmodern law reduces the protection granted in former times by “rights” because their frame of reference was, in the past (liberal society), also pre-structured by the general limitations imposed on subjective rights by other holders of rights: if the differentiation of the networks of operators increases, this will also change the general and universal frame of reference for the definition of the rules of co-ordination of rights of different subjects. At the same time, this evolution is - for the same reason - a challenge for the state, which loses its general frame of reference itself. The rules of co-ordination within the emerging “network of networks” of the law, which is much more loosely coupled than in the past, have not found their contours yet. This is why theoretical positions that question the legal character of the new self-organised norms which emerge in the differentiated range of rules that is characteristic of the postmodern normative “network of networks” miss the point: the increasing complexity of the cognitive embeddedness of legal norms demands a higher level of reflexivity of their mutual inter-dependence; a new constructive and selective dimension with regard to the fragmented cognitive rules and the construction of a whole domain of options (instead of the experimentation on a stable trajectory laid out by experience or the corporatist consensus based rules) has to be modelled. This is why the “internal” cognitive preparation of the administrative decision-making processes, which was more or less negligible in the outcome-oriented administrative law of the “society of individuals” has to be attributed normative character in different forms. This goes for administrative rule-making in the US, which uses “notice and comment”-procedures for the set up of enforcement rules which can no longer be derived from the law or be pre-supposed as the product of internal (administrative) or external (social) experience – for example, with regard to the societal approach to “danger”. This is also the reason why more and more interests are transformed into rights to be heard, and to be protected from private or public interference.

298 Ladeur, supra, note 82.
below the level of the classical conception of “infringement” and “harm”. This is a problematical side-effect of the fragmentation of the “networks of the law”, which leads to a phenomenon which Sean Farhang has called the “litigation state”: the courts are involved in a much more intense mode in the process of enforcement of legal norms. This is why the procedure and the reflection of the “internal” side of administration necessarily get a new normative dimension. The focus on the “publicness” of rules, or the search for a secondary layer of control of primary rules in the sense of H.L.A. Hart, misses this point, and it also transcends the horizon of H.L.A. Hart’s conception of law. This increasing importance of the “internal side” of the processing of decision-making can also be observed in private law. Michael Power, in particular, has drawn our attention to this phenomenon: the rise of “risk” as a challenge has found its repercussion in the “precautionary principle”, which is not limited to the environmental law, but finds a parallel, for example, in financial market regulation where “negligence” and the liability have shown to be insufficient for the management of complex risks. This reflexivity of both private and public law beyond the classical limits of “rights”, on the one hand, and stable behaviour-oriented norms, on the other, leads to a transformation of normativity in postmodernity. The traditional criteria for the definition of law, as opposed to factual rules, are no longer adequate for the observation of the dynamic of a fragmented self-reflexive legal system that necessarily expands the field of relevance and includes the procedural rules of construction of administrative decisions.

299 Urbinati, supra, note 134.
300 Karl-Heinz Ladeur, Die Netzwerke des Rechts, in: NETZWERKE IN DER FUNKTIONAL DIF"FERENZIERTEN GESELLSCHAFT (Michael Bommes & Veronika Tacke, eds., 2010, to appear)
301 Farhang, supra, note 297.
302 In my view Sean Farhang, supra note 297, 45 et seq., overestimates the impact of the specific institutional setting of the US tension between Congress and the presidential control of administrative agencies in particular. The phenomenon can be observed in other countries with different institutions, as well. It is rather due to the fragmentation of the cognitive basis of society.
303 Kingsbury, supra note 9 (2009); Teubner, See the references supra note 23; for a critique (of Kingsbury) See Alexander Somek, The Concept of Law in Global Administrative Law, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 985, 986 (2009), who criticizes the theoretical limitations of the New York approach to global administrative law in as much as its focus is on rather broad concepts of “accountability” and not on “legal relationships” and “rights”; See also Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities, 9 German Law Journal 1375 (2008) available at: www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1375-1400_Articles_von%20Bogdandy_Dann_Goldmann.pdf. – but this is a position which neglects the possibility that the concept of law itself might undergo a process of transformation; for an analysis of the problems with the identification of a “legal source” in postmodernity, see also Zumbansen, supra, note 202,142.
304 Sadeleer, supra note 138.
This development finds a correspondence in the increasing internal fragmentation of the private firm and the decline of the traditional hierarchical “control project”, i.e., the rise of heterarchical versions of intra-organisational distribution of competencies. It is reflected by/in the overarching establishment of public control of the internal processes of knowledge generation within companies.

V. THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW

V.1. The evolution of postmodern domestic administrative law as the background for its globalisation

In the following, the hypothesis will be developed that the perspective on/of a homogeneous global society to which a kind of a global state with more or less the same attributes as the territorially limited state is beyond the point. It leads to the assumption of too much unity in the legal order – at least as an aim to be accomplished in the long run. At the same time, in the reverse perspective, it epitomises legitimacy as the primary focus of a legal theory of global law.

As opposed to this conception, a theoretical perspective can be designed that takes the network like fragmented character of the law as it is, and epitomises - so to speak - the “internal side” of the autopoiesis of the legal system, and does not try to derive legitimacy from some higher order of law (constitution of the state or the world society). The reflection in legal theory would try to analyse the self-construction or the “auto-constitution” of a legal order of networks. In order to clarify what is meant by this approach, the idea was first tested in retrospect in a better known historical process of the evolution of modern administrative law in order to check whether an overarching evolutionary tendency inherent in the whole body of domestic, transnational and global law, in particular, which could also

305 See Michael Power, THE AUDIT SOCIETY. RITUALS OF VERIFICATION (1999), who demonstrates also the disfunctionalities of this new approach.


308 See for a further differentiation of the network concept which can easily end up as a fashionable rhetoric Stohl & Stohl, supra, note 173; a broader perspective on the role of private actors in the regulation of public interests (including “second order regulatory agreements” between private corporations and non-for – groups) can be found in Michael Vandenbergh, THE PRIVATE LIFE OF PUBLIC LAW, 100 COLUMBIA LAW REVIEW 101 (2007).

shed new light on the evolution of global administrative law might not be observed. Both with regard to transnational and domestic law, governance has to be “retooled”, as Jody Freeman and Martha Minow have formulated the challenge of public-private co-operation.\footnote{See Introduction: Reframing the Outsourcing Debate, 1, 19, in: GOVERNMENT BY CONTACT: OUTSOURCING AND AMERICAN DEMOCRACY (ead., eds., 2009).}

Against the background of the analysis of the self-transformation of the normative systems of society outlined here, a new perspective on the rise of the new “international” or “global administrative law” – leaving aside private law in the narrower sense - seems possible: on the one hand, it could appear to be productive to consider that the network-like character of the new transnational administrative law is not a completely new phenomenon. Instead, it can be described as a continuation of the fragmentation and, as a consequence, the increasingly loose coupling of the different layers of the normative system of postmodernity which can be observed at the domestic level, as well. Once the domestic legal system is challenged by the requirement to allow for more and more fragmentation and differentiation in the network of norms, the transnational expansion of its reproduction no longer seems as completely incompatible with the logic of the legal system which had to give up its “unity” as a paradigm of reference long before.\footnote{For European law See Marc Amstutz, In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning, 11 EUROPEAN LAW JOURNAL 766 (2005).} Afterwards, the loose coupling and the network-like structure within domestic law had to be taken into consideration and a new set of meta-rules for the internal “management of rules” had to be developed. The expansion of this new hybridisation to the transnational level between states and the domestic legal systems could no longer be constructed as a breach of the continuity of postmodern law but as its consequent continuation. This analysis is confirmed by the observation of the deep transformation which public international law has undergone in the last decades: its focus on the state as the main actor has been supplemented by the inclusion of domestic affairs in the focus of international law, thus making the borders of sovereignty much more permeable for the observation and action of international law. The same is true for the function of public international organisations,\footnote{See for the evolution of an administrative law of an international organisation as opposed to the global administrative law in a stricter sense James Salzman, Decentralised Administrative Law in the OECD, 68 LAW AND CONTEMPORARY PROBLEMS 191 (2005).} which have developed much more autonomy and independence from the states as their “creators”.

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V.2. “Constitutionalising” global administrative law or experimenting with a hybrid transnational legal order?

It may be a too far-reaching assumption that public international law is on the way towards “constitutionalisation”, a concept which finally assumes the evolution of a new meta layer of homogenisation of the law beyond the reach of the will of the sovereign state. As has been shown above, G. Teubner has ventured the hypothesis of a transnational “civil society” beyond both the state and traditional state-based public international law as the new “source” of a transnational autonomous law. This assumption even goes so far as to attribute the potential of self-constitutionalising to this transnational civil society. Teubner aligns the reflexive mechanisms of self-control and revision of this new layer of the normative order with the secondary norms that H.L.A. Hart defined as constitutive for the stabilisation of positive law in general. This approach ignores the basic weakness of the broadened proof of variety of normative rules, patterns of co-ordination and their inter-relationships with both state and international law.

This discussion need not be taken up in detail here. What is relevant here is the assumption that, both at the domestic and the international level, the pre-conditions for the evolution of global administrative law do not need a “delegation” from a constitution or statute law. At both levels, the hierarchical construction of the state-based and the international public law have been supplemented by a tendency towards a heterarchical dimension of the reproduction of the legal system. “International” or “global administrative law” appears to be able to draw on components of both the more hybrid loosely coupled type of the law of networks, which emerges at the domestic level, and on components of the new public international law which shatters the hitherto established clear separation from the state-

314 See the references in note 20.
316 See also Kingsbury, supra, note 9.
318 For a new approach to the state in postmodern societies François Moreau, The Role of the State in Evolutionary Economics, 28 CAMBRIDGE JOURNAL OF ECONOMICS 847 (2004) (the state as a “moderating” agency).
based law. As Daniel C. Esty has assumed, global administrative law can provide the necessary “connectedness” between different transnational arenas of decision-making.  

This perspective allows for a more differentiated look at the new layer of a network type of transnational law, and brings in new arguments for the conception of an adequate system of meta-rules which would help formulate new requirements for the co-ordination of different transnational networks as such, and, in a vertical sense, the relating between transnational and domestic networks of regulation in particular. This development brings to the fore the dependence of public law on the activities of private firms, etc. As far as the effects of decision-making on third parties are concerned, the co-operative dimension between transnational and domestic administrative law has to be strengthened, because the new focus on the procedural elaboration of complex administrative decision-making (for example, on health standards) including global co-ordination should not lead us to overlook the often ensuing implementation through direct interference with individual rights. As Alfred C. Amann jr. has argued - with good reason - administrative law can mitigate the democracy deficit of public-private co-operation both at the transnational and at the domestic level. This approach might be a productive mode of managing the unavoidable indeterminacy of the permanent self-transformation of society by a shifting of institutional design more towards checks and balances.

The description of the emergence of the “society of networks” should allow us to shed some doubts on Fischer-Lescano and Teubner’s assumption that the rise of the problems attributed to the globalisation process can be regarded as a consequence of the “maximisation

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319 Esty, supra, note125.
321 This includes the possibility to apply domestic administrative law to transnational transactions. See Cassese et al., supra, note 99, 57; for the unavoidable inclusion of the principle of domestic law See Christoph Möllers, Internationales Verwaltungsrecht. Eine Einführung in die Referenzanalysen, in: id. et al. (eds.), supra, note 16, 1, 3; Christian Tietje, INTERNATIONALISIERTES VERWALTUNGSUANDELN, 50 et seq. (2001).
322 Johannes M. Bauer, Complex Technical Systems, Institute of Technology Assessment, WPITA 04-03.
323 Eberhard Schmidt-Alffmann, The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship, 9 GERMAN LAW JOURNAL 2061 (2008).
326 Hardin, supra, note 206, 128.
of the eigenrationality” of specialised societal functional systems, and the economy in particular. \textsuperscript{327} This assumption does not seem to be easily compatible with the hypothesis of the auto-constitutionalisation of the global civil society in its “own right” (beyond the state). \textsuperscript{328} The instability between the functional systems is a phenomenon which is characteristic of the acentric society and the permanent “unrest” which it creates. And the political problems that are attributed to globalisation both at the domestic and the global level cannot be reduced to a mere quantitative reduction of the impact of the political system and its co-ordination with the economic system in particular. It is also a consequence of a self-produced lack of learning capabilities, which attributes the permanent failures of public policies just to “neo-liberalism” and not to political slack. The focus on the evolution of the knowledge basis of society as the “pool of variety” whose distributed dynamic character puts each system under permanent stress and is open for evolutionary processes which proliferate across the borders of all functional systems allows for a more differentiated description of the network logic which transcends both territorial and functional borders. This is due to the fact that there is a close link between the knowledge system and societal institutions. \textsuperscript{329} The hypothesis that legal fragmentation is a consequence of the maximisation of the “eigenrationalities” of functional systems appears doubtful. \textsuperscript{330}

The new relational rationality of networks can no longer be regarded as being “deposited” in a canonical (legal) text; \textsuperscript{331} instead, legal meaning is to be generated from several overlapping texts and contexts of practices in an experimental approach that comprises both the domestic and the transnational realms.


\textsuperscript{328} Gunther Teubner, Fragmented Foundations: Societal Constitutionalism Beyond the Nation State, 327, in: THE TWILIGHT OF CONSTITUTIONALISM? (Martin Loughlin & Petra Dobner, eds., 2010).


\textsuperscript{330} The second example of a one sided maximisation of a functional rationality is even less convincing: the Christian opposition to birth control (maximisation of the “eigenrationality” of the religion) is blamed for the growth of population in many parts of the world: Apparently this is in the present primarily a problem for non-christian societies; in the past the catholic opposition to birth control has not prevented believers to circumvent this doctrine quite successfully.

\textsuperscript{331} See in a sociological perspective Albert Ogien, Le double sens de l’interprétation, 26 REVUE SUISSE DE SOCIOLOGIE 485, 498 (2000).

\textsuperscript{332} See for the consequences for fragmented regulation Julia Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, 2 REGULATION AND GOVERNANCE, 137, 145
V.3. The new logic of cooperation – domestic and transnational

The heterarchical normative “network of networks”\textsuperscript{333} is functioning upon the basis of structured and focused project-like co-operation,\textsuperscript{334} and mutual observation within communities of limited scope. It follows a relational rationality,\textsuperscript{335} in the sense that it makes use of a multiplicity of perspectives and of the modelling of a multi-layered complex spatial and con-textual order.\textsuperscript{336}

In this respect, the comparison of old and new Lex Mercatoria is quite plausible, though the trust generated by co-operation is no longer based upon personal acquaintance and confidence but upon a functional web of inter-relationships among strangers. In this sense, the new network-based relational rationality is itself a product of the rationale of the legal system and its function to process and support impersonal relationships. At the same time, public law

\textsuperscript{333} See also Guéhenno, supra note 23 (1995), 56 (“aggregates of networks”).

\textsuperscript{334} The cooperation of courts is much more difficult and mutual citations tend to be overestimated See A different version of cooperation and network-formation in the globalised jurisprudence of courts can be found in the very variously marked readiness to refer in their reasoning of courts in other countries. See Benvenisti, supra note 141, 263; for the coordination of different regimes of protection of constitutional liberties See Anne Peters, \textit{Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechts toleranz}, 48 ARCHIV DES VOLKERECHTS 1 (2010); Anne Marie Slaughter, \textit{A Global Community of Courts}, 44 HARVARD JOURNAL OF INTERNATIONAL LAW 191 (2003); ced. & David T. Zaring, \textit{D. The Use of Foreign Decisions by Federal Courts. A Comparative Analysis}, 3 JOURNAL OF EMPIRICAL LEGAL STUDIES 297 (2006) (the impact of this version of judicial cooperation is overtaxed by the authors; it has only marginal importance in the bigger states); ced. & William Burke-White, \textit{The Future of International Law is Domestic}, 47 HARVARD INTERNATIONAL LAW JOURNAL 1 (2006); A EUROPE OF RIGHTS. THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet, eds., 2009); for a critique See EricPosner & John Yoo, \textit{Judicial Independence in International Tribunals}” 93 CALIFORNIA LAW REVIEW 1 (2005); see also Miguel Poiares Maduro, Courts and Pluralism. Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in: Dunoff & Trachtman (eds.), supra note 22, 377; “cooperation” can also mean mutual correction beyond traditional rules of international law in cases where “interlegal” or “interadministrative” cooperation is not explicitly supported by coordination of judicial protection, see \textit{Conseil d’État}, 9 June 1999, No. 198344, Mme Hamssoua: an illegal German administrative act binds a French administrative decision maker (asylum case): as a consequence judicial protection against the French decision has in one way or other to include the competency of the French court to control the German administrative act; on the basis of administrative acts this permeability of sovereignty is established by mutual recognition of administrative decisions, Kalypso Nicolaidis & Gregory Shaffer, \textit{Managed Mutual Recognition Regimes: Governance Without Global Government}, 68 LAW AND CONTEMPORARY PROBLEMS 233 (2005); Matthias Ruffert, \textit{The Transformation of Administrative Law as a Transnational Methodological Project}, in: id. (ed.) \textit{THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE – A TRANSNATIONAL METHODOLOGICAL PERSPECTIVE OF REFORM/LA MUTATION DU DROIT ADMINISTRATIF EN EUROPE – UNE PERSPECTIVE TRANSNATIONALE ET MÉTHODOLOGIQUE DE RÉFORME} 3 (2007).


\textsuperscript{336} See Carole Lypsce, Construction de la perspective, construction du sens, \textit{COMMUNICATIONS} No. 85, 37, 41 (2009); Sophie Lavaud-Forest, Perspectives numériques, variabilités, interactions, univers distribués. À la découverte de perspectives renouvelées, ibid., 55, 62.
cannot be discarded as a “quantité négligeable” because the state, administrative agencies in particular, and international organisations are major players in the transnational legal process. As mentioned above, the problem with the new “net based” law is to be seen in the fact that the consideration of outsiders both within networks and outside is far from being guaranteed by the new logic of networks. In this respect, the role of state-based traditional law, constitutional in particular, cannot be completely superseded. The same is true for domestic administrative law: the new forms of transnational co-operation both among state agencies, and among the latter and private actors, are legitimate as long as they remain limited to the impact on the networks as such.

Once they have an impact on the rights of outsiders (consumers, smaller firms, etc.), in some way or another, a link between the transnational law and the domestic public or

337 Möllers, supra, note 25, 329.
339 See for the coupling of global and domestic administrative law Stewart & Badin, ibid., 10; Kingsbury & Schill, supra, note 307, 5.
340 From the perspective of German administrative law see Christoph Möllers, Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 351 (2005); id., Die Governance-Konstellation: Transnationale Beobachtung durch öffentliches Recht, 238, in: GOVERNANCE IN EINER SICH WANDELNDEN WELT, POLITISCHE VIERTELJAHRESSCHRIFT, SPECIAL ISSUE NO. 41 (Gunnar Folke Schuppert & Michael Zürn, eds., 2008); Claudio Franzius, Warum Governance?, 42 KRITISCHE JUSTIZ 25, 30 (2009).
private law can find its basis in domestic law. The same is true for public accountability in a democratic sense: a narrow understanding of reducing any kind of impact on the rights of others to a quasi-public interference which needs a delegation of regulatory power misses the point, i.e., the autonomy of the civil society which includes a “power” to generate norms in the sense described above, which has always been an essential element of societal self-organisation. At the same time, the state based-legal system has always fulfilled the function of oversight of both the functionality of the knowledge base as such, and the role of a universal core function of positive law which consisted in the preservation of openness, diversity (competition, plurality of opinions, etc.) and a coupling between the different versions of social norms upon the basis of the rationality of the impersonal legal system of inter-relationships as such.

V.4. How democratic is global administrative law?

The democratic function of the law should not be overtaxed. The problem comes to the fore whenever the state interferes directly with the individual rights, as this function cannot be extended without limitation to the indirect participation of the state in the generation of the vast amount of norms of all types in which the state is involved under conditions of increasing

343 For the relationship between global and domestic administrative law see Ming-Sung Kuo, Between Fragmentation and Unity: The Uneasy relationship Between Global Administrative Law and Global Constitutionalism, 10 SAN DIEGO INTERNATIONAL LAW JOURNAL 439 (2009); for an approach to the description and analysis of a kind of „meta-networking“ between different types of actors institutionalized at different hierarchical levels see Christoph Möllers, Globalisierte Verwaltungen zwischen Verselbständigung und Übervernetzung, 39 RECHTSTHEORIE 217, 228 (2008).


346 Competition can also be used in a reflexive way for the control of public regulation: Errol Meidinger, Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems, 121 in: LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS (Christian Brütsch & Dirk Lehmkuhl, eds., 2007).

347 See for the role of the judiciary within the whole range of mechanisms of controlling accountability Edwin L. Felter jr., Accountability in the Administrative Judiciary: The Right and the Wrong Kind, 86 DENVER UNIVERSITY LAW REVIEW 1 (2008).

348 However, see for a critique of the tendency to “put democracy in brackets” when it comes to globalized law Marks, supra note 252, 995.
complexity of the preservation of social order. The emergence of the new globalised administrative law strengthens - by necessity - the autonomy of the administrative function.\footnote{349}{See Tietje, \textit{supra} note 320, 275.}

On a more abstract layer, the function of accountability\footnote{350}{For the permeability of the sovereignty see Slaughter & W. Burke-White, \textit{supra}, note 334, 117; ead. \& Zaring, \textit{supra} note 166, 211, 215, 223.} and of transparency of public action is also to be borne in mind.\footnote{351}{Bhopinder S. Chimni, \textit{Two Forms of Global Administrative Law}, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 799, 802 (2005); Kingsbury, \textit{supra}, note 9; id. \& Schill, \textit{supra}, note 307; William D. Coleman & Tony Porter, \textit{International Institutions, Globalization and Democracy. Assessing the Challenge}, 14 GLOBAL SOCIETY 377 (2000).} The state is a public function and is, as such, a “common sake”: this is the reason why the state has to be held responsible and accountable for all public action. However, this is not equivalent to a requirement of formal delegation of power by parliamentary statutes.\footnote{352}{See Linda Schultz Bressman, \textit{Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State}, Vanderbilt Public law Research Paper 02-06 (arguing that the focus on democratic legitimation is misleading and should be shifted to control of arbitrariness).} The accountability of administration (as opposed to the legislator) cannot be constructed in a simplistic way: Instead, it should be conceived with a view to the consistency in fulfilling its eigenrationality by following its rule-based type of decision-making.\footnote{353}{Edward L. Rubin, \textit{The Myth of Accountability and the Antiadministrative Impulse}, 103 MICHIGAN LAW REVIEW 2073, 2119 (2003).} In this respect, the increasing fragmentation of the state and the normative order is a problem, if only its intransparency and the risk of the emergence of a completely disentangled network of networks which is no longer mutually penetrable for the consideration of external interests, or does not meet the requirement that they develop themselves as part of a productive environment of other networks or of the social systems at large. Following the conception described in this article, one should not lose sight of the concomitant phenomena of the rise of the issue of accountability in private organisations: the interest in accountability in private organisations is also due to the fact of the decreasing transparency and the increasing fragmentation of the private (economic) organisation. Information and knowledge are no longer present and collected in a commonly distributed experience. This transformation of the environment of firms has its repercussion in multi-
faceted approaches to “count the invisible”.\(^{355}\) The fragmented character of global administrative law finds its repercussion in the fact that the constituencies to which administration might be accountable are fragmented, as well: many of the targets to be tackled at the transnational level emerge beyond the state and cannot be dissolved into fragments of competencies which escape from democratic state control;\(^ {356}\) this is true, for example, for many environmental problems\(^ {357}\) (climate change,\(^ {358}\) in particular). The same goes for the regulation of the internet, a challenge that has a new transnational global dimension, as well. This “network of networks” is a new phenomenon that has never been a “domestic” issue at all. The network-like character of transnational administration finds its reverse side in the fact that the distributed power of decision-making implies a self-limitation that might be used for a re-formulation of the public “control project” itself: it allows for experimentation with new heterarchical forms of “irritation” by the introduction of more variety, by bench-marking, instead of “steering”, by comparative observation of different networks, by the search for the emergence of new patterns of co-ordination and the generation of knowledge in procedure.\(^ {359}\)

In domestic administration, accountability cannot be reduced to the control of “compliance” with rules, either.\(^ {360}\) The inter-relationship between law and its cognitive infrastructure, which has always had a fundamental importance for the evolution of the legal system, undergoes a considerable transformation in postmodernity, which finds its repercussion also in the new regimes of accountability in “entangled hierarchies”: there is no longer a clear separation between rules and their application.\(^ {361}\) As a consequence, one might also talk about new


\(^{357}\) See the overview in Wolfgang Durner, *Internationales Umweltverwaltungsrecht*, 121, 123, in: INTERNATIONALES VERWALTUNGSRECHT, supra note 16., in particular for the interrelationship between domestic and international law.

\(^{358}\) See Hari M. Osofsky, *Is Climate Change “international”? Litigation’s Diagonal Role*, 9 VIRGINIA JOURNAL OF INTERNATIONAL AL LAW 585, 641 (2009), where the intertwining of factual and decisional networks of the management of climate change are discussed.

\(^{359}\) See Ladeur, supra, note 189.


\(^{361}\) In complex processes of learning by deciding a “continuous reconsideration” of norms is unavoidable, Noonan, Sabel & Simon, supra, note 207, 523, 524.
versions of “spontaneous accountability”, in the sense that the “hybrid accountability regimes”, in particular those generated by networks, are no longer to be defined in advance – as is the case with administrative decision-making as well. As a consequence, the “control project”, which is derived from the requirement of accountability, needs to be re-configured and to be re-formulated in a perspective centred on a broader concept of “systemic intervention” and not on compliance with stable rules. This evolution appears to be, at the very least, much more compatible with a postmodern understanding of democracy than a supranational (European) development toward the establishment of expertocratic agencies which are only in a very loose sense legitimised by democratic delegation. Against this background, the above-mentioned debate on “constitutionalism” looks like a projection of the lost unity and sovereignty of the nation state onto a future “international community”. The lost ability of the state to direct and control the social reality will be re-established on an international scale on which the “discourse on what is right or wrong must be crystal clear”. But how should this be possible if one takes into consideration the fragmentation of both private and public spheres within the nation state? It should be more promising to find new ways of managing the complexity of different regimes and their stabilisation by the emergent global administrative law instead of dreaming of a re-composition of sovereignty in a future world state. To reduce these high hopes to the expectation of a fruitful co-operation of democracies does not fare much better, as it does not take the transformation of the legal

363 Mashaw, supra, note 12, 118; Scott, ibid., 186.
364 Noonan, Sabel & Simon, supra, note207, 559.
365 Klaus Ferdinand Gärditz, Europäisches Regulierungsverwaltungsrecht auf Abwegen, 135 ARCHIV DES ÖFFENTLICHEN RECHTS 251, 287 (2010).
367 Tomuschat, ibid., 28.
368 See Augsberg/Gostomzyk/Viellechner, supra, note 282.
369 See also the critique by Richard Collins, Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law’s Past, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 251, 269 (2009).
370 Von Bogdandy, supra, note 366.
system and the fragmentation of statehood, both of which touch also on democracy, seriously.

For similar reasons, the requirement of meeting certain criteria of “publicness” as a pre-condition for the recognition of a norm as “law” appears to be misleading, as well. The increasing complexity and fragmentation of the cognitive base of society has shattered the whole architecture of the differentiated normative system and has challenged its consistency, which has provoked the emergence of a new set of procedural and internal meta-rules on the “management of rules” within the legal system. In the liberal society of individuals, this problem of the co-ordination of law and societal norms had existed as well, but its internal rules had been relatively stable and could remain almost invisible. As shown above, this was already no longer the case in the society of organisations as a secondary modelling of the institutional structure of the liberal society. Increasingly explicit re-formulations and re-modelisations of the whole architecture of the normative system became unavoidable. The setting of new internal rules of self-observation, co-ordination or separations for more differentiated niches and regimes within the normative system of society became much more complex than in liberal society. The consistency of the system could only be preserved at the expense of its doctrinal and methodological clarity and unity. Against the background of this evolution, the recourse to a rather simple distinction between more or less “publicness” of norm-generation does not look promising, either, because it cannot do justice to the whole range of extremely differentiated norms which demonstrate all imaginable versions of creation and public participation. In global administrative law, the reference to global interests in a stronger sense is limited. In many cases, global administrative law, as well as international public law in the stricter sense, serve mutual or efficiency interests, and the

371 See the works of the Bremen Research Center on “Transformations of the State”, in particular the contributions in: TRANSFORMATIONS OF THE STATE? (Stefan Leibfried & Michael Zürn, 2005).
372 This finds a similar repercussion in the ambivalent tendency to neglect the crisis of the state and the ensuing fragmentation of networks of decision making for the construction of Europe, See Karl-Heinz Ladeur, We, the European People ...Relache!, 14 EUROPEAN LAW JOURNAL 147 (2008).
375 See only Več, supra, note 46.
376 Noonan, Sabel & Simon, supra, note 207, 537; for the development in Germany See Anna-Bettina Kaiser, Die Kommunikation der Verwaltung. Diskurse zu den Kommunikationsbeziehungen zwischen Verwaltung und Privaten in der Bundesrepublik Deutschland 138 (2009).
377 Slaughter & Zaring, supra note 350.
degree of “globalisation” has to be differentiated.\(^{378}\) At the same time, the complex and – what is most important – the only loosely-coupled nature of the inter-relationships between different types of norms within the whole network of rules renders at least some forms of, for example, rule-making or convention-building among private actors or public norm-setting mutually inter-exchangeable.\(^{379}\) The “public” character of global administrative law is as problematical as is postmodern domestic law.

From the point of view taken in this article, it should be more preferable not to try to set up clear limits and separations between different types of norms, but to think more about the construction of the internal meta-rules of co-ordination within the network of networks of the postmodern fragmented normative system and its unavoidable hybridisations.\(^{380}\) As a frame of reference for this search, the idea should be accepted that an evolutionary process of the implicit shaping and re-shaping of administrative paradigms has to be distinguished from an explicit layer of administrative law that is made by the legislator. That “deep structure” of administrative law that underlies a historical evolutionary development is closely linked to the transformation of the knowledge and the (social) rule basis of society. Administrative law undergoes considerable transformations once the knowledge basis of society changes – as has been shown in this article. This is why the concept of administrative law cannot be stable, either. As a consequence, the question “is global administrative law ‘law’?” cannot be answered upon the basis of the more traditional conceptualisation. It has to take into account that the frame of reference for the construction of domestic law has changed considerably. The conceptualisation should, instead, follow the change of the historical paradigms of law. If this is accepted, a striking similarity between both domestic and transnational postmodern administrative law comes to the fore and opens a new perspective on global administrative law.

V.5. The search for new meta-rules of managing “entangled” inter-relationships

In the following, it should be demonstrated, first of all, that one cannot talk about a transnational “civil society” to which the new layer of the legal system might be attributed. Instead, it can be shown that the new rules and patterns of co-ordination do not emerge

\(^{378}\) Jean d’Aspremont, Contemporary International Rulemaking and the Public Character of International Law, New York University Law School, IILJ, Working Paper 2006/12, 4 et seq., 14, 16 et seq.


completely “beyond the state”, at least no more than the new versions of the rules in the “society of networks” at the level of the nation state do. In fact, new “entangled” inter-relationships between state agencies and social actors (both of different “national origin”) emerge, and demand, in a normative sense, a new conceptualisation and a new construction for the unavoidable “management of rules” under conditions of complexity which are at stake. This complexity is due to the fact that the new postmodern society creates more heterogeneity within its infrastructure of legal and social norms, and, as a consequence, more tensions and “collisions” between the different sets of rules can be observed. This is a challenge for the search for a new type of meta-rules that can bring about a kind of “moderation”, a type of proceduralised co-ordination of different rules but not a situative “balancing” of interests. In this respect, domestic administrative law and its postmodern challenge does not differ much from transnational administrative ventures. This is also valid for the increasing importance of public-private co-operation, which is due to the fact that stable co-ordination between (private) social rules and public administrative norms can no longer be brought about. The state does not lose its relevance; its role changes, but does not vanish because, as in the past, the polycentric practices of experimentation in the private realm cannot avoid lock-ins or perverse effects that are difficult to combat without a player who has a responsibility for the rules of the game or – in postmodernity – the meta-rules of the self-transformation of the heterarchical networks of inter-relationships.

The state does not disappear at the transnational level, either, nor does domestic law lose its relevance. One can even think about a new role for state-based public law in the transnational realm (ICANN ), in the sense that it can be used to irritate transnational processes of norm-building, for example, by using the more elaborated domestic civil rights as criteria for the recognition of the legality of decisions of private transnational organisations that have an impact on constitutional rights of individuals. This is an example for the new

381 Against the reduction of transnational law to private law, lex mercatoria inparticular, also Karsten Nowrot, NORMATIVE ORDNUNGSSTRUKTUR UND PRIVATE WIRKUNGSMACHT 656 (2006); Christian Tietje & id., Forming the Center of Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law, 5 JOURNAL OF BUSINESS ORGANIZATION LAW 321 (2004).

382 See with reference to the concepts of regime and “regime collision” Fischer-Lescano & Teubner, supra note 16.

383 von Bernstorff, supra, note 282.; Calliess & Zumbansen, supra note 24, 135 et seq.

384 Ladeur & Viellechner, supra note 282.
types of conflict that have not yet emerged at the domestic level and that cannot be tackled successfully at this level, either (for example, climate change).

The new hybridisation which is a characteristic element of the emerging transnational law can also be observed from the point of view of the public international law among (sovereign states) when, in co-ordinated administrative procedures (asylum), the decision of one state has an impact on the legal status of an individual in a different state: according to traditional rules of international law, the court of the second state could not be allowed to call the decision of the first into question (“par in parem not habet iurisdictionem”). In the new domain of a transnationalised law, the “internal affairs” of a state cannot be exempt from oversight at all costs because the co-ordinated administrative procedure has to find a repercussion at the level of court decisions, otherwise court protection would become next to impossible.

In the following part, the differentiated role of the state in different fields of action will be described with a view to its impact on the different legal networks which emerge in transnational law. The conceptual polarisation and the closer parallel between traditional national and postmodern international administrative law should not be overstated because, from the outset, the state as a global or international actor was confronted with different dimensions of a pluralisation of actors, a plurality of states, a plurality of divergent arenas of decision-making with heterogeneous participants, national or international agencies, private actors (groups, firms, associations, NGOs), which can only find their orientation via an involvement in transnational “networks” of public and private actors.

V.6. Distinguishing different versions of transnational administration

“Global administrative law”, in particular, can, against this background, be linked to the idea of a “disaggregated state”, which is not a state in dissolution, but a state which transforms itself into a loosely-coupled “network” of public and private actors, who are held together by

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387 For the legal pluralism in postmodernity see Zumbansen, supra, note 202; Oren Perez, Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law, 10 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 25 (2003).
388 Slaughter, A NEW WORLD ORDER (2004) 14 et seq. and passim.
a fragmented set of regulatory tasks of “moderation”. These tasks are integrated less by a chain of singular decisions (Verwaltungsakt) but by a focus on broadly-defined “webs” of reflexive strategic project-like ventures which follow the track of knowledge and rule management that has been brought about at the domestic level by the emergence of the “society of networks”. The permeability of the classical borderlines between public and private, market and organisation, cognitive and normative rule-making finds its repercussion finds at the global level.

From a perspective which is characterised by a focus on global administrative law, one would stress the necessity to bind together the components of the disaggregated state at a more abstract level if only to re-couple the internationalised and national components of decision-making. In this transnational dimension, the territorial state, its organisational structures and legal rules providing legitimacy are re-considered and the role of the state, if only in a heterarchical and not in the central position of the sovereign of decision-making, is brought back in.

If one has a clear look at the different types of networks within the “network of networks”, the multi-faceted character of this new hybrid version of administrative decision-making is demonstrated quite openly. One has to distinguish limited networks of targeted territorial boundaries spanning co-operation from among the agencies that are built up in the typical perspective of a management of public neighbour law problems. They address issues of information exchange concerning, for example, the social insurance claims of workers who have, so to speak, a double territorial attribution of legal status. This relationship has been and is still often asymmetrical, in the sense that the influx of the workers at stake is often not reciprocal. This fact may limit the co-operative activity of the country of origin.

389 Moreau, supra, note 318.
390 Power, supra note 354.
391 See Möllers, supra, note 25, 351.
393 This may be a case of “mutualised” interests in the sense of Jean d’Aspremont, supra, note 378, 14.
However, this does not call into question the exchange perspective that is
characteristic of this type of relationship. This rather stable co-ordination does not challenge
the territorial character of the activities of the participating agencies. There is a different
version to be observed in the international migration law: this is a field that has a strong
global dimension with regard to the number of countries that are concerned. However, this
global character of the network of agencies does not find a repercussion in the administrative
domain as such. The interest of the countries of origin of migrant workers will often be very
different from the host countries. The interest in the formulation of common standards will be
low, and this goes also for the transparency of procedures. This is a restriction for the
development of a new type of global law that pre-supposes the dominance of a focus on co-
operation.

An interesting variant of this type of exchange perspective might be seen in the co-
operative relationships between states in international tax law. The co-operation in this
domain is still limited, although, recently, the pressure of high tax countries on low tax
countries with the intent of reducing tax evasion has increased considerably. The traditional
focus is predominantly on avoiding double taxation.

The factual elements of co-operation may be complicated because it is difficult to
define and keep separate the financial “substance” that is to be taxed. As the common interest
of the states in this field is strong, it comes as no surprise that the problems which have to
solved in this field are managed in a satisfactory way: the OECD, or rather, a limited number
of OECD tax experts, function as a kind of neutral mediators, and this body of experts has
succeeded in generating trust. The creation of some kind of trust can be described as an
emergent effect of this type of network.

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395 Jürgen Bast, Internationalisierung und De-Internationalisierung der Migrationsverwaltung, ibid., 279; See
also the case study in Marc R. Rosenblum, The United States and Mexico: Prospects for a Bilateral Migration
396 For the inevitable requirements of coordination among uptaking countries see Benvenisti, supra note 338,
262
397 This is probably also the reason why the development of “paradigmatic discourse” allowing for a
comparative approach to international tax law is regarded as unsatisfactory, See Omri Y. Marian, The
Discursive Failure of Comparative Tax Law, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW
415 (2010).
398 See Eckhart Reimer, Transnationales Steuerrecht, 121, in: Möllers, Voßkuhle & Walter (eds.) supra note; 16
this may be a case of an “efficiency interest” in the sense of d’Aspremont, supra, note 378, 17.
The relationship between a developed country or an international organisation dominated by developed states, on the one hand, and assistance or protection of investment in developing countries, on the other, is also asymmetrical, although a common interest cannot be discarded in this type of inter-relationships. In the field of technical or general assistance it is the necessity to design a “control project” which does justice to both sides at stake. A new transnational layer of legal order that depends on the permeability of domestic administrative laws in both directions needs to be conceived. In the field of investment protection below the layer of traditional public international law, a new practice of global administrative law has emerged (although still not settled in a new satisfactory institutional frames) that relates to domestic public and international private law and demonstrates a typical hybrid character. It is, however, quite characteristic that, in this field, an extensive practice of transnational hybrid legal mediation has evolved. The development of rules and practices, procedural in particular, which are created in this domain, could be a productive example of the new experimental mode of global administrative decision-making.

Environmental law is particularly interesting with regard to the conceptualisation of global challenges because it demonstrates the necessity to develop new collective instruments of an internationalised or globalised administrative law which transcend the problems of a delimitation of competencies among states or the recognition of licenses, etc.: it definitely makes national law permeable to the recognition of public interests of other states – and, in this way, relativises the law of the nation state. This phenomenon can also be observed in European law though it is hidden by the tendency towards a separation between the europeanised parts of administrative law of Member States (which is pushed with reference to the famous “effet utile”), the administrative law of the EC agencies and the national administrative Law of Member States. In fact, it could be much more productive to focus, instead, on the permeability of Member State administrative law for certain interests of the EC.

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399 See Philipp Dann, Grundfragen eines Entwicklungsverwaltungsrechts, ibid., 7.
402 This is one of the phenomena of a „deteriorisation“ of administrative law, Eberhard Schmidt-Aßmann, supra, note323.
403 See ECJ-Reports 1990, I-2433 (Factortame), 1990, I-2879 (Wine).
and other Member States and to search for meta-rules for the management of “regime-collisions” (different sets of legal rules of the multi-layered legal system of the EC), instead of favouring a homogeneous European legal system.\textsuperscript{404}

In the third group of practices of global administrative law (standard-setting,\textsuperscript{405} environmental protection,\textsuperscript{406} the control of financial markets, etc.), we find a type of co-ordination that demonstrates the new hybridisation of social and legal rule-making in a particular form: different types of domestic “knowledge bases” and legal standards have to be co-ordinated or meshed in a way that transcends the domestic level of all involved legal administrative orders and lead to a new global frame of reference for decision-making.\textsuperscript{407} It is quite characteristic that there is still a link to domestic administrative law when concrete cases have to be decided. Both of the two other aforementioned fields are characterised by the fact that they include, from the outset, on the factual level, an emergent element that goes beyond state-controlled co-operation to a much more dramatic extent. The increasing importance of standards is again a phenomenon that cannot be reduced to the territorial element of globalisation alone:\textsuperscript{408} it is also, if not primarily, due to the weight of the scientisation of production and organisations. Globalisation is only one of the concomitant dimensions of the dynamic of self-transcendence of the knowledge base of societies which rids itself of the traditional links to the institutions of the stable organisation – public and private.\textsuperscript{409} This is also the basis for scepticism vis-à-vis the new global constitutionalism.\textsuperscript{410}

At least a major part of the issues which are at stake and which demand co-operation and co-ordination are “global” in a stronger sense: they concern complex problems which are


\textsuperscript{406}Wolfgang Durner, \textit{Internationales Umweltverwaltungsrecht}, in: Möllers, Voßkuhle & Walter, \textit{ibd.}, 121.

\textsuperscript{407}Nico Krisch, \textit{Global Administrative Law and the Constitutional Ambition}, LSE Law, Society and Economy Working Papers 10/2009, 3, has pointed out with good reasons that delegation is “thin” and cannot be regarded as a sufficient basis of legitimacy alone.

\textsuperscript{408}Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Law Making on Trade and the Environment, 22 \textit{ECOLOGY LAW QUARTERLY} 479 (1995).


\textsuperscript{410}Krisch, \textit{supra} note 407, 23.
completely beyond the reach of a nation state and which do not find a solution based upon patterns formulated at that level. The peak of this development is reached in financial market regulation, where we are confronted with a type of rapidly self-transcending, overlapping, disruptive market that processes risk information and demand risk management to a hitherto unknown extent. New global problems that do not just change the level of abstraction or the territorial dimension are at stake here, but undermine the territoriality of the legal order in a much more complex and demanding way than in the past of the nation state.

V.7. The future forms of co-ordination between global and domestic administrative law

At this point, a reflection on the future of domestic and global administrative law may be helpful: in both fields, a new generative dynamic momentum comes to the fore, which is due to the rise of networks emerging beyond both classical liberal administrative law ("the society of individuals") and its focus on the abstract person. This evolution demonstrates that administrative law can no longer be constructed with reference to classical patterns and their stabilisation by statute law. Meaning is no longer deposited in slowly evolving rules of experience nor in the legal text. It pre-supposes a dynamic modelling of a distributed domain of options and relations invoking a multiplicity of perspectives in "real time" in an open context. Co-operation will not only occur in public-private networks alone, but also in "inter-public" joint-ventures that mobilise expertise beyond the limits of stable territorial competencies. The transnational dimension of administrative law is nothing but an expansion of the multi-layered spatial relationships that emerge at the domestic level. The discretion of administrative decision-makers which finds its legitimation in the increasing importance of specialised knowledge that has to be generated within complex procedures and demands

411 See Anne van Aaken, Transnationales Kooperationsrecht nationaler Aufsichtsbehörden als Antwort auf die Herausforderung globalisierter Finanzmärkte, 219, in: Möllers, Vollkühle & Walter (eds.), supra note 16; David T. Zaring, Informal Procedure, Hard and Soft, in International Administration, 5 THE UNIVERSITY OF CHICAGO INTERNATIONAL LAW JOURNAL 547 (2005) for the “lightly institutionalized” cooperation among agencies in the field of financial markets regulation.


413 Théry, supra, note 110, 384 et seq.


415 For a discussion of the problems related with “democratic representation” in postmodernity See Zumbansen, supra, note 202, 144.

416 Guéhenno, supra, note 379, 82, 90.
the use of adequate methods of control could be opened for the co-ordination of heterogeneous and polycentric knowledge bases of different countries and societies, in the sense that, in transnational procedures, the aggregation and integration of global social norms and knowledge might be regarded as a new meta-rule for the judicial control of administrative discretion.\footnote{417}{See for a similar problem related with the transnational cooperation among regulatory agencies of Member States and the ensuing question whether the “consideration” of the comments of the agency of other Member States can be regarded as a legitimate procedural version of administrative discretion, Karl-Heinz Ladeur & Christoph Möllers, Der europäische Regulierungsverband der Telekommunikation im deutschen Verwaltungsrecht, 120 DEUTSCHES VERWALTUNGSBLATT 525 (2005).}

This process demonstrates that global administrative law cannot be conceived as a mere challenge to the sovereign nation state and the permeability of its territorial borders. Its evolution is a consequence of a deeper transformation of both the economic system and the nation state. As has been demonstrated in this article, the central components of the classical liberal legal system were dependent on stable concepts of property and the territory and their paradigmatic role. The evolution of administration and the economic system is characterised by the rise of the information and of knowledge as the main resource and frame of reference for decision-making. The dynamic of the postmodern “knowledge society” is at the bottom of the rapid self-transcendence of the environment of the legal system.\footnote{418}{See Gili S. Drori, John W. Meyer & Hokyu Hwang, World Society and the Proliferation of Formal Organization, 25, 34, in: GLOBALIZATION AND ORGANIZATION: WORLD SOCIETY AND ORGANIZATIONAL CHANGE, supra note 355.} Not only the territorial borders of the state, but also the traditional conceptual and institutional separations on which administrative law was founded have been severed.

As a consequence both for the domestic layer of administrative law and the emerging global administrative law, new forms, procedures and meta-rules for an administration beyond the nation state have to be designed.\footnote{419}{For the necessity to spread administrative rules in countries of the “Third World” see \url{www.transparency.org/global_priorities/aid_corruption}; Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, Measuring Corruption: Myths and Realities, The World Bank Institute. Development Outreach, Januar 2007, \url{www1.worldbank.org/devoutreach}; Susan Rose-Ackerman, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM IX (1999); Migai Akech, Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 829 (2006); with a focus on strengthening accountability through administrative law (834).} Considering the dynamic nature of the administration in, and of, networks, more evaluation \footnote{420}{For a theoretical perspective on “evaluation” as second order knowledge that reuses the same knowledge that has already been referred to in the decision making process Rudolf Stichweh, Wissensgesellschaft und Wissenssystem, 30 SCHWEIZERISCHE ZEITSCHRIFT FÜR SOZIOLOGIE, 147, 155 (2004).} \textit{ex post} and more indirect rule-making will be
necessary: “steering” administrative practice \textit{ex ante} by statutes or by the “application” of informal rules of experience will not be sufficient. The new knowledge base of the “society of networks” will allow for more self-organised rules and patterns, while, at the same time, the decreasing relevance of stable norms in both senses should lead to a focus on procedural norms which are designed with regard to the generation of new knowledge that will be useful for the evaluation \textit{ex post}.

We are still in the process of experimentation which will generate new forms of action, new procedures, new types of co-ordination between public and private actors. It may well be the case that the role of the judiciary in this new evolutionary process will be negligible, not to mention codification by the legislator. What should be conceivable is a new type of co-operation between domestic agencies and the legislator, with the prospect of coupling transnational procedures of decision-making and domestic legitimation and accountability of decision-makers.\textsuperscript{421} New elements of an inter-twinement of domestic and transnational law might be developing.\textsuperscript{422}

\textbf{VII. OUTLOOK}

The article has tried to build a bridge between the evolution of domestic administrative and postmodern global administrative law. It could be shown that the evolution of administrative law is characterised by periods of creative construction of new forms, instruments and procedures of administrative law in the administrative decision-making procedures. Court control of these processes should not be interpreted as being the only legal source of administrative law (“judge made law”) before the partial codification of general administrative law could be brought about in Europe and the US. If one bears this evolution in mind, it comes as no surprise that the new hybrid postmodern forms of decision-making in both domestic and global public-private networks cannot easily be subsumed under established administrative rules because the experimentation with, and the search for, new forms and procedures of transnational decision-making has not yet come to a conclusion. This constellation is not new in the evolution of administrative law, and it cannot be reduced to the


\textsuperscript{422} For new forms of accountability that emerge at the global level see Helmut Willke, \textit{SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY} 50 (2007).
process of globalisation alone: it is one of the phenomena of the emergence of a new paradigm of (administrative) law: the law of the “network society.”


424 See. Ladeur, supra, note 300.