

## THE DEVELOPMENT OF GERMAN ADMINISTRATIVE LAW

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“*Verfassungsrecht vergeht, Verwaltungsrecht besteht.*”<sup>1</sup>  
Otto Mayer (1924)

“*Verwaltungsrecht ist konkretisiertes Verfassungsrecht.*”<sup>2</sup>  
Fritz Werner (1959).

## INTRODUCTION

The two statements captioned above are (or rather should be) familiar to every German law student. They encapsulate much of the historical trajectory of German administrative law, as well as its present-day tensions.<sup>3</sup>

Otto Mayer is widely perceived as one of the founding fathers of modern administrative law in Germany.<sup>4</sup> His statement appears in the preface to the third edition of *Deutsches Verwaltungsrecht* (1924), a magisterial three-volume treatise that has retained canonical status and shaped the contours of administrative law over nearly a full century. The statement reflects the institutional separation of the state’s constitutional organization and its executive branch (its administration).<sup>5</sup> Moreover, it emphasizes that the governing rules of constitutional law exert little influence on the governing rules of administrative law.

Mayer’s epigram will sound startling and perhaps horrifying to American ears. However, Mayer, who lived from 1846 to 1924, had in fact witnessed the coming and going of several German constitutions—including, most recently, the Weimar Constitution, which marked Germany’s transition from a monarchy into a parliamentary democracy. In contrast to the United States, then, administrative law—the *corpus juris* that Mayer sought to syn-

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<sup>1</sup> Otto Mayer, *Preface to the Third Edition of DEUTSCHES VERWALTUNGSRECHT, BAND I* (3d ed. 1924) (GERMAN ADMINISTRATIVE LAW). Translated, this means, “Constitutional law comes and goes; administrative law is there to stay.”

<sup>2</sup> Fritz Werner, *Verwaltungsrecht als Konkretisiertes Verfassungsrecht*, DEUTSCHES VERWALTUNGSBLATT [DVBL] 527–33 (1959). Translated, this means, “Administrative law is constitutional law made concrete.”

<sup>3</sup> Christoph Schönberger, *Verwaltungsrecht als Konkretisiertes Verfassungsrecht*, in Michael Stolleis (ed.), *DAS BONNER GRUNDGESETZ: ALTES RECHT UND NEUE VERFASSUNG IN DEN ERSTEN JAHRZEHNTEN DER BUNDESREPUBLIK DEUTSCHLAND (1949–1969)* 53 (2006).

<sup>4</sup> MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, BAND II: 1800 TO 1914* 404 (1992) (HISTORY OF PUBLIC LAW IN GERMAN: VOLUME TWO: 1800–1914); HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* 19 (18th ed. 2011) (General Administrative Law); Jens Kersten & Sophie-Charlotte Lenski, *Die Entwicklungsfunktion des Allgemeinen Verwaltungsrechts*, DIE VERWALTUNG 504 (2009).

<sup>5</sup> In this article the notions of “executive” and “administration” are interchangeable. Administration in particular should not be confused with government.

thesize and systematize—preceded the establishment of a democratic constitution. To that extent, Mayer’s statement was an empirical observation. But it also encapsulated a legal aspiration. Throughout every turmoil and even at momentous turning points in German constitutional and political history, the administrative branches on all levels—federal, state, municipal—continued to perform their ordinary functions: building permits had to be granted; restaurant licences had to be issued and withdrawn; streets had to be planned and built; technical installations had to be checked for safety; the civil service had to be organised and taxes had to be collected. Ideally, all those essential functions ought to be performed in a lawful, impartial way, even as many civil servants were still committed to the old order and its representatives. That, in any event, was Mayer’s ambition.

Mayer would definitely have modified his point of view had he witnessed Germany in 1933 and in the subsequent years. Even during this atrocious period of German history, building permits had to be granted, restaurant licences had to be issued and withdrawn, streets had to be planned and built, technical installations had to be checked for safety, and taxes had to be collected. But at the same time, arbitrary prosecutions and dutifully organized murders were committed by agents of the state, and entire classes of citizens were *not* granted licences and permissions because of their race, faith, or political beliefs. The state removed citizens who did not commit themselves to the new order from civil service. The notion of an administration practically cut off from the constitutional framework proved obsolete, as the new and repulsive idea of a national-socialist state impregnated most aspects of administrative law. Administrative law was not, and maybe had never been, just a tool to deal with everyday problems but also a sharp instrument of the new rulers to shape Germany to their liking.

The horrendous experience of the Nazi era was the driving force behind the very different statement made after the war and reconstruction by Fritz Werner, a President of the newly established Federal Administrative Court (*Bundesverwaltungsgericht*). By characterizing administrative law as “constitutional law made concrete,”<sup>6</sup> Werner meant to emphasize the strong links and mutual interdependence between those two branches of public law. Under the “Basic Law” (the *Grundgesetz*, adopted in 1949), fundamental decisions of the constitution now determine the shape of the administration and its law. The very first Article of the *Grundgesetz* places the protection of human dignity at its center.<sup>7</sup> It binds all branches of government to that obligation and to the protection of all constitutional rights.<sup>8</sup> Moreover, all law has

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<sup>6</sup> Werner, *supra* note 2, at 527–33.

<sup>7</sup> Art. 1 (1) Grundgesetz [GG] [Basic LAW], translation at [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic_law-data.pdf) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”).

<sup>8</sup> Art. 1 (3) GG (“The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law”).

to be made in conformity with the procedural and substantive rules of the constitution.<sup>9</sup> These foundational commands have had a profound effect on legislating the rules of administrative law and their application.

However, the new constitutional commands came to operate on the pre-existing administrative law—a very robust, highly theorized and systematized body of law that reflects centuries of experience and scholarly thought. Thus, modern German administrative law is not simply a more detailed, particularized codification of the Constitution’s abstract commands. It is better understood as a synthesis, whose structure and function must be perceived both from a historical perspective and in light of the requirements of the Constitution.

Part I of this essay provides a very brief history of German administrative law, from its beginnings as an independent discipline to its modern-day constitutionalization. Part II describes the theoretical, jurisprudential debates that accompanied the historical developments, with particular emphasis on the “juristic method” propounded by Otto Mayer and his disciples. Part III discusses the constitutionalized administrative law of the Federal Republic. Part IV describes some of the contemporary challenges.

## I. ADMINISTRATIVE LAW IN GERMANY: A VERY BRIEF HISTORY

### A. *Public Law and Civil (Private) Law*

Administrative law, as well constitutional law, is an element of public law.<sup>10</sup> From a European (continental) point of view, there is a distinct difference between administrative law and civil law. The distinction had been developed by the Romans. Civil law regulates the relationships between legal persons in a coequal sense, where all participants can be obligated or enabled in the same manner. Administrative law, in contrast, is largely defined by a system of subordination. The public authority is unilaterally obligated or enabled and, on many occasions, legally superior to the addressee of its decisions.<sup>11</sup>

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<sup>9</sup> Art. 20 (3) GG (“Legislation shall be bound by the constitutional order, the executive and the judiciary by law and justice.”).

<sup>10</sup> BERND BENDER, ALLGEMEINES VERWALTUNGSRECHT (2nd ed. 1956) (General Administrative Law); Maurer, *supra* note 4; MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, BAND I: 1600 TO 1800 (1988) (HISTORY OF PUBLIC LAW IN GERMANY: VOLUME ONE 1600–1800); Stolleis, *supra* note 4; WALTER PAULY, DEUTSCHLAND, IN Armin von Bogdandy, Sabino Cassese, Peter Michael Huber, HANDBUCH IUS PUBLICUM EUROPAEUM, BAND IV: VERWALTUNGSRECHT IN EUROPA: WISSENSCHAFT (2011) (GERMANY, IN HANDBOOK OF PUBLIC EUROPEAN LAW—VOL. 4: ADMINISTRATIVE LAW IN EUROPE: SCIENCE); ULRICH EISENHARDT, DEUTSCHE RECHTSGESCHICHTE (6th ed. 2013) (German Legal History); Georg-Christoph von Unruh, Kodifiziertes Verwaltungsrecht, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 690 (1988).

<sup>11</sup> Pauly, *supra* note 10, § 58 at 42–43; Stolleis, *supra* note 10, at 58; Bender, *supra* note 10, at 15.

In the Roman Empire the power to police rested with elected public officials. By medieval times it became an inherent power of feudal lords. Public offices turned into political bargaining chips that could be inherited, sold, or pawned. The clear distinction of public law and civil law vanished, given that any appointment to a public office could have its foundation in a purely private transaction. This legal dilution continued well into the feudal period, during which land was distributed by the contractual formation of vassalage and governmental powers that rested on landholding, such as taxation.<sup>12</sup>

German law experienced a fundamental change with the rediscovery of Roman law in the sixteenth century. The adaptation of Roman law started as early as the eleventh century with the rediscovery of ancient sources at the schools of Pavia and Bologna, mostly consisting of fragments of legal texts, verdicts, and discussions that were divided into the Pandects (a digest of Roman law compiled by the East-Roman emperor Justinian) and the Corpus Juris Canonici, *i.e.* canon law. The adaptation of the Pandects initiated a process that ended during the time of the absolutist state of the seventeenth and eighteenth centuries. It culminated in the clear differentiation between public and civil law that we know today. The distinction between civil and public law re-emerged, and public law became an independent field of theory and study, separated from the well-established rules of civil and canon law.<sup>13</sup>

A key point in this development came when in the seventeenth century feudal lords managed to free themselves from the realm. By installing a firm bureaucracy and further developing a standing army, the lords started to consolidate power in themselves. A new class of bureaucrats and soldiers emerged. This was an essential foundation and a stabilizing factor for the absolutist state, because the servants' loyalty lay solely with their local sovereign and not with the emperor. Sovereigns were only formally bound by the Holy Roman Empire's law. This led to an externally unchallenged position of power, while the lords' internal power was secured by a far-reaching *ius eminens*.<sup>14</sup>

The *ius eminens* gave the sovereign the power to encroach upon the acquired rights of the nobility (*iura quaesita*) in a manner that put them at the sovereign's mercy. The control through the *ius eminens* had started out as an exceptional measure, to ensure the regions' prosperity. It quickly became the norm and turned into the legal foundation of what we have come to call "sovereignty."<sup>15</sup>

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<sup>12</sup> Bender, *supra* note 10, at 17.

<sup>13</sup> Eisenhardt, *supra* note 10, at 83; Stolleis, *supra* note 4, at 58–59, 64–65.

<sup>14</sup> Pauly, *supra* note 10, at 52; Maurer, *supra* note 4, at 14.

<sup>15</sup> Maurer, *supra* note 4, at 14; Stolleis, *supra* note 10, at 67–68.

B. *Policing (Policeywissenschaft) and Cameralism (Kameralistik)*

The rules of policing (*Policeywissenschaft*) and cameralism (*Kameralistik*) were the first fields of study to which German scholarship of administration devoted itself.<sup>16</sup> The German notion “Polizei” emerged in the sixteenth century. Far more comprehensive than the modern notion of the “police,” it represented the entire system of internal governance and described the sovereign’s authority to independently regulate the lives of his subjects. Policing was an expression of a regulating and interfering government safeguarding the livelihood of its citizens but also strictly limiting their freedoms. *Policeywissenschaft* was the theory or “science” of exercising those powers.<sup>17</sup> *Kameralistik* (derived from Latin “camera,” meaning chamber or treasury) focused on the administration of the sovereign’s finances. In a broader sense, it describes an active economic and financial policy in which the state is a central actor on all levels.<sup>18</sup>

These first attempts to develop a modern administrative law were based on Christian Wolff’s theory of natural law and Hobbes’ teachings of the social contract. Good administration was a way for the sovereign to protect the citizens’ life and welfare. This in return was supposed to justify subjecting them to his rule. Sovereign action was to serve the common good, and it had to pursue a “good police” (*gute Policey*) in the sense of protecting and fostering the “good” and sound state of society. The rules of substantive law promoted these objectives by regulating social interactions such as trading, begging, and lending.<sup>19</sup>

The absolutist state’s national identity was somewhat ambivalent. While its paramount goal was to further the national interest, it also contained a paternalistic element. Furthering the national interest did not only mean that the community prospered; it also meant that an individual citizen’s welfare or happiness was to be pursued as a matter of public policy. This resulted in a system that can be characterized as both a welfare state and a police state at the same time.<sup>20</sup>

Because absolutist rule prohibited any objection or resistance to governmental action, the subject had to tolerate any and all public action without the chance of redress while the sovereign enjoyed a position of absolute legal immunity. Thus, the protection of the individual required a theoretical construct called *Fiskustheorie* (“fiscal theory”), offering an aggrieved party the option of financial recourse through a *civil* suit. To that end, it was assumed

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<sup>16</sup> Pauly, *supra* note 10, at 42.

<sup>17</sup> Von Unruh, *supra* note 10, at 690.

<sup>18</sup> *Id.*

<sup>19</sup> Pauly, *supra* note 10, at 42–43.

<sup>20</sup> Maurer, *supra* note 4, at 15; Pauly, *supra* note 10, at 43. *See also* Stolleis, *supra* note 10, at 369–70.

that the sovereign and the treasury were two separate legal entities.<sup>21</sup> While the treasury possessed legal capacity, the absolutist state as such and its ruler did not. They could not be held liable for any wrongdoings and could not be sued. In the case of governmental abuse of power, the treasury had to be sued in court as a legal entity in civil law. This offered the citizen a legal recourse and a chance to obtain compensation while maintaining the absolutist conception, since public authority as such vested in the monarch remained untouched.<sup>22</sup>

### C. *Civil Service*

To cope with the growing administrative demands of a mercantilist state and to enable a system of comprehensive policing, administrative capabilities had to be increased in size, intensity, and professionalism. The crucial novelty of this administrative organization was a new social class of professional civil servants. The classes of public servants and soldiers became the foundation of the executive branch of the state.<sup>23</sup> Its existence also led to a changing image of the sovereign. The notion of “l'état c'est moi,” coined by Louis XIV, was no longer in tune with the zeitgeist and the actual organization of the state. Frederick the Great saw himself as the state's chief or “first” servant, which marked the legal metamorphosis of the public official from being the sovereign's servant to being in service to the nation.<sup>24</sup>

The comprehensive book of statutes for Prussia, *Allgemeines Preußisches Landrecht*, of 1794 became the first codification of the law governing the modern state.<sup>25</sup> Among other things, it regulated the public servants' appointment and conditions of employment in a way resembling our current understanding of the civil service.<sup>26</sup> The rules altered the nature of the civil service. It was now perceived as a subject of public law. For example, the civil principles of annulment were no longer applicable to public servants' employment contracts.<sup>27</sup> This paved the way for the new principle of tenure. Public servants could now depend on their employer to secure their personal livelihood. Lifelong service in exchange for lifelong support made public service desirable. This attracted members of the intellectual elite and it improved the system through the influx of highly skilled employees.<sup>28</sup>

Beyond this, a complete system of the general rules of administrative law in the form of a code of law was neither enacted nor seriously pursued

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<sup>21</sup> Bender, *supra* note 10, at 21.

<sup>22</sup> *Id.* at 23; Maurer, *supra* note 4, at 15.

<sup>23</sup> Bender, *supra* note 10, at 23.

<sup>24</sup> *Id.*; Stolleis, *supra* note 10, at 358–59.

<sup>25</sup> Eisenhardt, *supra* note 10, at 151–52.

<sup>26</sup> Bender, *supra* note 10, at 23.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; Maurer, *supra* note 4, at 18.

by the German states or at the federal level until the early twentieth century. State legislatures focused on rules that governed and justified individual administrative acts in specific areas of the administration. The fragmentation was supported by the distribution of legislative competences between the states and the federation (or the Reich, respectively).<sup>29</sup>

With industrialization and the concentration of large parts of the populace into urban centers, there arose a social need for governmental support of individual citizens. Too, there was a need for a functioning infrastructure and balancing acts to ensure social equality. Out of these needs developed the preconditions for the further development of administrative law in the modern sense. The basis lay in the nineteenth century state constitutions of Bavaria, Baden, Württemberg and Hesse-Darmstadt (1818-1820).<sup>30</sup> The constitutional separation of powers and constitutionally-granted fundamental rights demanded an explicit regulation of the public administration's jurisdiction and power.<sup>31</sup>

#### D. *Lawful Government and Separated Powers*

The new principles of public service stood the test of time. Absolutism and mercantilism did not. The liberal bourgeoisie of the nineteenth century stood up against the oppressive governments, monarchs and their public administration and demanded a sharp reduction of administrative power.<sup>32</sup> The economic sector was to be left to its natural principle of open competition. The public administration's power was in theory to be reduced to the protection of health and safety and public order in the widest possible sense – though in practice it reached beyond that task.<sup>33</sup>

These demands were largely met by state constitutions of the nineteenth century, which set new limits to the power of the absolutist sovereign.<sup>34</sup> The bourgeois society of the nineteenth century was defined by its newly found freedoms, guaranteed by the fundamental rights and the separation of powers.<sup>35</sup> With the principle of the separation of powers came a constitutional

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<sup>29</sup> Von Unruh, *supra* note 10, at 692–93.

<sup>30</sup> Bender, *supra* note 10, at 35.

<sup>31</sup> *Id.* at 34–35.

<sup>32</sup> Maurer, *supra* note 4, at 15.

<sup>33</sup> Police power was ultimately limited by the Kreuzberg-decision of the higher Prussian administrative court. It decided that the police, who had taken it upon themselves to regulate the planning sector in Berlin, was acting outside of its given powers and that the function of the police was limited to the prevention of hazards and that all other aspects of the administration's responsibilities were outside of its jurisdiction. Kreuzbergurteil, PrOVG Endurteil des II Senats vom 14.6.1882, Rep. II B. 23/82 PrOVGE 9, 353 et seq.

<sup>34</sup> Maurer, *supra* note 4, at 15–16.

<sup>35</sup> Bender, *supra* note 10, at 28.

paradigm shift based on the idea that there is not only a functional necessity to separate powers but an organizational one as well.<sup>36</sup>

The functional differentiation of state authority into executive, judicial and legislative acts had long been well-known feature. However, the idea that these exercises of authority had to be divided between separate, independent branches of the state was new. Montesquieu was among the first to formulate this idea in his groundbreaking work on *De l'Esprit des Lois* (1748).<sup>37</sup> To separate the powers meant to lower the risk of arbitrary encroachment upon individual rights and a significant reduction of the sovereign's authority. He was no longer the focal point of the state's power and had to work with the populace, if he meant to exercise his still-considerable executive powers.<sup>38</sup> For Montesquieu, political freedom meant to be able to do everything the law permitted, while refraining from doing what was prohibited by the law.<sup>39</sup> In return, citizens should be able to trust the institutions to act in the same lawful manner.<sup>40</sup>

This resulted in two fundamental changes for the public administration. It was no longer a loyal subject's duty to tolerate any and all administrative action.<sup>41</sup> And for an act to be legal it had to adhere to the law in a way, that can be described by the contemporary principles of the *Vorbehalt des Gesetzes* and the *Vorrang des Gesetzes*.<sup>42</sup> The former principle requires governmental action to be based on a legitimizing parliamentary law and deems all acts lacking such a foundation as unconstitutional.<sup>43</sup> This concept is further elaborated by the principle of substantiality, *Wesentlichkeitstheorie*, which states that an administrative act needs an explicit authorization by parliamentary statute if the act has substantial consequences for a citizen's fundamental rights.<sup>44</sup> Otherwise, by-laws or other delegated legislation are a sufficient base for administrative action. The corresponding *Vorrang des Gesetzes* supplements this fundamental principle.<sup>45</sup> It establishes that any branch of public authority is bound by law (parliamentary statutes, delegated legislation, by-

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<sup>36</sup> Stolleis, *supra* note 4, at 43–44.

<sup>37</sup> Bender, *supra* note 10, at 26.

<sup>38</sup> *Id.* at 26–27.

<sup>39</sup> *Id.* at 27.

<sup>40</sup> Maurer, *supra* note 4, at 16–17.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.* at 27; Wolfgang Kahl, Über einige Pfade und Tendenzen in Verwaltungsrecht und Verwaltungsrechtswissenschaft - ein Zwischenbericht, *DIE VERWALTUNG* 486 (2009) (On Some Paths and Tendencies in Administrative Law and Administrative Jurisprudence: An Interim Report, *THE ADMIN.* 486 (2009)).

<sup>43</sup> Helmuth Schulze-Fielitz, in Horst Dreier (ed.), *GRUNDGESETZ-KOMMENTAR, BAND II: Art. 20 Rn.105 et seqq.* (3rd ed. 2015).

<sup>44</sup> *Id.* at 113; Klaus Stern, in: *KLAUS STERN & FLORIAN BECKER, GRUNDRECHTE-KOMMENTAR, Einl. 130* (2nd ed. 2016).

<sup>45</sup> Schulze-Fielitz, *supra* note 43, at 92.



laws etc.) as well as by the constitution itself; however, Parliament is bound by the constitution only.<sup>46</sup>

E. *Judicial Review*

The focus on lawful governmental and administrative conduct raises the question of how lawfulness is to be safeguarded and enforced in individual cases. One means of accomplishing that end is judicial review. While the liberal principles championed by the ascendant bourgeoisie suffered a setback in the failed 1848–1849 revolution, the development of the rule of law progressed.<sup>47</sup> A key point in this development was the creation of a separate system of courts, which were tasked to subject sovereign acts to judicial review.<sup>48</sup> The (albeit slow) establishment of this new administrative court system in the realm of some German states was due to the perception of judicial review as the enabling factor for law and order and as the cornerstone for the guarantee of an accountable administration.<sup>49</sup>

The first German state to create an administrative court system separate from all other courts was Baden (1863).<sup>50</sup> By 1876 all other states had followed suit.<sup>51</sup> However, effective legal protection had not yet been achieved, given that most courts only had jurisdiction for a limited number of specific laws.<sup>52</sup> Significant elements of administrative action remained exempt from judicial review.<sup>53</sup> This deficit in legal protection was exacerbated by the nature of the newly founded courts. Judges were not yet independent from the public administration but appointed like all other public servants.<sup>54</sup> Accordingly, administrative courts did not belong to a third branch of the judicial system (alongside criminal and civil courts); rather, they were an institutional part of the administration.<sup>55</sup> From a rule of law perspective, however, even a weak court system was a significant improvement compared to the state of affairs prior to 1863.<sup>56</sup> This relatively weak state of the administrative courts persisted until 1960 when a general statute governing the administrative courts, the *Verwaltungsgerichtsordnung*, or VwGO, was enacted and the

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<sup>46</sup> Bender, *supra* note 10, at 27; Maurer, *supra* note 4, at 123; Von Unruh, *supra* note 10, at 690–91.

<sup>47</sup> Bender, *supra* note 10, at 43.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 42.

<sup>50</sup> *Id.*; FRIEDHELM HUFEN, VERWALTUNGSPROZESSRECHT 28 et seq. (9th ed. 2013).

<sup>51</sup> Bender, *supra* note 10, at 42; Hufen, *supra* note 50, at 28–29.

<sup>52</sup> Hufen, *supra* note 50, at 28.

<sup>53</sup> Von Unruh, *supra* note 10, at 694.

<sup>54</sup> Hufen, *supra* note 50, at 25–26.

<sup>55</sup> Bender, *supra* note 10, at 42.

<sup>56</sup> Stolleis, *supra* note 4, at 242.

constitutional need for an independent administrative court system and effective legal protection was finally met.<sup>57</sup>

## II. FROM *STAATSWISSENSCHAFT* TO THE “JURISTIC METHOD”

Eighteenth-century scholarship focused on the effectiveness and the political necessity of a specific administrative act. Given the nature of mercantilist administration and its immunity against judicial review, a genuinely legal approach – in the sense of testing administrative decisions against generic procedural and higher-ranked (*i.e.* constitutional) substantive rules and establishing a requirement to explain the result with instruments of legal argument – did not develop. This changed with the fundamental idea that the law binds every public institution, which has to act within its limits. The so-called constitutional method, *staatswissenschaftliche Methode*, marked the first attempt to establish administrative law as a discipline of German legal scholarship.<sup>58</sup>

Lorenz von Stein, a leading proponent of the constitutional method, developed a theory of the administration, *Verwaltungslehre*, that combined legal aspects of administration with economic ones.<sup>59</sup> Von Stein used the old rules of policing and developed them into a discipline that was fit to cope with the demands of his time.<sup>60</sup> He sought to compile, sort, and comment on the existing rules used as the legitimating basis of administrative action.<sup>61</sup> According to Lorenz von Stein, a coherent development of administrative law could only ever be achieved if all relevant statutes and regulations were merged into a comprehensive code of law.<sup>62</sup> From his point of view, administrative law could only exist if it was codified. Von Stein’s theory and other, similar ideas remained linked to constitutional concerns.<sup>63</sup> In fact, the first systematic approaches to administrative law were published as chapters in textbooks on constitutional law.<sup>64</sup> Moreover, in systematizing rules of “police” that had developed in widely varying areas, von Stein focused on a field

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<sup>57</sup> DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 3/55 p. 26 concerning § 1.

<sup>58</sup> Bender, *supra* note 10, at 43; Maurer, *supra* note 4, at 18; Stolleis, *supra* note 4, at 320, 390 – 391.

<sup>59</sup> Bender, *supra* note 10, at 43.

<sup>60</sup> Maurer, *supra* note 4, at 18; Pauly, *supra* note 10, at 45.

<sup>61</sup> Von Unruh, *supra* note 10, at 692.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 692–93; *see also* Bender, *supra* note 10, at 43; Stolleis, *supra* note 4, at 391–92 (critical towards von Stein).

<sup>64</sup> Maurer, *supra* note 4, at 18.

of study that modern scholarship would classify as “special” rather than general administrative law.<sup>65</sup>

The developments of the nineteenth century and the emergence of an administrative judiciary in particular brought about the end of the constitutional method and created the foundation for the juristic method (*juristische Methode*), which has remained the principal “method” of German administrative law to this day.<sup>66</sup> Its representatives did not only focus upon the compilation of the positive law, but also and foremost on the doctrinal development of systems and structures extracted from the sector-specific rules.<sup>67</sup> The juristic method sought to create a doctrinal system that implemented these changes in the enforceability of the administrative law.<sup>68</sup> It turned out that decisions such as scrutinizing a building permit, a tax claim, or a plan to build a street, had some common features even though they dealt with completely different questions of varying complexity. This insight and the attempt to develop it marked the beginning of a “general” administrative law in today’s sense.<sup>69</sup>

Groundbreaking work in that respect was completed by Otto Mayer. His elaboration of administrative principles underlying all administrative law has influenced German doctrine to this day.<sup>70</sup> His method was inspired by the French administrative scholarship, and it followed a systematic and positivist approach.<sup>71</sup> Mayer presented “German Administrative Law” as a comprehensive system of governmental / administrative action.<sup>72</sup>

Otto Mayer’s method has shaped German administrative law doctrine towards the establishment of a coherent system based on the idea that all doctrinal meaning is contained within the normative legal text itself.<sup>73</sup> Extrinsic factors should have no influence on the application of the rule.<sup>74</sup> The system continues to develop and improve through every correct application of the normative text. Any further development is driven by the legislature or the court system, whose case law serves as a continued process of adaptation

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<sup>65</sup> Modern German law still embodies the longstanding distinction between “general” and “special” administrative law. The general law incorporates the fundamental principles of administration and administrative acts. It regulates the administrative act, the prerequisites of its legality and the consequences of its illegality. It is also the source of procedural law, that contains a conclusive description of the different forms of administrative legal protection. Specific administrative law on the other hand governs the different branches of administration (prevention, planning, environment, licensing). Special administrative regulations focus on the individual administrative act and stipulate the obligations and responsibilities of administration and the prerequisites of obligations or benefits for the citizen.

<sup>66</sup> Kahl, *supra* note 42, at 485–86; Maurer, *supra* note 4, at 19.

<sup>67</sup> Bender, *supra* note 10, at 43; Kahl, *supra* note 42, at 486.

<sup>68</sup> Kahl, *supra* note 42, at 486.

<sup>69</sup> Maurer, *supra* note 4, at 19; Stolleis, *supra* note 4, at 404.

<sup>70</sup> Maurer, *supra* note 4, at 19; Kahl, *supra* note 42, at 485–86.

<sup>71</sup> Maurer, *supra* note 4, at 19.

<sup>72</sup> Bender, *supra* note 10, at 43; Maurer, *supra* note 4, at 19; Pauly, *supra* note 10, at 47.

<sup>73</sup> Kahl, *supra* note 42, at 486.

<sup>74</sup> *Id.*

to modern circumstances and as an inspiration for the legislative process.<sup>75</sup> The guarantee of lawful administration is achieved through the systematization of the substantive law, which concretizes the constitutional limits and the prerequisites for the judicial review of administrative action.<sup>76</sup>

For Mayer, “administration” describes those acts necessary to fulfill governmental and administrative responsibilities.<sup>77</sup> He did not shy away from the use of notions developed in French and German civil law, and he built his theory around the concept of the individual administrative act, *Verwaltungsakt*.<sup>78</sup> For this, Mayer used the French *acte administratif* as a model and focused on its legal effect, in analogy to a judicial decision.<sup>79</sup>

But though Mayer’s theory and method were strongly influenced by the French model, they focused on the form of administrative action.<sup>80</sup> In contrast, the French approach focused on the administration’s jurisdiction and power.<sup>81</sup> The very core of Mayer’s system was the assumption that an individual administrative act was generally binding—regardless of its legality—until challenged.<sup>82</sup> From a rule-of-law perspective, this was acceptable because in his system, individual administrative acts were supposed to be subject to extensive judicial review.<sup>83</sup>

According to Mayer’s legal doctrine, the individual administrative act governs the rights and duties of citizen in their relationship with the state.<sup>84</sup> Most obligations and entitlements enshrined in the law remain abstract.<sup>85</sup> The individual administrative act clarifies for the citizen and the state alike that the particular rule is applicable in a particular instance.<sup>86</sup> Thus, the purpose of the individual administrative act is to build a bridge between abstract rules of laws and concrete situations.

Some scholars criticized Mayer’s system due to its similarities to French law.<sup>87</sup> Others questioned the juristic method because they were proponents of

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<sup>75</sup> *Id.*

<sup>76</sup> Art. 20 (3) GG (“Legislation shall be bound by the constitutional order, the executive and judiciary by law and justice.”).

<sup>77</sup> Maurer, *supra* note 4, at 19.

<sup>78</sup> *Id.*

<sup>79</sup> Pauly, *supra* note 10, at 47. It is ironic that Mayer was inspired by the French administrative doctrine to form a system in Germany given that the French administrative law today is not codified and differs greatly from the German legal order due to the strong dependency on the decisions of the highest administrative court, the Conseil d’État, which is the focal point of the French administrative law’s origination and its contemporary development.

<sup>80</sup> Maurer, *supra* note 4, at 19.

<sup>81</sup> Pauly, *supra* note 10, at 47–48.

<sup>82</sup> Stolleis, *supra* note 4, at 406.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Pauly, *supra* note 10, at 47; Stolleis, *supra* note 4, at 406.

<sup>86</sup> Stolleis, *supra* note 4, at 406, 410–11.

<sup>87</sup> Pauly, *supra* note 10, at 48.

a strict understanding of the separation of powers and argued that the individual administrative act should be as autonomous as a judicial decision and should therefore subject to appeal only within the executive.<sup>88</sup> Objections of this nature were short-lived, however, given the potential for administrative despotism that a system without judicial review would entail.<sup>89</sup>

Walter Jellinek, who was a disciple of Mayer, continued Mayer's work, further advancing administrative law into the twentieth century.<sup>90</sup> Even though today the modern state has moved on towards a highly interventionist welfare state, Jellinek's description of administration still has currency.<sup>91</sup> The general part of his textbook addresses sources and subjects of administrative law, the subjective rights of citizens, and judicial review.<sup>92</sup> However, he also addresses specific areas of the administration and their rules.<sup>93</sup> One of the last pre-Nazi representatives of a liberal, rule-of-law-oriented scholarship, Jellinek attempted to limit the powers of the administration in relation to the individual, even as he strove to account for the necessary powers of the state and its administration to govern for the common good.<sup>94</sup> The National Socialists drove Jellinek, a scholar of Jewish descent, out of his position.<sup>95</sup> The development of administrative law in the modern sense was halted, and the doctrine established by that point was replaced with the "Führer principle."<sup>96</sup>

With the end of the National Socialist tyranny and the enactment of the *Grundgesetz*, administrative law's development began anew and the work on a codification of the German administrative law began.

### III. THE BASIC LAW MEETS ADMINISTRATIVE LAW

The making of Germany's new constitution after the war—the Basic Law or *Grundgesetz* of 1949—triggered fundamental changes in German Administrative Law. With its enactment, the Basic Law changed substantive administrative law by establishing absolute limits of administrative action.

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<sup>88</sup> Stolleis, *supra* note 4, at 411.

<sup>89</sup> *Id.*

<sup>90</sup> Bender, *supra* note 10, at 43.

<sup>91</sup> JAN ZIEKOW, ARCHIV DES ÖFFENTLICHEN RECHTS VOL. 111, 219–230, 223 (1986); Martin Schulte, Walter Jellinek (1885-1955), in Peter Häberle, Michael Kilian, Heinrich Wolff (eds. 2015), STAATSRECHTSLEHRER DES 20. JAHRHUNDERTS: DEUTSCHLAND–ÖSTERREICH–SCHWEIZ 299–311, 306–310.

<sup>92</sup> See the table of content in: WALTER JELLINEK, VERWALTUNGSRECHT (3d ed. 1931; reprinted 1966).

<sup>93</sup> *Id.*

<sup>94</sup> Erwin Jacobi, Speech at the Memorial Service of the University of Heidelberg: In Memoriam Walter Jellinek, 16 (Nov. 11, 1955).

<sup>95</sup> KLAUS KEMPTER, DIE JELLINEKS 1820-1955: EINE FAMILIENBIOGRAPHISCHE STUDIE ZUM DEUTSCHJÜDISCHEN BILDUNGSBÜRGERTUM 478–488 (1998).

<sup>96</sup> Stolleis, *supra* note 4, at 415.

These constitutional boundaries were prerequisite of Germany's transformation from an authoritarian to a liberal administrative system.

The Basic Law has subjected large areas of administrative discretion to constitutional constraints and, in the process, revised or replaced major elements of Mayer's legal architecture. By way of quick example (and pending the more extensive discussion below): Mayer distinguished a general from a specific legal relationship between state and citizen.<sup>97</sup> A person is in a specific relationship with the state, *besonderes Gewaltverhältnis*, if he is closer to the state than ordinary private citizens—as are for example, public servants, judges, prisoners, or students in state schools.<sup>98</sup> Individual administrative acts within these special relationships, according to Mayer, are not subject to full judicial review and constitutional individual rights afforded only limited protection.<sup>99</sup> In 1972, the Federal Constitutional Court rejected the existence of these specific relationships and demanded the full application of fundamental rights and the rule of law in those cases.<sup>100</sup>

Even so, the Federal Republic does not present a picture of a one-sided triumph of lofty constitutional aspirations over administrative law, as understood and developed in accordance with the juristic method. Rather, the interplay is best understood as a synthesis. The experience of the Nazi era compelled the legal profession to think very hard about the prerequisites of a liberal democratic order in accordance with the rule of law—the *freiheitlich-demokratische Rechtsordnung* enshrined in the Constitution.<sup>101</sup> Otto Mayer's administrative law had obviously failed to provide a barrier against autocracy and tyranny. Even so, its formal conceptual apparatus and especially its emphasis on lawfulness proved highly conducive to the important task of making general, highly abstract constitutional precepts concrete in the day-to-day operation of an administrative—yet liberal and democratic—state.

Art. 1 (3) and Art 19 (4) GG have been the principal sources of this approach. Art. 19 (4) GG guarantees comprehensive legal protection against any act of public authority.<sup>102</sup> With regard to administrative action, it guarantees that any and all public acts affecting the subjective rights of citizens as defined in the constitution are subject to judicial review.<sup>103</sup> The reviewability of an act depends on Sec. 42 (2) VwGO, *Verwaltungsgerichtsordnung*, Code

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<sup>97</sup> *Id.* at 411–12.

<sup>98</sup> Schulze-Fielitz, *supra* note 43, at 110–111.

<sup>99</sup> *Id.*

<sup>100</sup> 33 BVerfGE 1–18, 2 BvR 41/71 (Mar. 14, 1972) (“Prisoner” Decision).

<sup>101</sup> MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, BAND IV: 1945–1990* 32 (2012) (*HISTORY OF PUBLIC LAW IN GERMANY: VOLUME FOUR: 1945–1990*).

<sup>102</sup> Art. 19 (4) GG (stating that should any person's rights be violated by public authority; he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts).

<sup>103</sup> Christoph Brüning, *in: Stern & Becker, supra* 44, at Art. 19 Rn. 107 et seq.

of Administrative Court Procedure.<sup>104</sup> This rule states that legal action against any public action is admissible, *zulässig*, if the person affected can show that there is a possibility of an infringement of a subjective right.<sup>105</sup> This right can be of constitutional origin, but could also be enshrined in parliamentary or delegated law. This wide range of German judicial review is guaranteed by Art. 19 (4) GG.<sup>106</sup> It reflects the fundamental condition of the German constitutional state: there is no legal sphere in which the citizen has to accept an infringement of his fundamental rights.<sup>107</sup>

This is further emphasised in Art. 1 (3) and 20 (3) GG and the principle of a lawful administration constituted by these two provisions.<sup>108</sup> Substantive and procedural administrative law were modified in the light of these new boundaries. Fundamental rights became determinants of all executive action and decisions even within the inner workings of the government. What had once been a simple question of legality in the sense of accordance with statutory law is now supplemented with the question of its constitutionality as an additional layer of legality. The idea of administrative law as the concretization of Constitutional Law was born.<sup>109</sup> The binding effect of the Federal Constitutional Court's decisions<sup>110</sup> and the possibility of a constitutional complaint as a way to review all legal acts for consistency with the fundamental rights institutionalized these changes.

The administrative court system used the Federal Constitutional Court's decisions as the foundation of its case law. This led to an infusion of fundamental rights into every aspect of administrative law. Fundamental rights also operate as an indicator of the value changes of society and help the courts adapt to the social dynamic. This function became most apparent with the recent inclusion of technology and data security as a fundamental right into the German Basic Law. This newly established fundamental right is a special

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<sup>104</sup> VERWALTUNGSGERICHTSORDNUNG [VwGO] [Code of Administrative Court Procedure] § 42 (2) (Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission).

<sup>105</sup> Wolf-Rüdiger Schenke/Ralf Peter Schenke, in: Ferdinand O. Kopp & Wolf-Rüdiger Schenke, VERWALTUNGSGERICHTSORDNUNG: VwGO § 42 Rn. 59 (21st ed. 2015).

<sup>106</sup> Christoph Brüning, in: Stern & Becker, *supra* note 44, Art. 19 Rn. 107.

<sup>107</sup> 33 BVerfGE 1–18, 2 BvR 41/71 (Mar. 3, 1972) (“Prisoner” Decision).

<sup>108</sup> Schulze-Fielitz, *supra* note 43, at 92–93.

<sup>109</sup> Schönberger, *supra* note 3, at 53.

<sup>110</sup> BVerfGG § 31.

(1) The decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as on all courts and public authorities.

(2) In the cases referred to in § 13 nos. 6, 6a, 11, 12, and 14, the decision of the Federal Constitutional Court shall have the force of law. This shall also apply in the cases referred to in § 13 no. 8a if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or if it voids the law. If a law is declared to be compatible or incompatible with the Basic Law or other federal law, or if it is voided, the relevant operative part of the decision shall be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection. This shall apply accordingly to the operative part of the decision in the cases referred to in § 13 nos. 12 and 14.

variation of Art. 2 (1) GG and the right informational self-determination (data privacy).<sup>111</sup> It protects the citizens from governmental cyber searches and grants information systems, like computers or cell phones, a similar level of security as personal correspondence.<sup>112</sup>

The interplay between constitutional commands and administrative law traditions is illustrated by three legal debates that have accompanied the process: the principle of proportionality; the distinction between state and society, public and private, and administrative and civil law; and the codification of administrative law.

#### A. *Proportionality*

All public acts that restrict private citizens' rights are subject to judicial review, and they must be "proportional." The principle of proportionality is not expressly constituted by the German Basic Law.<sup>113</sup> Some argue that it is a part of Art. 20 (3) and Art. 1 GG,<sup>114</sup> while others see it as an expression of art. 20 (2) and (3), Art. 3 (1) and Art. 19 (2).<sup>115</sup> There is consensus, however, that the principle of proportionality is constitutionally guaranteed and a fundamental element of the rule of law.<sup>116</sup>

The idea of a system that prevents the citizen from being subjected to a disproportionate measure can be traced back to the police law and the case law of the Prussian administrative courts.<sup>117</sup> It took the Basic Law to transform the principle of proportionality into the universal safeguard it is today. The principle binds all governmental action as long as citizens' subjective rights are being restricted. An act is proportionate and therefore constitutional if it is the suitable ("*Geeignetheit*"), necessary ("*Erforderlichkeit*") and balanced ("*Angemessenheit*") measure.<sup>118</sup> These three elements form the standard of judicial review for all administrative acts.<sup>119</sup> A measure is suitable if it is capable of furthering the achievement of objective.<sup>120</sup> An act is necessary if it is the relatively least restrictive among all equally suitable means.<sup>121</sup>

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<sup>111</sup> Horn, *supra* note 44, Art. 2 Rn. 51.

<sup>112</sup> *Id.*

<sup>113</sup> The principle of proportionality is explicitly mentioned in the Treaty on the European Union, Art. 5(4) TEU.

<sup>114</sup> Karl-Peter Sommermann, *in*: Hermann v. Mangoldt, Friedrich Klein, Christian Starck (eds.), GRUNDGESETZ-KOMMENTAR BAND II: Art. 20 Rn. 308 (6th ed. 2010).

<sup>115</sup> Schulze-Fielitz, *supra* note 43, at 179.

<sup>116</sup> Hans Hofmann, *in*: Bruno Schmidt-Bleibtreu, Hans Hofmann, Hans-Günther Hennecke (eds.), GRUNDGESETZ-KOMMENTAR BAND II: Art. 20 Rn. 72 (13th ed. 2014).

<sup>117</sup> Schulze-Fielitz, *supra* note 43, at 179.

<sup>118</sup> Klaus Stern, *supra* note 44, Einl. Rn. 136.

<sup>119</sup> Helmuth Schulze-Fielitz, *supra* note 43, at 179–80.

<sup>120</sup> Klaus Stern, *supra* note 44, Einl. Rn. 138.

<sup>121</sup> *Id.* Einl. Rn. 139.



The element of balance or of proportionality in a strict sense measures the proper ratio between the intensity of the harm to individual rights on the one hand and the public interest on the other.<sup>122</sup> If the disadvantages to the citizens outweigh the benefits of the state an administrative act is disproportionate, therefore unconstitutional and illegal.<sup>123</sup>

Proportionality is a legal concept. All legal acts can be tested for their proportionality when they interfere with individual rights. Since proportionality is also a constitutional question, the Federal Constitutional Court can even test parliamentary statutes accordingly. Of course, the scrutiny is much more intense when testing administrative action. When parliamentary statutes, or even delegated legislation, are at stake, courts are reluctant to second-guess policy considerations of lawmakers.

## B. *State and Society*

As described earlier, the distinction between public and private administrative and civil law has been a foundation of German law over the centuries. In recent decades it has become controversial, and it is sometimes dismissed as an ideological construct of the nineteenth century—both because modern-day government features so many “hybrid” forms of public-private action, and because in a democratic system society has become the foundation of the state’s sovereignty. Contrary to such suggestions, however, the Basic Law presupposes and in fact cements the distinction, while stripping it of its historical authoritarian connotations and implications.<sup>124</sup>

The Basic Law replaced the authoritarian system with a democracy. Citizens (rather than a party or a single person) again became the source of sovereignty. On the one hand, the Basic Law binds all branches of government—but *only* the government.<sup>125</sup> On the other hand, the GG emphasizes the separation of a state that is bound by constitutional restraints and a society that is protected by fundamental rights. As a matter of principle, fundamental rights are not applicable in legal relationships between private individuals. However, they will become relevant when the state becomes involved. For example, a landlord can terminate the lease of a flat under certain conditions. When courts are required to actually evict the tenant, however, they have to consider his fundamental rights (privacy, right of family life, etc.) in their decisions.

The nation’s people democratically empower the state. Yet, civil society is not the location of sovereignty but of individual freedom that distinguishes the modern constitution from its authoritarian predecessors. These somewhat

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<sup>122</sup> Schulze-Fielitz, *supra* note 43, at 184.

<sup>123</sup> Klaus Stern, *supra* note 44, Art. 2 Rn. 51.

<sup>124</sup> Kahl, *supra* note 42, at 495–96.

<sup>125</sup> *Cf.* Art. 1 (3) GG.

metaphysical doctrines have great practical relevance. If the use of the administrative law is not mandatory and the administration is not dependent on its coercive powers as it is, for example, in taxation, it may also perform its functions using civil law instruments such as contracts. This power to choose extends to both the organizational form of institutions and the form of the legal relationship between state and citizen. However, the Basic Law binds administrative action and decisions even if the administration chooses to act under the civil law, preventing an “escape into the civil law”.<sup>126</sup> Thus, the use of civil law by the state is primarily limited by Art. 3 (1) GG,<sup>127</sup> its prohibition of arbitrary acts and the fundamental principles of administrative law, including the principle of proportionality.

These limits lead to a permeation of the civil law by the public law and the creation of a civil law specially shaped for the administration. With blurred lines come areas of regulation that incorporate aspects of both administrative and civil law. What was once governed by specific branches of administrative law is now regulated through a multitude of laws only connected by their underlying constitutional protective purpose. It is sometimes doubtful how well these guarantees can hold up when the institutional players no longer act under public law and instead choose to act as civil law entities. For example, the undertaking operating Frankfurt airport (“Fraport”) is a listed limited company with the state as majority shareholder.<sup>128</sup> This led to the question whether the Fraport had to adhere to the German Basic Law and guarantee the freedom of assembly as stated in Art. 8 (1) on its premises.<sup>129</sup> A private enterprise could have relied on its property rights and denied demonstrators access.<sup>130</sup> However, the Federal Constitutional Court insisted that Fraport was bound by the constitution and therefore unable to deny the demonstrators entrance, even though the state’s ownership of the undertaking was based on civil law provisions.<sup>131</sup> The decision underlines the fundamental rule that the guarantees of legal protection and lawful administration are always relevant and that the state may not escape its public law limitations by using private law.

### C. *Codification and Administrative Discretion*

The codification of administrative law—ideally, in a single statute governing all public agencies—may sound like a mere problem of bureaucratic

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<sup>126</sup> FRITZ FLEINER, INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS, 326 (8th ed. 1928).

<sup>127</sup> Art. 3 (1) GG (“All persons shall be equal before the law.”).

<sup>128</sup> 33 BVerfGE 128, 226–78, 1 BvR 699/06 (Feb. 22, 2011).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

organization and management. However, in Germany the question has always been entangled with broader concerns about lawful government. Lorenz von Stein aimed for comprehensive codification. However, the idea that the administration could be regulated as a whole was met with skepticism. In 1910, von Stein's demand for codification was once again subject of a scholarly debate questioning the possibility of a lawful administration without a comprehensive code of law.<sup>132</sup> Many German scholars rejected these demands and argued that administrative action was not a purely legal problem and therefore not accessible to a unifying code of law.<sup>133</sup> They argued that administration is focused on the individual case and that a set of general rules could not afford the necessary flexibility.<sup>134</sup>

Prior to the National Socialists' rise to power, the codification of a "general part" of administrative law had been attempted but not enacted. Only in 1976, a codification was legislated for the federal administration, *Verwaltungsverfahrensgesetz* (VwVfG).<sup>135</sup> All German states enacted state administrative codifications for their state administration.<sup>136</sup> These codes are mostly identical to the federal codifications. The jurisdiction with regard to general administrative law is therefore equally divided between the states and the federal government. While the substantive law might differ marginally depending on the respective state, the applicable procedural law is a federal matter and uniformly regulated by the federal *Verwaltungsgerichtsordnung* (VwGO).

However, some areas of Administrative Law, especially those that are characterized by a high degree of complexity in individual cases, such as land-use planning decisions or permissions for huge technical installations, proved to be resistant to statutory regulation.<sup>137</sup> This was due to the complexity of the subject and the flexibility required when making decisions affecting not only individual applicants or plaintiffs but also numerous other parties.<sup>138</sup> To cover a middle ground between parliamentary responsibility and administrative flexibility, statutes would use open-ended, broadly worded provisions and devolve discretionary power to the administration.<sup>139</sup> Dangers of both open worded provisions and corrosion of the codification system through extensive discretionary decisions are partly met by the guarantee of

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<sup>132</sup> Von Unruh, *supra* note 10, at 692.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> While the VwGO regulates the requirements of judicial review in the formal sense, the VwVfG defines which criteria have to be met for a governmental procedure or action to be legitimate.

<sup>136</sup> Von Unruh, *supra* note 10, at 695.

<sup>137</sup> *Id.* at 696.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 695–96.

universal judicial review.<sup>140</sup> Judicial review encompasses both the compatibility of administrative decisions with the statutory law and the exercise of discretionary power both in regard to its objectivity and proportionality. This leaves only considerations of practicability to judicial deference.

The question remains whether codification is a constitutional necessity. To codify means to create a system of legal certainty—a body of law that is at least in principle accessible and comprehensible for everybody and fit to delineate the legality of an administrative act. Additionally, codification leads to a greater predictability of administrative action. This in turn leads to a better protection of citizens' legal positions. At the same time, attempting to codify all administrative law means to cover all relevant details of social and economic life. What is meant to secure a sphere of legally protected freedom can also lead to an overly restricted and inflexible public administration. The VwVfG and its equivalents have nonetheless been a significant step forward for Germany. They have led to a harmonization of administrative procedural law, made constitutional limits of state action transparent, and eased the workload of the courts. At the same time, they have enhanced the administration's effectiveness and strengthened citizens' rights.

#### IV. CHALLENGES

Is the German administrative system still fit to face the challenges of the twenty-first century? Scholarly proponents of a “new Administrative Law” perceive themselves as reacting to a crisis of German administrative law in the face of (1) increased social and administrative complexity and (2) the growing demands of globalization and Europeanization. Both developments allegedly require alternatives to the well-established juristic method to handle them in an appropriate way.

##### A. *Complexity*

It is argued that the circumstances for exercising administrative authority have changed fundamentally due to an increase of administrative functions in both size and complexity.<sup>141</sup> Germany's *Wirtschaftswunder* in the 1960s had led to widespread optimism and the promise of lasting social and economic progress. With the transition from a liberal state towards a proactive welfare state and the additional challenges of environmental protection came a substantial increase in functions and responsibilities for the state. State planning expanded from budgeting and project planning to land use

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<sup>140</sup> Art. 19 (4) GG (“Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.”).

<sup>141</sup> Kahl, *supra* note 42, at 489.

planning, planning of education, healthcare, local transportation, waste disposal, and so on. The link between complex decisions made by state authorities and the statutory basis for this process became weaker. The traditional structure of conditional legal rules (“if...then”) had to be adjusted for planning purposes. The legislator devolved extensive discretionary powers to the administration.<sup>142</sup> However, courts and administration alike were not immediately able to cope with these new powers and their consequences for the scope of judicial review. In addition, the system’s complexity and rigidity caused a whole range of administrative errors. Critics argued that traditional normative interpretation and reasoning were not sufficient to cope with the changed demands for the executive. Instead of solving problems by interpreting and applying normative texts, solutions should be found by analyzing the administrative reality and assessing consequences and effectiveness of administrative action.<sup>143</sup>

It took decades to develop a coherent doctrine for the phenomenon of “state planning.” Uncertainty grew in the 1980s when it became clear that regulatory rules, environmental law in particular, had often not been strictly enforced and that administrative agencies cooperated with undertakings to come up with “informal” solutions to remedy this.<sup>144</sup>

## B. *Europeanization*

Europeanization has led to a fundamental change of the scholarly perspective on public law in general and administrative law in particular. During the early period of European integration, Union law was perceived as a separate legal order, akin to public international law—an order with isolated, extrinsic influence on German law and something that had to be processed or repelled when it was alien to national doctrine. That is no longer so. Nowadays, EU Law is an integral part of the national legal system.<sup>145</sup> A new phase was characterized by the mutual interconnectedness between the European states, which entailed the need to adapt national legal systems to the Union’s law. In many areas, European administration resembles a network structure in which different levels of decision-making interact. European law<sup>146</sup> requires cooperation of national authorities and the Commission. Joint administration is enabled by the principle of *effet utile*,<sup>147</sup> which requires Member

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<sup>142</sup> Pauly, *supra* note 10, at 56; Andreas Voßkuhle, *Verwaltungsrecht & Verwaltungswissenschaft = Neue Verwaltungsrechtswissenschaft*, Bayerische Verwaltungsblätter 584 (2010).

<sup>143</sup> Kahl, *supra* note 42, at 494; Pauly, *supra* note 10, at 56.

<sup>144</sup> Voßkuhle, *supra* note 142, at 584.

<sup>145</sup> Kahl, *supra* note 42, at 467.

<sup>146</sup> TEU Art. 4 (3) (1) (“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”).

<sup>147</sup> TEU Art. 4 (3) (2) (“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.”).

States to cooperate loyally and effectively in those cases where European law leads to a collision of jurisdictions. Accordingly, German administrative law is in a state of constant transformation to meet European law's requirements. Any application of the law is no longer solely bound to the prerequisite of legality and constitutionality; it also has to consider the rules of the European Treaties as well as European legislation. The European authorities' rules are directly applicable in national legal systems, and they enjoy supremacy in relation to all national law—even the constitution. All sovereign public power is bound to the Treaties' principles. Thus, all national law has to be interpreted in accordance with European law.

The process of Europeanization is comparable to the German administrative law's doctrinal change that came with the enactment of the Basic Law and can be seen as a second phase of constitutionally governed administrative law.<sup>148</sup> However, European law's determination of German administrative law is interactive. While it is true that German law must adhere to the European law's standards, this does not mean that completely alien rules are forced upon the German legal doctrine. National administrative law of the Member States' has operated as source and inspiration for the European authorities (Council, Parliament, Commission), but also—albeit in a less explicit manner—the case law of the European Court of Justice (ECJ). Specific elements of the Member States' administrative law have shaped European law. Prominently, the German proportionality principle was first used by the ECJ to balance individual's market freedoms and national regulatory powers; later it became a ubiquitous principle now explicitly mentioned in the Treaty.<sup>149</sup>

### C. *A “New” Administrative Law?*

The narratives of complexity and Europeanization became the argumentative foundation of “new Administrative Law.” In a very real sense, though, the criticism that traditional German administrative law is no longer fit for purpose marks the latest iteration of the scholarly dispute between the followers of Lorenz von Stein and the juristic method. While the latter solely focuses on administrative (legal) acts, the science of administration has broadened its focus to include economic, sociological, psychological and geographical aspects. “New Administrative Law” has attempted to shift the doctrinal focus from legal forms and judicial review to a pragmatic, problem-oriented approach by asking whether a solution to a given problem is functional at all. It broadens the focus beyond a purely legal approach and leads to the implementation of non-legal and especially economic considerations

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<sup>148</sup> Kahl, *supra* note 42, at 466.

<sup>149</sup> *Id.* at 470–71.

into the decision-making process. To call all this “new” implies that an alternative system has been developed transcending the old one. However, such a new system has yet to be found. “New administrative law” is far from being a homogenous set of rules. It is rather a still-developing doctrinal experiment asking more questions than it manages to answer.<sup>150</sup>

Administrative law’s function is to determine legality of executive action in an individual case. To generally implement economic and non-legal factors beyond statutory necessity in the decision-making process would cause administrative law to be no longer focused on the legality of an action but on its “rightness” or “efficiency.”<sup>151</sup> Such a shift means to accept the premise that an action can be both legitimate and wrong. This could be an option in an ethical or a practical debate. However, a German legal debate cannot include such considerations because of the principle of a lawful administration<sup>152</sup> and the necessity of democratic legitimization of governmental action,<sup>153</sup> which would be lacking if extrinsic factors, not determined by Parliament, had to be considered.<sup>154</sup>

The task of administrative law theory is to convert the findings of the social and economic sciences into a democratically legitimized and juristically manageable normative system. Considerations of efficiency and ethics can be implemented through parliamentary devolution of discretionary powers or the interpretation of legal definitions. In contrast, a jurisprudence that aims to focus on non-legal aspects reduces itself to futility. As a general approach, this would be unconstitutional; however, a legislatively-formed system implementing such governance-based assumptions would not be. This cautious approach questions the “novelty” of administrative law: it is not new that administrative decisions are made using discretionary powers and evaluating legal and non-legal aspects of an individual case. Still, it achieves a broadening of the administrators’ horizons as well as the initiation of a new debate about the scope of discretionary power and the possibilities of incorporating non-legal aspects into administrative law.<sup>155</sup>

Other scholars have sought to modify administrative law by viewing it through the lenses of social sciences. They want to have social problems collectively regulated by hybrid networks consisting of private, public and hybrid actors. Their proposed system focuses on forming collectives and corporations, which in turn form networks of administration. This approach leads to the blurring of constitutional limits of power and to undemocratic

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<sup>150</sup> *Id.* at 464–65.

<sup>151</sup> *Id.* at 496.

<sup>152</sup> Art. 20 (3) GG (“The legislature shall be bound by the constitutional order, the executive and judiciary by law and justice.”).

<sup>153</sup> Art. 20 (2) GG (“All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”).

<sup>154</sup> Kahl, *supra* note 42, at 497.

<sup>155</sup> *Id.* at 491, 499–500.

disadvantages for the non-participating citizen.<sup>156</sup> It also abandons the distinction between state and society. That distinction, however, is a constitutional necessity, given that Art. 1 (3) and 20 (2) GG presuppose a constitutionally restricted state and a society not bound by these restraints. Theories that favor informal and cooperative action have been advocated mostly by social scientists. Their approach has failed to convince the German legal profession.

#### CONCLUSION

The juristic method and its focus on the legal act remain the core of German administrative law. In some respects, the juristic method has grown too rigid to react to rapid social and legal changes. Its highly abstract and systematic nature and the traditional legal instruments that have been devised to protect individual rights need to be adjusted to meet the demands of the changed conditions under which administrative law operates. Yet to suggest that its foundational premises are outdated is neither empirically nor normatively convincing. Rather, a doctrinal approach has to be sought that is both conscious of the historical development of German administrative law and also willing to implement the necessary innovations to include the demands of the multi-layered and multi-arena administration in Europe.<sup>157</sup>

The administrative act and the doctrinal focus on it remain the most effective legal instrument, given its highly flexible nature. Governance concepts can be implemented at the legislative level. This would ensure that administrative law has more outcome-oriented legal consequences. Viewed in this light, Germany's administrative law system need not be shy in comparison with other legal orders. It will surely master the challenges of Europeanization; and a 400-year long development process has left us with a constitutionally bound administration and with legal certainty to plan our individual and collective future.

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<sup>156</sup> *Id.* at 497.

<sup>157</sup> *Id.* at 498–99.