CHAPTER 2

Constitutional State and Public Administration

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1 Introduction

Among the characteristics of German public administration that are most likely to catch the eye of a foreign observer include the following two phenomena: first, the high density of statutory law (law adopted by the parliament) regulating the organisation, the procedure and the substantive criteria for the activities of public administration; and second, the almost ubiquitous presence of arguments inferred from constitutional law in the legislative process, court rulings and even administrative decisions. The practice to constantly emphasise the interconnection of constitutional and ordinary law can also be seen in legal education, where professors of public law teach administrative law against the background of constitutional law. Unlike in the Romance-speaking countries, most German law faculties do not clearly separate the chairs of constitutional law from those of administrative law, but combine them under the denomination of 'public law', notwithstanding the fact that the holders of the chairs will often specialise more or less in one of the fields.

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The legalistic orientation of German public administration has not constituted an obstacle to modernisation processes based on managerialist or new governance approaches, but has limited their scope, in particular by pointing out the necessity of constitutional safeguards. This chapter undertakes to elaborate on the guiding constitutional concepts and requirements, which determine the development of German public administration and its capacity to adapt to a changing environment.

2 Key Concepts of Public Law and Public Administration

German public administration has been profoundly shaped by two concepts: by the liberal idea of a *Rechtsstaat* that originated in pre-democratic times and aims at an effective protection of individual freedom, and by the idea of a strictly normative constitution that is binding upon all public powers—the legislator as well as the executive power and the judiciary.

*2.1 The Principle of the Law-Governed State (***Rechtsstaat***)*

In international and European terminology, the term *Rechtsstaat* has for some time now generally been translated into English as 'rule of law'. This terminological choice and the subsequent exchange of ideas have fostered a conceptual convergence of both principles, even in the national sphere (see Sommermann 2018: 107ff.). Despite their origins in far different contexts and the attachment of the rule of law to the concept of parliamentary sovereignty, they are inspired by similar insights and by the objective to protect individual freedom through reliable laws and prevention of arbitrary state action. The most prominent German author of the first half of the nineteenth century who pushed forward the idea of the *Rechtsstaat* was the liberal Robert von Mohl (1799–1875). His approach even resembles the modern concept of a 'social' *Rechtsstaat*, when he emphasises the obligation of the state to promote the free development of citizens by organising 'the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in its free and comprehensive exercise and use of its strengths' (von Mohl 1844: 8). In the further discussion, scholars put more emphasis on the formal requirements of the *Rechtsstaat*, gradually supplementing the core principles of legality and separation of powers (including judicial

control by independent courts) by the principles of equal treatment, accountability of those who act on the basis of public powers, legal certainty and proportionality. The *Rechtsstaat*, like the rule of law, relies upon procedural rationality and fairness, although the criteria are not always the same.

2.2 *The Constitutional State (*Verfassungsstaat*)*

The modern constitutional state takes up essential elements of the idea of the *Rechtsstaat*. It is characterised by the strict normativity of a constitution, which includes guarantees and enforcement measures for individual freedom, even against parliamentary acts. In the Basic Law, conceived as a counter-concept to overcome the totalitarianism of the Nazi period and, since 1990, the constitution of the reunified Germany, Article 1 (3) already reflects the will of its drafters to establish a strictly normative constitution. It reads: 'The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law.' Furthermore, considering the guarantee of judicial protection in Article 19 (4) and the powers attributed to the Federal Constitutional Court in Article 93, the normative, in no part merely programmatic, character of the Basic Law becomes evident. The normative and formative powers of the Basic Law turned out to be so strong that as early as 1959, the then president of the Federal (Supreme) Administrative Court, Fritz Werner, coined the phrase—nowadays often quoted, not only in Germany—that 'administrative law is constitutional law put into concrete terms' (Werner 1959: 527). This is particularly true for the general principles derived from Article 20 (3) (see Sect. 3.1) and for the normative effect of the fundamental rights (see Sect. 3.3).

2.3 *The Integration of the* Rechtsstaat *and the* Verfassungsstaat *in the European Union*

The German legal system, as any other legal system of the European Union (EU) Member States, is subject to the influence of supranational law. European Union law has not only been triggering legal reforms and the reinterpretation of ordinary law, but also constitutional amendments (cf. Chap. 4). In general, conflicts between European law and domestic constitutional law have largely been avoided by constitutional opening clauses, first, by the general empowerment clause of Article 24 (1) 'to

transfer sovereign powers to international organisations', and later since the constitutional reform of December 1992, by a special clause for European integration (Article 23). However, this empowerment finds its limits in other constitutional provisions. The Federal Constitutional Court had already stated with regard to the general clause of Article 24 (1) that it does not authorise the constitutional bodies to give up the constitutional identity of the Federal Republic of Germany through the transfer of powers that will jeopardise the constituent structures of the Basic Law (BVerfGE 73, 339, 375–376). This applies, in particular, to the constitutional elements declared as unchangeable in Article 79 (3) (the so-called eternity clause), that is, 'the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20'—Article 1 enshrines the inviolability of human dignity and the direct applicability of fundamental rights; Article 20, basic constitutional principles such as democracy, separation of powers and the rule of law. The 'European Clause' of Article 23, inserted in the Basic Law in 1992, took up the case law of the Federal Constitutional Court. Germany's participation in the development of European integration is admissible as long as the Union 'is committed to democratic, social and federal principles, to the rule of law (principles of a *Rechtsstaat*) and to the principle of subsidiarity and [..] guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law', and does not infringe upon the constitutional elements secured by the 'eternity clause'.[1] Since the European Union considers itself to be a *Rechtsunion*, that is, a union governed by the rule of law/*Rechtsstaat* (Article 2 of the Treaty on European Union), there are favourable conditions for a harmonious interaction between the national and the European level in this respect. Despite the fact that 'different national traditions underpin the "rule of law" in the EU' (Nicolaidis and Kleinfeld 2012: 27ff.), the subprinciples of the *Rechtsstaat* mentioned above are, in essence, equally recognised by the European Court of Justice.

This is not always the case regarding the democratic principle. As will be shown (see Sect. 5), the requirement for democratic legitimacy of all state action, laid down in Article 20 (2), bears the potential to generate conflicts with secondary EU law containing organisational prescriptions for the national public administrations.

2.4 Lessons Learned

German history has shown the importance of always maintaining awareness that formal principles, such as the separation of powers, legality, legal security, proportionality and judicial protection by independent courts, are not ends in themselves, but serve the common goal of preventing arbitrary state action and preserving individual rights. When the Nazis came to power, some lawyers tried to reinterpret the *Rechtsstaat*, criticising the mere formal understanding of the notion. They proposed substituting it for a concept focussing on 'national-socialist justice', which would allow sacrificing 'mere formal principles' for the sake of this substantive goal. Such perversion of the *Rechtsstaat* is only conceivable against the background of a former reduction of the *Rechtsstaat* to formal principles. The original idea that led to the establishment of the formal principles mentioned had not been kept alive (cf. Sommermann 1997: 150ff.). Hence, it is indispensable to understand that the fundamental objective of the *Rechtsstaat* is the protection of human dignity and individual freedom, and to centre any discussion on the further development of the concept around this objective. Equally, a mere reference to an unspecified 'justice' (*Rechtsstaat* as state of justice, *Gerechtigkeitsstaat*) bears the risk of opening up the concept to barely controllable contents.

3 The Constitutional Frame of Public Administration

Notwithstanding the fact that the Basic Law provides only few concrete rules for public administration, numerous organisational, procedural and substantive requirements have been derived from its general principles, its federal architecture and the duty to protect fundamental rights.

3.1 Constitutional Principles

The concept of the *Rechtsstaat* had early on been linked to principles such as proportionality (choice of the less severe appropriate means to attain a legitimate aim that must not be outweighed by the detrimental effects) and legal certainty (prohibition, inter alia, of retroactive regulations or of the revocation of lawful administrative decisions). The administrative courts applied these criteria as general principles, implied in the essence of administrative law as such. With the entering into force of the Basic Law,

these principles became, alongside others, part of the positive constitutional law. The Federal Constitutional Court and the legal doctrine considered the principle of the *Rechtsstaat*, which is expressly mentioned in Article 28 (1) of the Basic Law (with regard to the *Länder* constitutions), to be primarily enshrined in Article 20 (3) (BVerfGE 35, 41, 47; 117, 163, 185), which provides that the 'legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice'. From the subjection of the executive power to the law (principle of legality), the jurisprudence furthermore derived, besides the supremacy of the law (*Vorrang des Gesetzes*), the necessity to base administrative action directly or indirectly on a parliamentary act (*Vorbehalt des Gesetzes*). In this sense, Article 80 (1) of the Basic Law determines that the issue of statutory instruments (*Rechtsverordnungen*) requires an explicit parliamentary act of delegation. Consequently, in the German parliamentary system of government, there are no independent statutory orders, as is the case, for example, in the semi-presidential system of France. Furthermore, in the light of the democratic principle, the Federal Constitutional Court has concluded that all 'essential provisions', especially those related to fundamental rights, have to be regulated by the parliament itself and therefore cannot be delegated to the executive power (BVerfGE 49, 89, 126; 139, 148, 174–175). Apart from democratic considerations, this solution ensures that important questions are deliberated in a multistage parliamentary process where the pros and cons are discussed more intensely and more transparently than in a monocratic executive organ. Irrespective of the eminent role played by the parliament, the Federal Constitutional Court recognises a core area of self-responsibility of the executive power, which includes a 'confidential sphere for initiatives, deliberations and actions', in particular in the governmental process of decision-making (BVerfGE 137, 185, 234–235).

The requirement to assign state tasks to the functionally most adequate bodies is attributed to the principle of separation of powers (Article 20 (2)), which, in turn, is considered to be inherent in a *Rechtsstaat* (BVerfGE 68, 1, 86; excerpts in English in Kommers 2012: 139ff.). Further recognised subprinciples of the constitutional principle of the *Rechtsstaat* are a clear attribution of responsibilities, certainty of the law (definiteness, publicity, reliability and consistency of the law as well as protection of legitimate expectations) and proportionality (Heun 2011: 41ff.; Morlok and Michael 2019: 142ff.; Robbers 2019: 49–50; Sommermann 2018: 128ff.). Other more detailed requirements of the *Rechtsstaat* concerning

administrative action are the objectivity and impartiality in the exercise of public functions, the duty of administrative authorities to hear the individual before imposing a burden and to give reason for the decision. The federal law and the laws of the sixteen *Länder* on administrative procedure further specify these requirements. The duty to give reason is most important for an effective defence against unlawful acts and has to be seen in the light of the requirement of an effective judicial protection of the rights of individuals. Being part and parcel of the concept of the *Rechtsstaat*, the guarantee of an effective judicial protection against the violation of individual rights by a public authority is explicitly laid down in Article 19 (4) of the Basic Law.

The principle of objectivity and impartiality in the exercise of public functions finds an institutional safeguard in the guarantee of a professional civil service (*Berufsbeamtentum*). Article 33 (4) and (5) of the Basic Law stipulates that the exercise of sovereign authority as a rule should be entrusted to members of the civil service who stand in a relationship of service and loyalty defined by public law, with due regard to the traditional principles of the professional civil service (cf. Chap. 13). The status of this category of civil servants is characterised, inter alia, by employment as lifetime officials, different career tracks (according to qualifications), recruitment and promotion according to the merit principle and loyalty towards the constitution and towards the public employer, the prohibition of strikes and the duty of public employers to grant remuneration and retirement benefits that correspond to the public function exercised by the respective official. Influenced by new concepts in leadership and human resource management, the maintenance of the constitutional guarantee of Article 33 has repeatedly been discussed, but no constitutional reform that would abolish the traditional principles of the *Berufsbeamtentum* has taken place so far.

As far as principles of state policy are concerned, the German constitution enshrines two basic aspirational principles (*Staatszielbestimmungen*): first, the principle of the social state (Article 20 (1)), and second, the principle of environmental protection, also with regard to the responsibility towards future generations (Article 20a). These principles, although they do not convey individual rights, are not merely programmatic proclamations, but have binding character for the legislator, the executive and the judiciary. The legislator must pursue and consider these objectives when making laws, even though the jurisprudence of the Federal Constitutional Court has allowed for a wide margin of discretion and has limited its control to evident violations of the constitutional objectives. However, these

principles attain considerable importance when combined with fundamental rights. For the public administration and the courts, the principles of the social state (*Sozialstaat*) and the ecological state (*Umweltstaat*) constitute binding criteria for the interpretation of the law or for the exercise of discretionary powers. The social state, interpreted in the light of the freedom-protecting principle of the *Rechtsstaat*, can rather be qualified as an 'enabling state' that creates and improves the social conditions for a free development of the members of the society than a predominantly transfer-oriented 'welfare state' (Sommermann 2018: 54ff.; Morlok and Michael 2019: 187). The Federal Constitutional Court has derived from the principle of the social state in conjunction with the inviolability and protection of human dignity (Article 1 (1)), a fundamental right to the guarantee of a subsistence minimum, comprising not only a physical but also a sociocultural dimension (BVerfGE 125, 177, 221ff.).

3.2 The Multilevel Administration of German Federalism

The federal structure of German public administration entails three main territorial levels of public administration: the federal level, the *Länder* level and the local level (cf. Chaps. 3, 5, and 8). The local administration forms part of the *Länder* administration but enjoys a constitutional right to regulate through bylaws (*Satzungen*), within the limits of the law, all local affairs (Article 28 (2)). Because of their partial legal autonomy, local administration and other self-administrating public bodies created by law are characterised as 'indirect state administration' (*mittelbare Staatsverwaltung*). It should be noted that local authorities partly act as state authorities (*Länder* authorities) of first instance. In this sense, the areas of their own responsibility (*eigener Wirkungskreis*) have to be distinguished from those of delegated responsibility (*übertragener Wirkungskreis*; cf. Chap. 9).

While the Basic Law assigns the majority of legislative competences to the Federation, the overwhelming majority of administrative competences remains with the *Länder*, where the local authorities deliver most of the administrative tasks (Heun 2011: 62). The principle of execution of federal laws by the *Länder* forms part of what is called *Exekutivföderalismus* (executive federalism), characterised by an intertwining of the federal and the *Länder* level (cf. see Chap. 8; for the conceptualisation of the executive federalism in Germany, cf. Dann 2004: 123ff.).

According to Article 87 (3), the federal legislator can establish federal agencies for matters on which the Federation has legislative power and

thus create bodies of federal administration. The most important federal agency is the *Bundesnetzagentur* (Federal Network Agency), created in the wake of the privatisation of essential public services in the 1990s and whose regulatory and monitoring tasks lie in the field of telecommunications, postal services, energy and railways. The original administrative competences of the Federation relate to the foreign service, financial administration and federal waterways and shipping. Based on Article 87, a federal border police had been created, which was later transformed into a federal police responsible for border control and security of railways and airports. By and large, the main competence for police matters remains with the *Länder*.

As far as the regulations of the European Union are concerned, their execution conforms to the distribution of administrative competences applicable to national legislation. Likewise, the transposition of Union directives has to be carried out by that legislator or those legislators (federal parliament or *Länder* parliaments) who would be competent in national affairs. According to the principle of federal loyalty, which the Federal Constitutional Court has inferred from the federal principle (Article 20 (1); cf., e.g., the judgements BVerfGE 1, 299, 315, and 133, 241, 262), the *Länder* are obliged vis-à-vis the Federation to take within their sphere of competence responsibility for the implementation of Union law. This is indispensable to prevent Germany breaching obligations under Union law. The same applies to the implementation of international law. In order to prevent unforeseeable obligations for the *Länder*, the Basic Law provides for their participation through the *Bundesrat* in matters concerning the European Union. Participation can even amount to representation of Germany at Union level by a representative of the *Länder* when 'legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected' (Article 23 (6)).

3.3 The Impact of Fundamental Rights on Public Administration

It goes without saying that fundamental rights put limits on the legislative power of the parliament and the rule-making power of public administration. Likewise, they constitute important criteria for the interpretation of the laws and for the exercise of discretionary powers by the administrative authorities. However, the normative scope of the fundamental rights goes

far beyond their classical liberal function as defensive rights against intrusions of the public power. According to the German Federal Constitutional Court, the fundamental rights establish

> an objective order of values, and this order strongly reinforces the effect of power of fundamental rights. This value system, which centres upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law. It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. (BVerfGE 7, 198, 205—leading case)

Subsequently, the Court has inferred duties to protect from the objective dimension of the fundamental rights. The protection must also be ensured by an appropriate administrative organisation and procedural setting (BVerfGE 65, 1, 51; 84, 34, 45–46). The legal doctrine has strengthened this approach by conceptualising administrative organisation and procedure as important steering mechanisms in the realisation of substantive legal rules and principles (Schmidt-Aßmann 2004: 19ff., 244–245; Schuppert 2012: 1073ff.). The jurisprudence to consider fundamental rights as procedural guarantees equally applies to court procedures. In this sense, the Federal Constitutional Court emphasises the duty of the courts 'to make really effective the normative value of the fundamental rights in the respective procedure' (BVerfGE 49, 252, 257).

3.4 Lessons Learned

A constitution can only comply with its task to create a reliable framework for the relations between citizens and the state and for the interaction between state organs if it possesses a strong legal normativity. 'Normative constitutions' (Löwenstein 1957: 147ff.; Grimm 2012: 105ff.) generally are provided with suitable mechanisms of implementation and enforcement. In Germany, the Federal Constitutional Court has particularly enhanced the effectivity of fundamental rights.

In modern societies, the complexity of law is increasing, not least by the necessity to regulate the provision of infrastructure and social services, and to care for the prevention of risks associated with, for instance, new structures of economic power, the evolution of modern technologies, environmental pollution and climate change. The new dimensions given to

fundamental rights by the jurisprudence of the German Federal Constitutional Court have to be seen against this background. The promotion of obligations stemming from the principle of the social state backs the derivation of protective duties and procedural guarantees for the state, even from classical liberty rights. The cooperative structures and mechanisms of the federal system, as they have developed over the years, not only contribute to a largely equivalent level of protection and services in the whole German territory, but also reduce dysfunctional conflicts between the federal actors and ensure interoperability and coherence between their administrations. It goes without saying that the optimisation of the cooperation remains a constant task.

4 The Role of Judicial Review

In its efforts to strengthen individual rights, in particular the fundamental rights against state authorities, the drafters provided for the previously mentioned guarantee of an effective judicial protection against the violation of individual rights and for a constitutional control of the legislator. Shortly after the entering into force of the Basic Law in 1951, the functions of the Federal Constitutional Court were supplemented by the competence to adjudicate on individual constitutional complaints.

4.1 The Right to an Effective Judicial Remedy

Under the auspices of the guarantee of judicial protection against the public power in Article 19 (4), the administrative jurisdiction soon developed into a bulwark of citizens against unlawful intrusions or inactivity of administrative authorities (cf. Chap. 12). From the beginning, the Code of Administrative Court Procedure of 1960 took into account that the protective interests of individuals are not limited to the annulment of illegal administrative decisions. They equally comprise claims aiming at the issue of an administrative decision or another performance that has been refused or omitted as well as the declaration of the existence or non-existence of a legal relationship. Hence, the Code provides rules for rescissory actions as well as provisions on actions for performance and on declaratory actions. The same is true for the corresponding specialised codes of the social jurisdiction and the financial jurisdiction. In the codes of all the three branches of administrative jurisdiction, the provisions on the main procedures are accompanied by rules of interim relief that comprise, on

the one hand, automatic suspensory effect of rescissory actions or court orders of suspension and the empowerment of the court to issue temporary injunctions on the other. This system meets the requirements which the Federal Constitutional Court has inferred from the guarantee of Article 19 (4), in particular that the protection must be complete (without loopholes) and effective (cf. BVerfGE 35, 263, 274; 115, 81, 92).

Individuals often make use of the protection afforded by the administrative courts. In the general administrative jurisdiction alone (i.e. not including the social and the fiscal jurisdiction), there were about 200,000 new lawsuits and around 80,000 requests lodged for interim relief in 2018.[2] Currently, there are still numerous claims of migrants for recognition as refugees which are pending.

4.2 The Powers of the Constitutional Jurisdiction

The constitutional jurisdiction of the Federation and the *Länder* participates in the protection of individuals against unlawful behaviour on the part of the public administration, especially by adjudicating on constitutional complaints. Since the Federal Constitutional Court has derived a general liberty right from Article 2 (1), which is applicable if none of the special liberty rights is relevant (BVerfGE 6, 32, 36ff.—leading case), all illegal acts that impose a burden have to be seen as affecting a fundamental right. However, before presenting a constitutional complaint, the plaintiff has to exhaust the ordinary remedies before the courts. If the action is dismissed by the last instance, the constitutional complaint that asserts the violation of a fundamental right is generally directed not only against the administrative decision, but also against the last-instance judgement that confirms the administrative act. The constitutional complaint, just as an abstract or a concrete review of statutes, can lead to the annulment of a law if the violation of the fundamental right originates in it. Out of the almost 6000 new cases received by the Federal Constitutional Court in 2018, more than 95 percent were constitutional complaints.

4.3 The Jurisdictionalisation of Administrative and Constitutional Law

If the Federal Constitutional Court finds that a law is unconstitutional, it does not always declare it null and void. It has developed a technique according to which it limits itself to the mere declaration of

unconstitutionality in case an annulment would cause disproportionate damage. However, in these cases, the court will generally combine the declaration of unconstitutionality with a time limit within which the legislator has to remedy the situation. In special cases, the court even states that specific transitional rules have to be applied until the new legislation is adopted, thus acting as a *praeceptor legislatoris*, that is, substitute legislator (Sommermann 2018: 98). Furthermore, the jurisprudence of the court has considerably contributed to strengthening judicial control over the exercise of discretionary powers and planning procedures. Therefore, new approaches to regain a broader margin of appreciation for public administration by restricting complete control of the legal application have been discussed (cf. Schmidt-Aßmann 2004: 217ff.), especially by the doctrine of specific empowerments of public administration by the legislator.

With regard to the active role the Federal Constitutional Court plays in the German legal culture, some authors warned that the state of parliamentary legislation would be transformed into a state of constitutional jurisdiction (*verfassungsgerichtlicher Jurisdiktionsstaat*; see in particular Böckenförde 1990: 25). However, it cannot be denied that the predominant role given to the fundamental rights by the constitutional jurisdiction has sensitised public administration for constitutional principles and has ensured over past decades a high degree of protection of the rights of the citizens, who hold the Federal Constitutional Court in high esteem.[3]

4.4 Lessons Learned

In a modern state, which takes responsibility for infrastructure, public services and social benefits, effective judicial control requires more than procedures that are limited to the annulment of illegal administrative decisions. After the Second World War, the drafters of the Basic Law and subsequently the German legislator felt strongly committed to establishing an all-encompassing judicial protection of citizens against unlawful behaviour on the part of the state. Consequently, a system was soon created that provided not only rescissory actions, but also, taking up earlier first approaches, remedies against the inactivity of public administration. In order to allow for timely help, interim relief remedies completed the protective system. In harmony with the main procedures, the administrative courts are empowered to grant interim relief in all conceivable situations where judicial control is needed to protect individual rights. In most

Member States of the European Union, this resynchronisation between the development of the administrative law (which had already expanded into the fields of planning procedures and service delivery much earlier) has taken place only since the 1990s. In the German case, it was the traumatic experience of a dictatorship which gave rise to the early modernisation of the judicial system. The same is true for the remedy of constitutional complaints that considerably strengthened the position of individuals and gave rise to a specification of the constitutional right to effective judicial protection.

5 Constitutional Reform and Constitutional Change

The constitutionalisation of the legal order on the one hand, and its Europeanisation on the other, entails the necessity to constantly adapt the constitution to the changing social and economic situations and supranational context. To date, the Basic Law has been modified sixty-four times, producing a constitutional text more than twice as long as it was in 1949 and, from the aspect of a formal legislative process, in many cases not exemplary for a constitution that should focus on essential points. Most modifications concern the organisational part and the financial constitution. Fundamental rights have undergone only a few modifications to their wording, the most important changes stemming from their dynamic interpretation by the Federal Constitutional Court. Thus, the Court has derived from the right to freely develop one's personality (Article 2 (1)) in conjunction with the protection of human dignity (Article 1 (1)), first a general right to privacy, later (1983) an implicit right to self-determination over personal data (BVerfGE 65, 1, 41ff.) and then (2008) a right to the confidentiality and integrity of information technology systems (BVerfGE 120, 274, 302ff.). Furthermore, the reinterpretation of constitutional rules or principles in the light of European Union law constitute an important factor of constitutional change, that is, a change without a constitutional reform pursuant to Article 79, which would require a two-thirds majority in both chambers, the *Bundestag* and the *Bundesrat*. As far as the principles laid down in Articles 1 and 20 of the Basic Law are concerned, constitutional reforms are not admissible. This has already generated a conflict between obligations arising out of Union law to establish independent agencies, on the one hand, and the principle of democratic

legitimation enshrined in Article 20 (1), on the other hand, given that the principle of democratic legitimation and responsibility is deemed to require supervision by the competent minister in order to maintain parliamentary accountability. A solution can only be found in a reinterpretation of Article 20, which means that the understanding of the requirement of an uninterrupted chain of democratic legitimation has to be modified. This appears to be justifiable to the extent that the legislator defines the rules governing the decisions of the agency in a clear and sufficiently precise manner and alternative forms of parliamentary control are established.

6 Conclusion

German public administration has long been influenced by a legalist approach inherent to, and shaped by, the concept of the *Rechtsstaat*. Under the Basic Law of 1949 and the jurisprudence of the Federal Constitutional Court, this approach even became a constitution-centric juridification of public tasks (Frankenberg 2014: 143). Fundamental rights not only are safeguards for individual freedom, but also convey, in the light of the principle of the social state, directives for positive state action. Given the dense normativity of the constitutional obligations inferred from the Basic Law, the law of the European Union poses a major challenge for the adaptability and flexibility of the German legal system.

German federalism is modelled in a way that the infrastructure and the social services are roughly equivalent in the sixteen *Länder*. The intense self-coordination among the *Länder* themselves and between the *Länder* and the Federation strengthens this tendency towards a unitary federal state (*unitarischer Bundesstaat*; Hesse 1962: 13–14). Not least at administrative level, the cooperation between the members of the Federation constitutes an important prerequisite for coping effectively with tasks like internal security, environmental protection, strategies for digitalisation and, as recent developments have shown, migration, climate policy and the fight against pandemic diseases. The latest constitutional reforms have further developed the cooperative federalism to the extent that the Federation can participate in structural tasks at the local level through co-financing educational infrastructure and public housing. The price the *Länder* had to pay was the admission of special controls concerning the use of the funds. The maintenance of a living federalism requires a constant balancing and reconciliation of centripetal and centrifugal forces.

Notes

1. Cf. the strict interpretation of the eternity clause by the Federal Constitutional Court in its judgement on the Lisbon Treaty, judgement of 30 June 2009, paras. 208, 216ff. (English translation available on the internet at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html).
2. Statistisches Bundesamt (ed.), Rechtspflege—Verwaltungsgerichte—Fachserie 10 Reihe 2.4–2018, Wiesbaden, 2019, pp. 14 and 40.
3. See Legal Tribune Online of 23 February 2017, available on the internet at https://www.lto.de/recht/hintergruende/h/bverfg-ethik-kodex-vertrauen-bevoelkerung-erhalten-politik-wirtschaft-einfluss/.

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