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ÍNDICE 2020

M. Januário da Costa Gomes
9-12 Editorial

ESTUDOS DE ABERTURA

Miguel Teixeira de Sousa
15-52 A prova ilícita em processo civil: em busca das linhas orientadoras
The Exclusionary Rule in Civil Procedure: In Search of some Guidelines

Pierluigi Chiassoni
53-78 *Common Law Positivism Through Civil Law Eyes*

ESTUDOS DOUTRINAIS

Alfredo Calderale
81-119 *The Forest Law* e *The Charter of the Forest* ai tempi di Enrico III Plantageneto
The Charter of the Forest at the time of Henry III Plantagenet

Aquilino Paulo Antunes
121-153 Vacinas para a Covid-19: aspectos para reflexão
Vaccines against Covid-19: Issues to Consider

Catarina Monteiro Pires | José Maria Cortes
155-180 Breves notas sobre o contrato de concessão comercial angolano
Brief notes about the Angolan commercial concession contract

Catarina Salgado
181-203 Breves notas sobre a arbitragem em linha
Brief notes on online arbitration

Diogo Costa Gonçalves | Diogo Tapada dos Santos
205-230 Juros moratórios, indemnização e anatocismo potestativo
Moratory interest, compensation and compulsory capitalisation of interest

Elsa Dias Oliveira
231-255 A proteção de passageiros aéreos no âmbito de viagens organizadas
Air passengers protection in package travel arrangements

Francisco José Abellán Contreras
257-288 Los efectos de la enfiteusis en los reinos peninsulares durante la Baja Edad Media: reflexiones sobre los derechos y obligaciones de las partes contratantes
The effects of emphyteusis in the peninsular kingdoms during the Late Middle Ages: reflections on the rights and obligations of the contracting parties

Francisco Rodrigues Rocha
289-316 Seguro desportivo. Cobertura de danos não patrimoniais?
Sports insurance. Non-financial losses cover?

Georges Martyn
317-346 O juiz e as fontes formais do direito: de "servo" a "senhor"? A experiência belga (séculos XIX-XXI)
The judge and the formal sources of law: from "slave" to "master"? The belgian experience (19th-21th centuries)

Hugo Ramos Alves
347-383 Breves notas sobre o penhor financeiro
Brief notes on the financial pledge

Ino Augsberg
385-414 *Concepts of Legal Control and the Distribution of Knowledge in the Administrative Field*

João de Oliveira Geraldes
415-446 Sobre a promessa pública
On Promises of Rewards

Miguel Patrício
447-477 Análise Económica do Risco aplicada à Actividade Seguradora
Economic Analysis of Risk applied to the Insurance Activity

Miguel Angel Morales Payan
479-506 La vigilancia del 'estado honesto' de la mujer por la justicia almeriense durante la crisis del Antiguo Régimen
Surveillance of 'women's honesty' by Almeria justice during the crisis of the Ancien Regime

Nuno Ricardo Pica dos Santos
507-550 O auxílio do colaborador de justiça em Portugal: uma visão jurídico-policial
The contribution of the collaborator of justice in Portugal: a legal-police approach

Pedro Infante Mota
551-582 Migração económica, a última fronteira
Economic migration, the last frontier

Pedro Romano Martinez
583-607 Diferentes vias de prossecução da justiça na aplicação do direito
Different ways to pursuit justice in the application of the Law

Rui Paulo Coutinho de Mascarenhas Ataíde
609-627 Empreitada de bens imóveis e relações de consumo
The consumer law on real estate contracts

Rui Pinto
629-646 Oportunidade processual de interposição de apelação à luz do artigo 644.º CPC
The timing for filing an appeal under the art. 644 of Portuguese Civil Procedure Code

Rute Saraiva
647-681 A interpretação no momento ambiental
Interpretation in the environmental moment

JURISPRUDÊNCIA CRÍTICA

Filipe Afonso Rocha
685-707 Um balanço possível entre o poder dos conceitos e o preço do sistema – Comentário ao acórdão do TJUE, de 12 de outubro de 2017, Proc. C-218/16 (Kubicka)
A Possible Balance between the Power of Concepts and the Price of the System – Commentary on the ECJ Judgment of October 12, 2017, Case C-218/16 (Kubicka)

Rui Soares Pereira | João Gouveia de Caires
709-728 Decisão de isolamento profilático como privação da liberdade passível de *habeas corpus*? – breve comentário ao acórdão do Tribunal da Relação de Lisboa de 11.11.2020
Prophylatic isolation decision as a deprivation of freedom admissible for habeas corpus*? – brief comment on the judgment of the Lisbon Court of Appeals of 11.11.2020*

VIDA CIENTÍFICA DA FACULDADE

Diogo Pereira Duarte
731-737 Arguição da Tese de Doutoramento de Rui Alberto Figueiredo Soares sobre o tema "A exceção de não cumprimento e o direito de retenção no contrato de empreitada"
Intervention in the public examination of Rui Alberto Figueiredo Soares' doctoral thesis on the subject: "exception of non-performance and right of lien in the Construction Contract"

Francisco Paes Marques
739-742 Sérvulo Correia – Mestre da Escola de Lisboa de Direito Público
Sérvulo Correia – Master of the Lisbon Public Law School

Gonçalo Sampaio e Mello
743-751 Em torno das Salas-Museu da Faculdade de Direito de Lisboa – "Sala Professor Marcello Caetano" e "Sala Professor Paulo Cunha"
On The Museum-Chambers of the Law School of the University of Lisbon – Professor Marcello Caetano and Professor Paulo Cunha Chambers

Rui Soares Pereira
753-772 Arguição da Tese de Doutoramento apresentada por Felipe Teixeira Neto – *Responsabilidade objetiva e dano: uma hipótese de reconstrução sistemática*
Cross-examination of the PhD Thesis presented by Felipe Teixeira Neto – Strict liability and damage: a hypothesis of systematic reconstruction

LIVROS & ARTIGOS

Isabel Graes
775-782 Recensão à obra *Inamovilidad, interinidad e inestabilidad*, de Pedro Ortego Gil

José Lamego
783-784 Recensão à obra *Hans Kelsen. Biographie eines Rechtswissenschaftlers*, de Thomas Olechowski

Miguel Nogueira de Brito
785-795 Recensão à obra *Ausnahmeverfassungsrecht*, de Anna-Bettina Kaiser

Concepts of Legal Control and the Distribution of Knowledge in the Administrative Field

Ino Augsberg[*]

Abstract: Against the background of the general question of the connection between knowledge and law, the article examines the extent to which certain forms of legal control techniques correspond to certain forms of knowledge. It thus substantiates the general thesis that law and knowledge do not denote two largely separate areas, but that there is a knowledge specific to law, the specificity of which legal scholarship must pay increased attention to.

Keywords: knowledge, knowledge distribution, administrative law, legal theory, legal control, governance.

Summary: 1. Introduction; 2. Control Through Law; 2.1. 1st Model of Control: Conditional Programmes of Norms; a) Concept of Control; b) Corresponding Knowledge Model; 2.2 2nd Model of Control: Margins for Discretion at Administrative Level; a) Concept of Control; b) Corresponding Knowledge Model; 2.3 3rd Model of Control: "Governance I/Control Theory"; a) Concept of Control; b) Corresponding Knowledge Model; 2.4. 4th Model of Control: "Governance II/Regulatory Structures"; a) Concept of Control; b) Corresponding Knowledge Model; 3. Impersonal Knowledge; 3.1 A Modern Concept of Knowledge; 3.2 Consequences of Such Concept of Knowledge; a) De-ontologisation; b) Impossibility of Knowledge Transmission; c) Specific Epistemologies; 3.3 Normative Criticism of the Impersonal Concept of Knowledge; 4. Implications for the Distribution of Knowledge; 4.1 Problem Analysis; 4.2. Established Procedural and Organisational Techniques for Knowledge Distribution; a) Hierarchy; b) Administrative Assistance; c) Networks and Data Bases; 4.3. Modifications in the Light of the Impersonal Knowledge Model; a) Hierarchy; b) Administrative Assistance; c) Networks and Data Bases; 5. Conclusion.

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1. Introduction

In recent jurisprudential debates, "knowledge" is no longer considered as a primarily extra-legal phenomenon, but instead as a distinct "cognitive dimension of law"[1] and knowledge production defined as the subject-matter of distinct legal procedures, particularly in administrative law.[2] This leads to the question as to what extent different concepts of legal control correlate with correspondingly different knowledge models, which in turn reflect a specific way of sharing and distributing knowledge in society. In other words, the answer to this question has an impact on the current discussion on the subject of knowledge in public law and on the justification of its basic assumptions: by demonstrating a relevant correlation between various basic concepts of legal control on the one hand, and, on the other hand, knowledge models on which these concepts are based, the thesis of knowledge being a distinct scientific dimension in law could be substantiated and, at the same time, the general concept of knowledge could be more accurately defined for a specific use in legal contexts.

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[1] Cf. Hans Christian Röhl (Ed.), Wissen – Zur kognitiven Dimension des Rechts (DV Beiheft 9), Berlin 2010. For more information on this subject refer to the articles in Indra Spiecker gen. Döhmann/Peter Collin (Ed.), Generierung und Transfer staatlichen Wissens im System des Verwaltungsrechts, Tübingen 2008, and Gunnar Folke Schuppert/Andreas Voßkuhle (Ed.), Governance von und durch Wissen, Baden-Baden 2008; as well as THOMAS VESTING, Die Bedeutung von Information und Kommunikation für die verwaltungsrechtliche Systembildung, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II: Informationsordnung – Verwaltungsverfahren – Handlungsformen, Munich, 2nd ed. 2013, § 20; BURKARD WOLLENSCHLÄGER, WISSENSGENERIERUNG IM VERFAHREN, Tübingen 2009; INDRA SPIECKER GEN. DÖHMANN, «Wissensverarbeitung im Öffentlichen Recht», Rechtswissenschaft 1 (2010), pp. 247 ff.; for more details you may now refer to INO AUGSBERG, Informationsverwaltungsrecht. Zur kognitiven Dimension der rechtlichen Steuerung von Verwaltungsentscheidungen, Tübingen 2014. On the subject of knowledge in (public) law in general KARL-HEINZ LADEUR, Das Umweltrecht der Wissensgesellschaft. Von der Gefahrenabwehr zum Risikomanagement, Berlin 1995. Informative from the civil law point of view DAN WIELSCH, Zugangsregeln. Die Rechtsverfassung der Wissensteilung, Tübingen 2008.

[2] Cf. eg. in the context of telecommunication law WOLLENSCHLÄGER, Wissensgenerierung im Verfahren (fn 1), pp. 116 ff.; as well as CHRISTIAN QUABECK, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung, Tübingen 2010, pp. 199 ff.; ROLAND BROEMEL, Strategisches Verhalten in der Regulierung. Zur Herausbildung eines Marktgewährleistungsrechts in den Netzwirtschaften, Tübingen 2010, pp. 201 ff.; on the subject of energy law KARSTEN HERZMANN, Konsultationen. Eine Untersuchung von Prozessen kooperativer Maßstabskonkretisierung in der Energieregulierung, Tübingen 2010, pp. 33 ff.; on the subject of competition law SEBASTIAN UNGER, Wissensregulierung, in: Gregor Kirchhof/Stefan Korte/Stefan Magen (Ed.), Öffentliches Wettbewerbsrecht. Neuvermessung eines Rechtsgebiets, Heidelberg 2014, pp. 239 ff.

In order to determine whether there is a correlation between legal control on the one hand and possible, specific legal concepts of knowledge on the other hand, I will adopt the following three-step-approach. As a first step, I will briefly outline four distinct basic conceptions of control through legislation, more specifically control through administrative legislation.[3] I will outline ideal conceptions in an ideal setting, which are not to be misunderstood as "empirical" findings. In this context, control is understood in the broader sense of "intentionally influencing social procedures".[4] I will analyse each of these outlined models of control with respect to their "cognitive dimension", i.e. whether each of them could possibly be based on a distinct knowledge model (II.). As a second step, I will take a closer look at the concept of knowledge, which by analysing the various knowledge models has already been implicitly defined as multifaceted, and highlight its essentially constructivist and at the same time impersonal character (III.). Finally, I take the results of the first two steps in the analysis and apply them to address the specific problem of appropriate distribution of knowledge within the state administration (IV.).

This article aims not only to confirm but to further sharpen the idea that the cognitive dimension of law is in fact becoming an increasingly distinct aspect in law; an idea which was initially only adopted as a hypothesis advanced in jurisprudential literature. According to this hypothesis, the cognitive and normative level of law are in a constant process of interweaving with each other. These two levels are influencing each other and only exist by being counterbalanced by the other.[5] This constant dynamic between these two interwoven levels has serious consequences for the idea of "distributing" knowledge. A brief conclusion will summarise this notion (V.).

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[3] Cf. on the subject in general GUNNAR FOLKE SCHUPPERT, Verwaltungswissenschaft als Steuerungswissenschaft. Zur Steuerung des Verwaltungshandelns durch Verwaltungsrecht, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/id. (Ed.), Reform des Allgemeinen Verwaltungsrechts. Grundfragen, Baden-Baden 1993, pp. 65 ff.; ANDREAS VOSSKUHLE, Neue Verwaltungsrechtswissenschaft, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/id. (Ed.), Grundlagen des Verwaltungsrechts, Vol. I: Methoden – Maßstäbe – Aufgaben – Organisation, Munich, 2nd ed. 2012, § 1 margin no. 16 ff.

[4] RENATE MAYNTZ, Soziale Dynamik und politische Steuerung. Theoretische und methodologische Überlegungen, Frankfurt/M. 1997, p. 275.

[5] Cf. explicitly on this subject e.g. KARL-HEINZ LADEUR, Wissenserzeugung im und durch Recht – und das Problem der „evidenzbasierten Medizin", GesR 2011, pp. 455 ff. (456). Now available for more details AUGSBERG, Informationsverwaltungsrecht (fn. 1), pp. 5 ff.

2. Control Through Law

2.1. 1st Model of Control: Conditional Programmes of Norms

a) Concept of Control

Traditionally, control through administrative legislation is carried out by means of conditionally programmed norms.[6] Using a rigid pattern of if-then statements, the legislators determine the factual preconditions under which a certain administrative action – typically an intervention – is to be set in motion.[7] Law is a direct "manifestation of reason"[8], i.e. of a superior rationality of the legislature, which neither requires nor permits additional considerations from other areas, but only allows the processing of information on extra-legal events within the structure predetermined by conditional programmes.[9] As a result, this regulation strategy typically does not provide for any extra margins of discretion on the part of the executive bodies;[10] at best, it may be permitted in very exceptional

[6] Cf. on the general subject of control through law – and hence on the discussion if such an (external) control is possible – e.g. CLAUDIO FRANZIUS, Modalitäten und Wirkungsfaktoren der Steuerung durch Recht, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. I (fn. 3), § 4, specifically on the subject of conditional programmes, cf. margin no. 13 ff. On the subject of legislation FRANZ REIMER, Das Parlamentsgesetz als Steuerungsmittel und Kontrollmaßstab, ibid., § 9.

[7] Cf. on the subject of this form of standardisation in general NIKLAS LUHMANN, Organisation und Entscheidung, Opladen/Wiesbaden 2000, pp. 263 ff. On the subject of legal processing of the category in administrative law RAINER SCHRÖDER, Verwaltungsrechtsdogmatik im Wandel, Tübingen 2007, pp. 110 ff. According to Luhmann, administrative action, in general, does not exclusively follow conditional, routine based programmes, but also purpose based programmes. However, the latter are not rooted in the principles of the rule of law, on which the administrative action is based on, but in the idea of the welfare state (cf. NIKLAS LUHMANN, Lob der Routine, in: *id.*, Politische Planung. Aufsätze zur Soziologie von Politik und Verwaltung, Opladen 1971, pp. 113 ff. [122]).

[8] EBERHARD SCHMIDT-ASSMANN, Der Verfahrensgedanke in der Dogmatik des öffentlichen Rechts, in: PETER LERCHE/WALTER SCHMITT GLAESER/ID., Verfahren als staats- und verwaltungsrechtliche Kategorie, Heidelberg 1984, pp. 1 ff. (9), referring to the traditional conception of police law.

[9] Cf. from a legal-sociological perspective NIKLAS LUHMANN, Das Recht der Gesellschaft, Frankfurt/M. 1993, S. 195, who for this reason even depicts, from a specific legal point of view, conditional programmes as the only alternative: "Legal programmes are always conditional programmes. Only conditional programmes are able to reflect the continuous and dynamic correlation between self-reference and external reference; they are the only cognitive structure with which external information can be deductively evaluated within the system." (references omitted).

[10] Cf. sceptical in this regard HANS-JOACHIM KOCH/HELMUT RÜSSMANN, Juristische Begründungslehre. Eine Einführung in die Grundprobleme der Rechtswissenschaft, Munich 1982, p. 22: "Whether

circumstances. Against the background of the Basic Law (German Constitution), however, this rule-exception equation is not predominantly justified from a cognitive perspective, i.e. the justification is not primarily based on the legislator's superior insight compared to that of the administration. Instead, normative aspects are the decisive factors: It was argued that "otherwise the requirement for limited, specified and measurable enablement and the guarantee of full and effective judicial control of all administrative actions affecting the individual would be overridden."[11]

From this point of view, the legislators determine in its entirety the subsequent application of the law[12] – at least from an ideal-typical perspective. Unavoidable hermeneutic questions regarding interpretation and concrete application[13] are completely ignored. As a consequence, in this model there is no divergence between the different perspectives of the legislative, executive/administrative and judicial branches: the administration and the courts in particular have to follow the legal programmes in exactly the same way. The responsibility of the courts is to adjudicate whether the requirements for these programmes have been met. These are exactly the same requirements the administration has to comply with.[14] In the traditional approach to conditional programming, legal programmes for the administrative and for the judicial branches are in complete synchronisation. It is therefore unconvincing to argue that in this approach judicial oversight is a more decisive factor than control.[15] It is true that the control in individual cases is not independently carried out by an autonomously acting administration. Control is not even carried out in the sense of a self-regulation within the respective areas of social regulation

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such purely conditional programmes exist to any significant extent in the field of law seems more than doubtful."

[11] According to Dietrich Jesch, referring to art. 19 Sec. 4 of the German Basic Law Dietrich Jesch, Gesetz und Verwaltung. Eine Problemstudie zum Wandel des Gesetzmäßigkeitsprinzipes, Tübingen 1961, p. 225.

[12] Cf. Jesch, Gesetz und Verwaltung (fn. 11), pp. 223 ff. regarding a similarly restrictive interpretation with reference to the constitutional justification given in Art. 19 Abs. 4 of the German Basic Law

[13] Cf. for more information on this subject e.g. Horst Dreier, Hierarchische Verwaltung im demokratischen Staat. Genese, aktuelle Bedeutung und funktionelle Grenzen eines Bauprinzips der Exekutive, Tübingen 1991, pp. 165 ff.

[14] Cf. Jesch, Gesetz und Verwaltung (fn. 11)., p. 219.

[15] Cf. on the general subject of comparing control-oriented "programmes regulating administrative actions" and legal protection oriented "programmes regulating judicial oversight" e.g. Claudio Franzius, Funktionen des Verwaltungsrechts im Steuerungsparadigma der Neuen Verwaltungsrechtswissenschaft, Die Verwaltung 39 (2006), pp. 335 ff. (336); for a detailed comparison of those different perspectives you may as well refer to id., Modalitäten und Wirkungsfaktoren der Steuerung durch Recht (fn. 6), Rn. 2 ff. as well as, especially with regard to legislative instruments, Reimer, Das Parlamentsgesetz als Steuerungsmittel und Kontrollmaßstab (fn. 6).

that is solely initiated and overseen by the state authorities.[16] Control, however, is exercised at the level of statutory provisions.[17] Therefore, external control is the predominating factor, not internal self-control.[18] At the same time, due to the anticipation by legislators of subsequent events (an assumption based on an ideal setting), which takes place in the form of a standardisation of facts, the bases for the administration and for the courts regarding their actions when applying the law are exactly the same. The legal and judicial control, each determined by the legislature and executed by the administration, are basically the same.[19]

b) Corresponding Knowledge Model

With this in mind, the answer to the question, as to which concept of knowledge underlies such control, must be the following: obviously a kind of knowledge, which is available, in at least approximately similar measure, not only to all three branches of government, but to the citizens who are also subject to the law. Indeed, the synchronisation of statutory control programmes and the notion of citizens adapting to norms presuppose, just like legislative provisions in general, a largely identical, i.e. society-wide, homogeneous knowledge, which is evenly distributed. Specific knowledge regarding the application of the law is basically not required. Conditional programming rather implies that the knowledge required for the application and understanding of the norms is either generally accessible or explicitly communicated by legislation itself.[20] In

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[16] Cf. for a detailed comparison between obligatory regulation carried out by the state, self-regulation carried out by the society within the legal framework given by the state and self-regulation carried out by the society WOLFGANG HOFFMANN-RIEM, Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen – Systematisierung und Entwicklungsperspektiven, in: Id./Eberhard Schmidt-Aßmann (Ed.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen, Baden-Baden 1996, pp. 261 ff. (300 ff.).

[17] Cf. REIMER, Das Parlamentsgesetz als Steuerungsmittel und Kontrollmaßstab (fn. 6), margin no. 1 f., 84 ff.

[18] Cf. on the subject to this differentiation and its relevance HANS-HEINRICH TRUTE, Die demokratische Legitimation der Verwaltung, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. I (fn. 3), § 6 margin no. 33; *id.*, Die Verwaltung und das Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, DVBl. 1996, pp. 950 ff.

[19] Cf. JESCH, Gesetz und Verwaltung (fn. 11), p. 4, who makes, however, a distinction between these programmes to the extent that the “creative act of finding a legally sound decision” is a distinctive competence of the judiciary.

[20] Cf. on the subject of law being a “medium of knowledge distribution” for social experiences e.g. WOLLENSCHLÄGER, Wissensgenerierung im Verfahren (fn. 1), pp. 13 f. As well as on the subject of “regulations and routines being a knowledge storage” AUGSBERG, Informationsverwaltungsrecht (fn. 1), Ch. 5 VII, pp. 188 ff.

fact, even in the context of conditional reasoning, the "conditions determining the decisions [...] are often so complex and subtle that the system cannot decide on the first source of information, but must initiate a complex investigation that makes the decision largely independent of the external information provided."[21] But even in the case of authorities being required to launch corresponding additional investigations, this concept does not pose a fundamental epistemic or even epistemological[22] problem: The knowledge required for the processes of applying and complying with the law is understood as a phenomenon which is possibly unequally distributed, but at the same time easily distributable. It is a type of knowledge that is uniform throughout society, which makes any asymmetrical distributions of knowledge that may occur appear to be merely a quantitative, but not a qualitative problem. Therefore, the acquisition of the required knowledge remains possible.[23] Any knowledge deficits at local level can be solved by means of simple knowledge transmission.[24] The only remaining problem to solve is therefore the appropriate "coordination" of the various administrative bodies, which may have to become involved in the decision-making process.[25]

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[21] LUHMANN, Lob der Routine (fn. 7), p. 126.

[22] Cf. for more information about this differentiation *Ino Augsberg*, Einleitung: Ungewissheit als Chance – eine Problemskizze, in: id. (Ed.), Ungewissheit als Chance. Perspektiven eines produktiven Umgangs mit Unsicherheit im Rechtssystem, Tübingen 2009, pp. 1 ff.

[23] This view was expressed even by the earliest representatives of the idea of a "sociological extension" of law; cf. correspondingly for the level of legislation e.g. EUGEN EHRLICH, Die juristische Logik, Tübingen 1918, pp. 310 f.: "It has long been recognized by the legislators that they would be incapable of drafting a useful monetary law, a customs law, a tax law, an agricultural law, or a law for the protection of workers, without knowledge of monetary policy, trade policy, financial policy, or social policy: to a modest extent, the legislators are now also required to have a little more knowledge of private law and criminal law than their own life experience can provide." Ehrlich contrasts this procedure with what he considers to be the still deficient case law, which focuses only on the interpretation of the law; but in doing so, he only confirms for another area that knowledge acquisition is possible, a notion which has already been fundamentally affirmed. "The activity of the judge is [...] of the same nature as that of the legislator and presupposes that the judge has the same knowledge that the legislator is nowadays required to have". (Reference as above, p. 312).

[24] Cf. HANS CHRISTIAN RÖHL, Ausgewählte Verwaltungsverfahren, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II (fn. 1), § 30 margin no. 24, who points out that knowledge according to the "traditional concept of the rule of law was a prerequisite within the state organisation or at least accessible."

[25] Cf. LUHMANN, Lob der Routine (fn. 7), pp. 128 ff.

2.2 2nd Model of Control: Margins for Discretion at Administrative Level

a) Concept of Control

In modern society[26], however, administrative legislation is no longer following such rigid conditional programmes.[27] As the responsibilities of the state have changed (i.e. especially their scope has broadened), normative programmes have changed as well.[28] Before, traditional "administrative intervention with its retrospective, punctual and bipolar character could be effectively and consistently controlled through conditional programming". Nowadays however, this is "not possible with the new responsibilities of the state being prospective, comprehensive and multipolar"[29]. Unilateral control by the legislator is now being replaced by an increasing pluralisation of actors, which goes hand in hand with a decentralisation of decision-making. This tendency is expressed above all in the margins of discretion granted to the authorities, with which the legislators surrender part of their right to control (sometimes even on a very detailed level) and accept an independent control carried out by an autonomously acting administration.[30] If the administration is allowed to invoke its right to decide by itself not only before the legislators who pass more abstractly defined legislation, but also before the courts, the perspectives regarding control and judicial oversight will diverge. The administration and the courts are now following different programmes for decision-making. As a result, judicial oversight becomes more and more restricted to monitoring compliance with procedures,[31]

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[26] But not exclusively: On the contrary, administrative discretion has been described as a specific feature of administration in the constitutional monarchy; cf. JESCH, Gesetz und Verwaltung (fn. 11), pp. 213 ff.; as well as HANS HEINRICH RUPP, Grundfragen der heutigen Verwaltungsrechtslehre. Verwaltungsnorm und Verwaltungsrechtsverhältnis, Tübingen 1965, pp. 6 ff.

[27] Cf. as well WOLFGANG HOFFMANN-RIEM, Gesetz und Gesetzesvorbehalt im Umbruch. Zur Qualitäts-Gewährleistung durch Normen, AöR 130 (2005), pp. 5 ff. (especially pp. 35 f., 38 ff.). Also very clear on this subject EKKEHARD HOFMANN, Abwägung im Recht. Chancen und Grenzen numerischer Verfahren im Öffentlichen Recht, Tübingen 2007, p. 1: "The mere enforcement of a clear legal provision is not the rule but the exception in administrative practice".

[28] Cf. HELGE ROSSEN, Vollzug und Verhandlung. Die Modernisierung des Verwaltungsvollzugs, Tübingen 1999, pp. 16 ff.

[29] DIETER GRIMM, Das öffentliche Recht vor der Frage nach seiner Identität, Tübingen 2012, pp. 37 f.

[30] Cf. on this subject e.g. DREIER, Hierarchische Verwaltung im demokratischen Staat (fn. 12), pp. 159 ff.; as well as WOLFGANG HOFFMANN-RIEM, Eigenständigkeit der Verwaltung, in: id./Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. I (fn. 3), § 10, passim.

[31] Cf. EBERHARD SCHMIDT-ASSMANN, Methoden der Verwaltungsrechtswissenschaft – Perspektiven der Systembildung, in: id./Wolfgang Hoffmann-Riem (Ed.), Methoden der Verwaltungsrechtswissenschaft,

whose elements are much easier to define in advance (ex ante) in legislative provisions than material requirements on which the decision has to be based.[32] With the partial transfer of the power to make the final decision, the model of control is changing as well. To the extent that the administration can now decide independently and therefore establish for itself their own criteria on which decisions are based, the model of a purely external control is being changed to (at least) a mixed form of external control and internal self-control.[33] However, the implementation of such a control strategy is not a recent phenomenon. In traditional administrative law, we can find cases of similar constellations as well, even though they are explicitly defined as exceptions. In addition to the traditional discretionary powers, a corresponding transfer of decision-making powers has been observed not only from the legislative to the administrative level, but also from the courts to the administration, particularly in the law regarding the oversight and assessment of officials.[34] This is less so when individual decisions are taken on a case-by-case basis, but more so when the achievement of an objective has to be planned.[35]

b) Corresponding Knowledge Model

This again leads us to the question as to what knowledge model could possibly underlie such legal control. The usual cases where the administration is deciding within its margins of discretion cannot be verified by the courts. Therefore, the thesis of a cognitive dimension playing an essential role in the strategies of legal regulation could provide a new approach to explain the special nature of constellations

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Baden-Baden 2004, pp. 387 ff. (391, 410 ff.); for more details QUABECK, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung (fn. 2), pp. 207 ff.

[32] Cf. GRIMM, Das öffentliche Recht vor der Frage nach seiner Identität (fn. 29), p. 38: "Whenever the legislators operate under conditions of uncertainty and therefore have to refrain from prescribing factual requirements, they retreat into procedural law."

[33] Cf. on the subject of an increasing internal self-control carried out by the administration itself WINFRIED BROHM, Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung, VVDStRL 30 (1971), pp. 245 ff. (259 f.).

[34] Cf. the article of WOLFGANG SCHULZ; from a methodological point of view, rightly emphasising the connection with the establishment of "norms" – i.e. also: the cognitive dimension regarding the concrete application of norms, FRIEDRICH MÜLLER/RALPH CHRISTENSEN, Juristische Methodik. Vol. I: Grundlegung für die Arbeitmethoden der Rechtspraxis, 10th ed. Berlin 2009, pp. 60, 89 ff.

[35] Cf. BROHM, Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung (fn. 33), pp. 259 f.; for an overview on the subject SCHRÖDER, Verwaltungsrechtsdogmatik im Wandel (fn. 7), pp. 111 ff.

in such cases.[36] From this perspective, which focuses on cognitive processes, the increasing plurality of actors involved in the decision-making goes also hand in hand with a corresponding pluralisation of knowledge. The relevant knowledge for making decisions is decentralised and incongruent, as are the persons and/or institutions involved in the decision-making process. Knowledge is therefore not readily available to any of the actors, including and especially to the legislators.[37] Law in and of itself can no longer serve as a universal source of knowledge and experience. When applying the law, this source of knowledge has to be supplemented with further, sometimes even assorted, local expertise. From this perspective, the lack of universally applicable knowledge at legislative level can hence lead on the one hand to highlighting the special epistemic added value of the parliamentary procedure, in which not only (in interaction with, above all, the ministerial administration) additional knowledge is generated, but at the same time remaining uncertainty is subsumed.[38] Without underestimating this added value, however, the pluralisation of knowledge has the additional effect, on the other hand, that decisions are now made at administrative level.[39] At this level too – as is illustrated on the subject of oversight[40] – the relevant knowledge to make decisions is not

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[36] Cf. on this subject WOLFGANG SCHULZ, Beurteilungsspielräume als Wissensproblem – am Beispiel Regulierungsverwaltungsrecht, Rechtswissenschaft 3 (2012), pp. 330 ff.
[37] Cf. in this regard e.g. ROSSEN, Vollzug und Verhandlung (fn. 28), pp. 21 f.: „The legal programming of the administration has to reflect the society of a political system. The definition of the scope of administrative intervention, regulatory goals and strategies have to be adapted to a society, which can no longer be considered as stable, essentially transparent and therefore in principle calculable in almost all of today's important reference areas of administrative law." Opposing this idea OLIVER LEPSIUS, Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik, Tübingen 1999, pp. 30 f.
[38] Cf. on this subject OLIVER LEPSIUS, Die erkenntnistheoretische Notwendigkeit des Parlamentarismus, in: Martin Bertschi i.a. (Ed.), Demokratie und Freiheit, Stuttgart 1999, pp. 123 ff.; STEFFEN AUGSBERG, Gesellschaftlicher Wandel und Demokratie: Die Leistungsfähigkeit der parlamentarischen Demokratie unter Bedingungen komplexer Gesellschaften, in: Hans Michael Heinig/Jörg Philipp Terhechte (Ed.), Postnationale Demokratie, Postdemokratie, Neoetatismus. Wandel klassischer Demokratievorstellungen in der Rechtswissenschaft, Tübingen 2013, pp. 27 ff. (37 ff.).
[39] Cf. early elaborations on this subject ERNST FORSTHOFF, Lehrbuch des Verwaltungsrechts, Vol. 1: Allgemeiner Teil, 7th ed., Munich 1958, pp. 73 f., who observed regarding the administrative discretion in general, that officials base "their actions partly on law and partly on their own experience and knowledge."
[40] Cf. MÜLLER/CHRISTENSEN, Juristische Methodik. Vol. I (fn. 34), p. 60, with reference to the more recent constitutional court ruling, which "derives the doctrine regarding the margins of discretion no longer from unfounded linguistic speculation about so-called defined or undefined legal concepts, but from the factual basis of a decision, which has to uphold the principle of equal treatment" (and, one must add, from the difficulties of reproducing such a factual basis in subsequent

simply "available", but it can and must be engendered ad hoc in the particular situation through the interaction of all those involved.[41]

Recognising the epistemic dimension of the decision-making process has also consequences for the idea of a single universal concept of knowledge. Knowledge is now defined as a phenomenon that is no longer uniform and accessible to the whole of society and sometimes just happens not to be available at a certain place and therefore has to be "transmitted". The concept of the margins of discretion is obviously based on a different perception: The relevant knowledge for making a decision is not transmitted to the competent authority – traditionally to the legislators – but instead the administrative bodies, which have access to the relevant and decentralised knowledge, assume the power of taking decisions. The second model of control is, at least implicitly, based on the idea that different kinds of knowledge exist throughout society.[42] Therefore, the accumulation, processing and standardisation of such knowledge by a single entity is no longer possible.[43] In epistemic terms, this is a change in perspectives. The transmitter of knowledge is no longer seen as an actor operating within a transcendental and therefore universal and standardised scheme of interpretation and action. Instead, the concept of "social epistemology" is embraced, which emphasises the need to place the different kinds of knowledge in the context of multiple social practices.[44] From

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court proceedings). If, on the other hand, the epistemic problem remains too much ignored, the discussion about "undefined legal concepts" threatens to fall short even if it goes beyond the purely semantic level and considers the question of competence; cf. in this respect recently Shu-Perng Hwang, Bestimmte Bindung unter Unbestimmheitsbedingungen. Eine institutionelle Analyse zur Funktion der unbestimmten Rechtsbegriffe im Umwelt- und Telekommunikationsrecht, Tübingen 2013.

[41] Cf. Wollenschläger, Wissensgenerierung im Verfahren (fn. 1), pp. 53 ff., with reference to relevant procedures regarding legislation on risk, telecommunication and competition; on the subject of mechanisms for such knowledge production in regulatory legislation see also the article of *Roland Broemel*.

[42] Cf. on the general subject of a "hierarchy" of different kinds of knowledge, the article of e.g. Wolfgang Schulz.

[43] Cf. explicitly on the subject Brohm, Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung (fn. 33), pp. 292 f., with reference to the relevant dissertations on organisational sociology by e.g. Herbert Simon, Charles Lindblom and Niklas Luhmann. Regarding the decentralised character of modern knowledge from a legal point of view, refer as well to Wollenschläger, Wissensgenerierung im Verfahren (fn. 1), pp. 29 ff.

[44] Cf. on this subject, e.g., Sybille Krämer, Medium, Bote, Übertragung. Kleine Metaphysik der Medialität, Frankfurt/M. 2008, pp. 223 ff.; for a concise overview Torsten Wilholt, Soziale Erkenntnistheorie, Information Philosophie 5 (2007), pp. 46 ff. From a legal perspective Karl-Heinz Ladeur, Negative Freiheitsrechte und gesellschaftliche Selbstorganisation. Zur Erzeugung

this new perspective, however, knowledge is still assigned to a person, i.e. a characteristic of natural persons.

2.3 3rd Model of Control: "Governance I/Control Theory"

a) Concept of Control

The development towards greater plurality of actors involved in the decision-making process, as already addressed in the second model, is further progressing in another model of control, which may be described as a first form of the so-called "governance".[45] In this model, diversification is no longer a rather implicit procedure, but promoted to an explicit programme. Furthermore, it now refers to previously unnoticed persons who are now actively participating in the actions. This type of control is characterised not only by the active role the administration is playing, but also by private entities, themselves subject to legal provisions, who are now also included in the overall process of the concrete application of law.[46] Therefore, the objective of this approach is not so much to introduce for the first time the general idea of control, but to change the principal procedures of control. With this in mind, the usual denomination of this regulatory approach as "control theory"[47] has to be understood as a reflexion on the possibilities and limits of the state "influencing social processes"; which is the reason for the change in perspective outlined above: the regulatory technique is shifting away from a primary external

von Sozialkapital durch Institutionen, Tübingen 2000, passim, e.g. p. 120; as well THOMAS VESTING, Die Medien des Rechts: Sprache, Weilerswist 2011, pp. 87 ff.

[45] Cf. a corresponding definition with regard to "global governance", which is described as a "global problem solving strategy through the orderly interaction of a plurality of actors, MATTHIAS RUFFERT, Die Globalisierung als Herausforderung an das Öffentliche Recht, Stuttgart u.a. 2004, S. 29, with further references. Generally, on the problem of the exact definition of this term VOSSKUHLE, Neue Verwaltungswissenschaft (fn. 3), margin no. 68. On delimitations of and overlaps with the model of "good governance" in political science MATTHIAS KÖTTER, Wie viel Recht steckt in Good Governance? Eine juristische Perspektive, in: Philipp Dann/Markus Kaltenborn/Stefan Kadelbach (Ed.), Entwicklung und Recht, Baden-Baden 2014, pp. 553 ff.

[46] RENATE MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie?, in: Gunnar Folke Schuppert (Ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2006, pp. 11 ff. (13), who proposes to "involve all actors" whose actions "are supposed to represent or execute public interest."

[47] Cf. e.g. SCHUPPERT, Verwaltungswissenschaft als Steuerungswissenschaft (fn. 3), pp. 68 f. For more details MARTIN EIFERT, Das Verwaltungsrecht zwischen „klassischer" Dogmatik und steuerungswissenschaftlichem Anspruch, in: VVDStRL 67 (2008), pp. 286 ff. (293 ff.).

control – which in turn can already make use of private entities as a means of fulfilling its tasks[48] – towards an even stronger emphasis on the relevance of internal self-control.[49] The persons, groups or institutions, who are subject to the norms, are now supposed to be involved in the overall process of establishing social order.[50] The number of persons is increasing, who are directly or indirectly involved in the complex mission of governmental control and who are therefore independent actors exercising such control (so-called control subjects).[51]

The legislative implementation of such strategies is best achieved by open-textured, outcome-based programming, in which only the objective (of public interest) pursued by the legislators is prescribed, but not the individual concrete steps to achieve it.[52] In this respect, traditional forms of action, which are primarily based on a conditionally programmed administration, are typically complemented by "softer" approaches such as (above all: financial) incentive schemes, contracts, etc.[53] In contrast to the unilateral

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[48] Cf. e.g. FRITZ OSSENBÜHL, Die Erfüllung von Verwaltungsaufgaben durch Private, in: VVDStRL 29 (1971), pp. 137 ff. On the transition from this traditional approach to a more modern perspective MARTIN *EIFERT*, Die geteilte Kontrolle. Die Beteiligung Privater an der Rechtsverwirklichung, Die Verwaltung 39 (2006), pp. 309 ff.

[49] Cf. on the correlation between governance and self-control or self-regulation from a historic perspective e.g. MARGRIT SECKELMANN, Regulierte Selbstregulierung – Gewährleistungsstaat – Kooperativer Staat – Governance: Aktuelle Bilder des Zusammenwirkens von öffentlichen und privaten Akteueren als Analysekategorien für historische Kooperationsformen, in: Peter Collin et al. (Ed.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20 Jahrhunderts, Frankfurt/M. 2014, pp. 27 ff. (esp. 49 ff.).

[50] This is not a completely new perspective either; cf. on historical predecessors e.g. MILOŠ VEC, Recht und Normierung in der Industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung, Frankfurt/M. 2006; and the comprehensive articles in Peter Collin et al. (Ed.), Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen, Frankfurt/M. 2011; id. (Ed.), Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat, Frankfurt/M. 2012; id. (Ed.), Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20 Jahrhunderts (fn. 49).

[51] Cf. on this action theoretical approach – with reference to Renate Mayntz – e.g.*Schuppert*, Verwaltungswissenschaft als Steuerungswissenschaft (fn. 3), pp. 68 f. Further details on the increasing number of actors following the introduction of the new guiding principle of a state delegating its public duties to private entities, the so called "cooperative/guarantor state" CLAUDIO FRANZIUS, Der Gewährleistungsstaat, VerwArch 98 (2008), pp. 351 ff.

[52] Cf. on this type of programming in general LUHMANN, Organisation und Entscheidung (fn. 7), pp. 265 ff.; from a legal perspective RÜDIGER BREUER, Konditionale und finale Rechtssetzung, AöR 127 (2002), pp. 523 ff.; especially on the development in the administrative law BROHM, Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung (fn. 33), pp. 259 ff.

[53] Cf. on incentive programmes in general e.g. UTE SACKSOFSKY, Anreize, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II (fn. 1), § 40; on the subject of contracts HARTMUT BAUER, Verwaltungsverträge, ibid., § 36.

act of a public authority, in which the concerned citizen is primarily solely addressed as an individual subjected to the norm,[54] this new approach, from the outset, places the emphasis more on the cooperative nature of the fulfilment of tasks.[55]

b) Corresponding Knowledge Model

The knowledge concept on which the above mentioned model of control is based continues and intensifies the same trend already demonstrated in the second model of control: with the even more extensive diversification of actors, knowledge is understood even more as fundamentally decentralised and incongruent. It can no longer be confined to the restricted perspective of a centralised state. Instead, it is precisely the knowledge deficit on the part of the state that makes it necessary to fall back on the control competencies of private entities, which means in particular making use of the cognitive competencies acquired by private entities. With this in mind, the legislative task is also to coordinate such new forms of "informational cooperation".[56] Again, as with the 2nd model, knowledge is understood as a plural, decentralised and in this sense also diversified phenomenon, but at the same time it is still considered as uniform to the extent that it is exclusively assigned to an individual. As before, only natural persons are considered to be transmitters of knowledge.[57]

2.4. 4th Model of Control: "Governance II/Regulatory Structures"

a) Concept of Control

At first sight, the fourth model of control seems to be similar to the third regarding the increasing number of actors contributing to the decision-making

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[54] Cf. for more information on this subject CHRISTIAN BUMKE, Verwaltungsakte, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II (fn. 1), § 35, with reference to a broader understanding in the context of new tasks (reference as above, esp. margin no. 75 ff.).
[55] Cf. for a typology of the different forms of such cooperation EIFERT, Die geteilte Kontrolle (fn. 48).
[56] Cf. on this subject e.g. ANDREAS VOSSKUHLE, Der Wandel von Verwaltungsrecht und Verwaltungsprozeßrecht in der Informationsgesellschaft, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann (Ed.), Verwaltungsrecht in der Informationsgesellschaft, Baden-Baden 2000, pp. 349 ff. (369 ff.).
[57] Cf. on a corresponding personal perspective e.g. RÖHL, Ausgewählte Verwaltungsverfahren (fn. 24), margon no. 31, who states, with reference to the telecommunication law: "A concentration of expertise within the agency is not sufficient for rational investigation and decision-making; rather, the agency relies on the knowledge and detailed information from users, competitors and operators, and must generate the necessary knowledge in cooperation with these market players".

process. The fourth model, too, considers "the entire process of fulfilling tasks as a cooperation of public and private actors"[58]. At the same time, however, the fourth model is fundamentally different from the third model of control induced by the legislators. This is because it makes an additional shift in perspective, according to which the focus is no longer on the actions of individual actors as "control subjects", but rather on interconnected structures and institutions.[59] The previously actor-oriented approach is being replaced by a more institutionalist understanding of the problem.[60]

Therefore, this model is not only de-subjectifying the concept of control by rejecting the idea of a single, centralised subject exercising control. Nor is this idea simply replaced by the diversification of the concept (and therefore basically upheld) in the sense of a multitude of subjects exercising control whose efforts must be coordinated. The difference between the subject of control (entity exercising the control) and the object of control (entity subjected to the control) as such becomes fragile.[61] Therefore, interconnected areas of decision-making, that are normatively influenced or influenceable, are taken into account from the outset. Without such areas the individual decision-makers and the possibilities for action to which they are entitled would not exist. However, the term control clearly refers to a "controller" and therefore supports the idea of a person being the control subject. Consequently, we are no longer talking about control but about governance.[62] Even so, with

[58] TRUTE, Die Verwaltung und das Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung (fn. 18), pp. 951.

[59] Cf. e.g. GUNNAR FOLKE SCHUPPERT, Staat als Prozess. Eine staatstheoretische Skizze in sieben Aufzügen, Frankfurt/M. 2010, p. 118; *id.*, When Governance meets Religion. Governancestrukturen und Governanceakteure im Bereich des Religiösen, Baden-Baden 2012, pp. 16 f.; CLAUDIO FRANZIUS, Governance und Regelungsstrukturen, VerwArch 2006, pp. 186 ff. (199 ff.).

[60] Cf. MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie? (fn. 46), esp. p. 14. However, Mayntz does not clearly distinguish between the two aspects, but rather combines them into an "actor-oriented institutionalism", with the consequence that the transition away from the debate about control towards the debate about governance is supposed to "be more of a shift in emphasis than a radical paradigm shift (reference as above, p. 17). Cf. explicitly on this subject as well *id.*/FRITZ W. SCHARPF, Der Ansatz des akteurzentrierten Institutionalismus, in: Renate Mayntz/Fritz W Scharpf (Ed.), Gesellschaftliche Selbstregelung und politische Steuerung, Frankfurt/M./New York 1995, pp. 39 ff.

[61] Cf. HANS-HEINRICH TRUTE/WOLFGANG DENKHAUS/DORIS KÜHLERS, Governance in der Verwaltungsrechtswissenschaft, DV 37 (2004), pp. 451 ff. (460), with reference to MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie? (fn. 46), p. 13.

[62] Cf. MAYNTZ, Governance Theory als fortentwickelte Steuerungstheorie? (fn. 46); on this concept as well e.g. ARTHUR BENZ, Einleitung: Governance – Modebegriff oder nützliches sozialwissenschaftliches Konzept?, in: id. (Ed.), Governance – Regieren in komplexen Regelsystemen. Eine Einführung, Wiesbaden 2004, pp. 12 ff.; GUNNAR FOLKE SCHUPPERT, Governance im Spiegel der Wissenschaftsdisziplinen,

kybernetes the idea of control is still, at least etymologically, hidden in this term.[63] It seems therefore more accurate to abandon the terminology of governance altogether and instead to refer to observable "regulatory structures".[64]

This change in perspective causes a similar modification of the underlying model of control. If the notion of external control executed by an external body is now replaced even more by a specific form of internal self-control, then it should be noted at the same time that the "self" in question can no longer be a single acting subject – not even in the form of a more complex "collective subject"[65] – but must itself be thought of as an interconnected system.

b) Corresponding Knowledge Model

The shift away from a control subject correlates with the rejection of the idea that a subject is – primarily or exclusively – the transmitter of knowledge. The act of controlling no longer depends on the knowledge of a particular human being exercising control.[66] Any change or shift has to be seen within a broader regulatory structure. Therefore, the cognitive dimension of this problem has to reflect this shift in perspective and to be re-evaluated against this background.[67] The necessary

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in: id. (Ed.), Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2005, pp. 371 ff.

[63] Cf. Heinz von Foerster, Kybernetik, in: *id.*, Wissen und Gewissen. Versuch einer Brücke, Frankfurt/M. 1993, pp. 72 ff. (72).

[64] Cf. on this concept in general Renate Mayntz/Fritz W. Scharpf, Steuerung und Selbstorganisation in staatsnahen Sektoren, in: Mayntz/Scharpf (Ed.), Gesellschaftliche Selbstregelung und politische Steuerung (fn. 60), pp. 9 ff. (16 f.), who, for a better understanding of the newly introduced term, propose the translation "governance structure". For more details on the correlation of the concepts Franzius, Governance und Regelungsstrukturen (fn. 59). Explicitly on this subject as well Schuppert, When Governance meets Religion (fn. 59), p. 17: Governance was about „*Governance by and through regulatory structures*". Stating very clearly that the governance theory has caused the shift away from an actor-oriented approach towards a procedure related to regulatory structures *id.*, Diskussionsbemerkung, in: VVDStRL 67 (2008), pp. 336 f.

[65] A distinction must be made between the so-called "governance collectives", to whose benefit the regulations are to be applied; cf. on this subject Schuppert, When Governance meets Religion (fn. 59), pp. 16 ff., with reference to Michael Zürn, Governance in einer sich wandelnden Welt. Eine Zwischenbilanz, in: Gunnar Folke Schuppert/id. (Ed.), Governance in einer sich wandelnden Welt. PVS Sonderheft 42, Wiesbaden 2008, pp. 553 ff. (554).

[66] Cf. the opposing concept of "administrative knowledge" stated by Fritz Morstein Marx, Hierarchie und Entscheidungsweg, in: id. (Ed.), Verwaltung. Eine einführende Darstellung, Berlin 1965, pp. 109 ff. (119 ff.).

[67] Cf. on this subject in general, but with the focus on specific problems and not from a general perspective, the articles in Schuppert/Voßkuhle (Ed.), Governance von und durch Wissen (fn. 1).

processes regarding the coordination of information and cooperation come to the fore, especially in the form of "multi-lateral and network-like structures".[68] As a result, knowledge is no longer seen as a process of consciousness an individual subject has to undergo, but as a phenomenon of communication within a structure. In this sense, knowledge is no longer an anthropological peculiarity. Instead, the focus shifts to communication as a specific requirement; a requirement which, in principle, can be met by any form of communication, including non-human communications.[69]

3. Impersonal Knowledge

3.1 A Modern Concept of Knowledge

The type of knowledge briefly outlined above, derived exclusively from the control concept of "regulatory structures", noticeably matches the exact same understanding of knowledge that has emerged in recent debates from a general perspective of the sociology of knowledge and has gradually established its role in the context of legal questions.[70] From this perspective as well, knowledge is no longer to be understood as a primarily or much less exclusively personal and psychological phenomenon, but as a primarily organisational-systemic phenomenon. Knowledge embodies a higher level of information processing, which in turn is defined as a distinction based on selection criteria within a system.[71] Information and knowledge are different "states of aggregation" of communicative events and

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[68] Cf. WOLLENSCHLÄGER, Wissensgenerierung im Verfahren (fn. 1), p. 74.
[69] Cf. on such a broad conception of communication and information in general CLAUDE E. SHANNON/WARREN WEAVER, The Mathematical Theory of Communication, Champaign 1963. Opposing this point of view – advocating a more anthropological approach – PETER JANICH, Was ist Information? Kritik einer Legende, Frankfurt/M. 2006; with similar views from a legal perspective JEAN NICOLAS DRUEY, Information als Gegenstand des Rechts. Entwurf einer Grundlegung, Zürich/Baden-Baden 1995, pp. 3 f., 27.
[70] Cf. HELMUT WILLKE, Systemisches Wissensmanagement, Stuttgart, 2nd ed. 2001. Explicitly referring to Willke, e.g. WINFRIED KLUTH, Die Strukturierung von Wissensgenerierung durch das Verwaltungsorganisationsrecht, in: Spiecker gen. Döhmann/Collin (Ed.), Generierung und Transfer staatlichen Wissens im System des Verwaltungsrechts (fn. 1), pp. 73 ff. (75 ff.). Sharing a similar perspective – with reference to Gregory Bateson and Luhmann – e.g.MARION ALBERS, Zur Neukonzeption des grundrechtlichen „Daten"schutzes, in: Andreas Harnisch/Dieter Kugelmann/Ulrich Repkewitz (Ed.), Herausforderungen an das Recht der Informationsgesellschaft, Stuttgart et al. 1996, pp. 113 ff. (121 ff.); VESTING, Die Bedeutung von Information und Kommunikation für die verwaltungsrechtliche Systembildung (fn. 1), margin no. 11 ff.
[71] Cf. WILLKE, Systemisches Wissensmanagement (fn. 70), pp. 10 f.; NIKLAS LUHMANN, Die Realität der Massenmedien, 2nd ed. Opladen 1996, pp. 40 f.

their processing within the system. The basic concept of knowledge is thus conceived as impersonal. This does not exclude a person-related dimension of knowledge, but for the overall concept, this dimension is of only limited and no longer fundamental importance. The discourse of inner-systemic differentiation and contextualisation does not point to a specific subject as an actor. In contrast, this new perspective considers the person only as a secondary phenomenon, namely a social entity, to which knowledge in the overall systemic context can be attributed for pragmatic reasons, but not necessarily.[72] As an example, this perspective can be studied within the context of law. In law, a concept of knowledge has long been in use which allows the attribution of knowledge to a person. Therefore, the ontological perspective is fundamentally abandoned, which also implies that knowledge has to be attributed to a person.[73]

3.2 Consequences of Such Concept of Knowledge

a) De-ontologisation

With this in mind, the question arises as to what consequences such a concept of knowledge might have. The most important consequence to be pointed out is the "de-ontologisation" of the concept of knowledge, which correlates with the de-subjectivation of the concept of knowledge. In traditional epistemology, the subject with all its cognitive possibilities is understood as a universal (and in this sense transcendental) figure and therefore guarantees the unity of the world. If this approach is not only pluralised, but rejected altogether and replaced by necessarily manifold criteria closely related to a system and by the information and knowledge stocks resulting from these criteria, then this would mean: the unifying synthesis machine has been lost. A "common reality" can no longer be assumed to exist, not even as a mere ideal. Instead, we have to assume an inescapable poly-contextuality of any observations ever made.[74]

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[72] Cf. correspondlingly e.g. Willke, Systemisches Wissensmanagement (fn. 70), pp. 104 f. Against this background, it may seem preferable from a terminological point of view to no longer refer to the specific knowledge dimension in law by the term "cognitive", which is mainly used in psychology, but rather to speak of the "epistemic dimension" in general.

[73] Cf. for more details with concrete examples Augsberg, Informationsverwaltungsrecht (fn. 1), ch. 3 VI, pp. 108 ff.

[74] Vgl. on the subject of a „*De-ontologisation of reality*" e.g. Niklas Luhmann, Das Erkenntnisprogramm des Konstruktivismus und die unbekannt bleibende Realität, in: *id.*, Soziologische Aufklärung 5: Konstruktivistische Perspektiven, Wiesbaden, 4th ed. 2009, pp. 31 ff. (esp. 35).

b) Impossibility of Knowledge Transmission

The second consequence of a de-subjectified concept of knowledge is related to this poly-contextuality. It refers to the possibility of knowledge transmission: if we assume that knowledge is dependent on the context, i.e. that knowledge is produced based on a system's very own relevance criteria, then knowledge no longer appears to be a quasi-objective product that can simply be "stored" and "distributed" as required. From this perspective, knowledge rather forms a process which is bound to its specific environment and therefore cannot simply be "passed on". For this to happen, knowledge needs to be constantly reconstructed and such reconstruction can only resemble the original to the extent that the relevance criteria used in the process are exactly the same.[75] However, different systems having absolutely identical criteria are only conceivable as a marginal case, which is unlikely to occur in practice. Therefore, information and knowledge are designed as essentially non-transmissible outside the confines of their respective systems.[76]

c) Specific Epistemologies

The plurality of system-specific perspectives, which can no longer be traced back to a common transcendental subject structure as a guarantor of knowledge, is also correlated with the need for a corresponding plurality of diversified epistemologies.[77] As a result, law as well has to be able to reflect its own knowledge capacities and constraints on the basis of its specific role. A specific legal epistemology is needed.[78]

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[75] Cf. with reference to the distinction between access and re-use of knowledge and information, which in this respect is strictly speaking not sustainable INO AUGSBERG, Informationszugang und -weiterverwendung als gesellschaftliche Grundprinzipien, in: Thomas Dreier/Indra Spiecker gen. Döhmann/Anne van Raay/Veronika Fischer (Ed.), Informationen der öffentlichen Hand. Zugang und Nutzung, Baden-Baden 2014 (forthcoming).
[76] Cf. e.g. LUHMANN, Die Realität der Massenmedien (fn. 71), p. 41; GUNTHER TEUBNER, Recht als autopoietisches System, Frankfurt/M. 1989, pp. 97 ff.
[77] Cf. HANS-JÖRG RHEINBERGER, Iterationen, Berlin 2005, p. 110. From a New Kantian perspective already pointing in a similar direction EMIL LASK, Rechtsphilosophie, in: id., Gesammelte Schriften, 1st vol., Tübingen 1923, pp. 275 ff. (esp. 306 ff.).
[78] Cf. AUGSBERG, Informationsverwaltungsrecht (fn. 1), p. 6.

3.3 Normative Criticism of the Impersonal Concept of Knowledge

Recently, however, such epistemological concepts have been criticised from a legal-normative perspective. The "negation of the cognitive abilities of the individual", it is argued, "cannot be reconciled with the anthropocentric assumptions of parliamentary democracy".[79] This criticism thus claims the existence of fixed constitutional assumptions about humans and their cognitive potentials. Their normative powers have to prevail over the newer epistemological models. Therefore, the interweaving of cognitive and normative conceptions is raised to the constitutional level: it is claimed that the Basic Law of Germany itself determines the choice of the epistemological model on which its application is to be based. The relevant "guiding norm", which interconnects these levels, has to be the guarantee of human dignity: "Article 1 (1) of the Basic Law [...] is an epistemological and anthropological basic assumption for the creation of rights and in this respect a fundamental guiding norm, which declares one interpretation, out of many possible epistemological and anthropological basic assumptions, to be binding."[80] An impersonal epistemological conception is therefore not compatible with the normative basic assumptions of the German constitution: the decision to enshrine the value of "human dignity" in Article 1 (1), sentence 1 of the German Basic Law is "an epistemological decision to make man the sole repository of knowledge."[81]

This criticism, however, can be analysed more closely and questioned in terms of its own logical coherence by using a perspective that is even more cognitive and more normative than the criticism itself. On the one hand, the assumption that the Basic Law prescribes a selection process obviously presupposes that the aforementioned "basic anthropological assumptions" are in principle a contingency. The procedure thus implies a general epistemology that is flexible enough to include such normative-constructivist elements. Therefore, the criticism follows in essence precisely the epistemological constructivism which it ostensibly claims to combat.[82]

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[79] Lepsius, Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik (fn. 37), p. 48.
[80] Lepsius, Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik (fn. 37), p. 58 f.
[81] Lepsius, Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik (fn. 37), p. 54.
[82] Cf. on the criticisme of the system-theoretical epistemology *Lepsius*, Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik (fn. 37), p. 46. More details on the complex argumentative procedure of Lepsius Ino Augsberg, Autonomie als soziale Konstruktion. Zur Wiedergewinnung des Individuellen in der gesellschaftlich orientierten Grundrechtstheorie und Grundrechtsdogmatik, in: Thomas Vesting/Stefan Korioth/id. (Ed.), Grundrechte als Phänomene kollektiver Ordnung. Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik, Tübingen 2014, pp. 39 ff. (52 f.).

On the other hand, this extensive contingency, at least implicitly acknowledged in this way, is not a purely epistemological issue; on the contrary, it affects the normative level as well and undermines the apparent hermeneutic certainty when determining what statements the Basic Law is supposed to make in an epistemological context. In this sense, the criticism of the modern understanding of knowledge outlined above can hardly be understood as a normative prohibition against establishing new epistemological models. Instead, it can even be cited in order to support the idea that the transformation of the traditional epistemology is possible, also and especially regarding its adaptation to the legal context.

4. Implications for the Distribution of Knowledge

4.1 Problem Analysis

Regarding the consequences of such an impersonal concept of knowledge, we can therefore note that the German Constitution neither prohibits switching from the purely cognitive to the normative sphere nor prohibits taking a look at the consequences of such a knowledge model within the law. Generally speaking, this changed conception of knowledge apparently makes it necessary to redefine legal control as an equally impersonal, structure-based event. The implication of such a definition for individual legal institutions can be illustrated by looking at the legally guided transmission of knowledge. At first, the findings in this regard seem to be purely negative: knowledge transmission, it has been said, is impossible under these changed, increasingly context-sensitive conditions. However, we cannot prematurely end the analysis by only looking at it in such a purely negative way. The findings rather lead to the follow-up question of how, under the conditions of such a knowledge concept, it is nevertheless possible to respond to undoubtedly existing needs for knowledge sharing and distribution within society in general and within the administration and its agencies in particular – both in the national and transnational context. Especially if knowledge is understood as a pluralised, specific communicative process, and if we reject the idea of individual areas being hermetically closed off from each other, the familiarisation with the perspectives of other areas becomes more and more crucial because of our own cognitive limitations and despite outlined communication difficulties across system boundaries. The universal world view of the transcendental subject is lost and can no longer be reconstructed as such. Such world view, however, served the purpose of harmonising different areas of society, which is still absolutely necessary to this day. Therefore, this task has to be taken up by a procedure called polyperspectivism,

in the sense of combining multiple points of view.[83] From the relational point of view, the shift to a structural perspective is less a matter of identifying the individual observer's viewpoints, but rather of conveying them in a network of communicative operations. In this way, such a network can serve as the necessary cognitive infrastructure within society.[84]

But how can the appropriate networks be developed if the basic problem lies in the fact that the perspectives, which have to be combined, are incongruent and incompatible? The traditional concept of administrative law was confronted with this difficulty in particular in the form of disputes over a "doctrine regarding experts", which provides guidance for the inclusion of external, typically scientific, expertise in the legally structured administrative decision-making processes.[85] If we look at the plurality of knowledge models from an even broader perspective, we can further generalise the specific problem of cross-border communication between science, administration and law and transfer it to a variety of similar constellations. We then can see that cross-border communication problems are not only affecting the communication between systems, but also within systems, for example within the administration.[86]

In order to examine the legal challenges specifically associated with the problem of knowledge transmission, I will, like in the previous chapter, start with a brief description of some of the existing legal regulatory strategies for the distribution of knowledge and, against the background of the previously outlined knowledge models, analyse their respective cognitive dimensions (2.). As a second step, I will discuss whether and to what extent respective mechanisms and their cognitive elements can possibly be reinterpreted in the light of a changed understanding of knowledge and thus be better adapted to new epistemic challenges (3.).

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[83] Cf. NIKLAS LUHMANN, Beobachtungen der Moderne, Opladen 1990, p. 100.

[84] Cf. on this "social epistemology", which is linked to the network concept, e.g. GUNTHER TEUBNER, „So ich aber die Teufel durch Beelzebub austreibe,...": Zur Diabolik des Netzwerkversagens, in: Augsberg (Ed.), Ungewissheit als Chance (fn. 22), pp. 109 ff. (133 f.).

[85] Cf. for an overview on this subject ANDREAS VOSSKUHLE, Sachverständige Beratung des Staates, in: Josef Isensee/Paul Kirchhof (Ed.), HStR, Vol. III, Heidelberg, 3rd ed. 2005, § 43; for more details PATRICK SCHOLL, Der private Sachverständige im Verwaltungsrecht. Elemente einer allgemeinen Sachverständigenlehre, Baden-Baden 2005. In the context of the general task of administrative knowledge management, as well AUGSBERG, Informationsverwaltungsrecht (fn. 1), Ch. 4.

[86] Cf. on this subject from an epistemological perspective in general BERND HOLZNAGEL, Informationsbeziehungen in und zwischen Behörden, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II (fn. 1), § 24.

4.2. Established Procedural and Organisational Techniques for Knowledge Distribution

a) Hierarchy

The first traditional model for the distribution of knowledge in an official context can be understood as a solution strategy determined by organisational law.[87] This form of legally structured knowledge transmission is fundamentally based on the hierarchical structure of administrative agencies.[88] Alongside this structure runs the cognitive requirement that findings are collected at the grassroots level and then successively passed on to the top via the respective intermediate levels, as required by the so-called "reporting obligations".[89] At the top administrative level, administrative knowledge is thus collected and classified in a central location and then distributed to the lower levels of decision-making in accordance with the requirements of currently pending and concrete regulatory tasks.

Such a hierarchical system, which is intended to create a reciprocal flow of information, is based on a knowledge model, which conceives knowledge as a phenomenon that does not necessarily already exist in a central location, but which can be stored in a central location. As a result, such a knowledge model forms a sub-form of knowledge in the sense of a "common knowledge". This sub-form of knowledge and the specific organisation and procedures associated with it have created an epistemic elite, which nevertheless has to have a sufficient overview to be able to recognise and satisfy the need of subordinate levels for specific knowledge.[90]

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[87] Cf. generally on the subject of the "central importance of *organisational* knowledge for a deeper understanding of the problems regarding knowledge, knowledge capital and knowledge management" HELMUT WILLKE, Dystopia. Studien zur Krisis des Wissens in der modernen Gesellschaft, Frankfurt/M. 2002, p. 130; on the general importance of the organisational law GUNNAR FOLKE SCHUPPERT, Verwaltungsorganisation und Verwaltungsorganisationsrecht, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. I (fn. 3), § 16. Combining both dimensions – i.e. highlighting the relevance of organisational law for the production of administrative knowledge – KLUTH, Die Strukturierung von Wissensgenerierung durch das Verwaltungsorganisationsrecht (fn. 70).

[88] Cf. in general on this subject, e.g. DREIER, Hierarchische Verwaltung im demokratischen Staat (fn. 12), esp. pp. 141 ff.

[89] Cf. KARL-HEINZ LADEUR, Die Kommunikationsinfrastruktur der Verwaltung, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Ed.), Grundlagen des Verwaltungsrechts, Vol. II (fn. 1), § 21 margin no. 21 f.

[90] Cf. early elaborations on combining hierarchical organisation with effective distribution of information MORSTEIN MARX, Hierarchie und Entscheidungsweg (fn. 66), pp. 114 ff. With the interesting observation that the management of the administration does not only involve effective coordination of the distribution of information within the agency, but sometimes involves even

b) Administrative Assistance

Such a hierarchical structure bases the transmission of knowledge within the administration on the traditional model of organisational law. Therefore, its counterpart in the area of procedural solution strategies is administrative assistance.[91] While one mechanism focuses on information flows within the agency, the other focuses on communication processes between agencies.[92] Administrative assistance is prescribed in Article 35 (1) of the Basic Law and its basic structure is further detailed in § 4 of the German Law of Administrative Procedure (VwVfG). As provided in these provisions, administrative assistance addresses the fundamental obligation of every agency to support other agencies in the performance of their duties. This assistance includes, in particular, the transmission of information. Administrative assistance can therefore be called an "information provider"[93] and as such constitutes the basic model for an exchange of knowledge between agencies, which is determined by specific processes. This strategy is complemented by cooperation requirements stipulated in procedural law, like in planning law for example.

With regard to the knowledge model on which the relevant procedures are based, it should be noted that both the traditional model of administrative assistance and its extensions in their original interpretation seem to be based on the idea that knowledge is no longer uniform and accessible to everyone. For this reason, knowledge exchange implicitly becomes a statutory requirement, which presupposes that knowledge is already being considered as a more fragmented and decentralised phenomenon. As a consequence, knowledge, due to its fragmented nature, has to be distributed between different agencies. And at the same time the model of ad-

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doing the exact opposite: In this case, "barriers have to be built within the flow of information. In some areas, management must be able to remain 'among themselves'. Selective transmission of information to certain levels strengthens the position of the involved superior, who thereby gains a disciplinary tool by applying a differentiated transmission of knowledge" (reference as above, p. 115). But Morstein Marx immediately walks this back by pointing out: "Admittedly, each participant must know what is important to guarantee his or her own performance" (ibid.).

[91] Cf. for more information, e.g. BERNHARD SCHLINK, Die Amtshilfe. Ein Beitrag zu einer Lehre von der Gewaltenteilung in der Verwaltung, Berlin 1982; HAGEN KOBOR, Kooperative Amtsermittlung im Verwaltungsrecht. Mitwirkungspflichten und Informationshilfe im Lichte des verfassungsdirigierten Leitbildes des Untersuchungsgrundsatzes, Baden-Baden 2009.

[92] Cf. on this differenciation in general HOLZNAGEL, Informationsbeziehungen in und zwischen Behörden (fn. 86), margin no. 9 ff.

[93] Cf. regarding this term in general WALTER SCHMIDT, Amtshilfe durch Informationshilfe, ZRP 1979, pp. 185 ff.

ministrative assistance implicitly demonstrates how such a knowledge distribution can be put into operation. Therefore, knowledge in principle is designed to be transmissible. To the extent that the exchange of information is presented less as a communication between organisations, but more as a communication between employees of administrative agencies, the underlying knowledge model must also be based on the idea that a person is the transmitter of knowledge (subject-based knowledge model).

c) Networks and Data Bases

A third form of administrative knowledge transmission, which is more strongly influenced by organisational law, consists in the establishment and operation of networks and databases. The networks themselves may tend towards a more traditional form, in which a central control centre coordinates the traffic in the network. However, they may forego such control in favour of a more heterarchical or even "rhizomorphic" network architecture.[94] In this case, the central control over the individual nodes in the network, is replaced by a largely untamed proliferation into ever more diverse ramifications, whose ever finer differentiation can at the same time produce unexpected short circuits between areas that were once clearly separated. The decisive factor here is not the individual nodes, but the innumerable relationships between the nodes; nodes which may disappear just as rapidly as they have emerged. A similar differentiation could be made regarding the databases, depending on the degree of control the database operators have over the information they provide.

Once again, if we want to know on what kind of knowledge model this concept is based, we have to differentiate between the different network topologies. A network with a central control unit presupposes a knowledge model, which is

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[94] Cf. for concrete examples of this differentiation in the context of the European Union Steffen Augsberg, Europäisches Verwaltungsorganisationsrecht und Vollzugsformen, in: Jörg Philipp Terhechte (Ed.), Verwaltungsrecht der Europäischen Union, Baden-Baden 2011, § 6 margon no. 53 ff.; as well as the article of Arne Pilniok. More information on the subject of rhizomorphic networks Ino Augsberg, Das Gespinst des Rechts. Zur Relevanz von Netzwerkmodellen im juristischen Diskurs, Rechtstheorie 38 (2007), pp. 479 ff. (489 ff.), with reference to the concept of the rhizom described by Gilles Deleuze/Félix Guattari, Kapitalismus und Schizophrenie. Tausend Plateaus, Berlin 1992, pp. 11 ff. Cf.Anna-Bettina Kaiser, Wissensmanagement im Mehrebenensystem, in: Schuppert/Voßkuhle [Ed.], Governance von und durch Wissen (fn. 1), pp. 217 ff. [231], who cites the European Environment Information and Observation Network EIONET as a concrete example for such a network.

analogue and based on the assumption that cognitive capacities can be accumulated. In contrast, anonymous networks that are no longer run by a central control unit, process a kind of knowledge that is highly fragmented and whose transmitter of knowledge can no longer be traced back to a subject. In this case, knowledge is generated ad hoc in the individual nodes of the network and it is only in these specific nodes that such knowledge can be used; each transfer to other nodes in the network changes its context and thus the knowledge itself.

4.3. Modifications in the Light of the Impersonal Knowledge Model

a) Hierarchy

In the light of a changed understanding of knowledge, the mechanisms outlined have to be reinterpreted, at the very least, regarding their essential functions and, prior to that, regarding the associated requirements for such functions. The reporting obligations within hierarchically structured organisations, in particular, illustrate this need. If we reject the idea of a uniform and common knowledge (at least in its very basic form) and instead adopt an epistemic model, where knowledge is plural and of different origins from the outset, the seemingly self-evident flow of information becomes more complicated: knowledge transmission between hierarchically structured levels presupposes that common, knowledge-constituting relevance criteria have been established in advance.[95] This, however, undermines the hierarchical structure, which takes into account the difference in perspective between individual levels and presupposes that only the top level has a comprehensive and superior awareness of potential problems. Against the background of a modified knowledge model, the hierarchical structure thus appears paradoxical: in order to work, such a hierarchical structure has to undermine its very own foundation, i.e. stratification reverses the desired effect of differentiation. From an epistemic perspective, as well, the hierarchical structure comes under pressure in another way: the fragmented structure of modern knowledge requires an ever increasing specialisation of knowledge, which must also be taken into account when setting up administrative agencies: A single “tightly structured unit” is thus increasingly being replaced by a large number of “independent specialised authorities and autonomous administrative units”.[96] This goes hand in hand with the need to establish

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[95] Cf. WILLKE, Systemisches Wissensmanagement (fn. 70), pp. 10 f.

[96] Expressing this point of view *Brohm*, Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung (fn. 33), p. 262.

new cooperation and coordination mechanisms between such specialised entities. Such mechanisms have to be, at least partially, a functional equivalent to the oversight exercised by the top level of administration, which has traditionally assumed the task of unifying institutional practice.

However, an assessment of the hierarchical structure and its epistemic function in the context of a changed knowledge model does not have to end with this rather negative finding. If we understand the organisational dimension as an aspect of internal administrative knowledge regulation, we can include the positive assessment that administrative agencies, including their own organisational structures, become independent transmitters of knowledge themselves. If the hierarchical structure is seen as a decisive element in the process of administrative knowledge management, then, against the background of a changed knowledge model, it is generally necessary to at least supplement the traditional idea of a person being the repository of knowledge (subject of knowledge), e.g. the main actor within an epistemic event, with the idea of procedural and organisational mechanisms having epistemic intrinsic value.[97]

If the hierarchical structure is not only analysed with regard to knowledge distribution, but also with regard to knowledge in general, another aspect comes to light. From this point of view, hierarchy is not so much a mechanism to improve the adequate supply of knowledge within individual agencies and the administration in general. Instead, hierarchy with its authoritative order ensures that decisions can be made without having to resort to actually given knowledge, in the sense of a mechanism for coping with epistemic (over)complexity.[98] The hierarchical structure guarantees the ability to make decisions even when there is a lack of knowledge and it therefore plays a role within the general task of administrative knowledge management. Such management always involves making decisions under conditions of uncertainty (which cannot be resolved by simply acquiring more knowledge).[99]

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[97] Cf. on the importance of organisational knowledge the article of e.g. Hans Christian Röhl.

[98] Cf. for more information Luhmann, Organisation und Entscheidung (fn. 7), pp. 20 f., 183 ff.

[99] Cf. on this general task as well as on other specific forms of legal handling of unmanageable uncertainty Augsberg, Informationsverwaltungsrecht (fn. 1), Ch. 7. Early observations on this subject Arno Scherzberg, Wissen, Nichtwissen und Ungewissheit im Recht, in: Christoph Engel/Jost Halfmann/Martin Schulte (Ed.), Wissen – Nichtwissen – Unsicheres Wissen, Baden-Baden 2002, pp. 113 ff.; Ivo Appel, Methodik des Umgangs mit Ungewissheit, in: Schmidt-Aßmann/Hoffmann-Riem (Ed.), Methoden der Verwaltungsrechtswissenschaft (fn. 31), pp. 327 ff.; now available for more information Indra Spiecker gen. Döhmann, Staatliche Entscheidungen unter Unsicherheit, Tübingen 2014 (forthcoming).

b) Administrative Assistance

In the area of administrative assistance, ensuring identical reference criteria on both sides of the information exchange leads to a similar problem. The authority receiving the information request has to understand such a request in exactly the same way as the authority asking for administrative assistance intended. For this to happen, the overall arrangement of administrative assistance must ensure that the knowledge-constituting relevance criteria on both sides are (at least approximately) the same. In order to eliminate potentially dangerous misunderstandings, it is necessary to be at least aware of potential differences. Providing additional information about the respective contexts of use etc. is therefore necessary. Apart from that, however, it is impossible to transfer information. Instead, only data, which is open to interpretation, can be transferred. Such a requirement, which aims to ensure a successful information exchange and appears to be a mere additional criterion, is itself just another symptom of the real problem: the contextualisation is a never ending process, because each given context can be re-contextualised in turn.[100] As a result, imposing such a requirement implies that, strictly speaking, the transmission of information and knowledge by way of administrative assistance is impossible.[101]

As before, this initial, purely negative assessment, however, can be reinterpreted from a more positive point of view: the transmission of "knowledge" – i.e. basically of data that has to be processed – is largely carried out, and even has to be carried out, without giving their respective concrete contexts of use. It is true that such transmission makes it impossible for the two sides involved in the process of administrative assistance to produce exactly the same knowledge. The inevitably new contextualisation by the recipient of the data transmitted, however, is not a simple falsification of the original information material. Instead, contextualisation contributes to the production of new knowledge by the recipient and thus increases the cognitive potential for society as a whole.[102]

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[100] Cf. JACQUES DERRIDA, Signatur Ereignis Kontext, in: id., Limited Inc., Wien 2001, pp. 15 ff. (17 ff.); *id.*, Überleben, in: *id.*, Gestade, Wien 1994, pp. 119 ff. (127); on this subject from a perspective of literary studies JONATHAN CULLER, Dekonstruktion. Derrida und die poststrukturalistische Literaturtheorie, Reinbek 1988, pp. 137 f.; more information on this subject from the perspective of legal theory INO AUGSBERG, Die Lesbarkeit des Rechts. Texttheoretische Lektionen für eine postmoderne juristische Methodologie, Weilerswist 2009, pp. 63 ff.

[101] Arguing explicitly in this sense, e.g. *Willke*, Systemisches Wissensmanagement (fn. 70), p. 9; LUHMANN, Die Realität der Massenmedien (fn. 71), p. 41.

[102] Cf. for more information about this aspect of production regarding the transmission of knowledge AUGSBERG, Informationsverwaltungsrecht (fn. 1), Ch. 3 and 6. From a more general perspective KRÄMER, Medium, Bote, Übertragung (fn. 44), pp224 f.

c) Networks and Data Bases

As far as network logic adopting rhizomorphic structures is concerned it can be noted that it has already implemented a modern understanding of knowledge and, in this sense, does not need to be modified in the light of a changed epistemic model. In contrast, the more traditional network concept, which is based on a central control unit, can be described as slightly dysfunctional with regard to the cognitive problems outlined above. Such a network faces the same problems as have already been identified for the hierarchical system and the administrative assistance, and is therefore unable to achieve its own objectives. The same can be said about the conception of databases. Given the uncontrollability of the constitution of knowledge, which goes hand in hand with the more modern network model, the role of such databases can now be defined in terms of their structural parallelism: from this perspective, databases appear only on the surface to be "knowledge repositories" that provide ready-made knowledge. But in reality, they constitute a mechanism of active access without needing any coordination with the knowledge providing entity. From the outset, such a mechanism must take into account an active recontextualisation of the data made available in new contexts of use.[103]

5. Conclusion

In brief, the above mentioned observations lead above all to the following conclusion: the outdated idea of "knowledge distribution", in which knowledge can apparently be simply transported from one place to another like a finished product, can no longer be sustained in the context of more modern concepts of legal control: concepts, which in turn make the modification of the epistemic model necessary, because it correlates with the traditional concept of control. Instead, "knowledge distribution" appears to be an independent cognitive construction and is part of the general administrative task of ensuring "knowledge production during procedures"[104]. In this sense, such a process can be seen as legally structured,

[103] Cf. regarding the need to understand and design corresponding knowledge repositories as an active process, HANS-HEINRICH TRUTE, Wissen – Einleitende Bemerkungen, in: Röhl (Ed.), Wissen (fn. 1), pp. 11 ff. (21 f.). General information on "knowledge repositories" as part of the overall task of administrative knowledge management AUGSBERG, Informationsverwaltungsrecht (fn. 1), Ch. 5.

[104] This is the title of the study regarding this global subject conducted by WOLLENSCHLÄGER, Wissensgenerierung im Verfahren (fn. 1).

insofar as legal mechanisms, themselves, are dependent on the knowledge generated during procedures. It is true that traditional concepts of administrative law such as administrative assistance should not be abandoned against this background; they continue to have, even more than ever, a special functional relevance. However, they now have to be understood as part of a general dynamic process, which takes the form of administrative knowledge management.[105]

[105] Cf. more information on this process and its legal design now available in AUGSBERG, Informationsverwaltungsrecht (fn. 1), on the subject of knowledge distribution esp. ch. 2 and 3.