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**The Changing Role of the Private in Public Governance
The Erosion of Hierarchy and the Rise of
a New Administrative Law of Cooperation
A Comparative Approach**

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**The Changing Role of the Private in Public Governance –
The Erosion of Hierarchy and the Rise of a New Administrative Law of
Cooperation**

- A Comparative Approach -

By Karl-Heinz Ladeur

Abstract:

The administrative law of the liberal state could presuppose a stable concept of the “public interest” either based on general laws or on a common public knowledge whose privileged bearer the administration was supposed to be. In the 30s a crisis of the clear separation of public and private interest emerged. It was settled by the evolution of the administrative law of the group-based welfare state. Recently this model has been challenged by new informal types of co-operation between private and public actors which develop beyond the forms of the welfare state model which have not found adequate institutional forms.

I. Public Administration and Public Interest in the Liberal State

1.) The Creation of the “Public Interest”

Public interest based theories of administrative law have always been suspicious of private interference with administrative decision making¹. Both, liberal theory and political history presuppose a universalistic approach to the public interest: the constitution and the laws made by parliament represent the universal interest; its formulation is meant to be based on a representative institution which filters out the special interests and brings about a rational form of a general rule which by its mere form is not prone to corruption by special interests. Based on this legitimation it can claim to impose restrictions on the individual as bearer of private rights and interests².

Administration is regarded as being submitted to the law which it has to ‘execute’. However, especially in Europe, we have different conceptions of an administrative autonomy to craft the public interest in its own right which coexist with this liberal doctrine – in a certain way they can be regarded as a hidden remainder of monarchical privileges gained during absolutism. In Europe there has always been a tension between parliamentary definition of the public interest through general laws and the direct claim of administration to deliver ‘public services’ to the public without interference of political

¹Cf. for the philosophy of the Federalist Paper Philipp Abbott, What's new in the Federalist Papers?,

49 Political Research, p.525ss; Mary Ann Glendon, Philosophical Foundations of the Federalist Papers: Nature of Man and Nature of Law, 16 Harvard Journal of Law & Public Policy 1993, p.23ss.

² Cf. for the evolution of the French concept of public interest Marcel Gauchet, l'héritage jacobin et le problème de la représentation, Le Débat, Sept./Oct. 2001, p.32ss.; for Germany the contributions in: Herfried Münkler/Harald Bluhm (eds.), Gemeinwohl und Gemeinsinn. Historische Semantiken politischer Leitbegriff, Berlin: Akademie Verlag, 2001; Robert Uerpmann, Das öffentliche Interesse, seine Bedeutung als Tatbestandsmerkmal und als dogmatischer Begriff, Tübingen: Mohr Siebeck, 1999.

intermediaries acting in a public realm of discussion. Marcel Gauchet³ has called this phenomenon, with respect to France ‘la mystique du service public’.

2.) The “Service public” in France

We can observe this tradition, for example in France – to follow this line of argument – as being centred on an elitist conception of a group of ‘specialists for the general interest’, if one may say so in a paradoxical way. The basis of this self-understanding is developed by the ‘grandes écoles’ of engineering (Ecole Polytechnique), public finances (‘inspecteurs des finances’), of the economy and of administration (‘Ecole Nationale d’Administration’, ENA)⁴ etc. It is perhaps not without interest to register that, until recently, there was no ‘grande école’ for lawyers and especially judges. The ‘Ecole de la Magistrature’ is a rather recent foundation of the state. The close relationship between delivery of ‘service public’ and the self-interpretation of private governance of enterprises finds its repercussion in the mutual exchange of leaders between the high ranks of public administration and big private enterprises.

3.) Public Administration and the “Public Interest” in the UK

In the UK⁵ we find this idea of ‘public service’ in a different way. Its administrative bearers are less integrated by certain institutional channels of

³ Cf. Gauchet, *supra* n. 2, p.45.

⁴ Cf. Jean-Michel Eymeri, *La fabrique des Enarques*, Paris: Economica, 2001; Michel Guénaire, *Déclin et renaissance du pouvoir*, Paris: Gallimard, 2002, p.18, calls the “hauts fonctionnaires” a class which had not known its limites, “leur seule prescience fondait l’intervention étatique”, but at the same time their ignorance of the market powers is also said to have led to a weakening of power in the '70s.

⁵ Cf. Carol Harlow, *Proceduralism in English Administrative Law*, in: Karl-Heinz Ladeur (ed.), *The Europeanisation of Administrative Law. Transforming national decision-making procedure*, Ashgate: Aldershot, 2002, p. 46ss.; ead./Richard Rawlings, *Law and*

recruitment as is the case in France, but rather by some common tradition of a group of leading administrators which has close links to the management of private industry. The British system of administrative law develops a high respect for administrative discretion, though one has to admit the homogenous historical development of government in the UK has not left much room for ideological conflicts between administration and parliament as they can be observed in both France and Germany. This is also the background against which one may understand why administrative discretion can, much more easily, be regarded as being delegated by parliament whose institutional traditions do not enter into deep conflicts with administrative decision making.

4.) The Public Administration and the “Public Interest” in Germany

A more autonomous position of administration as opposed to parliament can be observed in Germany, where the administration, until the 20s, followed a more or less autonomous conception of the administrative state and its duties and regarded the law rather as a limit to, and not the basis of, administrative action⁶. It is symptomatic for this self-interpretation of administration that the re-edition of the famous book on administrative law by Otto Mayer after the First World War, the breakdown of the monarchy and the constitutionalisation

Administration, 2nd edition, London: Butterworths, 1997, p.310, 576; British civil servants have been more “generalists” claiming to be aware of society's needs and not defining the public interest from the point of view of the State interest, Mark Bevir/R.A.W.Rhodes, *Decentering Tradition: Interpreting British Government*, 33 *Administration and Society* 2001, p.107ss.

⁶ Cf. Otto Mayer, *Deutsches Verwaltungsrecht*, 3rd edition, München: Duncker & Humblot, 1924,

Foreword: "Groß Neues ist ja seit 1914 und 1917 nicht nachzutragen. 'Verfassungsrecht vergeht,

Verwaltungsrecht besteht';...". This is a very famous quotation because it is both for its content and

its (wonderful) wording regarded as being symptomatic for the apolitical conception of public law in Germany until the beginning of the 30s the core element of which was administrative law:

of a democratic republic was introduced by the now famous observation of the author: ‘There was not much new to be added. Constitutional law fades away, administrative law remains in place’ (‘Verfassungsrecht vergeht, Verwaltungsrecht besteht’.)

5.) The Role of the Administration in the US

It is quite interesting that this tradition of a strong European self-understanding of administration was not followed in the USA: in the US the stronger focus on the self-organising power of society and on legislation as the forum of universal interest, did not give room for the evolution of an administration with a strong sense of autonomy. The American constitutional history is haunted by the fear of ‘factions’⁷ which might intrude on government and undermine the public interest by the interference of special interests. Administration had traditionally been weak in the US⁸. It did not have a strong self-understanding as being the legitimate interpreter of the public interest. This weakness finds its repercussion in the fact that the American administration, at the end of the nineteenth and the beginning of the twentieth century, has been shattered by a number of corruption scandals at a time when in Europe corruption of state authorities was still a rather marginal problem. Interestingly the weak American administration was much more challenged by new complex problems of ‘regulation’ which emerged at the end of the nineteenth century: it did not have the same level of ‘expertise’ as its European counterparts. Both the French and the German administration in particular had a strong tradition in accumulating all the publicly available knowledge which was necessary for technical regulatory programs. For example in Germany, especially the

constitutional law comes and goes, it is just politics...

⁷ Cf. supra n.1.

⁸ Cf. Martin Shapiro, The problem of independent agencies in the United States and the European Union, *Journal of European Public Policy* 4(1997), p.276ss.

Prussian administration, developed a highly competent knowledge in all technical fields such as standards for construction of buildings, safety requirements for machinery etc. It even played a very active role in distributing knowledge to private enterprises which only gradually were able to take an active role in organising technical knowledge for industrial purposes⁹. Later on Germany a long tradition of self-regulation by representative associations of industry, engineers ‘Technischer Überwachungsverein’ (TÜV), ‘Verein Deutscher Ingenieure’ (VDI) was brought about, whose creation had more or less been stimulated by the state (Prussia in particular). This mutual agreement between private and public forces had presupposed the internalisation of a state logic by private actors first. The general technical standards were fine-tuned to the structure of the general state law¹⁰.

But this approach was called into question when later on the economy no longer internalises the state view of legal problems based on a common knowledge but tries to impose its own expectations in a more proactive way on the state: Requirement of support for technologies which are no longer to be observed and described by common knowledge (high technology in particular) or requirement of new collective industrial structure for mass production. This evolution provokes the view that the "technische Realisation" of the forms of economy and technology creates more and more dependency on private expertise (not only in the technical sense) for the state¹¹.

⁹ Cf. Rainer Wolf, *Der Stand der Technik. Geschichte, Strukturelemente und Funktion der Verrechtlichung technischer Risiken am Beispiel des Immissionsschutzes*, Opladen: Westdeutscher Verlag 1986.

¹⁰ Cf. Reinhart Strecke, *Anfänge und Innovation der Preußischen Bauverwaltung*, Köln: Böhlau, 2000.

¹¹ Cf. Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München: Beck, 1971, p.20.

II. The American Public Administration and the Rise of the Independent Agencies

1.) The Historical Background of the Creation of Independent Agencies

How could the new challenge of technical complexity be managed in the American system which did not have a strong tradition of administrative expertise? The rather weak administrative system could not meet the requirements of the new complex technical and economic challenges of regulation such as setting safety standards, supervision of monopoly industries, rules for construction of buildings etc. This weakness of the American administration might, in the long run, be regarded as ambivalent because it allowed for the advent of an important reform which, in the long run, proved to be quite efficient whereas the prevailing conception of administration in Europe prevented governments and parliaments from setting up more flexible and more modern administrative strategies which would have been adapted to the rise of the industrial state. In fact this situation in the US made possible the establishment of a rather modern model of administration beyond the traditional administrative model, though this evolution was brought about in a rather lengthy process. But the major breakthrough is to be seen in the establishment of the (more or less) independent administrative agencies (independent with respect to the President) which were set up for the regulation of complex technical problems¹². The first was the ‘Inter-State Commerce Commission’ (ICC) which was followed later on by several other agencies such as the ‘Food and Drug Agency’ (FDA), the ‘Environmental Protection Agency’ (EPA) etc. At the outset of this reform the belief in the autonomy of technology and expertise prevailed¹³. This fact is also an explanation of the inter-mingling of

¹² Cf. Shapiro, *supra* n.8; for the evolution of administrative discretion cf. *id.*, *Administrative Discretion: The next stage*, 92 *Yale Law Journal* (1983), 1487ss.

¹³ Cf. Marshall J. Breger/Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Administrative Law Review* (2000), p.1111, 1132.

general and special interests, issues which ought to be managed by agencies and, on the other hand, the typical conception of the agency which comprises legislative, administrative and adjudicative competencies. As the agencies are based on technical expertise, the separation between legislation, administration and the judiciary do not have the same weight as in other fields of decision making.

2.) “Technical Neutrality” of Expertise Based Rule Making and the Rule of Law

Because of its supposedly technical expertise character rulemaking of agencies was not subject to any meaningful procedural or substantive restrictions before 1946. It was regarded as “filling in details”. This changed with the introduction of the “Administrative Procedure Act” (APA) which imposed several procedural requirements on the agencies including the obligation to give “notice” of the opening of a rulemaking procedure and to invite the interested public to comment. But only after 1960 the apolitical “expertise” of the agencies was more and more challenged¹⁴. In the 70s and 80s several agencies to different degrees found their new role in defining the general interest in an enlightened activist manner on the basis of public hearings, this is valid for the EPA in particular. This evolution provoked a backswing in the early 90s with the Reagan administration trying to impose an economic method for the self-control of public rulemaking on the basis of different versions of "cost-benefit-analysis" replacing the pluralist approach of the 70s and 80s which claimed to balance conflicting interests in an open scheme of a procedural political integrative approach. The new approach takes into consideration the criticisms of industry which challenged rationale of a more and more proactive administration which no longer wanted to be reduced

¹⁴ Cf. for this evolution of agency rulemaking Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 Wake Forest Law Review 1996, p.745ss.

to preserving the existing social and economic structure but took an interest in setting up ambitious future-oriented programmes for prevention of “risks” especially with reference to the “precautionary principle” in environmental law, but also in other domains of administrative action.

The approach on which this new type administrative agency was based turned out to be quite ambivalent at the outset: especially with regard to railway safety¹⁵ and control of fees. It was regarded as a merely technical process. However, on the other hand, the regulatory process was not regarded as being neutral and apolitical in the stricter sense. It was rather planned to be insulated from direct and one-sided political influence especially from the president. Political neutralisation of agencies was established rather by balancing political influence from both major political forces¹⁶. This model of administration could therefore, at least partially, be linked to American progressivism¹⁷ at the beginning of the twentieth century in the sense of a hope for expert based social reform which, in a paradoxical way, political reform could hide behind expertise knowledge.

Its technocratic character does because of its paradoxical mixture of expertise and political balancing not exclude its accountability to Congress, on the other hand, which had to do justice to the non-delegation doctrine which prevented Congress from handing over its legislative power to an

¹⁵ Cf. Timothy Dowd/Frank Dobbin, *Origins of the Myth of Neo-Liberalism: Regulation in the first Century of US Railroading*, in: Lars Magnusson/Jan Ottosson (eds.), *The State, Regulation and the Economy*, Cheltenham: Elgar, 2001, pp.61ss.

¹⁶ Cf. Todd D. Rakoff, *The choice between formal and informal modes of administrative Regulation*, 52 *Administrative Law Review* 2000, p.159, 160.

¹⁷ Cf. Breger/Edles, *supra* n.10., p. 1133.

administrative body¹⁸. This accountability finds its expression in the limitation of decision making powers, the obligation to give reports etc.

3.) Independent Agencies and the Transformation of Administrative Procedure

Though it was not meant to play this role from the outset, this new model of administration based on expertise¹⁹, separated from ‘normal administration’ gradually brought about major changes in the administrative process and especially procedural rules: the new regulatory model continuously opened itself to more and more sophisticated procedural design of decision making which tried to adapt to the complexities of the industrial state and its technical and economic requirements which did not fit into the traditional model of case by case decision making of administrative authorities. The relative absence of a specific administrative law based on a tradition of self-definition of the public interest by public administration²⁰ allowed more and more to accept and lay open the necessity to take into consideration political and economic interests which had to be balanced in decision and rule making processes and which were put forward by a variety of private interest groups. The transformation of the agencies towards social regulation (beyond mere technical safety standards etc.)

¹⁸ Cf. Cass R. Sunstein, *Designing Democracy. What Constitutions Do*, Oxford: Oxford University Press, 2001, p.137: non-delegation as a means to “ensure deliberation” which appears to be less crucial in “technical” matters.

¹⁹ Cf. Breger/Edles, *supra* n. 10, p.1132; Steven P. Croley, *Theories of Regulation: Incorporating the administrative Process*, 98 *Columbia Law Review* 1998, p.1ss.; Mark Seidenfeld, *Bending the rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *Administrative Law Review* 1999, p.429ss.; for France cf. Jean-Paul Pastorel, *L'expertise dans le contentieux administratif*, Paris: LGDJ, 1994; Guénaire, *supra* n.4, p.131; for the UK cf. Harlow/Rawlins, *supra* n. 5, p.310; for Germany Peter Marburger, *Die Regeln der Technik im Recht*, Köln: Heymann, 1979; generally Christian Joerges/Karl-Heinz Ladeur/Ellen Vos (eds.), *The Integration of scientific expertise into regulatory decision-making*, Baden-Baden: Nomos, 1997; Anthony Barker/Guy B. Peters (eds.), *The politics of expert advice: creating, using and manipulating scientific knowledge for public policy*, Edinburgh: Edinburgh University Press, 1993.

²⁰ Cf. Martin Shapiro, *The giving reasons requirement*, *Chicago Legal Forum* 1992, 179ss.

could be regarded as being part of the ‘New Deal’²¹ which was established in the 30s as the new model of the ‘social state’ beyond the traditional liberal conception of the state which openly accepted representative groups as intermediaries between the society of the individuals and the state.

The meaning of this transformation was pinpointed by the initial reluctance of the Supreme Court to allow government to interfere with the protection of private interests beyond the clear limits of established rights. In the famous *Lochner*-case²² the US denied the constitutionality of the imposition of working hours for workers of a bakery as long as obvious detrimental effects to health are not at issue. After a lengthy conflictual development the Supreme Court finally gave up its resistance to the establishment of a new type of state which was no longer based on liberal values alone.

This evolution led also to a more pluralistic conception of the procedure of decision making: agencies made use of the ‘notice and comment’ methods, allowing for open involvement of regulatees in the process of rule-making in particular – beyond the law limited European conception of the right to be heard in administrative processes²³. However, this right to be heard was limited to the specific interests and facts merging from ones own private domain and not a right to be invited to discuss the whole conception of decision making.

²¹ Cf. Laura Kalman, *Law, Politics and the New Deal(s)*, 66 *Yale Law Journal* 1999, p.2165ss.; Mark Tushnet, *The New Deal Constitutional revolution: Law politics, or what?*, 66 *Chicago Law Review* 1999, p.1061ss.; Gerald E. Frug, *The Ideology of bureaucracy in American law*, 97 *Harvard Law Review* 1984, p.1277ss.

²² Cf. *Lochner v. New York*, 25 S.Ct. 539 (1905); Gary D. Rowe, *Lochner revisionism revisited*, 24 *Law and Social Inquiry* 1999, 221ss.; David E. Bernstein, *Lochner, parity, and the Chinese laundry case*, *William and Mary Law Review* 1999, p.147ss.

²³ Cf. Shapiro, *supra* n.16.

Courts later on have imposed regulators the duty to respond to private comments and intervention²⁴. (These sketchy remarks do in no way justice to the complexity of the evolution of the practise of American regulatory agencies. However in the context of a comparative approach to the more recent evolution of administrative law in Europe and in the US it might be sufficient as a description of the different base lines from which the recent evolution emerged: it might at least have pinpointed some major differences between the American and the European administrative systems).

III. Public Administration and the Management of Technical Complexity in Europe

1.) The Crisis of European Administration of the First World War

In Europe the necessity to make broader use of expertise in administrative decision making at first did not provoke a major disruption in the administrative system. European public administration had proved to be able to accumulate and manage more expertise than the traditional American system. On the other hand, the American system with its high level of specialisation and insulation from government influence was not only prepared to make use of its discretionary powers but was able to integrate methods and approaches of balancing different private interests and also a plurality of conflicting public interests and bring about a more open and pluralistic conception of the public interest to be defined in a multi-polar setting, though this was, of course, not planned from the outset.

²⁴ Cf. Breger/Edles, supra n. 10; Jody Freeman, The private role in public governance, 75 New York University Law Review 2000, p.543ss.

It is also characteristic for the European/American differences that even the European version of the social state was put in place later and was characterised by a much higher level of institutionalisation than in the USA. It was based on the stable participation of ‘representative groups’ in new fields of administration such as the public insurance system and apart from this domain it was closer linked to the party and parliamentary system instead of having a direct impact on administration.

2.) The Reaction of the Higher Ranks of German Administration to the Growing Impact of Private Groups on Public Governance in the 20s

This evolution towards the rising level of intervention in the economy (which, by the way, was a result of the war economy, a state based economy which had evolved during the First World War) had provoked a first crisis of the self-understanding of administrators. It challenged the idea of the state as being separated from private society. One strand of authoritarian political movements wanted to recover their old ‘neutral state’²⁵ or they bemoaned the rise of ‘technical constraints’ which tended to touch the very core element of the political sovereignty of the state²⁶. In Germany a famous polarisation was formulated which called the existing state system of the twenties the ‘total state’

²⁵ Cf. Ernst Forsthoff, supra n.11, p.34: technology challenges the state because it has by itself a “power character”.

²⁶ With respect to the emerging Nazi state cf. Ernst Forsthoff, *Der totale Staat*, Hamburg: Hanseatische Verlagsanstalt, 1933; it is quite interesting that this author was one of the first to develop a new conception of the state as a provider of services (“Daseinsvorsorge”) within the context of the Nazi state - the welfare element had certainly existed before but it had not found its repercussion in the conceptual structure and role of administration; cf. Ernst Forsthoff, *Die Verwaltung als Leistungsträger*, Stuttgart/Berlin: Kohlhammer, 1938; for the later adaptation of the conception to the requirements of the post-war state cf. id., *Begriff und Wesen des sozialen Rechtsstaates*, Berlin: De Gruyter, 1994; for a still stimulating analysis of the contradictions of the Nazi state cf. Franz Neumann, *Behemoth - The structure and practice of National Socialism 1933-1944*, New York: Octagon Books, 1974.

due to weakness vis-à-vis the influence of private groups whereas an alternative could have consisted of a strong ‘total state’ which, instead of being the object of group influences, should have integrated groups into the state system itself and controlled their activities with a view to the ‘public interest’. It may be quite interesting to notice that conservative approaches to adopt a more active involvement of the state in society, instead of being the victim of group pluralism, conceived of civil servants as being the neutral group whose obligation to maintain the public interest should be regarded as a sufficient legitimation for a privileged position in the new state. Smend was one of the most prominent authors of these new theories of the “integrative state”²⁷ which went beyond the traditional conception of a static ‘public interest’ and took the view that society had to be transformed in an active way but the elite of civil servants should be the leaders of this new movement.

It is symptomatic that this theory became only influential only after the end of the Second World War: and the new forces which were regarded as bearers of the integration of society in the public realm were now the pluralistic groups themselves who had been regarded as the enemies of the neutral state, just some decades ago. But this is also symptomatic for the transformation of those groups themselves who accepted the new rules of the game of the social state. Only after the Second World War the stability of the welfare state²⁸ allowed for a more open conception of the state. The factual impact of trade

²⁷ Cf. Rudolf Smend, *Verfassung und Verfassungsrecht* (1928), in: *Staatsrechtliche Abhandlungen*, 2nd edition, Berlin: Duncker & Humblot, 1968, p.119, 146: The civil servants are an “integrative” force because they take a comprehensive “holistic” perspective (“vom Ganzen her”), p.209, as opposed to a “technical” one (this is meant in a broad sense not only with respect to technology in the stricter sense): this corresponds to the self-perception of the higher ranks of civil servants in the Weimar Republic which changed from a neutral-professional to an anti-liberal view, cf. Rainer Fattmann, *Bildungsbürger in der Defensive*, Göttingen: Vandenhoeck und Ruprecht, 2001.

²⁸ Cf. for the continental approach to the administrative law of the state as service provider Charles Albert Morand, *Le droit de l'Etat providence*, *Revue du droit suisse* 1988, p.52fss.;

unions, employers' associations, political parties etc. on public governance was never accepted as part of a changed functioning of the state. This is perhaps one of the reasons why a major part of the administration in spite of its ideology of neutrality later in the 30s turned out to be willing to accept the Nazi state.

With respect to Germany one might in retrospect go so far as to compare the democratic regime of the New Deal in the US and the totalitarian Nazi state which reacted to the same challenge of private interest groups and the rise of the 'society of organisations' with which both regimes tried to manage group conflicts in institutional forms beyond the traditional liberal state and its administration by allowing for the participation of groups in political decision making. Whereas the American version was the democratic way, the German one was the authoritarian destructive alternative: it could accept groups only within a state-centred ideological and oppressive scheme.

3.) The Emergence of a New Administrative Law in Germany in the 50s

In the 50s and 60s, the influence of groups such as trade unions and employers associations etc. were more and more institutionally structured, and channelled mainly to specific fields of administration such as public insurances or parliamentary law making processes whereas the core of administration remained more or less unchanged. The more politicised issues were integrated in the new model of group based social state whereas the more technical regulatory issues were still brought under the umbrella of the public administration, though of course the highly differentiated system of co-operation with private expertise and interest groups already emerged without being challenged from the outside. It is interesting that in the shadow of the institutionalisation of big representative organisations in the administrative state at the micro level, a whole range of important decision making powers in the field

of social law were delegated to more or less obscure groups of civil servants of public insurances, medical doctors etc. whose direct legal consequences for example for medical practice covered by public insurance were quite doubtful with reference to traditional approaches of delegation of rule making power²⁹.

4.) The Continuity of the Role of Administration in the UK and France

In France and the UK the continuity of the higher ranks of administration and its legitimation to formulate the public interest remained unchallenged, whereas in Germany this autonomy was more and more reduced and the role of law (Rechtsstaat) as the central medium for formulation of the public interest was brought to bear on the extension of administrative discretion³⁰. In the period of a more or less stable political consensus on major issues, expertise which was integrated in decision-making processes of administration could also be regarded as a merely technical problem which did not need political legitimation or it could be linked to the quasi-public status of intermediary groups: new types of rules either made by private enterprises (standards) or administrative guidelines formulated with the help of private experts were integrated in administrative decision making processes. This evolution is of course ambivalent because technical rationalities were also used in an opportunistic or pragmatic way by administration in order to give legitimacy to administrative decisions.

²⁹ Cf. Stephan Huster, *Recht. Eine Kolumne - Legitimitätsprobleme in der Krankenversicherung*, Merkur 2001, p.1122ss.

³⁰ Cf. Hans-Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre*, Tübingen: Mohr Siebeck, 1965; Dietrich Jesch, *Gesetz und Verwaltung*, Tübingen: Mohr Siebeck, 1961; Christoph Möllers, *Reform des Verwaltungsrechts - Möglichkeiten und Grenzen eines wissenschaftlichen Diskurses in Deutschland*, European University Institute, Working Papers in Law 2001/10.

5.) The European Reluctance to Accept Independent Agencies of the American Style

The problems of economic and social regulation and regulatory supervision of monopolies (telecommunication, energy etc.)³¹ were kept integrated in the general administrative framework. In Europe only a few countries such as Sweden allowed for the major role of independent agencies which could be insulated from the influence both of government and from coordination with the general administrative rationality. More or less independent agencies always tend to develop a rationality of their own which is not from the outset compatible with the general conceptions, ideologies, routines etc. of general state administration. The one major counter example in Europe was the German Bundesbank which could be regarded as a powerful independent agency as much as its monetary policy was neither controlled by parliament nor by government.

The Transformation of Public Law by the Emergence of New Complex Technical Issues beyond the Limits of the “Pluralised” State

1.) New Forms and Doctrines of Balancing Private and Public Interests in Urban Planning Law

A major role for the new specific rationality, on the other hand, emerged e.g. in German (urban) planning law which accepted more leeway for

³¹ Cf. Julia Black, *Proceduralising Regulation*, Oxford Journal of Legal Studies 2000, p.597ss.(in this study the author neglects in my view the necessary link of standards the complex societal infrastructure of conventions, routines, practices: a standard cannot claim to be the outcome of “argumentation”); ead., *Rules and Regulations*, Oxford: Clarendon Press, 1997; Daniel A.Farber, *Innovations in Environmental Policy: Triangulating the future of reinvention: Three Emerging Models of Environmental Decision-Making*, University of Illinois Law Review 2000. p.61, 68ss.

balancing of private and public interests in complex decision making processes. The substantive control of balancing was limited by an increasing role of the ‘proportionality principle’ which allowed for judicial control also in the domain of rather complex administrative procedures³². But in the same vein as in American administrative law – especially in domains controlled by independent agencies – a new role for public participation and a more sophisticated “giving reasons” requirement were developed by the legislature and administrative courts. The process of “considering relevant interests in the balancing process” (“Einstellung der Belange in den Abwägungsprozess”) was given a legal value of its own whereas in the past only the neglect of specific individual rights had been sanctioned and the public inquiry of the interests raised by a decision or a rule had been regarded as a monopoly of public administration. This was a first step towards a recognition of the limited access of facts to administration beyond a certain level of complexity and the attribution of higher value to procedure. A similar administrative rationality of planning allowing for balancing of private and public interests emerged in France on the basis of the principle of ‘bilan-couts-avantages’³³ : this new approach also went beyond traditional models of administrative discretion and its limited judicial control but as opposed to Germany it was more based on an internal administrative principle of efficiency which allowed only for a minor role of the judiciary.

2.) High Technology and the Environment as New Challenges to the Definition of the Public Interest – “Expertise” becomes intertwined with Limited Private Interests

³² Cf. only Werner Hoppe/Susann Grotefels, *Öffentliches Baurecht*, München:Beck, §7.

³³ Cf. for the evolution of the new administrative law René Hostiou, *Administrative Review of Complex Decisions: Litigation on the Declaration of Public Utility in French Law*, in: Ladeur (ed.), *supra n. 5*, p.112ss.

From the 70s onwards one can observe a growing uneasiness concerning the use of technical use of experts in administrative decision making in Europe. And it is perhaps not by chance that administration was more strongly challenged in Germany than in other European countries because the continuity of the administration as the interpreter of the public interest had been much more weakened than in other European countries. This new type of conflict which concerned evolution of high technology (nuclear power, genetic engineering) and environmental decision making etc.) can no longer be channelled by the traditional group base corporatist structure of the post War welfare state. The general framework of co-ordination of private and public interest and the use of expertise brought about by these frameworks were based on agreements with 'representative organisations' of firms, workers etc. and brought about some flexible consensus among private and public actors also with respect to the use of expertise and the integration of private interests in public decision making procedure. However, more and more specific forms of regulations based on specific information produced by the individual firms and not based on general expertise (experience which is in principle accessible to public deliberation) accumulated in representative organisations, could no longer be generalised in the traditional forms of group based decision making procedures³⁴.

³⁴ Cf. Freeman, *supra* n. 24; ead., Collaborative Governance in the Administrative State, 45 University of Los Angeles Law Review 1997, p.62ss.; cf. also David Guttman, Privatization: Public Purpose and Private Service - The 20th Century Culture of Contracting Out and The Evolving Law of Diffused Sovereignty, 52 Administrative Law Review 2000, p. 859ss.

This was also a challenge for the French system of 'grandes écoles' which claimed to be able to produce general knowledge for both public administration and private enterprises. Guénaire speaks about regulation "replacing" administration both with respect to formal distribution of competencies (creation of new independent agencies) and with respect to the type of knowledge (and new types of managers) which have more sophisticated expertise. This evolution creates a tension between old style administration and "regulation of networks"³⁵.

Small groups of firms and not primarily general associations of industry appear in the public realm and create a new challenge to the administrative model and as a consequence to the separation of private and public interests³⁶. The problems which come to the fore in this new arena of conflict can be demonstrated with reference to nuclear power: this was a technology which involved a much closer link between technological expertise and its specific practical use by firms; all the major experts in the field of nuclear power were in

³⁵ Cf. Guénaire, supra n.4, p.131, 135.

³⁶ Cf. for the US Freeman, supra n.24; for France Jean-Bernard Auby, *La bataille de San Romano - Réflexions sur les évolutions récentes en droit administratif*, *Actualité Juridique Droit Administratif* 2001, p.912ss.; Jacques Chevallier, *Régulation et polycentrisme dans l'administration française*, *Revue Administrative* 1998, No.301; Jean-Pierre Gaudin, *Gouverner par contrat: l'administration publique en question*, Paris: Presse de Sciences, 1999; cf. for European developments also the contributions in Mark Freedland/Silvana Sciarra (eds.), *Public Services and Citizenship in European Law*, Oxford: Clarendon, 1999; Michael Taggart (ed.), *The Province of Administrative Law*, Oxford: Clarendon; for Germany Wolfgang Hoffmann-Riem, *Die Modernisierung von Recht und Justiz*, Frankfurt/M: Suhrkamp, 2001, p.24ss.; Gunnar Folke Schuppert, *Grundzüge eines Verwaltungskooperationsrechts. Regelungsbedarf und Handlungsoptionen eines Rechtsrahmens für Public-Private-Partnerships*, Expert Analysis presented to the Minister of Internal Affairs, June 2001; for Italy cf. Fabrizio Cafaggi, *Governo per contratto o governo per organizzazione?*, Bologna: Il Mulino, 2002.

some way or other involved in its practical use whereas the general technological knowledge with reference to this new type of high technology more and more loses its value and is only to a limited extent accessible to the “generalists” within public administration.

V. The Rise of the Cooperative State

1.) The Fragmentation of Knowledge as a General Problem of Administrative Decision-Making

This changed situation creates a huge problem for administrative decision making because administration can no longer claim to have or to be able to get a general knowledge which might be used as the basis for the definition of the public interest. As a consequence a new imbalance in the process of coordination of private and public interests in administrative decision making procedures is brought about. But even if one leaves aside the spectacular conflicts about the possibility of formulating the public interest a general tendency of change cannot be overlooked: expertise is so closely linked to specific private interests as in high technology (but not only in this domain) that more and more informal arrangements between state administration and firms or groups of firms³⁷ have to be used instead of general rules and the traditional form of ‘administrative acts’ as the privileged form of administrative decision making.

³⁷ Cf. Rakoff, *supra* n. 16 and the authors cited in n.36.

2.) The Interchangeability of Private Standards and Public Norms and the Tendency towards Privatisation of Public Utilities

On the other hand economic organisation and production become more flexible and also more proactive by themselves with respect to standards. More and more legally relevant standards (risk, safety) are produced beyond public administrative procedures³⁸. One may even venture the hypothesis that private standards and norms tend to be functional equivalent to state-based rules or laws in the stricter sense. The difference is only to be seen in more or less indirect impact of private standards on legal decisions whereas state based rules have a direct impact. But this distinction is often only of limited importance. The crisis of the 'public interest' finds its repercussion also in the privatisation of big public enterprises such as energy, telecommunications, railways etc³⁹. It would be rather superficial to regard this just as a neo-liberal trend of the economisation of the public interest: this trend is due to a basic transformation of the production processes themselves. Telecommunications for example does no longer serve a clear purpose of provision of services in a universal and equal way but the number of services and the ways of provision are so multiple that it is no longer possible to claim that something like the 'public interest' has to be served by public enterprises or in the French terminology the 'services publics'. State administration is no longer prepared by its organisational and institutional structure to act on a more and more dynamic market. It is not by chance that direct provision of services in the public interest is more and more replaced by private provision of services under the supervision of the state⁴⁰.

³⁸ Cf. Joerges/Ladeur/Vos (eds.), supra n.19.

³⁹ Cf. Joseph D. Kearney/Thomas W.Merrill, *The Great Transformation of Regulated Industries Law*, 98 *Columbia Law Review* 1998, p.1223ss.; Croley and Seidenfeld, supra n.15.

⁴⁰ Cf.Freeman, supra n.24, p.649; Julia Black, *Talking about Regulation*, 43 *Public Law* 1998, p.77ss.

3.) Towards a New Model of the “Supervising State” (“Gewährleistungsstaat”)?

In Germany especially the privatisation of telecommunications has provoked a discussion on a change of a paradigm of state function: the “supervising state” (“Gewährleistungsstaat”): this new type of state is regarded as still playing a major role in the supervision of private enterprises in pursuing something like the public interest but the basic requirements of a ‘universal service’ which has to be accessible to everybody remains flexible and follows the market and technology. This is a new form of open co-ordination between the private and public interests: the state no longer defines what is in the public interest but it formulates a base line for the public interest in a rather abstract way whose concrete meaning can only be formulated in a flexible way which adapts to the dynamic market.

This example can also be used as a starting point for the observation of the transformation of regulatory approaches in other fields where spectacular processes of privatisation in the stricter sense have not taken place⁴¹. The flexibility of technology and the range of alternatives, the rapid change of technologies in dynamic markets, the fragmentation of knowledge in the process of a much more rapid transfer of technological and scientific knowledge to the production process make it more and more difficult to follow consistent economic and social regulatory models. New forms of co-operative rule making or decision making emerge; unilateral decision making by ‘administrative acts’ is more and more replaced by informal arrangements or

⁴¹ Cf. Hoffmann-Riem, supra n.36; Gunnar Folke Schuppert, Die öffentliche Verwaltung im Kooperationspektrum staatlicher und privater Aufgabenerfüllung: Zum Denken in Verantwortungsstufen, 31 Die Verwaltung 1998, p.415ss.; Thomas Vesting, Zwischen Gewährleistungsstaat und Minimalstaat, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Assmann (eds.), Verwaltungsrecht in der Informationsgesellschaft, Baden-Baden: Nomos, 2000, p.101ss.

explicit forms of contract which make it difficult to distinguish clearly between private and public interest.

4.) The New Phenomena of Private-Public Co-operation - “supervised Self-regulation” in particular

To mention just a few of the new hybrid forms of decision, I refer to new forms of regulation which are neither purely private nor purely public (this is rather the model of the past) but they use different forms of public involvement in a regulation which is more or less left to be concretised by private enterprises. On the one hand we have ‘supervised self-regulation’, a form of self-regulation which underlies a more or less detailed supervision by the state; this supervision can take on different forms by itself. It may also be combined to some kind of institutionalised threat in the sense that self-regulation is accepted as far as certain public interests are considered but the state will step in by regulation in the stricter sense once these goals are not achieved. Another form of flexible regulation is the so called ‘negotiated regulation’ a model of co-operative regulation which, in spite of its flexibility, imposes more obligations, more explicit requirements on the public sector. At the third version one may distinguish ‘audited self-regulation’ which means that even the supervision is, in a sense, privatised because private auditors have to check whether the requirements of administration or a statute have been met by self-regulation; in this version the state steps back even from control and restricts itself to imposition of criteria for the auditing on the one hand and for the supervision over the auditors themselves. In some forms just spontaneously emerged self-regulation is taken as a starting point for this new form of co-operation, but in either fields the state even stimulates in a more or less pressing way, the specific organisational form of self-regulation.

For example in Germany the “Duales System Deutschland” (DSD) for the collection of packaging waste has been brought about by imposing a rather unrealistic duty on firms to take care of their packaging waste but to allow them to put in place a collective organisation for the fulfilment of this obligation⁴². Of course the creation of this organisation was a central interest of this legal norm which in a stricter sense is only an ‘incentive’ to put in place a private organisation because the alternative of taking care of packaging waste by themselves was not economically manageable. This form is very interesting because the alternative would have been an organisation set up by the state itself with all the problems of management etc. but on the other hand the ‘private’ character of the dual system is somewhat ambivalent if one takes into account that this was from the outset the goal of the state that this ‘self-organised’ management of packaging waste was set up.

This shows that also in domains of administrations which are not focused on rule making unilateral administrative acts are more and more replaced by co-operative arrangements⁴³, formal incentives to establish a private co-operative organisation and contracts instead of hierarchical imposition of the public interest, and the separation between public administration and private organisations is fading in a form which differs from the one which came about in the group-based welfare state. This is a consequence of the breakdown of the clear separation of public and private interests. Both goals and instruments

⁴² Cf. Andreas Finckh, *Regulierte Selbstregulierung im Dualen System*, Baden-Baden: Nomos, 1998; *Die Verwaltung*, Beiheft 4 (2001): “Regulierte Selbstregulierung”; Matthias Schmidt-Preuss, *Funktionsbedingungen selbstregulativer Gemeinwohlverwirklichung. Zur Recyclingzuständigkeit eines dualen Systems*, *Deutsches Verwaltungsblatt* 2001, p.1095ss.

⁴³ Cf. Frans van den Woerd, *Environmental Management Systems in the Netherlands: Towards the Third Generation of Environmental Licensing*, in: Ute Collier (ed.), *Deregulation in the European Union: Environmental Perspectives*, London: Routledge, 1998, p. 198ss.; for the use of covenants in the Netherlands cf. also Henri Tjong, *Institutional Dynamics in Environmental Corporatism. The Impact of Market and Technological Change on the Dutch Polder Model*, MPPG, WP 2002.

(including financing) for the implementation of projects are included in contracts and co-operative arrangements.

5.) What is the Role of the Public Interest in Public-Private- Partnerships

Of course this new evolution raises new problems of definition of the public interest: what is the role of public administration in these unclear, more or less informal co-operative arrangements? The first steps towards a more open conception of administrative law e.g. of decision-making by independent agencies in the US or of “balancing” of public and private interests in planning law in France and Germany had counted upon a rationalising impact of procedural requirements instead of just stressing the substantive rationality of the decision itself. But how do we know that the more flexible forms of ‘co-operation’ - especially if conflicting interests are not immediately involved in the process – are in the public interest? How can we tell that this is not just a form of an open or hidden subsidy which is only in the private interest?

Especially in Europe this form of co-operation raises problems because in the past there had been this common understanding that the law and the administration in individual cases of decision making could refer to the definition of the public interest which, in spite of its flexibility, still could presuppose some stable elements of distinction vis-à-vis the private interest. But when co-operation becomes an open-ended process which presupposes that there can be no stability, how do we know that the public interest is served by these flexible forms of co-operation and contracting?

VI. New Models of State? The “Empowering State”? The “Polder Model”?

1.) Towards a Generalisation of the Model of the “Contracting State”?

It is quite interesting that also the traditional welfare state and its institutional basis is coming under attack not only from neo-liberal groups. In this respect the British Labour Party has taken the lead by formulating a new goal for the welfare state which is the ‘empowering state’⁴⁴, a concept which has immediately been referred to in France, Germany⁴⁵ and other European states. One might oneself again what the meaning of such a new formula is, at any rate it challenges the group-based social state and tries to introduce ‘relational’ contractual elements into the social state as well, an evolution which shows that pre-determined public solutions for social problems can no longer be presupposed and new forms of indirect incentive based forms have to be experimented with.

There are different approaches which have been tested in European states. The Netherlands have developed a rather sophisticated system of covenants⁴⁶ for environmental law which tries to reduce the impact of the command and control approach on industry without giving up the goal of improving environmental conditions. This is a system which is composed of differentiated levels of co-operative agreements on goals to achieve and instruments and resources to be used both by private and public actors. To give an example of the kind of incentive based self regulation one might refer to the German regulation on packaging waste which sets a base line for their use of refillable containers for drinks and threatens industry to impose a system of charges by

⁴⁴ Cf. Bevir/Rhodes, supra n. 5.

⁴⁵ Cf. Brigitte Zypries (Secretary of State at the Minister for Internal Affairs), *Der aktivierende Staat: Theoretische Grundlage für praktische Politik*, Vortrag am Institut für Öffentliche Dienstleistungen und Tourismus der Universität St.Gallen, 26 Jan. 2001.

⁴⁶ Cf. Van den Woerd and Tjong, supra n.37.

public law once this goal is not achieved. Co-operation is also used in the sense of contracting out services which are still regarded as being public but its implementation is left to private enterprises; this is a common practice in delivery of social services. Even in the domain of state control of the fulfilment of binding requirements, for example emission control in environmental law, more and more forms of self-control and self-auditing are put in place⁴⁷. The state also makes use of quality contract for example in medical aid, setting up a comprehensive monitoring plan which delivers a lot of information to the state in order to be used as a basis for revision and observation of quality standards. It is interesting to observe that this form of ‘relational contracts’ resembles those forms of ‘relational contracts’ which have spread in the private sector and which react also to phenomenon emerging within the private sector which indicate that the clear line between, on the one hand market solution (exchange contracts), and the organisation (producing certain services by oneself) is breaking down; in the private sector this is mainly due to the increasing role of information technologies which allow for hybrid versions of co-operation which are contractual but allow for mutual involvement of partners in the co-operation processes also within an organisation.

2.) Can Public-Private-Partnerships be brought under the Umbrella of the “Rechtsstaat”?

More and more public–private-partnerships projects emerge, for example in city development, in the administration of culture etc.. This evolution has recently led the German government to start a law making project focusing on the specific ‘law of administrative co-operation’⁴⁸ in order to bring in some

⁴⁷ Cf. Freeman, supra n. 24, p.649; generally Michael Power, *The Audit Society - Rituals of Verification*, Oxford: Clarendon, 1997.

⁴⁸ Cf. Schuppert, supra n.26

more structure to this rather opaque field of influence of private rules on public decision making and vice versa. The project focuses on rules about the rather general conditions of co-operation of administration with private firms, the selection of co-operation partners, the requirement of giving administration influence on the implementation of a project and quality control in contracting out of services. If one has a closer look at the requirements one has the impression that the legal value of such a law on administrative co-operation would be rather limited; this is valid above all for the substantive elements of the definition of the public interest in dynamic settings whereas the presupposed ability of administration to define the public interest in the past was rather based on a common stable understanding of some basic requirements which are in fact challenged if only by the rapid transformation of the economy and the growing impact of information which is not easily accessible to public administration and challenges its monopoly on the definition of what the public interest is.

3.) The Accountability of Co-operative Administration

Also problems of accountability⁴⁹ of co-operative administration vis-à-vis the parliament are at stake. One has often referred to the neglect of accountability with respect to subsidies whose efficiency is far from being adequately monitored. But in the vast domain of co-operative decision making, this issue becomes even more pressing because co-operation is more and more a functional equivalent to command and control approaches in unilateral decision

⁴⁹ Cf. Martin Shapiro, *Administrative Law Unbound*, 8 *Journal of Global Legal Studies* 2001, 369, 372; id., *Who Guards the Guardians? Judicial Control of Administrative Action*, Athens: University of Georgia Press, 1988, p.36ss; the New Public Management and its methods cannot be considered to contribute to the accountability of administration because it denies from the outset the specificity of public services; B.Guy Peters/John Pierre, *Governance without government? Rethinking Public Administration*, 8 *Journal of Public Administration Research* 1998, 223, 232.

making⁵⁰. Whereas one might still have presupposed that administration possess some common understanding and experience in how to safeguard the public interest in well known fields of administration, one might have some doubt that an administration still has this possibility of defining the public interest in completely new settings with which it has no experience at all and in which it has to learn from experimenting with new forms of co-operative arrangements.

In the American and the European literature this transformation is even regarded as being a fundamental change of paradigms from ‘hierarchy’ to ‘co-operation’. This is true because there is no way back to traditional forms of administration and this is mainly due to the fact that the basic structure of administration in some way or other corresponds to basic structure of decision making in private sectors: the traditional role of the unilateral sovereign state decision could only function against the background of a society which was based on rather stable patterns and rules to which the state, either by way of rule making or administrative decision making, could refer, there is a mutual correspondence between private and public decision making in the past which in a paradoxical way makes possible the separation of public and private interests.

4.) Towards a New Paradigm of the “Network Society”?

The new institutions of the social state were something like a secondary modelling of this evolution of administration in the liberal society; they correspond to a society of the organisations which is still capable of formulating common interests in representative organisations and prestructure public issues which may be decided in the public realm in the stricter sense. But now we are confronted with a new transformation towards something like a ‘network

⁵⁰ Cf. Freeman, *supra* n.24.

society' which is characterised by growing flexibility, dynamic markets, continuous restructuring of private organisations, hybrid forms of arrangements between markets and organisations, rapid transfer of technological and scientific knowledge into production processes to name but a few characteristics of new self-organisational patterns of society. This does of course not mean that the whole of society is underlying such a process of transformation, and the same could be said about the social state. The transformation does not completely replace the patterns, routines and rules of the liberal society of the individuals but especially the new challenges of state and society can no longer be managed within the old forms of organisation and action.

5.) Public Interest in the “Network Society” – from Substantive ex ante Determination to methodological ex post Evaluation of Experiments?

In many respects the management of this evolution is much more difficult for administration than for private enterprises because private enterprise has at least one major criterion, which is profit. But what about public agents and public administration in the general sense? The formulation of public interest in the past has always been linked to some kind of self-structuring of society according to general rules which were then controlled institutionalised, reinforced, reformed etc. by the state. This has been the presupposition of the substantive determination of the public interest by administration in Europe. At the next stage the “representative organisations” were established as intermediaries between society and the state. But how about a society which no longer produces stable patterns which might be used as a kind of frame of reference for the formulation of some general public interest – neither in a substantive nor in a procedural pluralist way?

How about the role of parliament⁵¹ once we have to accept that also the rule of law is challenged once the self-transformation of society is so dynamic⁵²? But this is even more problematic for administration whose possibility to define the public interest is extremely difficult in a flexible dynamic society which is in a constant process of self-transformation. So we have to take account of the breakdown of the long tradition of the role of the law and administration in the process of the formulation of the public interest and the breakdown of the presupposed separation of public and private spheres. But how can we replace these concepts and conceptions which have been the cornerstones of the public legal system in the past?

In the context of this paper only provisional hypothesis may be formulated. But in my view one should have first of all a look back to the transformation process of administrative law in the past. And the idea that the structure of administrative decision making in some way or other corresponds to the basic of decision making in the private sector – which does not mean that the state is just an economic actor among others! - might lead us to an idea about how to formulate a paradigm of public decision making in a context where public and private can no longer be clearly distinguished from the outset. This idea might start from the assumption that in the past we had a considerable interest which tried to accumulate requirements of stabilisation of some general

⁵¹ Cf. Oliver Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik*, Tübingen: 1999; Georg Kneer, *Von Kommandohöhen zu Maulwurfshügeln*, *Sociologia Internationalis* 1998, p.61, 81; for a sound analysis of the present discussion on the relationship between technology and law cf. Claudio Franzius, *Technikermöglichkeitsrecht. Wechselbeziehungen zwischen Technologie und Recht am Beispiel der Kommunikationstechnik*, *Die Verwaltung* 2001, 487ss.

⁵² Cf. for the decline of the non-delegation doctrine in the US Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, *52 Administrative Law Review* 2000, p.813, 839; the German Federal Constitutional Court has tried to reinvigorate this doctrine for quite some time but for technical matters in particular it has accepted that the protection of individual rights even demands more flexibility given to administration (“Dynamisierung des Grundrechtsschutzes”), *Reports of the Federal Constitutional Court Vol.48*, p.89, 120ss.)

rules, routines, a general knowledge bases (experience) which were accumulated in administration. This accumulative knowledge was, on the one hand implicit in the knowledge basis of administration and on the other hand it was made explicit in rule making and unilateral decision making by administration and could be more and more refined and transferred from one generation to another.

But once the knowledge which is produced and used in the private sector underlies a rapid process of change this ex ante approach to the formulation of public interest can no longer be helpful, at least not in those spheres which underlie processes of dynamic change. Instead a new experimental system of formulation of public interest might be put in place which at least pretends to learn from the basic requirements of correspondence between public and private modes of decision making. And once private decision makers have to experiment more and more with what the private interest is also administrators have to experiment with it and with a reference to public interest this would end up in a change from ex ante to ex post formulation of public interest. Public administrators would have to formulate hypotheses of what the public interest might be in the new flexible settings and on the other hand a system of monitoring evaluation and mode of revision and learning has to be put in place in order to allow for learning processes which might end in a new set of ‘best practices’ of co-operative law⁵³. At least one could develop an immanent rule of control of the public interest. Many forms of flexible interference with private activities are simply failures which do not even meet the most basic expectations of administration – but there is nor much interest in analysis of

⁵³Cf. for a practice of public accountability by monitoring procedures in contractual arrangements Jody Freeman, *The Contracting State*, 28 Florida State University 2000, p.155, 201, 211.

such failures on the side of governments whereas for outsiders including the general public it is extremely difficult to get information about such projects. Also in this respect we can observe a consequence of the changed character of knowledge: administrative action is no longer based on experience and it can no longer be observed publicly (by the press e.g.) without new knowledge being generated in a systematic way by monitoring and evaluation processes.

For parliament such an idea would allow for a more meaningful approach to accountability because instead of just imposing very vague substantive requirements on administration, parliament should set up procedural and methodological requirements for formulation of hypotheses about public interest, monitoring systems and the evaluation and finally the introduction of some general assumptions which may be devised from an experimental approach to public decision making.

VII. Prospects for the European Union in the Context of the New Co-operative Administration

The "erosion of administrative borders"⁵⁴ in a more open process of "governance" beyond the clear separation of private and public can also be observed at the EU level: The comitology procedure which is set up for both rulemaking and the preparation of individual decisions by the Commission no longer allows for a distinction between "government and governance"⁵⁵ because "regulatees have a say in the procedure" if only in an informal way in the process of preparing the comitology decisions⁵⁶. One may doubt whether this

⁵⁴ Cf. Shapiro, supra n.49, p.372.

⁵⁵ Cf. Shapiro, supra n.49, p.371.

⁵⁶ Cf. Christian Joerges/Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart, 1999.

development may call an evolution towards "deliberative" decision making⁵⁷. The comitology procedure has been criticized as lacking in transparency and as escaping from accountability. The Commission in its White Paper on "Governance in Europe" has demanded its abolishment and its replacement by agencies for the preparation of expertise based decisions under its own supervision.

Both the criticism and the reform proposal seem to neglect the peculiar character of technical and social standards : They are not just norms made in public-private partnership. Mostly they only have indirect legal value (concretising e.g. "negligence") because they only develop a practical hypothesis on how these legal requirement on the stricter sense may be met⁵⁸. In this vein they refer to "collective practices"⁵⁹ of the industry, professions which are involved in their generation. This is also why in some way or other the private industry etc. have to participate in the public process of screening or even legalizing standards. There is necessarily a differentiated infrastructure of conventions, routines, interpretations, common understandings, expectations etc. which contain a whole body of more or less implicit (practical) knowledge on which the legal rules in a stricter sense refer to. This relational structure can of course be changed but at least one has to be aware of this complex intertwinement of public and private rules. This is also the reason why law making in Europe and the harmonization of member states law is so complex. It is less the weight of "culture" as such or national ideologies which are a hindrance to the integration but rather the complexity of the differentiated conventional infrastructures of the law which until now are centered on the

⁵⁷ Martin Shapiro, *supra* n.49, observes in this respect a "dethroning" of established pluralist processes in the recent evolution of administrative law.

⁵⁸ Cf. Joerges/Ladeur/Vos (eds.), *supra* n.19.

⁵⁹ Cf. Shapiro, *supra* n. 49, 370.

nation state and its law. This is also an explanation why integration is much easier if member states are facing new problems for which new solutions beyond established practices have to be found (environmental and high technology law, telecommunications law etc.). The comitology process may be cumbersome but it is adapted to a complex process of integrating this state-based infrastructures of the law. And at the same time it allows for the cooperation of public and private decision-makers in a flexible way.