Legitimacy Principles in the Administrative Law Network of the EU

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I. Introduction

If confronted with questions about the legitimacy of EU law – and EU administrative law in particular –, one is tempted to ask: Is the Union still facing legitimacy problems? Historically, the Union had several severe legitimacy crises; most notably in the 1960s, 70s and 90s. They continued into the turn of the millennium, when the European Constitutional Treaty failed. Consequently, the Commission sought alternative ways of legitimation in its White Paper on European Governance, which focused on European citizenship and citizen rights, and their inclusion into the EU Treaties.[1] With the adoption of the Lisbon Treaty, European representative and participatory democracy got its home in Arts. 9-11 Treaty of the

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1 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final.

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European Union (TEU). Nowadays it is firmly established that the Union is built on the principle of dual democratic representation.[2] Hence, at least from the perspective of primary law, the EU has adopted conceptualizations designed to overcome some of the legitimacy charges of its past. This view seems to be shared by the academic literature on legitimacy in the EU. Research on the EU's legitimacy crises plummeted around 2009, when the Lisbon Treaty was adopted, and shortly thereafter.[3]

This does not mean that the Union has managed to ensure her actions are received as legitimate by the member states and European citizens. In fact, the current and ongoing crises in the European Union may easily be perceived as legitimacy crises. What else, if not the lack of acceptance of the EU and its institutions, would have led the British to renounce the European acquis in 2012? And let us remember the lack of acceptance by heads of state and state institutions in the so-called Visegrád states, which

2 Art. 10 paras. 1 and 2 TEU.

3 GA Caldeira/JL Gibson, 'Democracy and Legitimacy in the European Union: The Court of Justice and Its Constituents' (1997) 49 *International Social Science Journal* 209; R Caranta, 'Democracy, Legitimacy and Accountability - is there a Common European Theoretical Framework?' in M Ruffert (ed.), *Legitimacy in European Administrative Law* (Europa Law Publishing, 2011) 175; P Craig, 'Legitimacy in Administrative Law: European Union' in M Ruffert (ed.), *Legitimacy in European Administrative Law* (Europa Law Publishing, 2011) 197; A Føllesdal, 'Democracy, Legitimacy and Majority Rule in the European Union' in A Weale/M Nentwich (eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, 1998) 34, 35; B Kohler-Koch/B Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield Publishers, 2007); C Marxsen, 'Participatory Democracy in Europe Article 11 TEU and the Legitimacy of the European Union' in F Fabbrini/E Hirsch Ballin/H Somsen (eds.), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015) 151; A Moravcsik, 'Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603; J Newig/O Fritsch, 'More Input – Better Output: Does Citizen Involvement Improve Environmental Governance?' in I Blühdorn (ed.), *In Search of Legitimacy: Policy Making in Europe and the Challenge of Societal Complexity* (B. Budrich, 2009) 205; FW Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition. Why Europe Differs from the United States' in K Nicolaidis/R Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 355; FW Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173; FW Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis' in K Armingeon (ed.), *Staatstätigkeiten, Parteien und Demokratie: Festschrift für Manfred G. Schmidt* (Springer VS, 2013) 567; J Thomassen, *The Legitimacy of the European Union after Enlargement* (Oxford University Press, 2009).

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caused the rule of law crisis of the EU. Further, cannot the EU's financial crises, the reactions to the COVID-19 pandemic, in particular policies and agreements on vaccines, and the refugee crises of 2015 and 2022 be captured as incidences questioning the legitimacy of the Union?

Interestingly, this is not how those crises are looked at today. Academic literature as well as policy practice do not view these current crises as legitimacy crises of the Union *lato sensu*. Rather, discussions appear to have moved toward specialized topics and issues. Now, there is talk of the rule of law crisis,[4] the legitimacy of EU criminal law,[5] EU asylum policy and the refugee crisis of 2015,[6] European economic governance and EU environmental law,[7] the Euro crisis etc.[8] Concomitantly, more specific solutions are discussed for the areas of EU law, which allegedly lack legitimacy, such as the rule of law,[9] solidarity in EU migration law[10] and sustainability in EU

4 A Jakab/L Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal* 936; M Smith, 'Staring into the abyss: A crisis of the rule of law in the EU' (2019) 25 *European Law Journal* 561 ff.

5 J Öberg, 'EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty' (2011) 16 *Tilburg Law Review* 60; K Nuotio, 'A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all' (2020) 11 *New Journal of European Criminal Law* 20.

6 Y-D Kang, 'Refugee crisis in Europe: Determinants of asylum seeking in European countries from 2008-2014' (2021) 43 *Journal of European Integration* 33; S Angeloni/FM Spano, 'Asylum Seekers in Europe: Issues and Solutions' (2018) 19 *Journal of International Migration and Integration* 473.

7 G Barrett, 'European economic governance: deficient in democratic legitimacy?' (2018) 40 *Journal of European Integration* 249 ff.; R Csehi/DF Schulz, 'The EU's New Economic Governance Framework and Budgetary Decision-Making in the Member States: Boon or Bane for Throughput Legitimacy?' (2022) 60 *Journal of Common Market Studies* 118 ff.; N Craik/T Koivurova, 'Subsidiary Decision Making under the Espoo Convention: Legal Status and Legitimacy' (2011) 20 *Review of European Community & International Environmental Law* 258.

8 P Kratochvíl/Z Sychra, 'The end of democracy in the EU? The Eurozone crisis and the EU's democratic deficit' (2019) 41 *Journal of European Integration* 169; VA Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press, 2020); M Markakis, 'Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles' (2020) 23 *Journal of International Economic Law* 489.

9 J Öberg, 'EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty' (2011) 16 *Tilburg Law Review* 60; K Nuotio, 'A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all' (2020) 11 *New Journal of European Criminal Law* 20.

10 E Karageorgiou/G Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131; L Marin/S Penasa/G Romeo, 'Migration Crises and

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environmental law.[11] Hence, most of the Union's current legitimacy issues become manifest in specialized and sectoral areas of EU law. Accordingly, the critique of the 'legitimacy of the EU', which dominated EU legal writing all the way up until the 2000s, has diversified into a critique of specific legitimacy principles and/or the Union's core values, such as sustainability, the rule of law and solidarity.

This late, compartmentalized method of thinking about legitimacy in EU law corresponds to how the Union of today is perceived by its citizenry. Both Union critics, such as *Dieter Grimm*,[12] and its proponents, such as *Armin von Bogdandy*,[13] convincingly argue that the initial motives underlying the Union's creation, i.e., integration and harmonization, do not resonate any more with today's citizenry.[14] Likewise, questions like 'what is the Union' and 'what is it *for*' are no longer on the popular agenda. Since the coming into force of the Treaty of Luxembourg, generations of Union citizens have grown up with the benefits of the internal market and free movement in the Schengen area. They neither experienced the Second World War that led to the Union and its creation, nor have they been brought up with the gradual realization of the Union as a common, European peace project built on core values such as the rule of law, democracy and solidarity.[15] Today, the status of the Union is settled. As

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the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 *European Journal of Migration and Law* 1; J Bast, 'Solidarität im europäischen Einwanderungs- und Asylrecht (Solidarity in European Immigration and Asylum Law)' in M Knodt/A Tews (eds.), *Solidarität in der EU* (Nomos, 2014) 143.

11 DR Bell, 'Sustainability through democratization? The Aarhus Convention and the future of environmental decision making in Europe' in J Barry/B Baxter/R Dunphy (eds.), *Europe, Globalization and Sustainable Development* (Routledge, 2004) 94; U Collier, 'Sustainability, Subsidiarity and Deregulation: New Directions in EU Environmental Policy' (1997) 6 *Environmental Politics* 1; S Marsden/ J De Mulder, 'Strategic Environmental Assessment and Sustainability in Europe – How Bright is the Future?' (2005) 14 *Review of European Commmunity and Environmental Law* 50.

12 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016).

13 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022).

14 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016) 29; A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022).

15 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016) 30.

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Grimm stated: In today's Europe, "peace is no longer an achievement, it has become reality".[16] It is the common view that the Union of today is that of a 'Verbund', a Union of national states,[17] or a network endeavour. In either construction, states and their administrations retain their national sovereignty and identity, and do not succumb to the idea of a United States of Europe or a federal administration.[18] At the same time, there is a recent rise of populist parties.[19] Some states resort to populist policies.[20] Hence, not only agreement on core values like the rule of law or public participation dissipates. Consensus on common policies, like environmental protection and sustainability, also crumbles.[21] Whereas debate about the overall character of the EU has muted, common values and legitimations for the Union are – again – being renegotiated, debated and developed.[22]

Now, if this is the status quo on the legitimacy of EU law, how does this play out in the area of EU administrative law? Some have argued that the current crises mostly touched upon European principles and values, and thus on EU constitutional law.[23] EU administrative law had reached a consolidated state.[24] In this chapter, I argue that the constitutional crises continue to have fundamental effects on EU administrative law. On the one

16 *Ibid*, 30.

17 BVerfG, 30.06.2009 - 2 BvE 2/08 -, 1st leading paragraph, para. 229; M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa' in A von Bogdandy (ed.) *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2003) 227.

18 M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; M Ruffert, 'Verwaltungsrecht im Europäischen Verwaltungsverbund' (2015) 48 *Die Verwaltung* 547; A Voßkuhle, 'Der Europäische Verfassungsgerichtsverbund' (2010) 29 *Neue Zeitschrift für Verwaltungsrecht* 1.

19 A Noury/G Roland, 'Identity politics and populism in Europe' (2020) 23 *Annual Review of Political Science* 421, 424.

20 *Ibid*, 439, 424. For the terminology as to what counts as populism, compare A Klafki, 'Resilienz des Grundgesetzes im Zeitalter des Populismus' (2020) 103 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 113, 114 f.

21 S Bogojevic, 'Comment: Environmental Law and Populism: The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31 *Journal of Environmental Law* 389.

22 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160.

23 M Ruffert, 'Verwaltungsrecht im Europäischen Verwaltungsverbund' (2015) 48 *Die Verwaltung* 547.

24 *Ibid*, 547.

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hand, this is because core areas of EU law are administrative in character. On the other hand, EU constitutional law also affects EU administrative law, above all in the areas of environmental and migration policy.

Against this broader context, I will develop my thoughts on legitimacy principles in EU administrative law networks. I shall address each of the sub-questions related to that overall theme in turn. First, I will address the networked nature of European administrative law (B). Second, I will tackle the issue whether there is a legitimacy deficit in the European administrative law, and where it is (C). Third, I will debate where a principled approach to legitimacy has become relevant in EU administrative law (D). And the fourth part will illustrate where debates about fundamental legitimacy principles have arisen in EU administrative law (E). A fifth and final part will conclude.

II. On the Networked Nature of EU Administrative Law

When elaborating the role of principles in EU administrative law networks, we first need to establish what is meant by EU administrative law. This discussion ties into the well-known questions about the nature and function of the European Union, the role of EU law, and the member states. Revisiting those questions is important in order for us to understand today's legitimacy issues in EU administrative law.

1. What Counts as EU Administrative Law?

While we might have a clear vision of what constitutes constitutional and administrative law at the national levels, the categories "constitutional" and "administrative" remain problematic at the level of EU law.[25] The Constitutional Treaty of the Union has failed.[26] The Union of today is built upon the Treaty on the European Union and the Treaty on the Functioning of the

25 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160, 162; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung' in A von Bogdandy (ed.) *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2003) 227.

26 R Streinz, 'The European Constitution after the Failure of the Constitutional Treaty' (2008) 63 *Zeitschrift für öffentliches Recht* 159.

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European Union (TFEU), both of which are associated with the Union's constitution.[27] Nonetheless, some have highlighted that the TFEU also contained rules and provisions belonging to the sub-constitutional, and thus administrative, level.[28] In addition, some aspects of EU constitutional law clearly address (national and EU) administration, like Art. 41 Charter of Fundamental Rights of the European Union (ChFR).[29] Some aspects of EU administrative law influence constitutional guarantees, such as the access to justice provisions of EU environmental law.[30] Hence, even after the adoption of the Lisbon Treaty, it remains difficult to determine what counts as constitutional, and what as administrative law.[31]

This is further due to the fact that European administration and European administrative law are heavily influenced by European law and the relationship of European administration to the national administrations of the member states. Accordingly, views on EU administrative law are shaped by different perspectives on how this relationship is to be understood: The common and popular view regards EU administrative law from the angle of national law. Thus, mostly principles and rules known from national administrative procedure are identified as European administrative law.[32] The opposite view argues that EU administrative law, like EU law itself, needs to be perceived from an autonomous EU perspective.[33] From this standpoint, EU administrative law is dominated by the principles of European (constitutional) law.[34]

Bearing these two perspectives in mind, there are even more ways of looking at the subject matter of EU administrative law. Some have held that EU administrative law primarily concerned subject areas where member states *transferred* exclusive administrative competences to the Union,

27 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*, 3rd edn (C.H. Beck, 2016) 127.

28 *Ibid*, 131.

29 On this, see section D. II. below.

30 KP Sommermann, 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 320, 324.

31 For this discussion in the national context, see: F Wollenschläger, 'Verfassung im Allgemeinen Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation?' in (2016) 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 187, 197.

32 F Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the 'Touch of Stateness'' (2021) 22 *German Law Journal* 593, 597.

33 *Ibid*, 621 ff.

34 *Ibid*, 621 ff.

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such as in state aid and competition law.[35] In view of the principle of conferral, the primacy of Union law, and the principles of subsidiarity and proportionality, others have taken the position that European administrative law existed primarily where European law was *executed*.[36] This position requires administrative matters to be regulated by primary Union law. Member states have not yet rendered their sovereignty to the EU in the field of general administrative law. But the EU is competent to regulate matters of administrative law by way of annex in a field in which the Union is exclusively competent, if the regulation is necessary for the effective and proportional implementation of EU law.[37] Therefore, the law produced in those annex areas must also be considered as EU administrative law. In fact, the bulk of EU administrative law exists and is nowadays produced in those annex areas. Accordingly, and relatedly, EU administrative law in the Union of today not only concerns the *execution*, but also the *implementation* of EU law at the national levels:[38] Many rules contained in primary Union law establish or require institutions, or institutional arrangements, and national administrations cooperate with or integrate those institutional arrangements into their own administrative solutions.[39] This type of European administration exists, for example, in the area of the service sector, such as in telecommunications and energy law,[40] it concerns the area of trans-European networks,[41] the field of customs, competition, or pharmaceutics[42]. It exists both in areas of law under exclusive administration of the EU as well as in areas of law where member states are primarily competent to determine the execution of EU law. And independently of those previous classifications, European administrative action concerns both the passing

35 Arts. 86 and 107 TFEU; cf. P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 396; however, see also J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

36 Art. 52 para. 5 ChFR.

37 Cf. CJEU, C-176/03, ECLI:EU:C:2005:542, *Commission v. Council*.

38 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

39 W Schroeder, *Grundkurs Europarecht*, 6th edn (C.H. Beck, 2019); P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 391.

40 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 394.

41 W Schroeder, *Grundkurs Europarecht*, 6th edn (C.H. Beck, 2019) 133 § 8, para. 5.

42 *Ibid*, § 8, para. 5.

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of individual administrative acts in areas regulated by Union law and legislative activities. [43] Until the adoption of the Lisbon Treaty, the Union passed administrative legislation by way of the comitology procedure.[44] The procedure bypassed regular decision-making in parliament and replaced it with a specific, deliberative supranationalist[45] procedure. It was often critiqued for its lack of legitimacy, and its problems were traditionally addressed as problems of European administrative law-making.[46] However, after adoption of the Lisbon Treaty, the comitology procedure was succeeded by delegation of secondary rule-making, as described in Arts. 290 and 291 TFEU. These articles succumb the adoption of delegated legislation to the regular law-making procedure involving Council and Parliament. The procedure outlined by Art. 291 TFEU provides vertical structures of interaction between the EU and member states.[47] It therefore acknowledges the structures of European administration, without bypassing the representative democratic decision-making procedures required by the European treaties.

Summing up, we can conclude that EU administrative law is conceived of the constitutional principles governing administration, as well as the law governing administrative activity (legislative as well as executive) in the EU. It concerns the execution as well as the implementation of EU law and all the relevant horizontal and vertical interactions between actors at the level of the EU and the member states involved in those activities.

2. Is EU Administrative Law Networked? Union of Law, the *Verbund* Theorem, Network Theory, Constitutionalism and Governance in EU Administrative Law

Now, considering the specifics of European administration outlined in the previous paragraphs, how must we perceive EU administrative law? Does it

43 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 398.

44 *Ibid*, 357.

45 C Joerges/J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273.

46 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 398.

47 M Nettesheim, in E Grabitz/M Hilf/M Nettesheim (eds.), *Das Recht der Europäischen Union* (C.H. Beck, 80th supplement 2023), Art. 291 para. 10.

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display network structures, like *Jürgen Schwarze* suggested, [48] and what are alternative conceptualizations?

The history of ideas about the EU and the nature of the European project is long. It starts well before it was first conceived as the European Coal and Steel Community.[49] In fact, it begins with the global peace movements of the 19th century and the iconic speech of *Victor Hugo* at the Paris Peace Congress, who envisioned a United States of Europe, in parallel and side by side with the United States of America.[50] Whereas this early view of the EU surely underscored the idea of the Union as a federal and in fact etatist project,[51] the initial drafters of the Union, most prominently *Walter Hallstein* and *Robert Schuman*, conceived the European Union primarily as a Union of law. In this project, the law created the framework for the common endeavour to ensure peace between the former warring parties and to communalize their coal and steel industry.[52]

The concept of the Union as a Union of law has relived a powerful renaissance in recent years, mostly because the federalist concept of an "ever closer Union"[53] has not found further proponents,[54] least of all with Eastern European states. In addition, the "Union of law" is able to accommodate recent suggestions, such as a Union built on *integrated legal*

48 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

49 Art. 2 Treaty of Paris, 1951.

50 V Hugo, Opening speech at the Paris Peace Congress, 21 August 1849, published in *Œuvres completes de Victor Hugo, Actes et Paroles*, Vol. I (Hetzel-Quantin, 1882): "Un jour viendra où l'on verra ces deux groupes immenses, les Etats-Unis d'Amérique, les Etats-Unis d'Europe […] placés en face l'un de l'autre, se tendant la main par-dessus les mers, échangeant leurs produits, leur commerce, leur industrie, leurs arts, leurs génies […]."

51 For later federal conceptualizations, see J Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas' (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1; J Habermas, *The crisis of the European Union: A Response* (Polity, 2012); P Häberle, 'Föderalismus, Regionalismus und Präföderalismus als alternative Strukturformen der Gemeineuropäischen Verfassungskultur' in I Härtel (ed.), *Handbuch Föderalismus – Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt: Band 1* (Springer 2012), 251

52 W Hallstein, *Die Europäische Gemeinschaft*, 5h edn (Econ, 1979) 51 ff.

53 Arts. 1 and 23 TEU.

54 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*, 3rd edn (C.H. Beck, 2016) 20.

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pluralism.[55] It perceives the European legal order as one that is autonomous *lato sensu*. And in this order, the 27 member states have retained their constitutional autonomy.[56] The concept of a Union of law also focuses on the law and on the treaties, and not on the otherwise multi-faceted endeavours on how to understand the multiple interactions between the different actors involved.

Focusing on administrative law as part of the Union of law reminds us to look at the principles of primary law, and to the administrative rules found at the national levels. However, as the previous section showed, this approach has limits. At the level of EU law, the distinction between constitutional and administrative is not as clear-cut as in national law. Some principles of EU constitutional law dominate EU administrative law, while some rules of EU administrative law have constitutional character.[57] Moreover, EU administrative law is often principled and sectoral, European and national at the same time. In addition, focusing on the law alone would disregard the many formal and informal interactions that lead to administrative arrangements between member states, and to common standards and solutions. National and European approaches to administration are often shared, interwoven, and they display cooperative structures.

A look at those interactions and arrangements would, in turn, require one to perceive the Union as networked, as *Jürgen Schwarze* observed in his seminal treatise on European administration,[58] or integrated, in the sense originally developed by *Niklas Luhmann*.[59] Another way of highlighting the interactions between national and European administrative structures is *Matthias Ruffert's* and *Christoph Ohler's* characterization of European

55 S Besson, 'How international is the European legal order? Retracing Tuori's steps in the exploration of European legal pluralism' (2008) 5 *No Foundations: An Interdisciplinary Journal of Law and Justice* 50, 54 f. Distinguishing pluralism qua rank and pluralism qua validity (at 55).

56 *Ibid*, 56.

57 See section '1. What Counts as EU Administrative Law? ' above.

58 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.; G Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in G Teubner (ed.), *Global Law Without a State* (Dartmouth, 1996) 3; G Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 2011).

59 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013).

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administrative law as *Verwaltungsverbund*.[60] However, especially in those latter conceptualizations, focus is still on the law as the output and outcome of the network interactions. Moreover, the *Verbund* paradigm still perceives the Union as a constitutional association of EU member states.[61] The actors and interactions, and actors contributing to and realizing those outputs and outcomes, i.e., on government officials, regulators, judges and legislators, are not at the centre of this perception.[62] Administrative network theory, as envisaged by *Luhmann*, *Karl-Heinz Ladeur* and others,[63] in turn, focuses on the relationships and actions between the actors involved. The ordering principles governing those processes, defining hierarchies and conditioning actions by all actors involved are not of equal relevance. Thus, a network approach also ignores the different weight given to the rules and norms governing the field of EU administration, for example to the fundamental rights and constitutional principles that shape EU law in this area. Network approaches also accord less weight to the fact that EU primary law, or EU customary law, governs this area of EU law, side by side with national administrative laws and national constitutional provisions.

An overarching conceptualization underscoring this differently weighted influence and importance of the principles and values of EU law is EU constitutionalism.[64] EU constitutionalism highlights the hierarchical structures ordering the horizontal relationships between the public actors interacting

60 "Association of Administrations". Cf. C Ohler, 'Verwaltungszusammenarbeit Art. 197 AEUV' in R Streinz (ed.), *EUV/AEUV*, 3rd edn (C.H. Beck, 2018) para. 10 ff; M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; cf. A Klafki, 'Kooperative Verfahrenselemente im transnationalen Verwaltungsverbund am Beispiel von Planungsverfahren' (2019) 58 *Der Staat* 367, 367; M Nettesheim, in E Grabitz/M Hilf/M Nettesheim (eds.), *Das Recht der Europäischen Union* (C.H. Beck, 80th supplement 2023), Art. 291 para. 9.

61 BVerfG, 30. June 2009 - 2 BvE 2/08 -, 1st leading paragraph, para. 229.

62 For a network approach based on those interactions, see A-M Slaughter, *A New World Order* (Princeton University Press, 2004).

63 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013); K-H Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' (2007) 14 *Indiana University Press* 329.

64 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 267 ff.; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa' in A von Bogdandy/J Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2009) 227, 250 ff. See for global constitutionalism M Kotzur, in this volume, 71 ff.

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at EU level. EU constitutionalism has a huge bandwidth of possible and diverse understandings of the European constitution: *Jürgen Habermas's* idea of a European federal state would fall into this category,[65] as would *von Bogdandy's* take on EU law as constitutional law transforming the European public sphere.[66] A looser conceptualization that is still based on the idea of constitutional principles is *Samantha Besson's* pluralist account.[67] However, the constitutionalist idea would at least require an agreement upon the fact that Europe may already be perceived as a federalist state, or that it is nearing the overarching conceptualization of a federation of states. *Von Bogdandy* recently outlined convincing thoughts on why this may already be a reality.[68] Still, the major drawback to this is that some member states, in particular Hungary, Poland and Slovakia, do not share this common perception. European constitutionalism is bound by its own political realities. Now, this might be overcome by emphasizing the power of European public law, or by highlighting alternative, soft constructions that do justice to the political realities, like the *Verbund* paradigm. Still, I am sceptical whether even those soft constructions would match current realities. Certain national policies adopted in Eastern European member states pose a serious threat to European constitutional values and are currently discussed and adjudicated before the CJEU.[69] In addition, constitutionalism yet again focuses on the hierarchy of European public law, without paying equal attention to the actors and institutions, which contribute to its formation.

A combination of the insight that the European legal order must be perceived as *integration* of 27 autonomous national orders into one autonomous European legal order *and* the fact that European administration and European administrative law are constantly shaped by a multitude of actors, practices and policies in a highly complex structure[70] created the idea that

65 J Habermas, *The Crisis of the European Union: A Response* (Polity, 2012).

66 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 267 ff.

67 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160, 162.

68 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 70 f.

69 CJEU, C-619/18, ECLI:EU:C:2019:531, *Commission v. Poland*. CJEU, C-156/21, ECLI:EU:E:2022:97, *Hungary v European Parliament and Council of the European Union*; CJEU, C-157/21, ECLI:EU:C:2022:98, *Poland v European Parliament and Council of the European Union*.

70 HCH Hofmann/AH Türk, 'An Introduction to EU Administrative Governance' in HCH Hofmann/AH Türk (eds.), *EU Administrative Governance* (Edward Elgar Pub-

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the European political and legal sphere must be understood as *governance*. Similar to the constitutionalist idea, governance can be defined in various ways. As *Herwig Hofmann* and *Alexander Türk* noted:

> "[A]t the one end of the spectrum, governance is simply defined as the exercise of public power that is what governing institutions (but not necessarily governments) do. At the opposite end, governance is used to describe a very particular form of steering, in which public and private actors interact in an open way in order to reach common policy aims. Between those definitions we find governance often used to denote mechanisms of 'governing or steering' not exercised solely by governments, but including the governing and regulatory activities of different governmental, quasi- or semi-governmental as well as non-governmental actors."[71] In this way, governance also describes an analytical perspective, which focuses on the "procedures within these complex governance settings."[72]

In line with *Hofmann* and *Türk's* suggestion, I purport that this understanding of European administration and administrative law as governance is still the most adequate way of understanding the complex and multi-faceted ways of administration in and by EU law. The category of governance also corresponds to the self-perception of the Union. In 2012, the Commission published the White Paper e-book of European Governance.[73] Numerous legal acts enacted after that refer to this term, most recently in EU climate change law.[74] After all, the reality of EU administrative law is not networked, but governed.

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lishing, 2006) 1, 5; M Dawson/F de Witte, *EU Law and Governance* (Cambridge University Press, 2022) 48.

71 HCH Hofmann/AH Türk, 'An Introduction to EU Administrative Governance' in HCH Hofmann/AH Türk (eds.), *EU Administrative Governance* (Edward Elgar Publishing, 2006) 4.

72 Ibid, 4.

73 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final.

74 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

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III. Legitimacy in EU Administrative Law

1. Legitimacy in the EU

Now, what about legitimacy – and legitimacy in EU law, in particular? As the previous chapters in this book illustrate, the notion of legitimacy is difficult to grapple with. Legitimacy as a product of the enlightenment period is an answer to questions concerned, amongst others, with the authority and acceptance of national and international institutions.[75]

However, as *Anna-Bettina Kaiser's* contribution in this book illustrates,[76] at the level of constitutional law, the term democratic legitimation is sometimes more common. It refers to the core of what is commonly perceived to connect the authority exercised by state institutions to the will of the people. Yet, focusing on democratic legitimation ends up in musing about the – often institutional – ways and conditions in place of how public decisions can be referred back to the individual vote of the citizen.[77] Legitimacy, on the other hand, points to the procedures and standards of how public decision-making can be referred back to the approval of individual citizens, in ways exceeding the vote in elections.[78]

This perception, however, is less than unanimous. *Carl Schmitt*, for example, perceived legitimacy as equivalent to legality. He understood legitimacy as referring public decision-making back to the procedures of law-making.[79] This view is still common, especially in positivist legal thought: Legitimacy as legality focuses on the law as the main procedure constituting and channelling public decision-making.[80]

Legitimacy as a concept tying the will of the people to institutional authority only gained legal followers when it became clear that a positivist, legalistic perspective would fall short when public, and especially adminis-

75 A Føllesdal, 'The Seven Habits of Highly Legitimate New Modes of Governance' (2005) *NEWGOV Consortium Conference New modes of governance working paper DTF/D01a* 1, 4.

76 AB Kaiser, in this volume.

77 RA Dahl, *Democracy and Its Critics* (Yale University Press, 1989) 135 ff.

78 A Føllesdal, 'The Seven Habits of Highly Legitimate New Modes of Governance' (2005) *NEWGOV Consortium Conference New modes of governance working paper DTF/D01a* 1, 4.

79 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, first published 1932, 2012) 14.

80 PG Kielmansegg, 'Legitimität als analytische Kategorie' (1971) 12 *Politische Vierteljahresschrift* 367, 368.

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trative decisions were in conformity with, and based on, existing laws, but violated considerations of morality or natural laws. This insight grew after the German experience with the Nazi regime.[81] The concept of legitimacy found even further promoters from the 1980s onwards, when authors began addressing the crisis of traditional democracy, specifically the public's loss of faith in public administration and the ballot box.[82] Legitimacy of institutions beyond the state also became an issue.[83] This is mostly because democratic legitimation of – and the decision-making procedures in – those institutions was largely perceived as defunct, suboptimal and generally too remote from the vote at the national level.[84]

Though today, there is a certain consensus that legitimacy is an issue at the supranational level, there is no unanimity on the question how legitimacy can or might be attained. Authors propose and discuss a variety of standards. *Fritz Scharpf's* differentiation between input, output and throughput legitimacy[85] frequently serves as a standard in the political and social sciences, for both the national, supranational and the international context. *Luhmann's* focus on process-based legitimacy is famous in the European context, where certain qualitative features of substantive legitimacy are perceived to be problematic (no equal elections to the European Parliament).[86] Also, *Joseph Raz* is well-received by scholars dealing with

81 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013) 27.

82 C Sternberg, 'Ideologies and imaginaries of legitimacy from the 1950s to today: trajectories of EU-Official siscourses read against Rosanvallon's Democratic Legitimacy' (2021), *iCourts Working Paper Series* No. 230 2.

83 TM Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705; TM Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990).

84 A Føllesdal/S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533, 545.

85 FW Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition. Why Europe Differs from the United States' in K Nicolaidis/R Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 355; FW Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173. For its reception, see, for example, V Schmidt/M Wood, 'Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance' (2019) 97 *Public Admin* 727.

86 A Kemmerer, 'Spheres of Transformation, Limits of Integration: Seeing European Union Citizenship Through Luhmann's Lenses' (2010) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682551 .

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the exercise of supranational authority.[87] His rational account of legitimacy focuses on the reasons for subjects to follow an authority.[88] Finally, *Pierre Rosanvallon* is often cited in the EU context. He argues that impartiality, reflexivity and proximity could serve as alternative modes of legitimation in contexts beyond the state.[89] I do not need to decide which of these approaches to legitimacy I consider apt for the EU level. Here, it suffices to say that we can safely conclude that legitimacy can serve as an approach to deal with some of the challenges of the exercise of administrative authority by the EU and its institutions.

2. Legitimacy Challenges in EU Administrative Law

Let me now turn to the legitimacy challenges that have arisen at the level of EU administrative law. The 1980s were not the only period during which the acceptance of EU institutions among the European polity became an issue. Discussing the development of European public law, *von Bogdandy* identified three major phases in the development of the Union and European public law. The first phase was the founding phase of the Union. The second phase started with the breakdown of socialism in 1989 and ended with the adoption of the Maastricht Treaty in 1992. Finally, the third phase comprised the current period, which started with the financial crisis of the Union in 2009.[90]

Building on this argument, I suggest the story of EU administrative legitimacy spans five periods. The first phase, in which the newly created Union was called into question, comprises the time after the birth of the

87 S Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343; S Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights' in A Føllesdal/JK Schaffer/G Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes: Legal, Philosophical and Political Perspectives* (Cambridge University Press, 2013) 32.

88 J Raz, 'Authority, Law and Morality' (1985) 68 *The Monist* 295, 299; J Raz, *The Morality of Freedom* (Oxford University Press, 1988) 42, 47; B Peters/JK Schaffer, 'Introduction: The Turn to Authority beyond States' (2014) 4 *Transnational Legal Theory* 315, 321 f.

89 P Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011).

90 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 49.

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Union right up to the election of the first European parliament in 1979. It starts with the initial self-assertion of the EU and its administration: This is the phase when the CJEU issued its famous and far-reaching decisions on the principle of primacy in application, van Gend and Loos[91] and Costa,[92] and formulated its views on the autonomous interpretation of Union law.[93] However, this period also encompasses the broadening of competences and policy areas and, thus, administrative authority of the Union. For example, the Union acquired new functions in the field of environmental policy in 1972. In addition, the period addresses some first initiatives to tie the Union and its institutions to the individual citizen by codifying citizen rights. Since 1974, suggestions circulated in the Union to include the right to participate in municipal elections, a unified passport law, and rights to raise individual claims before the CJEU.[94]

The second phase comprises the span from 1979 up until 1992, when the European treaties were consolidated by the Maastricht Treaty. The Maastricht Treaty not only codified the fundamental values of the Union, but also approved individual Union citizenship and further citizenship rights, such as the right to petition the European Parliament.[95] In addition, the Maastricht Treaty introduced the European citizen representative.

The third period in the history of the Union comprises the eight years between the adoption of the Maastricht Treaty and the negotiation of the Constitutional Treaty in 2000, which famously failed. Nonetheless, consensus was achieved on the Charter of Fundamental Rights,[96] with its guarantees on good administration, and on access to justice, which play an overarching role in administrative contexts. From 1992 to 2000, legitimacy issues, in particular concerning the EU administration, above all the European Commission, were high on the European agenda. It was argued that the Union had to develop a more transparent administration closer

91 CJEU, C-26/62, ECLI:EU:C:1963:1.
92 CJEU, C-6/64, ECLI:EU:C:1964:66, *Costa v ENEL*.
93 *Ibid*, para. 585; See further: Opinion 1/17, re CETA ECLI:EU:C:2019:341, para. 109.
94 S Magiera, 'Die europäische Gemeinschaft auf dem Weg zu einem Europa der Bürger' (1987) 40 *Die Öffentliche Verwaltung* 221 ff.; Final Communiqué of the Hague High Level Meeting of the Heads of States of the European Communities, EC General Report 3/1969, para. 4.
95 Treaty of Maastricht, signed 7 February1992, entry into force on 1 November 1993.
96 Charta of Fundamental Rights of the European Union (2000/C 364/01).

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to the European citizens.[97] Right around 2000, when the European Constitutional Treaty was negotiated, the European Commission published its White Paper on European Governance, in which it suggested additions to the hitherto dominating perception of representative democratic legitimation. The Commission argued that representative democracy alone was not sufficient to bring EU administration closer to its citizens.[98] In that White Paper, the Commission underscored that output factors, such as transparency, coherence and the widest public participation, would enhance the legitimacy of the Union administration.[99]

Questions of legitimacy and authority were consolidated by important actors during the fourth period, from 2000 to 2009, culminating in the entry into force of the Lisbon Treaty. During this time, and a bit earlier, certain areas of EU administrative law developed the notion of the "informed citizen", which emphasized the transparency principle, the participation of the public in decision-making processes, cooperative administrative decision-making, as well as a broad access to justice in administrative matters.[100]

The Lisbon Treaty, together with the entry into force of the European Charter for Human Rights, marks the entry into force of the renewed European constitutional order. This fourth phase describes the years from 2009 to 2015, when the new Union was consolidated under the Lisbon Treaty and experienced its first major drawbacks and tests, with the financial crisis and the birth of new European economic institutions like the European Stability Mechanism (ESM), new economic policies like the Public Sector Purchasing Programmes (PSPP) of the European Central Bank (ECB), the exit decision of Great Britain in 2012, and the refugee crisis, which put European collective administrative action to a test. Those challenges arose both within and outside of the existing legitimacy framework of the Lisbon Treaty. The financial crisis was counteracted in a first reaction by an international treaty which created the ESM, and in a second reaction by the PSPP programmes of the ECB, which acted within the existing framework of the TEU and TFEU. In the refugee crisis, existing

97 C Gusy, 'Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU' (1998) 45 *Zeitschrift für Politik* 267.

98 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final, 7.

99 Ibid, 7.

100 J Martin, *Das Steuerungskonzept der informierten Öffentlichkeit: Neue Impulse aus dem Umweltrecht des Mehrebenensystems* (Duncker & Humblot, 2012), 119 ff.

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collective regulations concerning the administration of asylum seekers remained unapplied. In addition, solidarity was revived as an important and fundamental value of the Union to guide new administrative solutions in the migration context.[101] But whereas previous crises challenged the very foundation of the EU, both literature and practice addressed those new crises from within the existing treaty framework of the Union.[102]

The years following 2015 mark the hitherto final fifth phase of European administrative development. During the refugee crisis, the Eastern European member states in particular had discovered the benefits of their consolidated action in the so-called Visegrád group. Although the group was founded long before 2015,[103] the states in that group used their collective power visibly and strategically, particularly to block the further reform of EU refugee law.[104] Thus, the most recent phase in the legitimacy challenges of the EU began as a crisis of EU administrative law. Most lately, the challenges to EU authority also turned to a crisis of EU constitutional law and fundamental values.[105] On the one hand, the growing nationalization and illiberalism of some of the EU member states threatens and questions the further realization of common European values, above all the rule of law. The European Court of Justice has already decided on several rule of law infringement procedures.[106] On the other hand, fundamental values of the Union, like sustainability and environmental

101 E Karageorgiou/G Noll 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131; L Marin/S Penasa/G Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 *European Journal of Migration and Law* 1.

102 See the literature cited in notes 5-8 above.

103 The group was founded in 1991, after the fall of the Soviet Union, to further EU membership and accession of the respective member states.

104 JS Frelak, 'Solidarity in European Migration Policy: The Perspective of the Visegrád States' in A Grimmel/SM Giang (eds.), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer, 2017) 81.

105 LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1182, 1182.

106 CJEU, C-619/18, ECLI:EU:C:2019:615, *Commission v. Poland*; CJEU, C-156/21, ECLI:EU:C:2022:97, *Hungary v European Parliament and Council of the European Union*; CJEU, C-157/21, ECLI:EU:C:2022:98, *Poland v European Parliament and Council of the European Union*.

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protection, have gained new importance and influence administrative decision-making in new areas, such as in the area of state-aid law.[107]

The Union of today does not struggle any more with its overbearing bureaucracy. Neither do member states question the democratic legitimation of the Union's institutions. Today, the Union's legitimacy conflicts have become internalized: The Union struggles with some of the fundamental values and procedures it agreed upon in Maastricht and Lisbon to enhance its further legitimacy.

IV. Principles, Concepts and Rules as Legitimacy-Enhancing Factors in Administrative Governance Relationships

1. The Role of Principles

Having considered the current constitutional and administrative framework of EU administrative governance, we now need to develop further which standards provide legitimacy in the context of EU administrative law. In governance contexts, principles provide the very foundation for the governance system: They structure decision-making processes as well as the balancing of interests at stake.[108] This is due to the specific nature of principles: *Robert Alexy* has described principles as *Optimierungsgebote*, aspirational norms.[109] In contrast to norms, or rights, which provide a certain programme of action or inaction that is capable of determination by legal interpretation, they allow for a greater degree of discretion and a variety of state action attaining the standard protected by the principle.[110]

In the broader context of legitimacy, the extensive programme of action prescribed by principles guides the process[111] of how to attain acceptance

107 CJEU, C-549/18, ECLI:EU:C:2020:742, *Austria v. European Commission*; B Peters, 'EuGH, 22.9.2020 – C-594/18 P: Beihilferecht: Britische Beihilfen zugunsten des Kernkraftwerks Hinkley Point C' (2021) *Europäische Zeitschrift für Wirtschaftsrecht* 72.

108 N Krisch/B Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1, 2.

109 R Alexy, *Theorie der Grundrechte* (Suhrkamp, 1994), 76.

110 *Ibid*, 76.

111 T Würtenberger, *Die Legitimität staatlicher Herrschaft: Eine staatsrechtlich-politische Begriffsgeschichte* (Dunckler & Humblot, 1973), 27.

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with all actors involved for institutional decisions.[112] This implies that legitimacy principles are conceived as living standards. They are subject to constant shaping and reform by way of contestation and debate.[113] Such exchange furthers the mutual understanding and trust of all relevant actors in those principles and ultimately leads to and guarantees the very acceptance that legitimacy seeks for. As *Føllesdal* and *Hix* have highlighted: In the EU, debate by all actors and institutions involved on standards agreed to provide legitimacy constitutes perhaps the very essence of (democratic) legitimacy.[114] Thus, principles found the very framework of European legitimacy. They provide overarching and general guidelines on how European and national administrative structures need to respond and deal with the individual when executing EU law.

2. The Principles Providing Legitimacy in EU Administrative Law Contexts

In the supranational context other than the European one, it may be difficult to outline a set standard of principles dominating administrative law. Principles may be too contested, and attributed with content that is not shared by all actors and regions of the world.[115] In the context of the EU, however, the question which principles may provide legitimacy in EU decision-making appears a settled issue. Relevant principles have been agreed upon by all European states, above all in Art. 2 TEU, but also in Arts. 9-11, in Art. 1 ChFR, in the preamble to the European Convention on Human Rights,[116] and in further provisions of primary and secondary law.

Arts. 9-11 TEU refer to the concept of representative and participatory democracy and highlight the principles of transparency and participation.[117] Moreover, Art. 2 TEU codifies fundamental principles governing

112 B Peters, *Legitimation durch Öffentlichkeitsbeteiligung? Die Öffentlichkeitsbeteiligung am Verwaltungsverfahren unter dem Einfluss internationalen und europäischen Rechts* (Mohr Siebeck, 2020), 143.

113 A Føllesdal/S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533, 545.

114 *Ibid*, 545.

115 See M Kotzur, in this volume.

116 J Schwarze *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LIV.

117 Art. 10 para. 1 TEU mentions the concept of representative democracy. It also reminds the Union to conclude decisions openly and as closely as possible to its citizenry in paragraph 3. Art. 11 TEU further supports this with the direct participation

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the adoption, application and implementation of EU law as "fundamental values". Yet, in the context of Art. 2, the term "value" is misleading. The values enumerated in that article have legal character, are justiciable[118] and have already been the subject of disputes before the CJEU.[119] The term "value" merely points to the fact that they serve as fundamental yardsticks dominating EU law.[120]

Principles dominating governing relationships in EU law may further be derived from Art. 1 of the ChFR, in the preamble to the European Convention on Human Rights,[121] as well as from individual provisions guaranteed in those instruments. For example, in administrative contexts, the right to good administration[122] and the provision of judicial review[123] are of fundamental importance. In addition, customary principles dominate the field of EU administrative law. These are the principles of equivalence, effectiveness, proportionality and transparency.[124] Finally, the Court has acknowledged "general principles of law", derived from the constitutional traditions of the member states, as a source of EU administrative law, emphasizing, for example, proportionality, legitimate expectations, fair hearings and equality.[125] Most of those principles were developed long before the adoption of the Lisbon Treaty, in the early jurisprudence of the CJEU.[126] Hence, the various sources of EU primary law as well as the constitutional and administrative traditions of the member states actually provide for a

of EU citizens in the legislative decisions of the Union, as well as the transparency of Union decisions. Its para. 4 provides that every citizen shall have the possibility to participate in the political life of the Union.

118 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 154.

119 See the rule of law-infringement proceedings cited at n 106, above. For the principle of subsidiarity, see, for example, CJEU, C-547/14, ECLI:EU:C:2016:325, para. 218, *Philipp Morris*.

120 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 156.

121 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LIV.

122 Art. 41 ChFR.

123 Art. 47 ChFR.

124 They are also contained in the access to documents, information and transparency directives.

125 For a discussion of the corresponding jurisprudence, see P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 329 ff., 331 ff.

126 *Ibid*, 376.

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solid basis of fundamental rules governing the legitimacy of administrative action in the EU.

Following their provenance, some principles are genuinely European,[127] like the principle of subsidiarity; some govern administration also at the level of national law, like the rule of law, judicial review,[128] and access to justice,[129] the principle of legitimate expectations, the proportionality principle,[130] the principles of participation and information, and an administrative procedure based on the rule of law.[131] Last, but not least, there are certain areas of EU law where mostly secondary rules dominate administrative procedures; at EU level, at the national levels, or both. EU environmental law is a case in point, as is EU migration law. The standards of the Aarhus Convention (AC) form the fundamental pillars of EU environmental law. The principle of solidarity, though named in Art. 2 para. 2 TEU, is highlighted in Art. 80 TFEU and featured as the prominent principle dominating the further evolution of EU migration law and policies.[132]

Whereas primary, secondary and customary Union law provide for a seemingly settled standard of administrative legitimacy in the EU, the preceding sections and paragraphs have illustrated that this standard is subject to constant debate and contestation. In fact it appears to be the very essence of legitimacy in EU (administrative) law that its fundamental and underlying values are constantly questioned and renegotiated. I will now turn to two incidences where I perceive this to be the case.

V. Debates on Legitimacy Principles in EU Administrative Law: Two Examples

The examples discussed in this section concern the traditional field of *Verbund*, or cooperative administration between the EU and member state

127 Art. 5 para. 3 TEU. A Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law: The case of the EU and the European Convention on Human Rights' (2011) *Jean Monnet Working Paper 12/11 – Global Governance as Public Authority: Structures, Contestation, and Normative Change* 1.

128 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 379.

129 Art. 47 ChFR, Arts. 6, 13 ECHR.

130 Art. 5 para. 4 TEU.

131 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LV; Art. 41 ChFR.

132 E Karageorgiou/G Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131, 132.

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authorities. On the one hand, in the area of state-aid law and, on the other hand, administration in the implementation of EU environmental law.

1. *Verbund* Administration in State-aid Proceedings: Affirming Sustainability?

In a case brought forward by Austria after the UK had granted permission to build a new section to an existing nuclear power plant in the UK, Hinkley Point C,[133] the question arose whether state-aid proceedings should be governed by the general principles of EU environmental law, such as the principle of sustainability. The case concerned the legality and conformity of British state-aid measures with regard to a new plant section of Hinkley Point C. The case had been long awaited since it concerned the controversial financing of new nuclear power in the EU. This was fiercely debated between the member states. Austria had claimed that EU environmental law, in particular the principles guaranteed in Arts. 191 TFEU and 11 TEU, applied to the situation, which is why the UK should have abstained from the provision of state aid. The principle of sustainability prohibited an investment in high-risk technologies such as nuclear energy.[134]

The Austrian argument was new because the catalogue of reasons permitting or prohibiting state aid measures is usually assessed against the criterion of a market failure.[135] Pursuant to Art. 107 para. 3 TFEU, in order to be justified, the objectives for granting state aid must outweigh the negative distortion of the internal market caused by the aid.[136] For example, it was purported that there existed a market failure in the market for renewable energies, which at least for some time could not compete against conven-

133 CJEU, C-594/18, ECLI:EU:C:2020:742, *Austria v. European Commission*.

134 *Ibid*, para. 40.

135 Which is why J Buckler, 'State Aid Law' in B Peters/EJ Lohse (eds.), *Sustainability through Participation? Perspectives from National, European and International Law* (Koninklijke Brill NV, 2023) 231 does not assert great weight to the decision. But see B Peters, 'EuGH, 22.9.2020 – C-594/18 P: Beihilferecht: Britische Beihilfen zugunsten des Kernkraftwerks Hinkley Point C' (2021) *Europäische Zeitschrift für Wirtschaftsrecht* 72.

136 Cf. V Verouden/P Werner, 'Introduction – The Law and Economics of EU State-Aid Control' in P Werner/V Verouden (eds.), *EU State Aid Control* (Wolters Kluwer, 2017) 7, 52 ff.

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tional ones.[137] Even more generally, however, the Commission regarded environmental protection as one of the areas in which a market failure justified an intervention by the state.[138]

In Hinkley Point C, the Court did not follow the Austrian argument. Nonetheless, the Court conceded that primary and secondary EU environmental law was applicable to the case at hand. The Court found that the Commission had to consider EU environmental law, and most notably Art. 11 and Art. 37 ChFR, when assessing the conformity of state aid measures with the European treaties.[139] It could declare state aid measures as incompatible with the common market, if the economic activity furthered by those measures violated EU environmental law.[140] Still, the Court saw no violation of EU environmental law in the case at hand.[141] The British measures did not violate Arts. 107 ff. TFEU.

The decision indicates that the Court is mindful of the EU's cross-cutting policies, like sustainability and environmental protection. The question whether the economic activity involved a market failure was not the only aspect relevant to the Court. On the contrary, the Court held it to be decisive that the economic activity supported by the aid had not violated fundamental environmental principles. Hence, future state aid decisions of the Commission, as well as national administrators involved in the provision of state aid, will have to consider the additional argument that the economic activity involved is compatible with Art. 11 TEU, Art. 191 TFEU, Art. 37 ChFR, as well as secondary EU environmental law.[142]

2. Administrative Review in Environmental Decision-Making

The second example involving a debate on a legitimacy standard in EU administrative law concerns the access to justice, which is possibly the

137 Cf. K Struckmann/G Sapi, 'Energy and Environmental Aid' in P Werner/V Verouden (eds.), *EU State Aid Control: Law and Economics* (Wolters Kluwer, 2017) 663, 666 ff.

138 See: Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, *OJ C 80, 18.2.2022, p. 1–89*, and the previous versions of that document.

139 CJEU, C-594/18, ECLI:EU:C:2020:742, paras. 41 f., *Austria v. European Commission*.

140 *Ibid*, para. 45.

141 *Ibid*, paras. 48 ff.

142 CJEU, C-411/17, ECLI:EU:C:2019:622, paras. 177 ff., *Inter-Environnement Wallonie ASBL v. Conseil des ministres*.

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most important backbone of EU administrative governance. In the Union context, access to justice has a particular context and meaning. Providing access to justice to EU citizens does not serve the only purpose to address violations of individual rights and legal guarantees before national and Union courts, in the proper sense of Art. 47 ChFR. At EU level, access to justice in administrative matters also mobilizes European citizens for the implementation of EU administrative law.[143] This reinforces and enhances the primacy of European rules and ensures their proper implementation, and ultimately member state adherence to EU law.

Due to this both individual and overarching importance of access to justice, the CJEU has always interpreted Art. 47 ChFR in a very broad fashion. For example, the Court applied Art. 47 ChFR as interpretational aid where individual procedural rights, but no corresponding access to justice provisions, were contained in European instruments, such as in EU migration law.[144] The Court has also applied Art. 47 ChFR in environmental cases where implementation deficits are part of the daily business and perhaps the most contingent. Most particularly and controversially, the Court has sought to proffer the access to justice provision of Art. 9 para. 3 of the AC, which provides access to justice in all cases provided for by national law in environmental decision-making. Thus far, the provision is not implemented in secondary Union law. Because of its wording, it is commonly held that Art. 9 para. 3 AC is not directly applicable.[145] The provision hinges on the very precondition that member states grant access

143 Some have highlighted that the purpose of access to justice as implementation aid was contingent to EU environmental law. However, the concept is also applied in areas exceeding the environmental context, in particular in EU migration law. Its broad application may be derived from the provisions in the TEU regulating the dual concept of European democratic legitimation, and Art. 1 para. 2 of the TEU, i.e., all central provisions which apply to EU law as a whole. In particular, the firm foundation of the concept in EU primary legislation makes it hard for critiques to persist that the concept does not exceed the narrow confines of EU environmental law.

144 S Fontana, 'Der EuGH zwischen Rechtsschutzgewährleistung und Rechtsfortbildung – Methodische Erwägungen, dargestellt am Beispiel des Europäischen Asylsystems' (2019) 1 *Zeitschrift für das gesamte Verfahrensrecht* 1 ff.

145 CJEU, C-470/16, ECLI:EU:C:2018:185 para. 52, *North East Pylon Pressure Campaign Ltd. and Maura Sheehy v. An Bord Pleanála*; CJEU, C-873/19, ECLI:EU:C:2022:857, para. 66, *Deutsche Umwelthilfe v. Bundesrepublik Deutschland*.

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to justice in cases concerning the environment in their national laws.[146] If national laws do not provide for such a possibility, Art. 9 para. 3 has no relevance.

In the famous Slovak Brown Bear decision, but even more so in the decisions following that initial dictum, the CJEU reasoned that Art. 47 CHFR provided broad access to justice for environmental interest organizations.[147] Since environmental NGOs must be regarded as privileged claimants, pursuant to Art. 2 para. 5 of the Aarhus Convention, they are always considered as affected by environmental decisions. Accordingly, member states could not bar environmental interest organizations from claiming the violation of European environmental provisions under Art. 9 para. 3 of the Aarhus Convention.[148]

This series of judgments caused significant upheaval in the member states, in particular in Austria and Germany. In both member states, administrative lawyers feared that this interpretation might lead to the marginalization of the rights-based approach to access to justice, upon which the German and Austrian systems of administrative review are built.[149] Most particularly, it was feared that Art. 9 para. 3 AC could open administrative review to individual claimants. After all, the text of Art. 9 para. 3 AC did not

146 CJEU, C–826/18, ECLI:EU:C:2021:7, para. 49, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*.

147 CJEU, C-240/09, ECLI:EU:C:2011:125 para. 50, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*; CJEU, C-260/11, ECLI:EU:C:2013:221 para. 33, *The Queen, on request of David Edwards, Lilian Pallikaropoulos v. Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs*; CJEU, C-664/15, ECLI:EU:C:2017:987 para. 45, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*; CJEU, C-470/16, ECLI:EU:C:2018:185 para. 53, *North East Pylon Pressure Campaign Ltd., Maura Sheehy v. An Bord Pleanála, The Minister for Communications, Energy and Natural Re-sources, Ireland, The Attorney General*; CJEU, C-752/18, ECLI:EU:C:2019:1114 paras. 34 f., *Deutsche Umwelthilfe e. V. v. Freistaat Bayern*.

148 *Ibid*.

149 KF Gärditz, *Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts – Umfang des Verwaltungsrechtsschutzes auf dem Prüfstand: Verhandlungen des 71. Deutschen Juristentag – Gutachten D* (C.H. Beck, 2016); BW Wegener 'Nein, nein, nein?! – Kein Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts?' (2016) 17 *Juristenzeitung* 829 ff. For an actual overview over the discussion, see W Kahl, 'Subjektives öffentliches Recht im Unionsrecht' in W Kahl/M Ludwigs (eds.), *Handbuch des Verwaltungsrechts Band IV* (C.F. Müller, 2022) § 94 para. 69.

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refer to environmental interest organisations in particular, but to claimants in general.[150]

After a series of judgments, which largely supported access to justice in cases concerning Art. 9 para. 3 AC last year, the court used the opportunity of a claim by an individual to clarify the system of judicial review in environmental cases.[151] In contrast to its previous decision, where it had mostly underlined the broad access to justice, which the Aarhus Convention and Art. 47 ChFR provide, it held that Art. 9 para. 3 AC must not be understood as providing judicial review for individual claimants, who are *not* granted with a right to review under either national or European law. European law, and specifically the Aarhus Convention, granted judicial review only in cases where individuals are *affected* by environmental decision-making.[152] As the court underlined, with its reference to "national laws", Art. 9 para. 3 AC offered judicial review mainly in cases where the national laws provided such an opportunity.[153] The court therefore provided a much-needed clarification for member states like Germany and Austria which – from the outset – offer limited administrative review for individuals. Its decision also responded to the criticism coming from those member states, namely that a broad interpretation of Art. 47 ChFR could not lead to the effect that their decision for systems of individual administrative review cannot prevail under European law.

150 Against this view, most recently: BVerwG, 28.11.2019, BVerwG 7 C 2.18. See the summary by D Römling, 'Europäisierung des Individualrechtsschutzes im Umweltrecht: Anmerkung zum Urteil des Europäischen Gerichtshofs v. 3.10.2019 – C-197/18' (2020) 42 *Natur und Recht* 686, 687.

151 CJEU, C–826/18, ECLI:EU:C:2021:7, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*.

152 *Ibid*, paras. 36, 51. Nonetheless, a definition of what exactly constitutes affectedness is still pending.

153 CJEU, C-664/15, ECLI:EU:C:2017:987, para. 86, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*; CJEU, C–826/18, ECLI:EU:C:2021:7, para. 49, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*; CJEU, C-873/19, ECLI:EU:C:2022:857, para. 63, *Deutsche Umwelthilfe v. Bundesrepublik Deutschland*.

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VI. Conclusion

What can we conclude about legitimacy in EU administrative law networks? The following needs to be taken into account:

First, legitimacy is still an issue in EU law, and in EU administrative governance in particular. Yet, legitimacy is not debated *lato sensu* anymore. Discussions surrounding legitimacy in European administrative governance are nowadays tied to specific discussions around the interpretation and application of the agreed and existing legitimacy yardsticks in Art. 2 TEU, the ChFR and the ECtHR.

Second, these discussions are useful to clarify the scope of the rather broad principles contained in Art. 2 TEU (and Art. 47 ChFR). In fact, debate by all actors and institutions involved on standards agreed to provide legitimacy is inherent in the concept of legitimacy and perhaps the very essence of legitimacy. Legitimacy is, after all, about the socio-legal conditions and procedures aiming at the acceptance of all actors involved with institutional decision-making processes.

Third, where actors have agreed to provide this acceptance, legitimacy does not stop with the adoption and acceptance of legitimacy principles. Legitimacy principles are no fixed standards with uniform or universal content. Rather, legitimacy implies that the very principles providing legitimacy are living principles. They are subject to constant shaping and further forming by way of contestation and debate. Such exchange on the scope and reach of legitimacy principles furthers the mutual understanding and trust of all relevant actors in those principles, ultimately leading to and guaranteeing the very acceptance that legitimacy seeks.

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