**§ 14**

**THE COMPLEX RELATIONSHIP BETWEEN ADMINISTRATIVE AND CONSTITUTIONAL LAW**

**A COMPARATIVE AND HISTORICAL ANALYSIS**

**LUC HEUSCHLING***[[1]](#footnote-2)\**

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# A. Introduction

## 1. A Complex and Multifaceted Topic

Law is a social construct, invented through a variety of conceptual tools. One classic tool is the subdivision of law into branches of law. To find their way through the virtually infinite number of legal norms, lawyers divide their kingdom into provinces. The lawyers’ intellectual horizon is split up, with boundaries and fences. His or her mental world is organized. When isolated from the rest of the legal world, each such province of law may develop its own ‘spirit’, having its own theory of legal sources, methods of interpretation, and/or fundamental principles. Such a process of insulation is encouraged by the creation of specific guardians or ‘gatekeepers’ (e.g., judges and scholars) for each legal area. However, it is also important to note that boundaries may be more or less open, allowing cross-border exchanges, interactions, and transfers, be they unilateral or bilateral. In the ancient, and rather obscure, metaphor of the tree of law, the various branches are connected to the trunk, whose roots plunge into a common ground. Far from being stopped, communication between legal branches might be organized and canalized. In some cases, the demarcation line may even be totally blurred, two provinces being intimately intertwined.

In light of this general issue it is of particular interest and importance for European public lawyers to analyse, from a comparative and historical perspective, the position of ‘administrative law’ vis-à-vis ‘constitutional law’, and vice versa. This broad topic raises a series of questions. (a) How are the two elements of the binomial ‘constitutional and administrative law’—the formulation in reverse order (administrative and constitutional law) being quite rare—differentiated from each other in the various legal systems in Europe? Are they totally distinct from one another, with no overlap, or are they closely intertwined, such that speaking of two areas of law is somewhat misleading? (b) What are the specificcharacteristics of each of the two areas of law, once they are separated into two distinct groups of norms?[[2]](#footnote-3) (c) How are these groups of norms related: What significance do legislators, judges, lawyers, civil servants, and scholars attach, in their mind, to constitutional law when operating in the field of administrative law? How do constitutional lawyers look upon administrative law? (d) If each group of norms has its own ‘gardeners’ and ‘guardians’ (e.g., specialised courts and specialised scientific disciplines), how do they interact? (e) How important is that relationship to building the identity of administrative law and constitutional law in the various European countries: is it a central issue (if not a mass of problems?) or only a marginal issue, both in theory and practice? Is it, in particular, the key question (the ‘*Gretchenfrage*’) to identify the nature and content of administrative law, or are the rules of administrative law determined more by the external influences of politics and/or other areas of law (e.g., private law, international and European law, or some foreign legal models)?

Given the abundance of questions, the vastness of the research field in space[[3]](#footnote-4) and time,[[4]](#footnote-5) and—this may already be said—a rather broad variety of individual responses, the aim of this chapter is simply to give a first outline of the relationship between both areas of law. Its cognitive goal is twofold: comparative (cartographic) and theoretical (ontological). Its first, and most important, aim is to get an exact view of how far the national legal systems in Europe converge, or diverge, with respect to the relationship between constitutional and administrative law. Pleading the thesis of an *Ius commune Europaeum* (i.e., the existence of a common legal view in Europe) is not as easy a task as it might seem at first sight. It requires an in-depth analysis of all European countries, without excluding (or even hiding) individual cases that do not fit into the mainstream (for the present issue, particularly the United Kingdom and Sweden). A comparative lawyer must prove herself/himself in relation to such ‘hard nuts’, to which she/he must pay special attention. Only then can any thesis of unity amongst diversity—a thesis which will, indeed, be proffered here—be truly persuasive. However, in this chapter, the use of legal comparison is not limited to legal mapping of the world (here: Europe). In contrast to a purely nationally minded academic, a specialist in comparative law and the history of law has at her/his disposal a far richer range of legal materials from which to draw some theoretical conclusions. These materials, especially if they include some extreme cases,[[5]](#footnote-6) allow her/him a much deeper insight into the matter. Thus, the second aim of this investigation is to get a better theoretical understanding of administrative law as such.

## 2. A Tricky Preliminary Question: Defining ‘Administrative’ and ‘Constitutional’ Law

In such a complex area, attention must be paid to avoid falling prey to a distorted image of reality. A first taste thereof is the definition of the two terms: ‘administrative law’ and ‘constitutional law’. The demarcation of these areas of law varies depending on the country.

### a) An Asymmetrical Demarcation on the Continent (Except Austria and the Netherlands)

In almost all countries on the Continent, which, for our topic, includes Ireland, there is a general consensus amongst scholars that constitutional law is to be defined formally (i.e., with reference to a certain layer of norms inside the hierarchy of norms). Constitutional law comprehends all norms embedded in one or several written documents entitled ‘Constitution’, ‘Basic Law’, ‘Instrument of Government’, etc. that enjoy a higher rank than ordinary statutes. A minor problem results from the fact that a substantive definition of constitutional law is also still present in scholarly debate in these countries and contributes to the shaping of positive law.[[6]](#footnote-7) However, the greatest difficulty is that, on the basis of the hierarchical criterion, constitutional law is not distinguished from administrative law, but from ordinary law. The term ‘ordinary law’ (from the German ‘*einfaches Recht*’) means in this context ‘the mass of all sub-constitutional norms’. Thus, on the basis of the hierarchy of norms, the binomial ‘constitutional law and administrative law’, at first glance, makes no sense.

Understood as a strict distinction, the phrase ‘constitutional law and administrative law’ only makes sense if administrative law is also defined by its formal sources. Two hypotheses may be considered: (a) Administrative law consists only of sub-constitutional norms because the Constitution contains absolutely no norms with respect to public administration. This hypothesis does not reflect reality (more on that later); therefore, it may be neglected. (b) The Constitution includes standards regarding the structure, functions, powers, staff, and/or means of public administration; however, these norms are classified exclusively under the label ‘constitutional law’ and are not considered to also be part of ‘administrative law’. This reasoning currently prevails in Austria: the contemporary doctrinal definition of administrative law in Austria relies on the traditional distinction between *Justizrecht* (literally, the judiciary law, i.e., law applied by the civil courts of justice) and *politisches Recht* (literally, political law, which is law applied by administrative bodies, administrative law *lato sensu*).[[7]](#footnote-8) This first criterion is supplemented by a second: the hierarchy of norms. From the mass of administrative law *lato sensu* are excluded all norms of constitutional ranking.The result is administrative law *stricto sensu*, which is the usual meaning of *Verwaltungsrecht* (administrative law) amongst Austrian legal scholars and practitioners. Overall, according to this classification, three groups of legal norms arise, which are, at first glance, strictly separated, both hierarchically and analytically, without any overlap. This apparently clean separation of legal material allows a ‘clean’ division of the jurisdictions of the courts: at the top, there is constitutional justice, with parallel civil and administrative justice below.[[8]](#footnote-9)

The Austrian approach, however, is rare. The criterion of legal source plays no role in other countries, if one considers the dominant definition of administrative law.[[9]](#footnote-10) Generally, administrative law is first defined either institutionally (i.e., the law applicable to administrative authorities) or functionally (i.e., the law applicable to administrative activities); in a second step, private law rules, which are applicable to administrative organs or actions, are typically sorted out. The result of this asymmetric definition of constitutional law and administrative law is the existence of an intersection that may be qualified, according to the Swiss scholar Pierre Moor either as *droit constitutionnel administratif* (administrative constitutional law) or as *droit administratif constitutionnel* (constitutional administrative law).[[10]](#footnote-11) In French literature, it is very common to speak, with regard to the various sources of administrative law, of the constitutional sources of administrative law (*sources constitutionnelles du droit administratif*). The overlap between constitutional law and administrative law can be relatively broad or very narrow depending on the extent of each area of law. Its existence, however, is very often lost in the heat of the discussion: the usual question about the influence of constitutional law on administrative law makes sense only if the two are not identical. With regard to this debate, the Austrian definition is the only consistent one.

### b) The United Kingdom: A Fluid and Evolving Demarcation

The binomial ‘constitutional and administrative law’ also makes much more sense, analytically, if both areas of law are substantively defined. This results in the coexistence of two spheres: the sphere of policy (creation of law) and the subordinate sphere of administration (implementation of law). Constitutional law establishes the norms for the state’s highest organs, while administrative law establishes them for its lower organs (the administrative bodies, distinct from the cabinet). The principles of the State’s existence and its core policies are the focus of the first branch of law, while the second focuses on the execution of such policies. These substantive differences, however, may not generate a sharp distinction. The government is located at the hinge of politics and administration; like the Roman god Janus, it looks in both directions. The place of local government institutions is not always very easy to define. Moreover, the rights and principles established by the Constitution (human rights, rule of law, democracy, etc.) are addressed both to the political decision-making process and to the administrative decision-making process; they permeate administrative law.

This substantive approach is still used, although as a minority approach, in many parts of the European Continent.[[11]](#footnote-12) It prevails in two countries: the Netherlands and the United Kingdom. As the Dutch Constitution (*Grondwet*) is an entrenched (supra-legal) Constitution, one might have expected Dutch lawyers to observe the asymmetric approach. Yet, the lack of judicial review of the constitutionality of statutes, prohibited by article 120 of the *Grondwet*, may explain why Dutch scholars tend to delineate both administrative and constitutional law according to substantive criteria. The distinction is only presented didactically, without any practical relevance in law.[[12]](#footnote-13)

The result is the same in the United Kingdom, although in a rather different context. In England and Scotland,[[13]](#footnote-14) a substantive definition traditionally prevails both in constitutional law scholarship and in the recently-recognized science of administrative law. A historical survey of textbooks in British public law shows that the emergence of administrative law as a separate area came about in four stages: First, Albert Venn Dicey rejected its existence within constitutional law doctrine; second, from the time of William Ivor Jennings, the existence of administrative law was gradually recognized in textbooks on ‘constitutional law’; third, from the 1960s, its official recognition was intensified through the new title ‘Constitutional and *Administrative Law*’of most textbooks in constitutional law; and finally, textbooks devoted strictly to ‘administrative law’ had a great success. Traditionally, administrative law had been incorporatedinconstitutional law. ‘Administrative law is a part of constitutional law’ went the classic statement made even by authors such as Frederick John Port, William Wade and Stanley de Smith, who were pioneers of the scholarship specializing in administrative law.[[14]](#footnote-15) Today, administrative law is more often positioned *outside* constitutional law than within it. In the influential work by William Wade and Christopher Forsyth, constitutional law and administrative law are being addressed as *two* areas of law, even if they intermingle to a certain extent.[[15]](#footnote-16) The demarcation line is still blurry and evolving.[[16]](#footnote-17) It is a matter ‘of convenience’ or ‘choice’,[[17]](#footnote-18) as the criteria used to define it vary.[[18]](#footnote-19) Authors of textbooks on ‘Constitutional and Administrative Law’ often refrain from drawing any such line (why should they?). Moreover, some authors apply the newly-coined term ‘public law’ as an umbrella term for both areas of law.[[19]](#footnote-20) According to Peter Cane, the divisions of law should not bother ‘unduly’ an administrative lawyer, as the United Kingdom lacks a rigid Constitution.[[20]](#footnote-21) The fact is, however, as will be shown later, that British constitutional law is in transition, moving from a purely substantive definition to a formal, hierarchical one. This tectonic shift has not yet been noticed and theorized in most textbooks. The ultimate earthquake is still some ways off, but the pressure is gradually building.[[21]](#footnote-22)

In general, a comparative lawyer must keep in mind four complex definitional strands, as summarized in the following table:

|  |  |  |
| --- | --- | --- |
|  | ‘constitutional law’ definition | ‘administrative law’ definition |
| ‘Continent’ (including Ireland) | formal | substantive |
| Austria | formal | formal (and substantive) |
| The Netherlands | substantive (notwithstanding the existence of an entrenched Constitution) | substantive |
| The United Kingdom | substantive (in transition) | substantive |

## 3. Four Classic Theses Regarding the Relationship Between Both Areas of Law

What is the relationship between these areas of law? A historical and comparative assessment results in no less than four types of statements, which reflect the classic perspectives on this topic. (a) Constitutional law and administrative law are completely separate. (I call this view the ‘Two World Thesis’ and discuss it in more detail below). (b) The Constitution prohibits the existence of administrative law. This legal dogmatic conclusion, based on the analysis of a specific legal system (Great Britain), was famously defended by Albert Venn Dicey at the end of nineteenth century. It was, however, erroneous, as was shown later; no similar claim has ever been made in any other European legal system. (c) Administrative law is predetermined by constitutional law. According to the discourse that emerged already in nineteenth century, the Constitution fixes the ‘foundations’ (in French ‘*les bases*’) of administrative law. An even more extensive view of the Constitution’s impact (or empire) is conveyed by the famous phrase coined by Fritz Werner, the first president of the German *Bundesverwaltungsgericht* (Federal Administrative Court) after World War Two: ‘Administrative law is a concretization of constitutional law’ (*konkretisiertes Verfassungsrecht*).[[22]](#footnote-23) Since the 1990s, there has been much talk, in many (but not all), countries about the ‘constitutionalization’ of administrative law, which discourse has been promoted on the international level by, inter alia, the French professor of constitutional law, Louis Favoreu. Nevertheless, some scholars prefer to use a more neutral qualification (and, thus, less ‘imperialist’): the Constitution simply fixes the ‘framework’ (‘*Rahmen*’, ‘*cadre*’) upon which administrative law ‘depends’ (in German *Verfassungsabhängigkeit des Verwaltungsrechts*). The extent to which administrative law is shaped by the Constitution may give rise, indeed, to controversial discussions, which may even touch on the merits of this bond. (d) According to the fourth thesis, the content of constitutional law is predetermined by administrative law, a radical change of perspective that, in 1996, a famous French professor, Georges Vedel, provocatively called the *administrativisation du droit constitutionnel* (literally: the ‘administratization’ of constitutional law i.e., the permeation of constitutional law by principles, rules and habits of thought developed initially within administrative law).[[23]](#footnote-24) In Germany, in contrast to Fritz Werner’s thesis, a growing number of scholars are now looking at parts of constitutional law as *abstrahiertes Verwaltungsrecht* (abstracted administrative law).

These four points of view are successively analysed in the following pages. Given its radical nature, the ‘Two World Thesis’ will be my starting point.

# B. The Two World Thesis: A rarity and conceptual absurdity

## 1. An Elusive ‘Theory’

From today’s perspective, this thesis appears downright strange. How is it possible to even conceive of such a total disconnection between both areas of law? Yet, the idea of such a ‘separation’ still haunts the thoughts of some lawyers, especially those who are used to thinking in terms of antitheses. The Two World Thesis appears to be the logical counterpart to the theory of administrative law’s dependency on constitutional law. To even fix the exact content of this thesis, or even to identify its original author(s), is quite difficult. As far as I know, this thesis has never been systematically and thoughtfully exposed. Thus, to call it a ‘theory’—a term that requires a modicum of coherence and substance—would be a misnomer. A researcher attempting to track it down must often be content with some famous, misunderstood, and often misleading quotations, which are presented as ‘winged words’.[[24]](#footnote-25) At best, she/he will discover some theoretical attempts or beginnings, but not a full-fledged theory.

The following statement is an attempt to systematically reconstruct this thesis: constitutional law and administrative law are two hermetically-sealed spheres of law sitting next to one another. Figuratively speaking, they are parallel, or perhaps divergent, branches on the vigorous tree of law.[[25]](#footnote-26) Such a perfect separation could only exist if the two branches of law: (a) governed completely different matters; (b) arose from different legal sources; and (c) used different values, categories, and standards. If that were the case, it would mean that judges or academic scholars assigned to each particular area of law could totally ignore the other area. At the root of this thesis, one usually encounters a concrete, even empirically verifiable, statement relating to one particular aspect of this multifaceted issue. The corresponding grain of truth is extrapolated and condensed into a catchy, often polemic formula. What frequently happens thereafter is that said extrapolation is perpetuated by a hurried reader who is likely to have simply skimmed the rest of the text, even though in those remaining pages, the catchy formula is often strongly relativized, either explicitly or implicitly, by its original author. The result of this interaction between the author’s sweeping statement and the reader’s hastiness is a ‘theory’ that, if looked at it closely, does not appear to be particularly well-founded. In a constitutional State, sealing off administrative law from the Constitution is unthinkable. Therefore, it is not very surprising that the Two World Thesis is rarely represented. It appears to have been debated only in Germany and France; even in Spain, where professors of administrative law and professors of constitutional law tended to ignore each other before the political and intellectual caesura of 1978, no such thesis has ever been affirmed.[[26]](#footnote-27) It should also be noted that, from a historical perspective, the Two World Thesis emerged relatively late, only over the course of the twentieth century. The adverse theory of administrative law being linked to constitutional law is much older and goes back to the start of the nineteenth century. Today, no one defends the Two World Thesis, which silence is not particularly surprising. In retrospect, it is the mere past existence of this thesis that puzzles and raises questions about its function.

## 2. The German Debate over Otto Mayer’s Dictum

Even today, in Germany and in those countries in which scholars are influenced by German legal literature, virtually every administrative law scholar knows of, and still cites, Otto Mayer’s classic dictum. In 1924, after the fall of the monarchy and the difficult birth of the Weimar Republic, Otto Mayer (1846–1924) wrote, in the preface to the third edition of his classic textbook on *Deutsches Verwaltungsrecht* (German administrative law): ‘Nothing of importance happened between 1914 and 1917 that needs to be incorporated here. Constitutional law passes away, administrative law remains *(Verfassungsrecht vergeht, Verwaltungsrecht besteht*). This had been observed elsewhere long before.’ By ‘elsewhere’, Mayer meant France. In 1886, Mayer noted in his *Theorie des französischen Verwaltungsrechts* (Theory of French Administrative Law): ‘From the French point of view, it is a natural contrast that constitutional law changes and administrative law persists.’[[27]](#footnote-28) He cited the French professor of administrative law, Théophile Ducrocq (1829–1913),[[28]](#footnote-29) who argued, in the context of the troubled, plagued-by-upheaval constitutional history of France, that there existed at least a *certain* stability of administrative law.[[29]](#footnote-30) As pointed out by Andreas Auer,[[30]](#footnote-31) the godfather of this view might also have been Jean-Étienne-MariePortalis (1746–1807), one of the authors of the French Civil Code, who said: ‘Public law passes, private law remains.’ The history of the reception of Mayer’s quotation shows that it has been read and understood in two very different ways.

### a) A Will-o’-the-wisp: Mayer’s Dictum as an Expression of the Two World Thesis

In German literature, it is now a foregone conclusion that the initial interpretation of Mayer’s dictum as an expression of the Two World Thesis is, under the 1949 Basic Law (*Grundgesetz*), entirely untenable. As a matter of fact, that understanding was already untenable during the Weimar era: a quick glance at the Weimar Constitution of 1919 shows a large variety of provisions (both classic and new) addressing issues of administrative law. Accordingly, Mayer’s dictum already encountered resolute criticism in the 1920s.[[31]](#footnote-32) Even the situation of the French Third Republic was not correctly reflected by Mayer’s phrase, as French scholars of the end of nineteenth century, including Ducrocq, explicitly stressed the constitutional dependency of administrative law. Today, many authors[[32]](#footnote-33) argue that Mayer himself, a ‘temperamental man of contradictions’ who occasionally tended toward exaggerated statements,[[33]](#footnote-34) never really intended such a radical opinion. Indeed, Mayer wrote at the beginning of his textbook: ‘[t]he epitome of the rules according to which [the Constitutional State] is established is constitutional law. We will see just how our entire administrative law depends on the differentiations within supreme power.’[[34]](#footnote-35) This is a fairly explicit and unequivocal statement of the idea that administrative law depends on constitutional law. In the eyes of Mayer, who took over an idea that was commonly stated in French legal literature, the connection point between the two areas was the principle of separation of powers.

The Two World Thesis engendered another short discussion in Germany in 1958, when Karl Josef Partsch accused Ernst Forsthoff, one of the leading German administrative lawyers at the time, of defending such an untenable thesis.[[35]](#footnote-36) Partsch’s harsh criticism was triggered by a statement made by Forsthoff in the preface of the first edition of his famous *Lehrbuch des Verwaltungsrechts* in 1949, that ‘the overall design’ of his work, which was largely fixed before the outbreak of war and largely written before 1945, ‘needed no change in the light of [Germany’s] capitulation’. The debate, however, quickly subsided. Yet, the Two World Thesis is still mentioned today in almost all German textbooks on administrative law; it plays the role of a negative model or, expressed in a more exaggerated way, of a bogeyman. Mayer’s dictum serves as an abstract antithesis, that has never been implemented in positive law, and which is diametrically opposed to Fritz Werner’s theory of administrative law as ‘a concretization of constitutional law’.[[36]](#footnote-37) As the former represents no serious alternative, the latter (maximalist) thesis automatically comes to the fore despite its shortcomings. That there can be *different levels* of constitutional dependency remains unsaid.[[37]](#footnote-38)

### b) A Grain of Truth: The Problem of Constitutional Disruptions

If one reduces, as often happens, the scope of Mayer’s dictum to the context of constitutional change, a grain of truth appears. Two aspects should be considered.

First, every change in constitutional law does not imply a change in the principles, categories of thought, or technical rules of existing administrative law. Some constitutional norms are simply irrelevant to how administrative bodies are organized and function. A certain independence or insensitivity of administrative law is given.[[38]](#footnote-39) Assessing the latter is, however, not an easy exercise. The risk is to overestimate administrative law’s insensitivity by underestimating the scope of constitutional continuity when a country has been given a new Constitution (i.e., a new constitutional text). The content of the latter (the constitutional norms) may be the same, even if the receptacle (the text) is not. Some fundamental principles may be identical, even if the political regime has been replaced (e.g., the replacement of a monarchy by a republic or a presidential system by a parliamentarian system or vice-versa). Even between a dictatorship and a democracy, a certain constitutional continuity may exist, as, for example, the acceptance by the dictatorship of a minimum, formal standard for the rule of law. However, if the most fundamental constitutional principles are overturned, as happened in the case of the Nazi regime or the communist dictatorships in Central and Eastern Europe, the limits of administrative law’s independence appear very clearly.[[39]](#footnote-40)

Second, while a Constitution can be modified quite quickly (one only needs to rewrite the text), implementing the new constitutional principles through the thicket of administrative law statutes, regulations, and case law takes more time. Mayer’s statement can be understood as pointing to this specific problem: the resilience of ‘administrative law’ (i.e., the subconstitutional norms of administrative law). This take on the problem was somewhat sensitive in Germany: after 1949, in the eyes of critical administrative lawyers, the implementation of the new liberal and democratic principles enshrined in the *Grundgesetz* was far too timid and slow. Administrative law was still stuck with authoritarian or even Nazi ideas. Thus, at the beginning of the Federal Republic, the validity of the traditional theory of the *besondere Gewaltverhältnisse* (special power relations), which went back to the rules and doctrinal constructions of nineteenth century administrative law, was hardly questioned by administrative scholars or courts. It was only in 1972 that this interpretation of the Constitution excluding civil servants, prisoners, and pupils from the benefit of fundamental rights, was declared unconstitutional by the Federal Constitutional Court.[[40]](#footnote-41) Mayer’s formula, in this context, could be used in a polemic way in order to denounce the empirically given, but legally unacceptable insulation of the subconstitutional norms of administrative law. Mayer’s dictum may serve as a bogeyman or ‘red cape’.[[41]](#footnote-42)

## 3. The French Case: The Logical Impossibility of the Two World Thesis

### a) France: The Home of the Two World Thesis?

If the Two World Thesis could have chosen a home country, it would most likely have been France.[[42]](#footnote-43) Indeed, in the past, many aspects of French law paved the way for the crystallization of the Two World Thesis, which found its apologists, at the end of the twentieth century, in René Chapus and, paradoxically, although to a far lesser extent, in Georges Vedel. The favourable factors were: (a) the high authority and self-confidence of the *Conseil d’Etat* (Council of State), which, similar to English courts, created the major rules of administrative law and, more generally, occupied a central position inside the French State;[[43]](#footnote-44) (b) a particularly broad and sophisticated administrative law that shaped to a large extent the image of the French State and French public law; (c) the relative weakness and instability of French Constitutions in the troubled context of the nineteenth century, its skeleton-like existence under the more stable period of the Third Republic (during which, in the absence of a declaration of human rights, the guarantee of civil liberties fell to the legislators and the *Conseil d’Etat*) and the feeble legal normativity of the Constitution until 1958/1971; (d) the marginal position, in the past, of the then-newly created *Conseil constitutionnel* (Constitutional Council), whose legitimacy remained controversial for a long time, in comparison to the authority of elected politicians and the prestige of the older, long-established *Conseil d’Etat*; and (e) the academic primacy of administrative law scholarship, which, in the nineteenth century, dominated the field of public law—there was virtually no constitutional law training at French universities at that time—and which, in the twentieth century, still represented the splendour and heart of that discipline for a long time.[[44]](#footnote-45)

Thus, a large number of elements seem to suggest the decoupling of administrative law, administrative courts, and administrative law scholarship from constitutional law. Yet, even in France, the Two World Thesis turns out to be erroneous. Even under the French Third Republic (1870–1940), which came the closest to such a decoupling, it never actually existed in positive law. The thesis was false and it could only have been false as it cannot exist in positive law. Yet, France’s particular situation also shows that the link between constitutional and administrative law can take different forms, with regard to two interesting phenomena. (a) Although the link between both cannot be severed, it can be relaxed: the French case shows that the autonomy of administrative law is, to some extent, flexible. (b) Constitutional law may be ‘taken over’ by administrative law, meaning that certain constitutional matters may be appropriated by administrative law and its guardians (in the nineteenth century, the first constitutional law doctrine at university was established by administrative law scholars; during the Third and Fourth Republic, human rights—the so-called ‘*libertés publiques*’—were protected by administrative law, specifically by the case law of the *Conseil d’Etat* on the ‘general principles of law’; today, the *Conseil d’Etat* may deliver its own sovereign interpretation of the Constitution).

### b) The Two World Thesis in the Writings of René Chapus and Georges Vedel

The Two World Thesis—called the ‘*thèse de la dualité de l’ordre juridique*’ (thesis of a dual legal order) by its critic, Louis Favoreu[[45]](#footnote-46)—was explicitly addressed in the 1980s and 1990s by René Chapus, then-professor of administrative law at the University Paris II. In the introduction to his textbook on administrative law, which was immensely popular among academics and members of the *Conseil d’Etat*, Chapus briefly touched on the question of the relationship between administrative law and constitutional law. The title of that section remained, from the first edition of the textbook (1985) to its eighth (1994), ‘The distance to the Constitution’.[[46]](#footnote-47) Chapus’ explanations varied slightly, depending on the edition, and were not always entirely consistent. The general tenor, however, was that constitutional law and administrative law were ‘separated’.[[47]](#footnote-48) Apart from certain similarities in content, both areas of law existed ‘in parallel’. The ‘legal order has been split’ (*dédoublement de l’ordre juridique*). According to Chapus, the heart or ‘fundamental’ part of administrative law was the case law of the *Conseil d’Etat*: ‘Administrative case law lives and evolves within its own system.’ In the past, and especially since the Third Republic—a crucial period for administrative law— ‘there was always a distance, or even a chasm (*vide*) between this law and the successive constitutions’. In his eyes, this was good, as administrative law could continuously evolve through an organic growth process based on the liberal decisions of the *Conseil d’Etat,* without being stopped by the numerous constitutional changes in the nineteenth century. At this point, Chapus cited Vedel’s famous article on ‘The discontinuity of constitutional law and the continuity of administrative law: the role of the judge.’[[48]](#footnote-49) With regard to the Third Republic, Chapus was categorical: ‘The separation of administrative law and constitutional law was inevitable’.

At first glance, this retrospective interpretation of the Third Republic may appear convincing. The separation between the two spheres of law appears perfect. Substantively, the content of the three Constitutional Acts of 1875 were limited to the relationships between political institutions (the president, legislature, and ministers). According to Chapus, the issue of administration and administrative law was nowhere addressed; the 1875 Constitution did not even mention the terms *administration* or *public service*. Formally, administrative law would also arise only from sub-constitutional sources. The ‘principle of legality’—the classical French term used in the past to sum up all the normative standards to be obeyed by French administration—encompassed ordinary statutes and, in particular, the *Conseil d’Etat’s* self-developed ‘general principles of law’.

Paradoxically, the Two World Thesis also took shape in the writings of one its most important critics, Georges Vedel (1910–2002). In his famous article ‘*Les bases constitutionnelles du droit administratif*’ published in 1954, Vedel had supported the idea of the constitutional foundations of administrative law. Yet, at the end of the twentieth century, he gave the Two World Thesis a certain credibility with respect to the past. In his closing address to a conference in 1989, he asserted: ‘Thirty years ago, you could write a textbook on administrative law without a word about constitutional law’. He immediately added: ‘Today, even the fiercest defenders of separation between both disciplines are obliged to insert long constitutional passages in their textbooks on administrative law.’[[49]](#footnote-50) This partial recognition of the Two World Thesis (perhaps a rhetorical exaggeration?) fails, however, to convince. In his statement, Vedel did not advance any evidence; he did not cite any specific textbook. It should also be noted that he did not, as Chapus did, refer to the Third Republic, but to the 1950s and 1960s (i.e., ‘thirty years ago’).[[50]](#footnote-51)

### c) A Grain of Truth: Rivalry between Courts and the Drifting Apart of the Two Legal Branches

At a first glance, one might think that the Two World Thesis reflected the reality of French law at different historical periods. A deeper insight reveals, however, that this view is wrong. Regarding the Fifth Republic, Chapus’ general statement about the *dédoublement de l’ordre juridique* is an excessive extrapolation. His empirical evidence was the manner in which the *Conseil d’Etat* used to handle ‘general principles of law.’ Rather than relying directly on the Constitution or the constitutional principles laid out by the *Conseil constitutionnel*, the *Conseil d’Etat* chose to create—without supervision—its own ‘general principles of law’, even though the content thereof overlapped with constitutional principles. In this way, the *Conseil d’Etat* created a certain distance between itself and the Constitution and the *Conseil constitutionnel*. It is an aspect of the rivalry between the two *Conseils*; to speak of a *total* decoupling of the two legal areas is, however, exaggerated.[[51]](#footnote-52) Such a statement is refuted by the mere existence of the so-called ‘constitutional sources’ of administrative law (administrative law norms with constitutional ranking), which Chapus explicitly addressed in a different part of his textbook.[[52]](#footnote-53)

Chapus’ analysis is also inaccurate with respect to the Third Republic. The idea of a hermetic separation between constitutional and administrative law was never put forward during the Third Republic. Already in the early years of the Third Republic (1870–1900), scholars emphasized the complex interweaving of constitutional and administrative law under the umbrella category of ‘public law’.[[53]](#footnote-54) When presenting administrative law in a nutshell, the cram school teacher (*répétiteur*) François Boeuf put it somewhat more simplistically: ‘The first [constitutional law] fixes the principles of the government; the second [administrative law] determines the consequences involved and puts them into application.’[[54]](#footnote-55) The link between both are human rights and the principle of separation of powers. The intertwined nature of the two branches of law is even more pronounced in the classic literature of the Third Republic (Maurice Hauriou, Léon Duguit, Gaston Jèze, etc.), which sometimes resulted in a totally blurred boundary.[[55]](#footnote-56) According to the distinction made by Duguit and Jèze, constitutional law and administrative law concern different actors: the first deals with those who govern (the rulers, *les gouvernants*), while the second is addressed to the administration (the agents, enforcers). Yet, both areas of law essentially pay homage to a common set of values, such as the concepts of public service (*service public*) and individual liberties. However, one may argue that Duguit and Hauriou artificially inflated the thin content of the three Constitutional Acts of 1875, which contained no reference to the word or idea of ‘public service’ nor even a bill of rights, with the help of controversial natural law superstructures. Yet, even if one only considers the written text of the three Constitutional Acts of 1875—which, together, represent one of the shortest Constitutions in the world history of Constitutions and, conceptually, an absolute minimum (in 1875, a total of 34 articles, after 1884, only 26 articles, corresponding to 1746 words)[[56]](#footnote-57)—the bond between the two legal branches may be very stretched, but it did not break. The minimum link consists of the principle of separation of powers, which encompasses some basic standards about the organization, function, and control of the administration. The important role of the separation of powers is revealed in the text of the Constitution itself,[[57]](#footnote-58) in the jurisprudence of the *Conseil d’Etat*[[58]](#footnote-59)and in the doctrine of those administrative law scholars who approach the subject matter from a sober, positivist perspective without a monumental superstructure.[[59]](#footnote-60)

French administrative law scholarship, over the entirety of the nineteenth century, would have viewed the Two World Thesis as almost heretical.[[60]](#footnote-61) Its existence appears even more paradoxical if one remembers that the existence of the *Conseil d’Etat*, whose role gave rise to some controversial discussions during its history, has usually been legitimized with reference to the Constitution (initially, article 52 of Napoléon’s Constitution of 1799; later, the specific French interpretation of the separation of powers principle).[[61]](#footnote-62)

## 4. A Last Rebuttal and an Outlook

Extreme theses stimulate the spirit, inciting a more profound comprehension of the issue. As Søren Kierkegaard once noted,[[62]](#footnote-63) it puts the subject matter in a different light. If the Two World Thesis were true, it would logically follow that the respective guardians of each of the legal areas could completely ignore the other. However, that is contradicted by the historical and comparative data that indicate a link between the courts and scholars of both fields. Extreme cases, in which the guardians of either administrative or constitutional law were absent, are particularly interesting in this context.

### a) The Bond between Constitutional and Administrative Justice

A look at the history of law in Europe shows that, in many countries (though not all), constitutional and administrative courts did not come into existence at the same time. In most countries, judicial review of administrative actions first developed in the nineteenth century, be it through special administrative courts or ordinary courts. Special constitutional courts only saw the light of day much later, in the twentieth century. However, even before these special constitutional courts were established, a certain constitutional justice already existed inside civil justice and/or administrative justice. When rendering a decision in an administrative or private law dispute, a court was supposed to apply thereto the law. The Constitution was one potential source of law, to the extent that: (a) the constitutional norm was factually relevant and directly applicable, and (b) courts were allowed to invoke and use the Constitution.[[63]](#footnote-64) The scope of this kind of constitutional adjudication was either very broad (e.g., the courts were entitled to examine the constitutionality of statutes)[[64]](#footnote-65) or much narrower (e.g., the courts could only apply the Constitution to the extent that no statute prevented it from doing so).[[65]](#footnote-66) Its existence, even before the establishment of specialized constitutional courts, is not surprising, as the concepts of constitutional justice, on the one hand, and administrative justice, on the other, are delineated according to different criteria: whereas the criterion defining administrative justice is the subject matter(judicial review of administrative organs or administrative activities), the province of constitutional justice is determined according to the *formal source of applicable law* (constitutional justice is the judicial application and interpretation of the formal Constitution).[[66]](#footnote-67) An intersection of the two is, ipso facto*,* given. Thus, a judge may pass from the area of administrative justice into the area of constitutional justice.

The reverse path—from constitutional justice to administrative justice—also exists, but was less frequently taken. A rare example is Switzerland. Traditionally, since the nineteenth century, Swiss administration had only been subject to internal oversight and to external political control by Parliament and citizens.[[67]](#footnote-68) The ordinary (i.e., civil) courts had no competence to review administrative acts; special administrative courts did not exist (at the federal level, they were created only in 1917, 1925, and 2007, at the cantonal level only between 1959 and 1996). However, the Federal Court, which was established as a permanent court of justice in 1874, held, in addition to its main civil and criminal law jurisdiction, some powers of constitutional judicial review.[[68]](#footnote-69) Since the end of the nineteenth century, the Federal Court has used this power, thereby developing a selective, though not all-encompassing, system of administrative justice, which partly, but only partly, filled the gap of the missing administrative courts.

Thus, in both theory and practice, there is a path from administrative justice to constitutional justice as well as from constitutional justice to administrative justice. Even though they overlap, they are not yet identical or interchangeable: as the Swiss example shows, it is not possible to build a complete system of administrative review solely out of a jurisdiction of constitutional justice. Conversely, even under the best conditions, administrative courts can never interpret their own powers to encompass all those that are currently entrusted to constitutional courts.[[69]](#footnote-70)

### b) The Bond between Constitutional Law Scholarship and Administrative Law Scholarship

In many European countries (e.g., Germany, the United Kingdom, Switzerland, Austria, Hungary, Denmark, Sweden, Portugal, and the Netherlands), the academic study of administrative law became autonomous through a slow process of detachment from the pre-existing study of constitutional law.[[70]](#footnote-71) As a logical consequence and conclusion of the enquiry into the constitutional structure of the state, professors of ‘state law’ (*Staatsrecht*), ‘constitutional law’ or ‘political law’ also analysed the legal framework of those state organs called ‘administration’.[[71]](#footnote-72) Their view of public power expanded to include the State’s ‘upper’ levels as well its ‘lower’ levels, from the most abstract principles of the Constitution to the thicket of administrative law’s regulations and decisions. Older and even recent textbooks covering both subject areas bear witness to such a continuous broadening of constitutional lawyers’ horizons.[[72]](#footnote-73) Yet, a constitutional lawyer’s interest in administrative law was by definition of secondary importance. Administrative law risked being neglected, as was demonstrated in nineteenth century Germany by the attitude of the famous *Staatsrechtler* Carl Friedrich von Gerber or, during the same period, the primary focus of most Danish professors of *Statsret* (state law) for *Statsforfatningsret* (constitutional law) to the detriment of *Statsforvaltningsret* (administrative law).[[73]](#footnote-74) Just systematizing the sheer mass of administrative law rules and decisions required specialization. The creation of an autonomous scholarship in administrative law occurred, for some of these countries, by the middle or end of the nineteenth century (e.g., in Germany,[[74]](#footnote-75) Austria, Hungary, Portugal), somewhat later in Switzerland (in the beginning of the twentieth century[[75]](#footnote-76)) and in Denmark (in the 1920s), and much later in the United Kingdom (in the last fifty years). Despite boundary disputes and excessive attempts at disentanglement, this historical development generally suggests the existence of a special relationship between the study of constitutional and administrative law.[[76]](#footnote-77)

This special relationship is also confirmed when looking at the issue from the opposite perspective, that is, the example of France.[[77]](#footnote-78) From 1789 to 1870, despite the existence of several Constitutions, constitutional law was almost never taught in French universities. The chairs of the faculties of law were dedicated mainly to the study of civil and criminal law and, to a lesser extent—since 1819/1828—to the study of administrative law. In this peculiar context, it is worth noting that the introductions to textbooks on administrative law and, to a lesser extent, private law, at least made mention of the constitutional framework or sometimes even discussed it more extensively. One of the most striking examples of such a broad excursion into the province of constitutional law can be found in the third edition of the *Cours de droit public et administratif* (Lectures on public and administrative law) by Firmin Laferrière (1798–1861), professor of administrative law at the University of Rennes. That third edition was published in two volumes in 1850. In the first 376 pages of volume one, in Part I entitled ‘Public Law’, Laferrière successively discussed the philosophical background of public law (*droit public philosophique*), the positive Constitution of France (*droit constitutionnel français*), canon law, and international law. Thereafter, in Part II, entitled ‘Administrative law’(‘*Droit administratif*’) comprising pages 377–508 of volume one and all of volume two, Laferrière focussed on its main topic (i.e., administrative law *stricto sensu*). *Nomen est omen*: it is not a mere accident that the title of many administrative law textbooks from that period used not only the term *droit administratif*, but also the term *droit public**.*[[78]](#footnote-79) Sometimes, the latter referred to the entire body of public law, but it very often only referred to the specific branch of constitutional law. In the peculiar context of the nineteenth century—in the absence of chairs dedicated to constitutional law, to political science and to empirical studies on administration—the administrative law scholarship succeeded in occupying a monopolistic or at least central position in the academic field of studies on the state. It succeeded in doing so from a marginal position (no one disputed that, logically, administrative law must follow, not precede, constitutional law). Whereas in most countries, the academic curriculum went from the ‘summits’ of constitutional law down into the ‘valleys’ of administrative law, the French approach in the nineteenth century was ‘bottom up’, moving up from administrative law (and, to a far lesser extent, from private law) into the higher sphere of constitutional law.[[79]](#footnote-80) This shows that there is an overlap between those two fields of study and, further, that the said overlap may be overtaken from one side or the other.

## 5. Interim Conclusions: A New Definition of the Problem

In a system in which the Constitution enjoys primacy, a total decoupling of ordinary administrative law from constitutional law is impossible. This is true even if the Constitution is reduced to a strict minimum, as it was under the French Third Republic. Thus, the Two World Thesis definitely belongs in the dustbin. The real question is not whether ordinary administrative law (i.e., statutes, regulations, case law, contracts, customs, and decisions pertaining to public administration) is predetermined by higher constitutional norms, but to what extent it is so. The juxtaposition of two antithetical models (dependence versus independence; in the German debate: Fritz Werner versus Otto Mayer) makes little sense. It gives a distorted picture of reality as one of the two models is not supported empirically and the other is not sufficiently nuanced. Such an analytical framework does not allow to capture nuances *within* the paradigm of administrative law being linked to constitutional law. A typology that wants to reflect the richness and variety of law’s reality, particularly from a comparative perspective, needs to focus on the area of the spectrum between low- and high-predetermination of administrative law by constitutional law standards. But, before this question can be discussed systematically (see part D), a preliminary question must be answered. In contemplating a common European paradigm of administrative law’s dependence on constitutional law, is it possible to integrate British law or, because of its special constitutional arrangements, does the United Kingdom represent a separate and distinct case? How wide and how deep is (still) the Channel?

# C. The United Kingdom: Still a Special Case?

Any comparison in Europe must pay special attention to the legal systems within the United Kingdom. This is true for practical comparisons (e.g., working toward a consensus solution) as well as a comparison dedicated solely to a theoretical understanding (e.g., measuring the exact distance—whether near or far—between legal systems). It is generally understood that the legal situation in England, Scotland and Northern Ireland, especially in terms of constitutional and administrative law, is different from that on the Continent.[[80]](#footnote-81) But, how far-reaching were these differences in the past and to what extent do they still exist? Not infrequently, the Channel is hyped by both sides to an unbridgeable abyss.[[81]](#footnote-82) Since at least the 1990s,[[82]](#footnote-83) ‘public law’ in the United Kingdom has endured a profound, and on-going, mutation process. ‘The British constitution has veered from being a major source of pride to an arrangement that provokes dissatisfaction.’[[83]](#footnote-84) Comparative law specialists usually describe these changes under the new buzz word: ‘convergence’.[[84]](#footnote-85) Others speak of the ‘continentalisation’ of British law. The breadth and depth of these changes, which often take the ambivalent and sometimes even obscure form of gradual ‘evolutions’, remain unclear even to many Britons. Their true extent has not always been reflected, on the conceptual level, in the literature (at least not in the textbook literature). Nevertheless, regarding the present topic, this process is downright striking, when considering two key statements separated by one century: whereas Dicey, in 1885, cursed *droit administratif* as anathema to British constitutional law, more than one hundred years later, in 1999, Lord Johan Steyn asserted the ‘constitutionalization of public [to wit,administrative] law’.[[85]](#footnote-86)

## 1. Dicey and the Constitutional Freezing of Administrative Law

Unlike on the Continent,[[86]](#footnote-87) the classic British narrative on the relationship between constitutional and administrative law starts with a clash.[[87]](#footnote-88) According to Dicey, the founder of the orthodox doctrine of British constitutional law,[[88]](#footnote-89) the British Constitution—more specifically, the constitutional principle of the *rule of law*—precluded the existence of a special administrative law as it existed in France. British constitutional law provided for the unrestricted rule of private law and of ordinary courts. The fact that Dicey’s view was empirically false is well known. What is less well known is that the impact of Dicey’s doctrine on the evolution of administrative law reveals the existence of a certain primacy of constitutional principles, specifically the primacy of the principle of the rule of law, even vis-à-vis Parliament.

### a) A False Generalization: The Existence of English Administrative Law

Dicey’s restatement of the valid norms in Britain, and more specifically in England, was empirically mistaken and could only be mistaken.[[89]](#footnote-90) Each modern state has a set of administrative bodies; every state complying with a minimum understanding of the reign of law is willing to legally constrain the powers of those bodies (thus, the existence of legal rules applicable to public administration, i.e., administrative law *lato sensu*); such administrative law *lato sensu* necessarily involves a minimum number of special public law standards (administrative law *stricto sensu*), if only because the organizational and procedural rules established for administrative authorities can hardly be found in private law. Indeed, as was first shown by Frederic Maitland[[90]](#footnote-91) and later by William Ivor Jennings and William Robson, England had an abundance of specific administrative laws. But, this part of positive law was not taken into account by Dicey when he defined, in a supposedly inductive manner, the constitutional principles of Great Britain. His theory of the constitutional principle of the rule of law was not descriptive, but normative.

Due to his immense influence on the subject of British constitutional law, Dicey’s normative stance froze, to a certain extent, the evolution of administrative law.[[91]](#footnote-92) Its mere existence was first ignored, later its constitutional legitimacy was denied, and its development was slowed, if not stopped. Over time, however, Dicey’s star fell. His grip on the minds of legislators, judges, lawyers, and professors faded (the process of ‘de-icing’ started). On the one hand, according to the writings of Jennings and Robson, the bar was lowered with respect to the principle of the *rule of law* (they redefined the meaning of that phrase). On the other hand, from a strictly legal perspective, Parliament was not bound by said bar anyway: as a sovereign, it could, by statute (and administrative law was, to a large extent, made by statues and by-laws), change the flexible Constitution, including the constitutional principle of the rule of law, whatever its meaning. Thus, administrative law could develop slowly, though not without difficulty, either against Dicey’s constitutional framework or inside the constitutional framework (re)defined by Jennings and Robson. However, that difficult birth was not without negative impact on the further development of English administrative law.[[92]](#footnote-93)

### b) Dicey’s Profound Influence Indicates a Certain Primacy of Constitutional Principles

What is even more remarkable is the fact that Dicey’s empirically-proven influence on the development of administrative law cannot be explained from a strictly legal point of view. A constitutional principle, such as the rule of law, posed no legal barrier to a sovereign legislature. The British Parliament could override it and often did so, as evidenced by its frequent use of ouster clauses. Nevertheless, to some extent, the principle of the rule of law became a normative barrier in the minds of members of Parliament (who abstained from voting legislation favourable to administrative law) and in the minds of judges (which, in the light of Dicey’s constitutional doctrine, tended to construe administrative legislation in a restrictive way[[93]](#footnote-94)). Thus, Dicey’s statement of the rule of law effectively became a normative reference point for legislation and case law. The reason for this ‘higher’ authority, of course, was not Dicey himself, but what his theory represented in the conservative-liberal circles of English society. My hypothesis is that constitutional principles were accorded a higher status based on a respect for tradition. In the nineteenth century, the main parts of the British Constitution were still unwritten and consisted of common lawrules and/or ‘immemorial customs’. The Constitution, therefore, relied on time honoured traditions that, according to legend (the ‘classical theory of common law’ or the ‘Whig Interpretation of English History’), dated back to some glorious ancient time. Thus, Dicey’s view, which was regarded by many members of the English elite as the true outline of the Constitution, did not entirely stop the development of administrative law, but significantly hampered it.[[94]](#footnote-95)

In the eyes of most continental lawyers, the prestige and authority accorded by the British Parliament to the British Constitution is based exclusively on ‘moral’ or ‘non-legal’ grounds; this would be a sufficient reason to exclude this phenomenon from a strictly juristic analysis of the Constitution. However, according to the British understanding of constitutional scholarship, the moral, social, and cultural background of the Law of the Constitution has to be taken into account in order to get a comprehensive and exact view of how constitutional law works. Dicey explicitly highlighted the crucial role of such extra-legal factors in connection with the British Constitution. According to his classic, still-commonly-used definition, the British Constitution encompasses a legal part (the ‘Law of the Constitution’, constitutional law *stricto sensu*) and a non-legal part (the so-called ‘constitutional conventions’, which are standards of political ethics and constitutional morality).[[95]](#footnote-96) The distinguishing criterion between constitutional law and constitutional morality is the justiciability of the particular standard. From this point of view, the constitutional principle of the rule of law appears to have an ambivalent status: its normative authority within the legislative process (e.g., the legislature’s self-restraint in bills[[96]](#footnote-97)) is of a moral character, as it occurs in the absence of any judicial intervention. However, if a restrictive constitutional interpretation of an Act of Parliament is issued by a court, the rule of law principle becomes, ipso facto, a constitutional standard of a legal character. Thus, its primacy, depending on the circumstances, may be considered the primacy of either a moral or a legal principle.

## 2. The Contemporary Constitutionalization of Administrative Law

Today, English legal doctrine speaks—though rarely and in a timid voice—of the ‘constitutionalization’ of both administrative and private law.[[97]](#footnote-98) This may, at first glance, surprise continental European observers. On the continent, constitutionalization operates on the basis of the supremacy of an entrenched (rigid) Constitution, especially over statutes. Yet, this is precisely what the United Kingdom lacks! However, such an analysis is too narrow for two reasons. First, it presupposes the ubiquity of Acts of Parliaments, an assumption that is false in the case of the United Kingdom due to the importance of judge-made law. A large number of those Common Law rules are informed by constitutional principles, as is demonstrated by the debate about the constitutional foundations of judicial review. Second: parts of the British Constitution are being elevated to a higher rank, a complex and still ongoing process that has not yet been systematized.

### a) The Debate over the Constitutional Foundations of Judicial Review

The constitutionalization debate was triggered by the expansion of judicial review of administrative bodies that took place since the mid-1960s. At the beginning, the evolution initiated by the courts used a pragmatic, case-by-case approach, without further systematization. Only in the 1990s did a debate unfold, amongst judges and scholars, regarding the constitutional grounds for this development.[[98]](#footnote-99) The aim of the various protagonists was either to canalize this dynamic or to push it further. Various constitutional principles were mobilized: the principle of the Sovereignty of Parliament was the starting point for the so-called ‘ultra vires doctrine’ (the purpose of judicial review is to enforce the will of the democratically-elected legislature), while the defenders of ‘common law constitutionalism’ started from the principle of the rule of law and the role of the courts as guardians of individual liberties. In practice, the latter view predominated. The highest courts proclaimed the existence of ‘constitutional’ or ‘basic rights’, which had higher authority than Acts of Parliament.[[99]](#footnote-100) While ‘ordinary rights’ can implicitly be restricted or abolished by Acts of Parliament according to the traditional understanding of parliamentary sovereignty (the doctrine of implied repeal[[100]](#footnote-101)), fundamental rights (so-called ‘constitutional rights’) can only be repealed by an express declaration of Parliament’s will.

From the abstract concept of liberal democracy and/or the liberal theory of common law flows the precedence of fundamental rights over the principle of sovereignty. These rights are valid even without a statute and they apply as long as no Act of Parliament expressly contradicts them. As demonstrated by the example of Israel,[[101]](#footnote-102) the judicially-implemented primacy of the Constitution need not, necessarily, to be based on the classical criterion of a rigid Constitution (i.e., the existence of a special amendment procedure requiring a qualified majority). The judicial distinction between ‘explicit’ and ‘implied repeal’ raised part (but only part) of the British Constitution to a higher level. Another major contribution to the incremental emergence of a hierarchy was the famous distinction between ‘ordinary statutes’ and ‘constitutional statutes’ asserted by Sir John Laws in the Divisional Court in *Thoburn v Sunderland City Council* (2002).[[102]](#footnote-103) In the same vein, Lords Neuberger and Mance, with the concurrence of the five other justices of the Supreme Court, recognized in its *HS2* decision from 2014, the higher authority of certain ‘fundamental principles’ that are either contained in constitutional statutes or recognized at common law.[[103]](#footnote-104)

### b) A Higher Rank for Parts of the Constitution Because of the Human Rights Act and the European Convention on Human Rights

This constitutionalization process was reinforced by the Human Rights Act 1998, which incorporated into British law the human rights proclaimed in the European Convention on Human Rights (ECHR).[[104]](#footnote-105) In the Scottish legal system, these freedoms are clearly given precedence over the legislation passed by the Scottish Parliament. Whenever Convention rights are infringed by an Act of the Scottish Parliament, Scotland’s highest courts are entitled to set aside the latter (sections 29, 33, 98 and 100 of the Scotland Act 1998). The same applies to statutes passed by the Parliament of Northern Ireland (sections 6, 11, 14 and 79 of the Northern Ireland Act 1998). It should also be noted that all courts in the United Kingdom, when establishing judicial precedents (‘judge-made law’) still have to act in a way that is compatible with Convention rights (section 6 of the Human Rights Act). The trickiest issue, however, concerns statutes passed by the Parliament of the United Kingdom (‘Westminster Parliament’), which may apply to the entire United Kingdom or to only parts of it (especially England). Pursuant to section 3 para 2 (b) of the Human Rights Act*,* no court is allowed to question the validity of a statute made, either before or after the Human Rights Act entered into force, by the Westminster Parliament. Thus, the classic principle of parliamentary sovereignty seems, at first glance, intact.[[105]](#footnote-106) However, that provision of the Human Rights Act is only part of a far more complex set-up.

First, section 3 para 1 of the Human Rights Act, instructs courts to interpret, ‘so far as it is possible to do so’, any Act of Parliament ‘in a way which is compatible with the Convention rights’. The demarcation between a neutralizing interpretation, which is permitted by the Human Rights Act, and an open declaration of nullity, which is not, is, however, fluid. Second, if an Act of Westminster Parliament violates Convention rights, the highest courts are given the power to issue an official statement to that effect (a ‘declaration of incompatibility’, section 4 para 2 Human Rights Act). According to United Kingdom’s internal law (i.e., the Human Rights Act), Government and Parliament are legally free to maintain or amend the statute declared by its judiciary to be ‘incompatible with the Convention rights’.[[106]](#footnote-107) However, this room to manoeuvre exists only in its domestic law: at the European level, their discretion is restricted by the ECHR (articles 1 and 46) and the supervisory powers of the European Court of Human Rights. One can assume that the Strasbourg court will probably, in most cases, adopt the critical position of the British courts. The European Court of Human Rights will then finish the British courts’ work at the level of international law, by finding a breach of the ECHR. The British Government would then be obliged to put an end to the violation, forcing a change in the contested Act of Parliament. Figuratively, one can speak of a boomerang procedure: once the British court sends out a declaration of incompatibility (i.e., the boomerang) and the European Court of Human Rights sends back a final ruling from Strasbourg to London with a similar conclusion, the so-called ‘sovereignty’ of Westminster Parliament will have shrunk to the proverbial fig leaf.

In light of all these developments, it appears that the constitutionalization and ‘continentalization’ of British law is gaining ground. Four specific features, however, are to be noted. (a) The legal primacy of the British Constitution over ordinary statutes is not based on some classic understanding of the rigidity of said Constitution, as on the Continent. Rather, it is based, first, on the original differentiation between the need for ‘explicit’ or ‘implied repeal’ established by British courts and, second, on the United Kingdom’s voluntarily-assumed international commitments (e.g., the ECHR and the Treaty on European Union). (b) Such priority is extremely complex because only certain parts of the British Constitution enjoy a higher rank, according to different rules of recognition. (c) In comparison to other national legal systems, the two phenomena of constitutionalization of administrative law, on the one hand, and Europeanization of administrative law, on the other, are particularly intertwined in the case of the United Kingdom. (d) To a significant degree, the constitutionalization process operates without judges having the power to annul an Act of Parliament or to refuse to apply it. Regarding legislation passed by Westminster Parliament (but not that of the legislatures of Scotland or Northern Ireland), said judicial prerogatives are vested neither in the British courts nor, at a supranational level, in the European Court of Human Rights. The importance of these four specific features of the British system should, however, not be overestimated. The classic image of the United Kingdom’s ‘splendid isolation’ is no longer accurate. Although the United Kingdom is still a special case, it is such within a common European paradigm.

# D. The Common European Paradigm: A Two-Sided Relationship

Today, the logically compelling notion of a bond between constitutional and administrative law is commonly accepted in all European legal systems. It is at the core of the growing role of constitutional review throughout the second half of the twentieth century, and it is also at the forefront of the most recent evolutions in administrative law such as the emergence of the new field of ‘Global Administrative Law’.[[107]](#footnote-108) Unsurprisingly, the idea of the link between the two branches of law is also very old. It goes back to the very beginning of the coexistence of both branches. Thus, France’s first written Constitution of 1791 contained a large number of principles and rules related to public administration. In France, the ‘first’ professor of administrative law, Joseph Marie de Gérando, and the ‘first’ professor of constitutional law, Pellegrino Rossi,[[108]](#footnote-109) both highlighted the constitutional foundations (‘*les bases constitutionnelles*’) of administrative law.[[109]](#footnote-110) The same was true for Germany: the old masters in public law, such as Robert von Mohl, Ludwig von Rönne and Lorenz von Stein,[[110]](#footnote-111) acknowledged the constitutional basis of administrative law, with the latter coining the famous explanation of administration as ‘*tätig werdende Verfassung*’ (‘the Constitution put into action’).[[111]](#footnote-112) In Belgium, the most famous administrative law scholar of the nineteenth century, Alfred Giron (1832–1910), retained a similar definition: ‘The aim of administrative law is to develop and apply the principles established by the Constitution. It regulates the action and fixes the competencies of central and local administrations. Administrative law is far from being as permanent and stable as private law. It is saturated with political principles that change at the same time as the Instrument of Government.’[[112]](#footnote-113) In Spain, in 1843, one of the founding fathers of administrative law scholarship, Pedro Gómez de la Serna (1806–1871), stated: ‘*Derecho administrativo tiene por base al derecho public* [constitutional law]*, con el que está íntimamente ligado, y del que puede considerarse como consecuencia.*’[[113]](#footnote-114) Thereafter, Manuel Colmeiro y Penido (1818–1894), the most famous administrative law academic in late nineteenth century Spain, did not hesitate to claim that ‘*el derecho político es el fundamento de todo el derecho, asi publico como privado*’[[114]](#footnote-115) (constitutional law is the foundation of all law, public as well as private). This discourse on the ‘*bases constitucionales*’ of administrative law was common to all Spanish nineteenth century scholars[[115]](#footnote-116) and even, as far as I know, to all public law scholars on the European Continent during that period.

Yet, as demonstrated by the critical analysis of Alberto Gallego Anabitarte with regard to Spain before 1978, this discourse may, in reality, hide a lack of communication between the two disciplines, especially if, for ideological and/or epistemological reasons, constitutional law scholarship is unable or unwilling to develop a strictly juristic (that is, legally dogmatic) discourse on the Constitution that may be used by administrative lawyers. Thus, the relationship may be complex, which observation was already made, albeit from a different perspective, by Frank JohnsonGoodnow in 1897. In his comparative survey of four major jurisdictions (the USA, England, France, and Germany), Goodnow stressed the idea of a multifaceted and, thus, complex entanglement. According to him, the subject matter of both areas of law is largely the same (public authority and liberties). ‘While constitutional law gives the general plan of governmental organization, administrative law carries out this plan in its minutest details.’[[116]](#footnote-117) However, in the eyes of Goodnow, administrative law is not just normalized; it also plays a creative role by filling out the constitutional framework (e.g., it ‘supplements’ or ‘complements’). Certain parts of constitutional law are irrelevant to administrative law, while others (the so-called ‘constitutional foundations’[[117]](#footnote-118) of administrative law) are the cornerstone of administrative law. Each area of law looks at the issue of public power from a different perspective: ‘Constitutional law, it has been said (by a French administrative lawyer), lays stress upon rights; administrative law emphasizes duties.’[[118]](#footnote-119)

The bond between administrative law and constitutional law is indeed complex. It is not a one-sided, but two-sided relationship. (1) Ordinary (i.e., sub-constitutional) administrative law is informed, through various channels, by the normative standards (principles and/or rules) set by the higher Constitution, an aspect that stands out most clearly in the debate. However, the extent of this predetermination or, to put it differently, of ordinary administrative law’s autonomy must be assessed very carefully, as it may greatly vary. (2) In other ways, the Constitution also (a) depends on or (b) is inspired by, ordinary administrative law. (2a) Without the infrastructure of administrative legislation, regulations, case law, contracts, and decisions, the constitutional superstructure would literally hang in mid-air. The Constitution would be just a piece of paper, perhaps beautifully written, fair, and normative, but ineffective.[[119]](#footnote-120) (2b) The content of constitutional law may also stem from solutions established long ago by (ordinary) administrative law, which have proven valuable and adaptable. This phenomenon of legal transfer or ‘learning process’ (Jens Kersten) has been designated, in France, by George Vedel’s provocative phrase ‘administratization of constitutional law’ or, in Germany, inter alia by the qualification of constitutional law as ‘abstracted administrative law’ (Christoph Möllers). The coexistence of these two perspectives (1) and (2) and the internal complexity of each of them explain the diversity of national solutions. That ordinary administrative law depends on constitutional law, and vice versa, is a common European paradigm; yet, the actual form of this complex relationship may, and does, vary, depending on the specific context of each country and era. There are differences in substance as well as terms. Even if the terminology used is the same (e.g., the older term: ‘constitutional foundations’ or the current ‘constitutionalization’ of administrative law), one must be careful not to hastily conclude it has the same meaning in each jurisdiction. The following pages will be devoted, first, to a brief outline of the scale of variations, before looking at precise parameters that might explain such diversity.

## 1. A Broad Spectrum: Differences in Substance and Terminology

The degree of entanglement between administrative law and constitutional law vary by country and era. The link may be close or loose, broad or narrow. Sometimes, it falls into oblivion due to its minimal effect. Sometimes, it is torn apart by the deliberately distanced approach taken by some actors (see e.g., past tensions between the *Conseil d’Etat* and the *Conseil constitutionnel* in France or the mutual academic ignorance of either scholarship in pre-1978 Spain). Whether this relationship was, in the past, critical to defining the nature of administrative law is a complex question that is beyond the scope of this chapter (there is, however, some evidence that disengagement from private law was much more important in the past). Today, it is commonplace to observe that, from a historical-comparative perspective, constitutional law has increasingly shaped administrative law.[[120]](#footnote-121) The cross-border discussion in Europe and around the world,[[121]](#footnote-122) is about the ‘constitutionalization’[[122]](#footnote-123) of law, particularly administrative law. Another common assumption is that said phenomenon dates back to the crucial role of the newly-established constitutional courts. However, this first image—a scientific snapshot, so to speak—is, to some extent, too grainy. This diagnosis generally refers to the mainstream countries, whose avant-garde is Germany, whereas the situation in countries like Sweden remains out of focus. One should also take into account the existence of variants inside the mainstream: not all countries went as far in the constitutionalization process of administrative law as Germany (example: France).

### a) Outside the Mainstream: Sweden

During the twentieth century, the norms of the Swedish Constitution, enshrined in various fundamental laws, only played a minor role in legal practice and in the teaching of administrative law. To some extent, this particular situation still prevails today. According to the opinion of Hans-Heinrich Vogel, expressed in 2007, ‘a constitutionalization of administrative or even private law through extension of the provisions on fundamental rights has not been observed so far’; this statement is confirmed by Gunilla Edelstam: for Swedish lawyers it was ‘not a natural part of their daily work’ to consider the Constitution, and especially its provision on fundamental rights.[[123]](#footnote-124) At first glance, this might seem rather strange to a foreign observer. The Swedish Constitution is rigid; it prevails over ordinary statutes whose constitutionality can be reviewed by all courts (chapter XI article 14 of the 1974 Instrument of Government). The concept of a ‘hierarchy of norms’ is well known in Swedish legal scholarship. The 1974 Instrument of Government contains a series of institutional provisions that establish a minimal bond between both areas of law (various articles on the organization, composition, and control of state and local administrative bodies, including its highly original article 2 of chapter XII on administrative bodies’ independence, whose specific features have been highlighted by the French comparativist, Jacques Ziller[[124]](#footnote-125)). The rules of the famous Swedish model of free access to public documents were established in the Freedom of the Press Act (chapter II), which is also part of the Constitution. All these institutional provisions are, of course, taken into account by Swedish administrative scholars.[[125]](#footnote-126) Furthermore, chapter 2 of the Instrument of Government contains a large catalogue of fundamental rights that could, potentially, if one looks at it through the lenses of a Human Rights lawyer, at least a non-Scandinavian Human Rights lawyer, engender a deep infiltration of constitutional law standards into administrative law. As a matter of fact, no ‘Two World Thesis’ has ever been argued in Swedish scholarship or practice. Nor is there a single term that conceptualizes the slightest connection between the two branches of law: the concept of ‘constitutional sources of administrative law’ is rarely discussed in Sweden; discourse on ‘constitutionalization of (administrative) law’ is, to date, totally unknown. Although many chairs at different Swedish universities were, and still are, dedicated to the study of both constitutional and administrative law, it appeared, and still appears, almost impossible for most law professors to establish any conceptual connection between the two.

The causes of this scientific vacuum are numerous.[[126]](#footnote-127) One of them is structural lack of interest of Swedish lawyers in large-scale theoretical systems and conceptualism; the dominant administrative scholarship, founded by Carl Axel Reuterskiöld (1870–1944) and Halvar Sundberg (1894–1973), tends to be narrowly descriptive and reactive.[[127]](#footnote-128) In the eyes of Swedish lawyers, the constitutional substance of administrative law appears also to be poor. This raises the general question of the Constitution’s role in the Swedish legal system. According to Mats Kumlien and Kjell Åke Modéer, a discussion of constitutional arguments in political and judicial fora was considered ‘unusual’, ‘frivolous’, or even ‘ridiculous’[[128]](#footnote-129) during the period from 1917 to 1974, the so-called ‘half century without a Constitution’.[[129]](#footnote-130) The constitutional text was largely a facade as the new political practice of parliamentary democracy developed in contradiction to the black letter norms of the 1809 Instrument of Government. Even in the 1970s, the Constitution was mostly seen as an ‘unpractical decoration for the Nation State’.[[130]](#footnote-131) It took some time before it was ‘considered to be part of the valid legal rules’.[[131]](#footnote-132) At the time, legal scholars also showed a lack of interest in constitutional debates (Joakim Nergelius spoke, in that context, of a ‘theory deficit’[[132]](#footnote-133)). Until the end of the twentieth century, there was no critical academic assessment of the judges’ very deferential handling of constitutional rights. Compared to other Western democracies, fundamental rights were incorporated in the Swedish Constitution quite late—only in three waves in 1974, 1976, and 1979—due to the Social Democratic Party’s fear of the ‘judicialization’ of politics and its optimistic view of the consensual democratic process. The idea of popular sovereignty, expressed through Parliament, was the dominant constitutional value in Sweden, like in all other Nordic States. Given this context, which permeated the legal culture of Sweden, ordinary and administrative courts hardly mobilized fundamental rights in the 1980s and 1990s.[[133]](#footnote-134) Rights were already embodied in statutes and were efficiently protected by organs such as ombudsmen. In some disputes, judges did not take notice of the constitutional rights issue or, if they did, they did not attach much weight to it. Courts were, and remain, deferential to the elected parliament who is primarily responsible for ensuring that statutes comply with fundamental rights standards. Traditionally, Swedish Courts refused to interpret the constitutional rights provisions dynamically. The reasons for that attitude were manifold. Prior to 2010, a court could only refuse to apply a statute passed by the *Riksdag* or a regulation enacted by the Government if its unconstitutionality was *uppenbart*, that is to say, obvious or manifest (see the older version of chapter XI article 14 para 2 of the 1974 Instrument of Government[[134]](#footnote-135)). Yet, this was virtually never the case, if one looked at the matter from Axel Hägerströms’ positivist theory of law.[[135]](#footnote-136) The spiritual heritage of the Scandinavian School of Realism weighed on the shoulders of Swedish judges and lawyers; few knew how to escape its grasp. The ethos of Swedish judges was characterized by loyalty to Parliament and a civil-service mindset. Thus, Swedish courts preferred to interpret statutes and the Constitution in light of its legislative history (*travaux préparatoires*).

Since 2010, chapter XI article 14 of the Instrument of Government reads: ‘(1)If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. (2) In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the *Riksdag* is the foremost representative of the people and that fundamental law takes precedence over other law.’ This new wording of para 2, which is the result of a compromise between the social democrats and right wing parties, is quite ambiguous: are the courts supposed to be more proactive (a tendency which is strongly encouraged by ‘Europe’, i.e., the case law of the courts in Luxembourg[[136]](#footnote-137) and Strasbourg[[137]](#footnote-138)) or should they still be deferential to the will of Parliament (the wish expressed by some of the political participants in this reform)? Future developments will show whether the peculiarities of the Swedish constitutional culture (which are shared by some other Nordic countries[[138]](#footnote-139)) will remain under European integration.

### b) The Mainstream’s Avant-garde: Germany

A very different picture emerges in Germany which, after the trauma of the Nazi dictatorship, has expanded the precedence of its Constitution to the maximum extent possible (keywords: eternity clause, justiciability of fundamental rights, horizontal effect, primacy of the *Grundgesetz* over EU law, etc.). The empire of the *Grundgesetz* is ‘total’:[[139]](#footnote-140) in almost any daily life dispute, a constitutional law argument could be asserted. ‘Every administrative law case is potentially also a constitutional law case.’[[140]](#footnote-141) The extent to which the (federal) Constitution has been mobilized in Germany seems without precedent in history, at least in Europe.[[141]](#footnote-142) The primacy of the Constitution over ordinary law is accompanied, on the courts’ level, by the primacy of the Federal Constitutional Court over other courts (the so-called ‘*Fachgerichte’*, literally ‘specialized courts’: the civil and criminal, administrative, tax, labour, and social security courts)[[142]](#footnote-143) and—within science—by the primacy of constitutional law scholarship over the other fields of legal science.[[143]](#footnote-144) The three levels are closely coordinated with one another. Today, although the phrase ‘*Konstitutionalisierung des Verwaltungsrechts*’ (constitutionalization of administrative law) has tended to become more frequent amongst German scholars since the beginning of the twenty-first century, the situation of administrative law’s relationship to constitutional law is still often described, or at least discussed, by reference to the formula coined in 1959 by Fritz Werner, the first president of the newly-created Supreme Administrative Court of the Federation: ‘Administrative law as concretized constitutional law.’[[144]](#footnote-145) This phrase was later found appealing abroad, in Spain, Portugal, Switzerland, and Poland, for example. The overwhelming weight of constitutional law and of the Federal Constitutional Court in Germany is even more emphasized by various other terms coined by German scholars such as ‘constitutional reshaping’ (*verfassungsrechtliche Überformung*) of administrative law (Christoph Schönberger), ‘over-constitutionalization (*Überkonstitutionalisierung*) (Karl-Peter Sommermann),[[145]](#footnote-146) ‘over-saturation’,[[146]](#footnote-147) or ‘hypertrophy’ that would result in ‘German exceptionalism’ (*Sonderweg*) in terms of constitutionalization of administrative law.[[147]](#footnote-148) However, it should also be noticed that various German authors, especially in the last twenty years, have tended to qualify this situation.[[148]](#footnote-149) Werner’s dictum, especially the term ‘concretisation’, would hide parliament’s discretionary power and the autonomy of (ordinary) administrative law. Others insist on the bilateral nature of the relationship between both areas of law, some solutions of the *Grundgesetz* and/or of the Karlsruhe Court being inspired by former administrative law solutions that are put on a higher level. Similar to Vedel’s discourse in France on the ‘administratization of constitutional law’, some German authors address constitutional law as ‘*abstrahiertes Verwaltungsrecht*’ (‘abstracted’ administrative law), the best example being the principle of proportionality.[[149]](#footnote-150) Lastly, the growing impact of EU law (‘Europeanization’) also tends to relativize the older phenomenon of the constitutionalization, an evolution which is seen, by some, as a threat of ‘deconstitutionalization’ (*Entkonstitutionalisierung*, *Dekonstitutionalisierung*), by others as an impulse to rethink the constitutionalization process.

### c) A Variant Within the Mainstream: France

In France, the terminology used by scholars to conceptualize the relationship between constitutional law and administrative law has not yet achieved consensus. There are various words that each express quite different views of the matter. As to the Constitution’s impact on administrative law, scholarly opinions are indeed divided: while some authors suggest that the Constitution has a heavy impact,[[150]](#footnote-151) others see the constitutionalization of administrative law as a superficial phenomenon, which consolidates, rather than transforms, its traditional principles.[[151]](#footnote-152) The relationship between the two groups of legal norms (but not between the two courts: *Conseil constitutionnel* and *Conseil d’Etat*) is generally addressed on the vertical plane. There are three main formulations of said relationship. The first is the classic formula ‘*les bases constitutionnelles du droit administratif*’ (that is, the constitutional bases of administrative law) coined by Gérando and re-introduced in 1954 by Vedel.[[152]](#footnote-153) This phrase only refers to constitutional foundations, principles, and guiding ideas. A second discourse uses the expression ‘*les sources constitutionnelles du droit administratif*’ (the constitutional sources of administrative law), which is commonly accepted in all textbooks. The scope of that phrase is much broader, as it includes all constitutional norms, not just guiding *principles*, but also technical *rules*. The constitutional sources formulation is also relatively neutral: it does not reflect a dominant, or even imperialist, position of constitutional law. The third formulation refers to the ‘*constitutionnalisation du droit administratif*’ (constitutionalization of administrative law). Its inventor and most prominent supporter, Louis Favoreu, introduced the formulation in the French debate as early as the 1980s and thereafter in the international debate.[[153]](#footnote-154) As the term ‘constitutionalization’ may be used throughout Europe in quite a number of different ways, it is important to clarify the specific content of the French scholars’ use thereof.

Generally speaking, the term ‘constitutionalization’ designates a process moving towards a Constitution or flowing from it. More precisely, it may refer to three distinct meanings, which can be, and often are, intermingled in a given discussion: (a) the progressive implantation of some or even, ultimately, all components of a Constitution *stricto sensu* into a legal system that, so far, lacked one—it implies the transformation of a series of (domestic, European, or international) norms into a hybrid creature that comes close to a Constitution and that if this process goes on, eventually becomes a full-fledged Constitution (constitutionalization as partial or continuous Constitution-making process); (b) the enlargement of the content of an established Constitution *stricto sensu* by upgrading lower-level legal standards to constitutional status and/or by including non-legal standards into the highest level in the hierarchy of legal norms (a vertical, bottom-up movement towards the Constitution); (c) the ripple effect, shaping power, or influence radiating from constitutional principles such as fundamental rights, democracy, the rule of law, etc., on lower-level norms (a vertical, top-down influence).

German scholars almost exclusively assign the third signification to the term ‘constitutionalization’ with regard to domestic settings.[[154]](#footnote-155) In contrast, French scholars use the term to refer both to the second meaning (i.e., the enlargement of the content)—a major example is the incorporation of the 1789 Declaration of the Rights of Man and of Citizen into the 1958 Constitution by the *Conseil constitutionnel*’s decision of 16 July 1971 on freedom of association—and to the third meaning (the normative influence of the Constitution on ordinary, i.e., subconstitutional law).[[155]](#footnote-156) Accordingly, on a vertical plane, the term, as used in France, connotes not only the top-down influence (third meaning), but also a not-to-be-underestimated bottom-up influence (second meaning). Constitutional law, particularly the norms generated by the *Conseil constitutionnel*’s case law, uses standards, concepts, and methods first formed and applied by the *Conseil d’Etat* in administrative law.[[156]](#footnote-157) Thus, defenders of administrative law and of the *Conseil d’Etat* insist not only on the autonomy of administrative law and its judge, but also on the contributions made by administrative law and the *Conseil d’Etat* to constitutional law and the newly-established *Conseil constitutionnel*. This explains why, for some authors and actors, the term ‘constitutionalization’ goes all too far. To Vedel’s ear (one of its most outspoken critics), the term suggests the existence of a form of ‘imperialism’ by constitutional law and by the *Conseil constitutionnel*, which, fortunately, is neither visible in the past, nor desirable for the future. According to Vedel, traditional administrative law is not transformed (much less revolutionized) by the Constitution; it is simply consolidated by it. In a provocative reply to Favoreu’s discourse on the constitutionalization of administrative law, Vedel speaks of ‘*administrativisation du droit constitutionnel*’ (administratization of constitutional law) and, in the domain of private/civil law, of ‘*civilisation du droit constitutionnel*’ (civilization of constitutional law).[[157]](#footnote-158) In his opinion, the simpler term ‘constitutional sources’ is the most appropriate term, which opinion is also held by the former President of the *Section du contentieux* of the *Conseil d’Etat*, Bruno Genevois.[[158]](#footnote-159) It is hardly surprising that, so far, Fritz Werner’s formula found few supporters in France.[[159]](#footnote-160)

From the foregoing, the following conclusion can be drawn: the issue of the *normative*[[160]](#footnote-161)influence of the Constitution opens up a wide range of results. Germany and Sweden represent, in Europe, the two extremes of the spectrum,[[161]](#footnote-162) and in between is a plurality of legal systems, in which the intensity of the influence of the Constitution, depending on the commentator, is assessed as strong,[[162]](#footnote-163) weak, or relatively limited.[[163]](#footnote-164) Due to lack of time and space, neither such global characterizations nor the methodological foundations thereof (e.g., do all authors understand the terms ‘strong’ and ‘weak’ in the same way?) can be discussed here. However, it is undeniable that there are different degrees of constitutional predetermination of administrative law norms. The channels (actors, instruments), the pace, the range (e.g., are all legal areas affected in the same way?) as well as the result of constitutionalization (e.g., does it convert or simply consolidate ordinary law?) vary.[[164]](#footnote-165)

## 2. The Causes of the Diversity: The Different Parameters of a Complex Phenomenon

Constitutionalization, in the third sense, is a phenomenon that can take different shapes and forms, which is supported, artificially exaggerated, inhibited, or thwarted by a variety of factors.

### *a) The Number of Administratively-Relevant Constitutional Norms*

The shaping power of a Constitution depends, first, on its content. If looking at the question from a *quantitative* perspective, divergences immediately appear, although there are no exact figures. Establishing those raises some delicate theoretical and methodological questions: How can one count ‘norms’?[[165]](#footnote-166) Should one count words, paragraphs, signs (which is quite easy), or meanings (which would be more appropriate, but also far more difficult)? What is *one* norm? How should one count a constitutional principle such as the rule of law: is it one norm or a plurality of norms? One also needs to precisely delineate the borders of the Constitution, particularly with regard to customary and judge-made norms. Superficial and incomplete quantitative analyses show at least that constitutional texts vary in length (trend: growing).[[166]](#footnote-167) From the latter observation, one may roughly conclude that the number of constitutional norms is also increasing. In Europe, the opposite ends of the spectrum in this regard would likely be the Constitution of the French Third Republic,[[167]](#footnote-168) on the one hand, and detail-loving Constitutions such as those of contemporary Portugal and Austria.[[168]](#footnote-169) The interest of the Constitution’s drafter in transforming, and thus, regulating pre-existing public administrations will be strong or weak, depending on the political circumstances. When the French Constitution of 1958 was being drafted by the government led by de Gaulle, France was in the midst of a colonial war in Algeria; its drafters wanted, in particular, to strengthen the position of the head of state at the expense of the legislature, but wished to leave the administration unchanged, as it had represented a stable force since the Third Republic. Thus, the initial text of the Constitution of 1958 said relatively little about administration (or about human rights).[[169]](#footnote-170) In the case of Italy, Sabino Cassese also noticed a certain indifference, based partly on ignorance, on the part of the Constituent Assembly regarding the powers and functions of administrative authorities.[[170]](#footnote-171) In other countries, however, the constituent power clearly addressed the crucial issue of the administration’s power.[[171]](#footnote-172) Revolutions[[172]](#footnote-173) and dictatorships, as well as a State’s federal structure,[[173]](#footnote-174) promote the latter tendency. Furthermore, the volume of constitutional texts continues to grow over time by amendment. Finally, one has to take into account the increasing importance of constitutional case law, especially that developed by constitutional courts.

However, not all constitutional norms are relevant to the administration. From this perspective, three categories of constitutional norms can be distinguished: (1) constitutional norms that do not refer to the organs and/or functions of public administration (e.g., provisions relating to the internal structure of the legislature); (2) constitutional norms that are directed at all actors and areas of law and, hence, also to administrative authorities (e.g., fundamental rights, principles of the rule of law, and democracy); and (3) constitutional norms that specifically address public administration and administrative law (e.g., the competency of the head of state/government or Parliament to regulate administrative matters; the position of administration in the current multi-level system; the structure, powers, and hierarchy of administrative authorities: ministries, public services, local self-government, independent bodies, army, etc.; administrative procedural rules: right to good administration, transparency, access to information, participation, etc.; supervision by courts, Parliament, ombudsmen, citizens; scope and content of the civil service’s regime and the possibility to establish private law labour contracts; the boundaries of the State: nationalization of private enterprises, privatization of administrative functions, cross-border cooperation, etc.). The function of a Constitution is to define the foundations of the political community. But, the more narrowly-defined the concept of ‘foundations’ is, the more likely that administration will be left out. At its absolute minimum, the core function of a Constitution is to establish the highest state organs. Thus, the task to regulate administration and, sometimes, even to regulate the judiciary is left to ordinary law. Today, state objectives and declarations of human (or ‘fundamental’) rights, especially in countries previously suffering under dictatorships, are a political must. In the *Belle Époque*, there was no such catalogue of fundamental rights in Great Britain, France (Constitution of 1875), Germany (Constitution of the Empire of 1871) or Sweden (Instrument of Government of 1809). In some countries, the presence of such provisions is still relatively new[[174]](#footnote-175) or is met with uneasiness in some legal cultures due to their abstractness and their impact on democracy (the fear of the judicialization of politics).[[175]](#footnote-176)

### b) Preconceptions: The Constitution as the Law’s World Egg or as a Framework?

Albeit necessary, the foregoing quantitative analysis is, however, not sufficient. In order to understand the content of the Constitution, it does not suffice to simply read what is printed in black and white in the constitutional text. To quote Georg Jellinek: ‘*Das Recht existiert in unseren Köpfen*’ (The law exists in our minds).[[176]](#footnote-177) The same text can be interpreted quite differently in two countries and/or in two time periods. What a lawyer draws from the written text will depend on her or his hermeneutical preconceptions: that is, her or his assumptions of constitutional theory.[[177]](#footnote-178) It is beyond the scope of this article to create a map of constitutional thought throughout Europe; in looking for ideal types in the sense of Max Weber, one may, however, differentiate between two methods of reasoning.[[178]](#footnote-179)

Those lawyers, who embed the constitutional text in a set of moral beliefs and natural law values, tend to enrich the content of that text.[[179]](#footnote-180) The most extreme example of this attitude is the previously mentioned position of Hauriou and Duguit with respect to the existence of a constitutional guarantee of fundamental rights in the French Third Republic.[[180]](#footnote-181) To those legal scholars, the justiciability of abstract principles, such as human dignity and fundamental rights, appears to be self-evident. The apparent vagueness of the Constitution’s words is filled by a dense ideological and philosophical substructure. Such a lawyer tends not only to *seek* the answer to all fundamental administrative law questions in the Constitution (which is methodologically appropriate due to the supremacy of the Constitution); she or he will also tend to *find* them there, a mistake positivists may also make.[[181]](#footnote-182) The Constitution, as the epitome of all that is good and just, becomes a kind of legal bible—the legal source in which all fundamental rules regarding administrative law somehow already exist. By means of human dignity (from which, in turn, fundamental rights are derived[[182]](#footnote-183)), the Constitution tends to become the fountainhead of the entire legal system. Especially if its text is construed in an extensive, activist way, it becomes, to quote Ernst Forsthoff, the ‘*juristische[s] Weltenei*’ (the ‘legal World Egg’)[[183]](#footnote-184) or a ‘total Constitution’.[[184]](#footnote-185)

In contrast, the most radical critics of this view insist that ‘all may not be conjured from the Constitution’[[185]](#footnote-186) or be logically deduced therefrom. Rather, the Constitution is a framework: although it establishes certain limits, it does not fix all of the fundamentals of the legal order.[[186]](#footnote-187) Such criticism touches on Werner’s notion of ‘concretization’,[[187]](#footnote-188) which suggests that *everything* essential has already been decided. Only the technical, practical implementation remains. The freedom of the democratic legislature and/or the administrative court would be hidden or even restricted. The change of mood is particularly striking in Switzerland. After the ‘idolatry of the Constitution’ in the 1960s and 1970s, a certain ‘fundamental rights fatigue’ (Pierre Tschannen) now appears in parts of its doctrine. As a framework, the Constitution is also a lock, through which fundamental ideas, whatever their provenance (whether they come from politics, ideological movements, international or European law, or—from a historical perspective—from the prior legal order), may pass and be incorporated into ordinary law. The impetus for many recent reforms (privatization, New Public Management, etc.) did not arise from the Constitution, but from a variety of other factors, including: intellectual movements (such as the Chicago school of economics); changing party platforms; the attractiveness of foreign models; the vertical influence of other national laws (e.g., private law); and supranational law (e.g., European law). In this way, administrative law can, to a certain extent, develop or maintain a different culture or mentality.[[188]](#footnote-189) Thus, the relative independence of ordinary law is manifest.

### c) Preconceptions: Abstractness and Normativity of Constitutional Principles

The dispute between these two constitutional models is fuelled by the abstract nature of constitutional principles. Their vagueness is viewed as either a boon (the more abstract the norm, the greater the chance of creative adaptation by a scholar, an advocate, and eventually a judge) or, on the contrary, it is seen as a trouble area. If the law, as was common with many positivists in the past, is identified with rules (law is precise and sharp-edged), principles such as human rights are, in effect, denied the nature of legal norms despite the fact that they are laid down in a text belonging to positive law.[[189]](#footnote-190) Thus, fundamental rights enshrined in the Constitution are considered to be only ‘programmatic’ or ‘political’ standards, which are not justiciable vis-à-vis Parliament. When raised in the context of judicial review of administrative acts, the fundamental rights discourse is deemed to be addressed only to Parliament and not to administrative authorities and individuals. This attitude, which had been very influential in many countries during the nineteenth century and in the first half of the twentieth century, has been progressively abandoned in almost all European countries, as it was excluded either by an explicit provision of the Constitution itself (especially in those countries with a dictatorial experience: see article 1 para 3 of the German *Grundgesetz*; articles 3 and 18 of the Portuguese Constitution of 1976; article 53 of the Spanish Constitution of 1978; and article 8 para 2 of the Polish Constitution of 1997), by a decision of the national Constitutional Court (see the paradigmatic case of Italy[[190]](#footnote-191)) or by the case law of the European Court of Human Rights (this spill-over effect is visible particularly in Nordic countries where the scepticism against constitutional rights talk persisted up until the end of the twentieth century). Nowadays, one may still observe such an attitude from time to time, when advocates and judges consider some very abstract constitutional principles to be *too* abstract.[[191]](#footnote-192) Social and economic rights are particularly concerned, as their justiciability is still controversial.

Apart from the latter aspect, the problem of abstractness has, to a large extent, shifted. At the forefront of the discussion is, on the one hand, the thorny question of balance:[[192]](#footnote-193) Which of the sometimes-contradictory constitutional principles should guide ordinary (administrative) law more? Who is entitled to decide the ultimate balance: the legislature or the judiciary? The intensity of judicial review, as well as the assignment of roles between the various courts, may vary depending on the country. On the other hand, the old problem of the Constitution’s abstractness sometimes reappears under a new guise, as illustrated by the German discourse on the *Anwendungsvorrang* (primacy of implementation) of the most concrete norm (i.e., the lowest ranking norm).[[193]](#footnote-194) The notion of ‘implementation primacy’ of ordinary law, which is opposed to the *Geltungsvorrang* (primacy of validity) of the Constitution, is ambiguous and questionable. On an empirical-sociological level, the term might claim certain accuracy, as it reflects part of bureaucracy’s reality: it is commonly known that lower ranking civil servants will often refuse to lift a finger unless the requirements of the Constitution (and even statutes and regulations) have been spelled out in internal administrative instructions. However, the authors of the *Anwendungsvorrang* discourse do not understand the term in that way. Their concept is supposed to be a legal-dogmatic concept. Yet, as such, it is either (a) illegal or (b) logically inconsistent. (a) If the term aims at a real primacy (in the sense of exclusivity) of implementation of the most concrete norm, thus allowing administrative bodies to ignore the Constitution, such a concept would undermine the superiority and applicability of the Constitution, which, in most systems, is addressed to all State organs, including civil servants.[[194]](#footnote-195) (b) If the concept does not allow administrative bodies to ignore the Constitution (they must construe statutes in a way which is compatible with the Constitution), it makes no sense to speak of ‘a *primacy* of implementation’ as the administration is supposed to apply, simultaneously, all relevant legal norms, either concrete or abstract, in a given case.

### d) The Telos of the Constitution: Transformation or Consolidation of the Pre-Existing (Administrative) Ordinary Law?

One absolutely key parameter for defining the nature and scope of the constitutionalization phenomenon in a given country is the Constitution’s claim to either *transform* or *ratify* pre-existing ordinary law. Its force to transform, or even to revolutionize, the legal order depends: (a) on the more-or-less important gap between its own requirements and the content of ordinary law inherited from the previous regime; and (b) on the ability and will of the various state organs to enforce the Constitution’s claim to supremacy. Paradigmatic examples of factor (a) are ‘younger’ democracies, with a new liberal Constitution, that have inherited authoritarian administrative laws (statutes, regulations, case law, etc.) from a previous dictatorship (e.g., Germany, Italy, Spain, Portugal, Greece, Eastern and Central Europe, South America, South Africa, etc.). In such cases, the potential for a transformation of ordinary administrative law, by the legislature and/or the courts, in light of the new constitutional values is particularly high. The situation in ‘old’ democracies (e.g., France, Nordic countries, Benelux-States, and the United Kingdom) is quite different. Although the scholarly discourse tends, sometimes, to paint a too-rosy picture,[[195]](#footnote-196) one may assert that the administrative law of these countries was already marked by liberal ideas in the past.

Two ideal types, in the sense of Max Weber, may serve as an analytical framework. The first model, which I propose to call ‘the Constitution as a motor’,[[196]](#footnote-197) views the Constitution as the starting point for, and driving force behind, the new legal order. Age is considered a stain, everything old being linked to the former dictatorship.[[197]](#footnote-198) The Constitution is a major tool for legal regeneration. All expectations for a new and fair administrative law and/or private law are projected onto the Constitution[[198]](#footnote-199) and its main judicial guardian, the newly-created Constitutional Court. The drafters of such Constitutions tend, indeed, to distrust judges sitting in the ordinary courts (civil and administrative courts) as their training and career, as well as the whole tradition of their institutions, go back to the former authoritarian regime. In contrast, the Constitutional Court, as a new institution with specially selected, and therefore more reliable judges, is expected, alongside the legislative reform agenda of Parliament, to give a new (liberal, democratic, and/or social) impetus to the old administrative law by invalidating statutes, regulations, and, in some cases, even judicial decisions. Constitutionalization is, therefore, a dynamic, transformative process.

In the second model, which I propose to call ‘the Constitution as a treasury’, the new Constitution serves simply as the endpoint, a storeroom or receptacle of the prior historic, highly esteemed developments.[[199]](#footnote-200) The Constitution is not supposed to reform or, worse, revolutionize tradition; its main purpose is to consolidate it. Age is considered a sign of experience and trustworthiness. The new Constitution incorporates solutions that have already proved beneficial in political practice (informal political rules, e.g., on political accountability, are written down and legalised) or in ordinary law (these subconstitutional legal rules are given a higher, constitutional, ranking). This model results in a slightly different relationship between the newly-created Constitutional Court and the highest, and typically far older, administrative court. The Constitutional Court, as a ‘newbie’, is expected to be content to accept the classical concepts, methods, and solutions of the older and wiser administrative (case) law in terms of defining fundamental rights, secularism, ‘public service’, ‘general interest’, separation of powers, methods of judicial scrutiny, etc. Thus, in France, at the beginning of the Fifth Republic, the *Conseil d’Etat* was styled as the ‘older, wiser brother’ of the *Conseil constitutionnel*, with the former taking the latter under its wing.[[200]](#footnote-201) This bottom-to-top relationship, espoused by Vedel under the polemical catchphrase ‘*administrativisation du droit constitutionnel*’, preceded the Kelsenian perspective according to which the hierarchy of norms should be read from top to bottom. In this context, constitutionalization in the ‘bottom-up’ sense mentioned above (see above D. 1. c), meaning (b)) plays a major role. Constitutionalization in the ‘top-down’ sense (see above, D. 1. c), meaning (c)) is not absent, yet the nature of its impact changes: it does not lead to a transformation of the *status quo ante* in ordinary law, but to its petrification. The content of ordinary law is consolidated, and guaranteed, by the Constitution. Ordinary administrative law is not brought in line with constitutional law, but constitutional law with ordinary administrative law.[[201]](#footnote-202)

### e) The Primacy and Legitimacy of the Constitution

In addition to its content, the Constitution’s primacy is a crucial element of constitutionalization. The latter aspect is closely linked to the former. Yet, very often, scholars focus exclusively on the formal criterion of rigidity in order to grasp the idea of the Constitution’s primacy or supremacy, leaving aside any substantive consideration. However, from a comparative perspective, this approach turns out to be too narrow: an important part of reality is ignored. Constitutionalization can take place without the classic form of entrenchment, as the British example, above, showed. A certain liberal ideal of justice was the driving force inspiring Britain’s highest courts and, similarly, the Supreme Court of Israel, to reconstruct the highest level of the hierarchy of legal norms. Even in those countries in which the formal legal criterion of rigidity is given, the question of the legitimacy[[202]](#footnote-203) (or illegitimacy[[203]](#footnote-204)) of the Constitution is not pointless. In the former communist regimes, the Constitution, despite its higher rank in the formal legal hierarchy, was a taboo zone from which the judiciary kept its distance (the Constitution was a mere facade).[[204]](#footnote-205) Generally speaking, the supreme State organs’ obligation to comply with the Constitution is not enforced by coercion. It is mainly founded on the Constitution’s legitimacy, which may be called into question either generally (the best example: a military coup) or selectively. If, for example, the political parties’ commitment to the Constitution dwindles,[[205]](#footnote-206) the dynamic of constitutionalization by means of parliamentary legislation will slow down and may even stop. From outside, courts could possibly give a new boost to the process if citizens are allowed to lodge an appeal against the legislature’s failure to take action. Yet, such a procedure is quite rare and, generally, the courts’ role in guaranteeing the values of the Constitution should not be overestimated. The legislature also plays a crucial role in the implementation of fundamental rights, especially of economic and social rights. Moreover, it should be taken into account that courts (ordinary courts and/or constitutional courts) are not, *per se*, immune from violating the Constitution.[[206]](#footnote-207)

### f) The Stability or Instability of the Constitution

Only a relatively fixed point can act as a reference point. The Constitution can only penetrate the thicket of ordinary administrative law, with its various sub-branches and layers, if it is given the necessary time to do so. As shown by the historical experience of countries confronted with an authoritarian legacy, the adaptation of ordinary law is a long and complex process (I consider here only ‘transformative constitutionalization’; indeed, constitutionalization in the context of a Constitution aimed at conserving the status quo ante has an immediate effect). If, as was the case in nineteenth century France or Spain, the Constitution is subject to constant change, it loses its ability to serve as guide for legal reform. To avoid being drawn into constitutional upheavals, ordinary law may even tend to insulate itself, as much as possible, from the Constitution.[[207]](#footnote-208) In this way, each area of law develops its own foundations and general principles: the Civil Code becomes the ‘true constitution of society’ (Jean Carbonnier),[[208]](#footnote-209) and ordinary administrative law becomes the true backbone of the State.[[209]](#footnote-210)

### g) The Guardianship of the Constitution: Are Administrative Authorities Entitled, Or Even Obliged, to Ignore Unconstitutional Norms?

The implementation of constitutional norms in ordinary, particularly administrative law, involves a wide range of actors. Quite frequently, observers focus exclusively on courts. Their role as guardians of constitutional norms vis-à-vis administrative law norms is certainly crucial, but it is not exclusive, especially as, in most cases, courts intervene only in a reactive, *ex post facto* manner. The first, active role is assumed by the legislature, the government, the head of State, and, to some extent, administrative organs. Citizens also give their input (e.g., by means of elections, protest, semi-direct democracy mechanisms). One should also mention the important work of advisory bodies that, during debates on legislative or regulatory drafts, may raise the awareness of constitutional issues. Paradigmatic examples are the so-called *Conseil d’Etats*[[210]](#footnote-211) in France, Belgium, Netherlands, Italy, and Luxembourg and, in the Nordic context, the Law Council in Sweden[[211]](#footnote-212) and the Standing Committee of the Finnish Parliament specialized in Constitutional law (*Perustuslakivaliokunta*).[[212]](#footnote-213) Monitoring functions may also be exercised by ‘Chancellors of Justice’ (e.g., Finland, Sweden, and Estonia).[[213]](#footnote-214)

An issue that shall be analysed in more detail here is to what extent administrative organs, whether inferior or superior, contribute to ensuring the constitutionality of administrative actions. Administrative authorities are certainly supposed to implement the values of the Constitution within the framework set by the various infra-constitutional norms. Yet, to what extent are they able to use the Constitution against statutes, regulations, or orders? In all European legal systems,[[214]](#footnote-215) they are entitled, and may be even obliged, to interpret the norms in a way that is compatible with the Constitution. But, are they also empowered, or even obliged, to verify the constitutionality of these norms and to refuse to apply them if they are inconsistent? Does the legal system establish a constitutional review by some or all administrative organs distinct from, and prior to, the constitutional review exercised by judges? Although the possibility of such review had been discussed by some scholars, in some countries, as early as the nineteenth century,[[215]](#footnote-216) the simple question may seem strange to many contemporary lawyers in Europe. A positive answer would, indeed, qualify one of the most classic principles (i.e., the subordination of the executive to law, specifically to statutes). There are some examples in some legal systems, but, as this topic has attracted little or no attention in comparative research, they are hardly known abroad. Such a review exercised by administrative organs could, theoretically, take two forms. (a) When adopting a regulation, administrative authorities (head of state, government, local authority, etc.) could disregard, as void, a so-called ‘statute’ that is inconsistent with the Constitution. This would result in an abstract review, a hypothesis that, as far as I know, exists nowhere in Europe.[[216]](#footnote-217) (b) In a particular case, lower (or at least higher) administrative authorities would be empowered, or even obliged, to refuse to apply any unlawful norm, general or individual. This would result in a concrete administrative review.

One of the first, if not the first, European countries to have implemented in positive law, albeit with some restrictions, such a concrete review appears to be Switzerland.[[217]](#footnote-218) It is also the country that, today, seems the most open to this issue, along with Sweden and, to some extent, Portugal. At the outset, a foreign observer is struck by the fact that the current Swiss doctrine accepts that: (a) subject to some qualifications, the principle of rule of law (article 5 of the Swiss Constitution of 1999) encompasses a general entitlement to exercise, on demand or ex officio, a concrete review of the lawfulness of all norms; (b) this power is granted, with some reservations, to all public authorities applying the law, meaning both courts and administrative authorities, whether on a federal or cantonal level; (c) the principle of federalism (the primacy of federal law) reinforces this solution as it also requires a concrete review of cantonal statutes and regulations with regard to their consistency with federal law, by all cantonal courts and by certain of the cantons’ administrative authorities. This opens, at the level of the most fundamental principles, a broad perspective for a lawfulness/constitutionality review by administrative authorities. Yet, Swiss positive law incorporates also some (major) qualifications, which concern, in particular, federal law. Since the nineteenth century, the Federal Constitution has explicitly prohibited both courts and administrative bodies from questioning the validity of federal statutes (article 190 of Constitution 1999). Regarding regulations of the Federal government, the Federal Tribunal held, in 1974,[[218]](#footnote-219) that federal civil servants were bound by them, unless they were ‘manifestly illegal’ (a conclusion that, today, some scholars still uphold on the ground of the hierarchical subordination to government, while others, in view of article 5, consider it too restrictive). Most firmly established, at least de jure, is the concrete review by administrative bodies on the level of the cantons. First, according to the Federal Court, the ‘nature of the Federal state and the principle of supremacy of federal law’ (now article 49 of the 1999 Constitution) empower, and oblige, not only the cantonal courts, but also the cantonal ‘administrative authorities’ (meaning at least the government) to disregard, in a particular case, any cantonal statute or regulation that breaches federal law, especially the Federal Constitution.[[219]](#footnote-220) Second, in some of the 26 cantons, the Cantonal Constitution explicitly imposes on certain administrative authorities, when applying a general norm in a particular case, a duty to ignore any cantonal statute or regulation that is inconsistent with a higher (cantonal, federal, or international) norm.[[220]](#footnote-221) Thus, the classic understanding of the separation of power is being redefined.

Another legal system, whose Constitution allows, albeit under ambivalent conditions, such a review is Sweden. According to the Instrument of Government of 1974 (currently: chapter 12 article 10 para 1), ‘if a public body finds that a provision conflicts with a rule of fundamental law … the provision shall not be applied’. Until 2010, any administrative organ could only refuse to apply a statute or regulation if the conflict was ‘manifest/obvious’. This restriction, applicable to the concrete review of both courts and administrative organs, was replaced in 2010 by a more ambiguous limitation: like courts, administrative bodies have to pay ‘particular attention […] to the fact that the *Riksdag* is the foremost representative of people and that fundamental law takes precedence over other law’ (chapter 12 article 10 para 2).[[221]](#footnote-222) In practice, however, it seems that, like courts, administrative bodies rarely use this power.

In Germany, Italy and Portugal, the text of the Constitution does not contain a precise, and explicit, answer to the present question, but the issue has given rise to a rich, and controversial, debate. In Portugal, under the new Constitution of 1976, a considerable number of scholars, in the past and still today, admit the competence of administrative organs to ‘disapply’ an unconstitutional statute at least in a limited number of cases.[[222]](#footnote-223) In Italy,[[223]](#footnote-224) on the contrary, the Council of State and most authors tend to reject such a control with regard to the exclusive jurisdiction of the Constitution Court: unconstitutional statutes are valid and, thus, binding on the executive and ordinary courts, unless and until they have been abrogated *ex nunc* by the Constitutional Court (article 136 Constitution). In Germany, in light of the terrible experience of the Third Reich, and the new paramount position of the Constitution in the succeeding legal system, a series of scholars in the 1950s and 60s, amongst whom, most prominently, Otto Bachof,[[224]](#footnote-225) concluded that, in a certain cases, all administrative authorities had the right, and even the obligation, to analyse the lawfulness of post-constitutional statutes and regulations (*Prüfungskompetenz der Behörden*) and, if they were convinced of the inconstancy with a higher norm (Constitution, federal law, etc.), to set aside the contested norm (*Verwerfungskompetenz der Behörden*). Bachof put it in a nutshell: after the dramatic abuses of power under Hitler, the former German tradition of civil servants duty of obedience must be transformed with regard to the new responsibility of administrative authorities towards law, especially the Constitution.[[225]](#footnote-226) Yet, this thesis was not uncontroversial, even in post-war Germany. Some scholars totally rejected it. Others acknowledged such competence to disregard unlawful norms, but only for lower norms in certain circumstances. Still others argued, with respect to statutes in particular, that inferior administrative organs could only submit their doubts to the government. Inside the executive, the government is the only organ entitled to (and, in this kind of matter, is only entitled to) petition the Constitutional Court (of the Federation or of the Land) for a final determination. In this very vivid debate, which is still going on, most scholars refer to the same norms: the constitutional principles of *Rechtsstaat*, democracy, and separation of powers (article 20 *Grundgesetz*); the directly binding nature of fundamental rights (article 1 para 3 *Grundgesetz*); the subordination of the executive to ‘law and justice’ (article 20 para 3 *Grundgesetz*); the principle of legal security; the jurisdiction of the *Bundesverfassungsgericht* (article 100 para 1 *Grundgesetz*); article 93 para 1 no 2 *Grundgesetz* in conjunction with section 76 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*); the traditional German solution of the ex-tunc nullity of any unlawful general norm, etc. But, they attach slightly different meanings to them. Section 63 of the 2009 Federal Civil Service Act (*Bundesbeamtengesetz*) which discharges Federal civil servants from their obedience to superiors whenever the order infringes human dignity (article 1 *Grundgesetz*) or violates an obvious criminal standard, is only mentioned at the margin. Today, however, the old thesis of Bachof, which is quite unusual compared to most legal traditions in Europe, seems to be declining in Germany. It has been abandoned by almost all scholars with regard to unlawful statutes, passed by the Federation or a *Land*. Concerning regulations, the question is uncertain and controversial: administrative courts have admitted it, but only under very strict conditions in the field of urban planning. A certain, and to some extent paradoxical,[[226]](#footnote-227) ‘normalisation’ of Germany is on its way.

Indeed, in most European countries, the opposite thesis, supported and conveyed by national legal traditions, prevails. Finland, although quite near to it in matters of judicial constitutional review, has not adopted Sweden’s original solution on this point.[[227]](#footnote-228) Moreover, the Swiss approach seems to have been completely ignored abroad. The German debate has attracted a certain international audience (for example, in Switzerland, Portugal, and Austria); yet, in most cases it has not triggered a legal change. In Austria, the issue has been discussed by scholars since the early twentieth century, in the context of the Vienna School of Normativism. On the level of the general theory of law, Kelsen, Merkl, and many of their disciples argued that, unless the positive law contained a different rule, the concept of the hierarchy of norms logically implies that any norm inconsistent with a higher norm is void from the beginning (ex tunc). Such nullity could be taken into account by any state organ (e.g., ministers, civil servants, and judges) or by any member of the society.[[228]](#footnote-229) Yet, even on this theoretical premise, Ludwig Adamovich famously argued that, in contrast to courts and ministers, inferior administrative organs would not be able to contest the validity of a statute, a regulation, or an order, due to their subordination to government. When promulgating a statute or a regulation, the head of state and/or the government affirms, at the same moment, the constitutionality of those norms, which statement would be binding on all inferior organs and officials.[[229]](#footnote-230) In the eyes of Kelsen, even if the text of a Constitution was silent, the intent of a democratic constituent power to exclude such a review by civil servants was ‘obvious’, if at the same time ordinary courts were prohibited from exercising any judicial review.[[230]](#footnote-231) Regarding the current positive law of Austria,[[231]](#footnote-232) the first crucial element mentioned by Austrian scholars is the fact that irregular statutes or regulations are not *per se* void, but only voidable, and this can occur only upon a decision of the Constitutional Court abrogating the norm from then on (articles 139 and 140 Federal Constitutional Law of1920(*Bundes-Verfassungsgesetz*)). If the government has doubts about the consistency of any such any norm, it may only provoke its abrogation by its author or file a petition with the Constitutional Court. Civil servants may submit questions on the validity of a general norm to their superior, but they may/must only refuse to obey an order if the author of the latter has no jurisdiction or if the order infringes criminal law (article 20 para 1 *Bundes-Verfassungsgesetz* 1920). The only debate in Austria refers to the question of whether, like courts (article 89 *Bundes-Verfassungsgesetz* 1920), administrative authorities may refuse to obey statutes or regulations that have not been ‘duly published’, the latter term being understood quite broadly. According to the dominant ‘obedience thesis’ (*Gehorsamsthese*), the administration may not; but, this is contested by some scholars.[[232]](#footnote-233)

In Belgium, the Council of State and the civil courts rejected claims that administrative authorities would be entitled, on their own initiative in a concrete case, to ignore statutes, regulations, or orders from a superior organ even if they believe them to be unlawful.[[233]](#footnote-234) In this context, it should be noted that, in contrast to Italy, Austria, and many other countries, the Constitutional Court of Belgium, in the context of an abstract review (‘*recours en annulation*’), is empowered to annul *ex tunc* unconstitutional statutes passed by the federation or the regions and communities. This rule has had no (major) impact on the present matter, as most lawyers seem[[234]](#footnote-235) to think that the Court would not simply ‘declare’ or ‘discover’, as any other state organ, a pre-existing nullity, but is the only state organ empowered to decide the retroactivity of an annulment of a statute.[[235]](#footnote-236) In its decision of 21 December 2007 in a tort litigation, the Court of cassation held that the federal customs department committed no fault when applying a contested federal statute, as long as the Constitutional Court’s decision on the unconstitutionality of the statute had not been published in the official law gazette. In the eyes of the highest civil court, it was ‘obvious’ that ‘the customs department had no mission whatsoever to review the constitutionality of statutes’.[[236]](#footnote-237) This decision was not uncontroversial. In his report to the Court of cassation, the advocate general, Thierry Werquin, had defended the point of view that administrative authorities had, even before a decision was delivered by the Constitutional Court, an obligation to take into consideration whether or not their action could be qualified as a fault, with regard to the Constitution.[[237]](#footnote-238) In his comment, David Renders[[238]](#footnote-239) analysed the issue from a different point of view, by referring to the civil servants’ obligation to obey orders of their superiors unless the order is ‘manifestly unlawful’.

In many other countries, the issue is not even discussed. In the legal systems of the United Kingdom (regarding Acts of the Westminster Parliament), the Netherlands,[[239]](#footnote-240) France, Spain, Hungary, Luxembourg,[[240]](#footnote-241) etc., the existence of such a review, whether concrete or abstract, seems inconceivable, given the traditional understanding of the absolute binding nature of statutes on the executive and the judiciary. In France, according to the general understanding of the initial text of the 1958 Constitution, once a statute had been promulgated by the head of state, its validity with regard to the Constitution could not be questioned any more. At the time, the *Conseil constitutionnel* could only be seized prior to promulgation. In the eyes of most observers and practitioners, the traditional strict subordination of ordinary courts and, *a fortiori*, of the executive to enacted parliamentary statutes[[241]](#footnote-242) was maintained as a principle, in 1958.[[242]](#footnote-243) It only suffered a few exceptions, *inter alia* article 37 para 2 Constitution and, since 2008, article 61-1 Constitution. Yet, in any of those procedures, a decision by the Constitutional Council is necessary to ‘unbind’ the judiciary or the executive from their duty to obey statutes. This is illustrated particularly by article 37 para 2 Constitution: even if the government is strongly convinced that a statute infringes its own autonomous regulatory competence as defined by articles 34 and 37 Constitution, it may not simply disregard it *proprio motu* and adopt a regulation contradicting the statute. It has to submit the question to the Constitutional Council.

Lastly, it should be emphasized that European integration, specifically the case law of the Court of Justice of the EU, has triggered a radical change of perspective for most Member States. Guided by its desire to strengthen, as much as possible, the primacy of EU law and its own exclusive jurisdiction, the European Court of Justice has adopted a dual solution on this issue. The first rule, which is in line with the traditions of most European countries, concerns EU secondary law: no administrative organ whatsoever, be it an administrative authority of a Member State or, even, of the EU, has the right to refuse to apply, in a concrete case or in general, a norm pertaining to EU secondary law in case of inconsistency with a higher norm (especially the EU treaties). On the contrary, if the contested norm is part of national law and infringes any EU norm, all national administrations are obliged, *proprio motu*, and without needing to refer the question to any national (Constitutional) court—a referral to the European Court of Justice is, from the outset, legally impossible—to refuse to apply such national norm in a concrete case in order to give full effect to EU law.[[243]](#footnote-244) This solution is quite revolutionary. It is so with regard to the tradition of most unitary States, except Sweden. It is even unusual inside Federal States.[[244]](#footnote-245) For the future, one may wonder whether this EU solution will have a spill-over effect on national solutions with regard to inconsistencies with national Constitutions.

### h) Courts (Constitutional Courts and/or Administrative Courts) as Guardians of the Constitution

In all European countries today, courts play a growing role in the process of constitutionalizing law, especially administrative law. However, the degree to which courts actually usethe Constitution fluctuates greatly. For purposes of this study, this rich subject must be reduced to just two issues.

The first issue concerns the courts’ *jurisdiction in constitutional adjudication*. The extent to which the Constitution is entrusted to courts varies. Although the trend is towards increasing the courts’ jurisdiction over the Constitution—the avant-garde being Germany—certain barriers, which partially resonate with a fear of a ‘*gouvernement des juges*’ (government of judges), remain. In some countries, no court (neither the ordinary courts nor even the constitutional court, if one exists) is entitled to annul or disregard certain statutes.[[245]](#footnote-246) Courts may, perhaps, openly express a constitutional critique of such statutes (e.g., in Switzerland and in the United Kingdom, which uses the statement of incompatibility), but they are not empowered to question their validity. As a result, an administrative decision or a regulation grounded on an unconstitutional statute is immune to any constitutional review.[[246]](#footnote-247)

Other countries that lack a constitutional court but in which all ordinary courts (civil, criminal, and administrative) are given the right of constitutional review, offer a highly varied picture. While the ordinary courts in some of these countries only rarely or timidly use the Constitution (e.g., Sweden, Denmark, Finland, Greece, and outside Europe, Japan), the courts in other such countries have fully embraced the tool (e.g., Norway, Switzerland,[[247]](#footnote-248) and outside Europe, the United States of America). It comes down to the extent to which judges, who are tasked with a more technical and laborious legal matter: (a) show interest in constitutional matters (judicial will to consider the Constitution), (b) have the necessary skills and tools to undertake such a review,[[248]](#footnote-249) and (c) view themselves as qualified to legitimately undertake this delicate function (see, e.g., the contrast between, on the one hand, Norway and, on the other hand, other Nordic countries). The institutional, political, and intellectual context of the country, the personality of judges, as well as external influences, such as the role of the ECHR, play an important role. Depending on the circumstances, constitutional law is either deeply embedded in administrative law adjudication or its potential remains untapped.

In countries in which a special constitutional court has been established in order to adjudicate all or at least the most important constitutional disputes (e.g., Germany, Austria, Italy, France, Spain, Portugal, Belgium, Luxembourg, Eastern and Central Europe), it generally takes an important, even dominant, role in constitutionalization. It falls to this specialized court—rather than ordinary courts that may be tempted to shield ‘their’ venerable branch of law from external influences or may be very reluctant to act in constitutional matters—to set new trends. Thus, the Constitutional Courts in Italy and Spain have, from their first decisions and despite the resistance of their respective ordinary courts, reiterated the self-executing nature of fundamental rights.[[249]](#footnote-250) In France, the otherwise-rather-reserved *Conseil constitutionnel,* by its famous decision of 16 July 1971 *Freedom of association*, incorporated the Human Rights Declaration of 1789 into the French Constitution. In Germany, the Federal Constitutional Court is viewed as the central actor driving the constitutionalization process. In this context, however, it is important not to lose sight of country-specific differences. Significant differences are found in both the institutional design of constitutional courts as well as in cultural backgrounds (with a particular contrast arising from the difference of judicial activism versus judicial self-restraint[[250]](#footnote-251)). It is, furthermore, important not to create a caricature through a Manichaean comparison between constitutional judges loyal to the Constitution, on the one hand, and ordinary judges loyal to ordinary law, on the other. The latter are not a homogeneous group and some of these courts have been an impetus to constitutional judicature.[[251]](#footnote-252) So, the picture is muddled and complex.

The second issue, related to the impact, through the courts, of the Constitution, concerns the *relationship* between the constitutional court and the highest administrative court. Is the relationship between them one of peaceful, parallel coexistence? Of fruitful cooperation? Is there a hierarchy? Or, an open rivalry (in Spanish: *la* *guerra de las Cortes*)? This broad subject can only be touched upon briefly, limited to a single issue: the exercise of constitutional adjudication (i.e., the judicial interpretation and application of the Constitution).[[252]](#footnote-253) Four ideal types, in the sense of Max Weber, can point the way to a deeper analysis.

The first ideal type, theorised by the Vienna School on the basis of Austria’s legal history, is to strictly separate questions of legality (the consistency with ordinary, infra-constitutional law) and questions of constitutionality (the consistency with the Constitution), and to assign them to two different courts: the first to administrative courts, the second to the Constitutional Court.[[253]](#footnote-254) This model has been partly carried out in Austrian law. Under the *Bundes-Verfassungsgesetz* of 1920, and in its successive versions from 1920 through 2014,[[254]](#footnote-255) a complainant could, on the one hand, challenge an administrative decision before the Administrative Court of Justice as *illegal* (see article 129 *Bundes-Verfassungsgesetz*, especially as reformulated in 1946), while—in parallel—challenging the same act before the Constitutional Court as *unconstitutional* (article 144 *Bundes-Verfassungsgesetz*). If the contested administrative decision was declared illegal and unconstitutional, respectively, by the two courts, or if it was declared to be in conformance with both ordinary law and the Constitution, the parallel judicial decisions come to the same result. If, however, the administrative decision was declared legal but unconstitutional (or vice versa), it was invalid as a result of either one or the other court’s decision. This first ideal type is characterized by three features: (a) independent access: administrative courts do not control (‘filter’) access to the Constitutional Court (and vice versa); (b) the strict separation of the courts’ jurisdictions without any overlap: constitutional issues are concentrated in the hands of the Constitutional Court, which has a monopoly; and (c) the lack of hierarchy between the Constitutional Court and the highest administrative court: an appeal of the decision of the latter to the former with regard to constitutional issues does not exist because such review is, by definition, unnecessary. I propose to call this model the ‘double-track system’—with parallel judicial remedies for legality and constitutionality issues or ‘the monopolistic model of constitutional justice’.

In contrast to this first ideal type, the three following ideal types have in common that the jurisdiction to interpret and apply directly the Constitution (i.e., constitutional adjudication or ‘constitutional justice’) is shared by ordinary courts (civil, criminal, administrative, fiscal, etc.) and the Constitutional Court. The latter has no monopolistic position as the only (judicial) oracle or guardian of the Constitution. Besides dealing with the ordinary law of their specific legal branch, ordinary courts also mobilize, to some extent, the Constitution.[[255]](#footnote-256) This raises a question of internal coherence (do all these courts always attribute the same meaning to the constitutional text?) and, thus, of institutional ‘interplay’. The latter, very ambiguous term has been chosen voluntarily, as it may cover a variety of situations (ideal types no 2, 3, and 4).

The first approach (ideal type no 2), I propose to call it the ‘polycentric system of constitutional justice’. It is best illustrated by some specific features of the French legal system, which were particularly visible in the period before 2008. According to this ideal type, the highest ordinary courts are totally independent from the Constitutional Court. There is no hierarchical-institutional solution to abolish divergences between the interpretations of the Constitution by the various courts, due to the lack of an appeal from the ordinary courts’ judgments to the Constitutional Court. Nor are they interacting through cooperation. Inside the four corners of its own jurisdiction, every judge, including administrative judges, develops final (‘sovereign’) interpretations of the Constitution. Unity of constitutional interpretation may only come about either through a ‘dialogue of judges’ (whether such informal discussions take place depends entirely on each judge) or on the recognition, by the ordinary courts, of the legally binding force of constitutional interpretations issued by the Constitutional Court. Yet, in France, such a rule of precedent—called by scholars ‘*autorité de la chose interprétée*’—was and still is resolutely rejected by ordinary courts, whether civil or administrative.[[256]](#footnote-257) Thus, barring strategies[[257]](#footnote-258) and creative initiatives[[258]](#footnote-259) by such ordinary courts remain possible.

The second approach (ideal type no 3), which is, to some extent, an intermediate solution, could be called the ‘cooperative system of constitutional adjudication’. It is exemplified by the referral, by ordinary courts to the Constitutional Court, of preliminary questions on constitutional issues (the constitutionality of a norm[[259]](#footnote-260) or the interpretation of the Constitution).[[260]](#footnote-261) A certain vertical (hierarchical) logic inspires this model: the courts a quo are, under certain conditions, legally obliged to submit a question to the Constitutional Court; the decision of the latter is binding on the court a quo or even on all courts. However, this hierarchy does not take the strongest form of the Constitutional Court acting as the highest appeal court. If, notwithstanding its legal obligations, a court a quo happens to ignore the decision issued by the Constitutional Court,[[261]](#footnote-262) the latter has no means to annul the final decision of the former. It is valid, although unlawful. Furthermore, as mentioned, the legal obligation of the ordinary courts to refer certain issues to the Constitutional Court is limited by certain conditions (the criticisms have to be ‘serious’ or even ‘convincing’), conditions whose interpretation leaves a more-or-less breadth of discretionary power in the hands of ordinary courts. Thus, they may reject as unfounded constitutional criticisms that the Constitutional Court, in contrast, might have admitted.

The last ideal type (no 4), which might be called the ‘hierarchically-ordered’ or ‘pyramidal system of constitutional justice’, has been implemented in Germany, Spain, Portugal, and some other countries. In this model, unity in the interpretation of the Constitution is ensured by the legal system, which allows individuals to submit the final decision of the highest relevant ordinary court to the Constitutional Court, in order to rule on the constitutional issues at stake (the Constitutional Court is not allowed to rule on the ordinary law questions). This is the core of the Portuguese system, as established by articles 204 and 280 para 1 of the 1976 Constitution.[[262]](#footnote-263) In Germany and Spain, it is the indirect result of the special procedure of petition called ‘*Verfassungsbeschwerde’* (article 93 para 1, 4a *Grundgesetz*) or *recurso de amparo* (article 53 para 2 Constitution 1978) when applied to the decisions of the highest ordinary courts. Similar procedures also exist in Slovenia, the Czech Republic, Slovakia, Montenegro, Macedonia, and outside Europe in various Latin American countries. In this model, the ordinary courts are, with regard to only constitutional law matters, under the supervision and control of the Constitutional Court. The latter, however, is not a Supreme Court *stricto sensu*, as in the United States.

These four ideal types demonstrate the substantially different positions of administrative courts vis-à-vis the Constitution and the judicature of the Constitutional Court.

### i) *The Role of Scholars with Regard to Constitutionalization of Administrative Law*

Lastly, the outcome of constitutionalization of administrative law (I mainly refer here to the hypothesis of transformative constitutionalism) is determined by the attitude of legal academics. Given the abstractness of constitutional principles, it is a particular (albeit not the exclusive) role of scholars in administrative law and/or constitutional law (depending on whether both disciplines are institutionally linked or separated) to explore the possible meanings of a new Constitution and to expose in detail the necessary changes to ordinary administrative law that must occur. Their function is also to identify and, if appropriate, denounce delay strategies used by the legislature or the judiciary. Scientific research and educating future legal practitioners in the spirit of new constitutional requirements (keyword: generational change) help to stimulate and accelerate the dynamics of constitutionalization.[[263]](#footnote-264) But, academics can also hamper the process, by ignoring or diluting the substance of new constitutional guidelines.[[264]](#footnote-265) This may happen for various reasons, either ideological (i.e., scholars reject the new constitutional regime) or epistemological (i.e., instead of developing a legal-dogmatic discourse on the Constitution’s provisions, scholars prefer studying the Constitution exclusively from an historical, sociological, comparative, or theoretical perspective).

On a more abstract level, legal education and research also shape the legal culture, or mindset, of a country. Academic discourse about what is legally possible (conceivable) with regard to certain positive law materials, and how a practising lawyer should correctly think (legal theory and epistemology), impacts the identity of constitutional law and administrative law. In Sweden, Denmark, Finland, Austria (until the early 1980s), and France, the rather meagre results of constitutional judicature are, to a great extent, due to the dominance of Viennese- or Scandinavian-style positivism. The teachings of Hans Kelsen and Axel Hägerström[[265]](#footnote-266) ground themselves—at the epistemological level—on the premise of radical value relativism (moral noncognitivism). Through the interdependence of the Constitution and legal theory, and of legal theory and general philosophy, the width and depth of the topic ‘administrative law and constitutional law’ is once more revealed. Law is embedded in a cultural context, which affects it, and the existence of which must be brought, through a comparative law perspective, into the consciousness of lawyers.[[266]](#footnote-267) This is not contrary to the aim of European integration: ‘legal culture’ is not a sacred or immutable essence.[[267]](#footnote-268) Even ‘classic periods’ are not the end of the story. Legal cultures can radically change, if there are good arguments for it and a will to do so.

1. \* I would like to thank Suzanne Larsen (University of Luxembourg) for her help in translating this contribution. [↑](#footnote-ref-2)
2. On this research question, which will not be taken up here, see, for example, Tom Ginsburg, ‘Written constitutions and the administrative state: on the constitutional character of administrative law’, in [Susan Rose-Ackerman](http://www.e-elgar.com/search_results.lasso?Author_Name_grp=Susan%20Rose-Ackerman) and [Peter L Lindseth](http://www.e-elgar.com/search_results.lasso?Author_Name_grp=Peter%20L.%20Lindseth) (eds), *Comparative Administrative Law* (Elgar, Cheltenham, 2010) 117 ff. [↑](#footnote-ref-3)
3. In the framework of the project *Ius Publicum Europaeum*, the term ‘Europe’ is somewhat vague. The chosen legal systems include many (but not all) Member States of the European Union (EU) and also some (but not all) European States that are not members of the EU (e.g., Switzerland). This chapter is based on my study of the following countries (in the approximate order of my level of knowledge): France, Germany, the United Kingdom, Luxembourg, Switzerland, Austria, Belgium, Sweden, Spain, Finland, Greece, Italy, Poland, Hungary, the Netherlands, Portugal, Norway, Denmark, and Ireland. EU law is mentioned only at the margin. The classification of ‘legal families’ or ‘major types’ (see Michel Fromont, ‘A Typology of Administrative Law in Europe’, *in this volume* XXX, XXX (55)) will not be used here as it would be more harmful than helpful to the subject matter. See, already, the criticisms by Jean Rivero, ‘Réflexions sur l’étude comparée des sources des droits administratifs’, in René Cassin and others (eds), *Problèmes de droit public contemporain, Mélanges en l’honneur du professeur Michel Stassinopoulos* (LGDJ, Paris, 1974) 135. [↑](#footnote-ref-4)
4. This investigation will look back, for some countries which are particularly interesting, at the nineteenth and the twentieth century. [↑](#footnote-ref-5)
5. On the heuristic fertility of border cases, see Carl Schmitt, *Politische Theologie* (2nd edn, Duncker & Humblot, Berlin, 1934) 22, specifically the quote from Søren Kierkegaard: ‘*Die Ausnahme erklärt das Allgemeine und sich selbst. Und wenn man das Allgemeine richtig studieren will, braucht man sich nur nach einer wirklichen Ausnahme umzusehen. Sie legt alles viel deutlicher an den Tag als das Allgemeine selbst.*’ [‘The exception explains the general and itself and if one wants to study the universal, one has to look for a real exception. It makes everything much clearer than the general itself.’] [↑](#footnote-ref-6)
6. As to the influence of the substantive definition of ‘Constitution’ on the delimitation of constitutional courts’ jurisdiction, see Michel Fromont, *Justice constitutionnelle comparée* (Dalloz, Paris, 2013) 6 f; Luc Heuschling, ‘Justice constitutionnelle et justice ordinaire’, in Constance Grewe and others (eds), *La notion de justice constitutionnelle* (Dalloz, Paris, 2005) 103 ff. [↑](#footnote-ref-7)
7. Adolf Merkl, *Allgemeines Verwaltungsrecht* (first published 1927, reprint Verlag Österreich, Vienna, 1999) 79, 85; Ewald Wiederin, ‘Österreich’, *in this volume* XXX, XXX (§ 46 mn 21, 23 and 91). The classic distinction between private and public law was and is discarded in Austria under the influence of Kelsen’s criticisms. [↑](#footnote-ref-8)
8. Adolf Merkl, *Allgemeines Verwaltungsrecht* (n 6) 378 ff; see below D. 2. h). [↑](#footnote-ref-9)
9. For example, France, Germany, Switzerland, Ireland, Spain, Portugal, Greece, Italy, Belgium, Luxembourg, and Sweden. [↑](#footnote-ref-10)
10. Pierre Moor, *Droit administratif: Les fondements généraux,* vol 1 (2nd edn, Staempfli, Bern, 1994) 28 ff. The term *droit constitutionnel administrative* is already used in 1948 by the French constitutional law scholar Marcel Prélot, *Précis de droit constitutionnel* (Dalloz, Paris, 1948) 13. In Germany, since 2000, some authors use the expression *Verwaltungsverfassungsrecht*. See Ferdinand Wollenschläger, ‘Verfassung im Allgemeinen Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation?‘ (2016) 75 VVDStRL 195 ff. [↑](#footnote-ref-11)
11. See, for example, Georges Vedel, *Manuel élémentaire de droit constitutionnel* (Sirey, Paris, 1949) 3 ff; Gerard Hogan and David G Morgan, *Administrative Law in Ireland* (3rd edn, Round Hall Sweet & Maxwell, Dublin, 1998) 1 ff; [Maurice-André Flamme](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Maurice-Andr%C3%A9+Flamme%22), *Droit administratif*, vol 1 (Bruylant, Bruxelles, 1989) 4 ff and many contemporary Belgian textbooks. [↑](#footnote-ref-12)
12. Pieter de Haan and others, *Bestuursrecht in de sociale Rechtsstaat* (6th edn, Kluver, Deventer, 2010) 63; René Seerden and Daniëlle Wenders, ‘Administrative Law in the Netherlands’, in René Seerden (ed), *Administrative Law of the European Union, its Member States, and the US: A Comparative Analysis* (3rd edn, Intersentia, Cambridge, 2012) 101; Remco Nehmelman, ‘Niederlande’, in Armin von Bogdandy, Pedró Cruz Villalón and Peter M Huber (eds)*, IPE II* (CF Müller, Heidelberg, 2008) 624; Henk Kummeling and others, *Het* *bestuursrecht als agenda voor het staatsrecht* (Tjeenk Willink, Deventer, 1999); Adriaan Koelma and Roelof Kranenburg, *De verhouding van staatsrecht en administratief recht* (Tjeenk Willink, Haarlem, 1940). [↑](#footnote-ref-13)
13. Despite some differences, Scottish public law is strongly influenced by English law, both in administrative and constitutional law. See Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (Avizandum, Edinburgh, 2006); see further [Anthony W](https://www.google.com/search?sa=N&biw=1477&bih=771&tbm=bks&q=inauthor:%22Anthony+Wilfred+Bradley%22&ei=2b0zVP-nOuu8ygPspoC4DQ&ved=0CGwQ9AgwDzgK) Bradley and Chris Hinsworth, ‘Administrative Law’, in The Law Society of Scotland (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 1 (London, LexisNexis, 1987) 59 ff; Mungo Deans, *Scots Public Law* (T & T Clark, Edinburgh, 1995); Valerie Finch and Christina Ashton, *Administrative Law in Scotland* (W. Green, Sweet & Maxwell, Edinburgh, 1997); Jean McFadden and Dale McFadzean, *Scottish Administrative Law* (Edinburgh University Press, Edinburgh, 2006); Christopher Himsworth and Christina O’Neill, *Scotland’s Constitution: Law and Practice* (2nd edn, Bloomsbury Professional, Hayward’s Heath, 2009). Thus, references to Scottish practice are only necessary if there are relevant differences. Northern Ireland’s administrative law similarities to English law are even stronger. [↑](#footnote-ref-14)
14. Frederic J Port, *Administrative Law* (Longmans Green, London, 1929) 6; William Wade, *Administrative Law* (Clarendon, Oxford, 1961) 3; Stanley A de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin, London, 1998) 503. Other pioneers were William Robson, Cecil Thomas Carr, John Aneurin Grey Griffith and Harry Street. [↑](#footnote-ref-15)
15. William Wade and Christopher F Forsyth, *Administrative Law* (10th edn, OUP, Oxford, 2009) 8: ‘Constitutional law and administrative law are subjects which interlock closely and overlap extensively.’ [↑](#footnote-ref-16)
16. See the redefinition of the boundaries in Peter Cane’s fifth edition of this textbook on *Administrative Law* (OUP, Oxford, 2011) v, part I and II, in contrast to his 4th edition, chapter 1 (OUP, Oxford, 2004). [↑](#footnote-ref-17)
17. [John A G Griffith](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22John+Aneurin+Grey+Griffith%22) and [Harry Street](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Harry+Street%22), *Principles of administrative law* (2nd edn, Pitman, London, 1957) 3; Owen H Phillips and Paul Jackson, *Constitutional and Administrative Law* (7th edn, Sweet & Maxwell, London, 1987) 10, 31. [↑](#footnote-ref-18)
18. According to Wade’s influential definition, the focus of ‘administrative law’ lies with judicial remedies and administrative procedural law (e.g., judicial review). See William Wade and Christopher F Forsyth, *Administrative Law* (n 14) 4 ff; Mark Elliott,*Beatson, Matthews and Elliot**’s Administrative Law: Text and Materials* (4th edn, OUP, Oxford, 2011); Peter Cane, *Administrative Law* (n 15) 1 ff. Questions regarding the organization of administrative authorities are supposed to be dealt with by scholars of constitutional law. On the contrary, the latter topic is included in the province of administrative law by Cane in the 5th edition of his textbook: administrative law is supposed to focus primarily on the executive, whereas constitutional law deals with all three functions of the State. See Peter Cane, *Administrative Law,* 5th edn (n 15) 3 f. The criterion used by Stanley A de Smith and Rodney Brazier, *Constitutional and Administrative Law* (n 13) 503, is the distinction between legislation and implementation. For Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell, London, 2012), however, the scope of administrative law is much broader and the transition to constitutional law and political theory is very fluid. [↑](#footnote-ref-19)
19. For example, David Feldman (ed), *English Public Law* (2nd edn, OUP, Oxford, 2009); Andrew Le Sueur, Maurice Sunkin and Jo Murkens, *Public Law* (2nd edn, OUP, Oxford, 2013); John F McEldowney, *Public Law* (3rd edn, Sweet & Maxwell, London, 2002); Martin Loughlin, *Foundations of Public Law* (OUP, Oxford, 2010). [↑](#footnote-ref-20)
20. Peter Cane, *Administrative Law*, 5th edn (n 15) 3. [↑](#footnote-ref-21)
21. See Aidan O’Neill’s analysis in the contribution ‘Parliamentary Sovereignty and the Judicial Review of Legislation’, in Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (n 12) 197, 198 ff, with the following quote from Lord Donald Nicholls: ‘In all cases development of the common law, as a response to changed conditions, does not come like a bolt out of a clear sky. Invariably the clouds gather first, often from different quarters, indicating with increasing obviousness what is coming […]’ at page 200. [↑](#footnote-ref-22)
22. Fritz Werner, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (1959) 74 DVBl 527. [↑](#footnote-ref-23)
23. Georges Vedel, ‘L’unité du droit. Aspects généraux et théoriques’, in Jean Bernard Auby and others (eds), *L’Unité du Droit.* *Mélanges en hommage à Roland Drago* (Economica, Paris, 1996) 8. See also Georges Vedel, ‘Preface’, in Bernard Stirn, *Les sources constitutionnelles du droit administratif* (3rd edn, LGDJ, Paris, 1999), reprinted in the 8th edn (LGDJ, Paris, 2014) 7. The English phrase ‘administratization of constitutional law’ seems to be used, for the first time, by Moshe Cohen-Eliya, and Iddo Porat, *Proportionality and Constitutional Culture* (CUP, Cambridge, 2013) 129 f. [↑](#footnote-ref-24)
24. This qualification (‘*geflügelte Wörter*’) is commonly used by German scholars when quoting the famous dictum of Otto Mayer. [↑](#footnote-ref-25)
25. Add private law to this and it becomes a ‘Three World Thesis’. The distinction is, at a minimum, still latently present in current literature. [↑](#footnote-ref-26)
26. In contrast, all major Spanish legal academics of the nineteenth and twentieth century paid at least lip service to the classic theory of the constitutional foundations of administrative law. On this issue, see Alfredo Gallego Anabitarte, *Formación y enseñanza del derecho público en España (1769–2000). Un ensayo crítico* (Pons, Madrid, 2002); see below D. [↑](#footnote-ref-27)
27. Otto Mayer, *Theorie des französischen Verwaltungsrechts* (Trübner, Strasbourg, 1886) 3; Otto Mayer, *Droit administratif allemand*, vol 1 (Giard & Brière, Paris, 1903) 86. [↑](#footnote-ref-28)
28. Théophile Ducrocq, *Cours de droit administratif* (4th edn, Ernest Thorin, Paris, 1874) 5 [= 5th edn, Ernest Thorin, Paris, 1877, 13]. [↑](#footnote-ref-29)
29. This interpretation of the French history was already hinted at by Alexis de Tocqueville. In his famous work *L’Ancien Régime et la Révolution* (chapter 7, *in fine*), he stated: ‘*Depuis [17]89, la constitution administrative est toujours restée debout au milieu des ruines des constitutions politiques.*’ It was later systematized by Georges Vedel, ‘Discontinuité du droit constitutionnel et continuité du droit administratif: le rôle du juge’ in *Mélanges offerts à Marcel Waline: le juge et le droit public*, vol 2 (LGDJ, Paris, 1974) 777 ff. Yet it was not as self-evident as Mayer claimed. Today, French legal historians reject the soundness of this view. See Grégoire Bigot, *Introduction historique au droit admininstratif depuis 1789* (PUF, Paris, 2002) 356. The thesis of the stability of administrative law was already criticized in the nineteenth century. See Anselme Batbie, *Traité théorique et pratique du droit public et administrative*, vol 2 (2nd edn, Cotillon, Paris, 1885) v: ‘A revolution [1870] has overturned the political institutions, but it is hard to imagine that a change of constitutional law would not impact administrative law’. See also Adèle G D Bouchené-Lefer, *Principes et notions élémentaires du droit public-administratif* (Cosse et Marchal, Paris, 1862) 40 ff, who showed that, despite the upheavals, a certain continuity in the constitutional foundations of administrative law existed. [↑](#footnote-ref-30)
30. Andreas Auer, ‘Droit constitutionnel et droit administratif’, in Jean-François Aubert (ed), *Mélanges André Grisel* (Ides et Calendes, Neuchâtel, 1983) 23, referring to Jean Étienne Marie Portalis, *Discours préliminaire du premier projet du Code civil*, 1801 (‘*Le droit public passe, le droit privé demeure*.’) [↑](#footnote-ref-31)
31. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol 3 (CH Beck, Munich, 1999) 203 f. [↑](#footnote-ref-32)
32. *Locus classicus*: Otto Bachof, ‘Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung’, in Wolfgang Martens and others, ‘Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung’ (1972) VVDStRL 30 204 ff. [↑](#footnote-ref-33)
33. Otto Bachof, ‘Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung’ (n 31) 204. For an even stronger opinion, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30) 203 (‘extraordinarily biased reductionist’). [↑](#footnote-ref-34)
34. Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker & Humblot, Berlin, 1895) 3. [↑](#footnote-ref-35)
35. Karl J Partsch, *Verfassungsprinzipien und Verwaltungsinstitutionen* (Mohr, Tübingen, 1958) 8, and the response of Hermann Reuß, ‘Die Wirkungseinheit von Verwaltungs- und Verfassungsrecht’ (1959) 12 DÖV 321. [↑](#footnote-ref-36)
36. See, for example, Dirk Ehlers, ‘Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat’, in Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (15th edn, de Gruyter, Berlin, 2016) 239. [↑](#footnote-ref-37)
37. Same criticism by Christoph Schönberger, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’, in Michael Stolleis (ed), *Das Bonner Grundgesetz* (BWV, Berlin, 2006) 59. [↑](#footnote-ref-38)
38. Andreas Auer, ‘Droit constitutionnel et droit administratif’, (n 29) 22 ff. For a certain continuity in French administrative law before and after 1870, see Patrice Chrétien, ‘Frankreich’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE IV* (CF Müller, Heidelberg, 2011) 91. Similarly, for Spain before and after 1978, see Juan A Santamaría Pastor, ‘Spanien’, in ibid 350 f and Eduardo García de Enterría and Ignacio Borrajo Iniesta, ‘Spain’, *in this* volume, XXX, XXX. For Poland before and after 1989, see Andrzej Wróbel, ‘Polen’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE III* (C.F. Müller, Heidelberg, 2010) 255. [↑](#footnote-ref-39)
39. To the radical decomposition of constitutional law under the Third Reich corresponds the radical weakening of administrative law. See the unequivocal statements made by Walther Summer, an official of the NSDAP and first president of the Administrative Court of the Reich that Hitler established in 1942: ‘A healthy administration has nothing to do with paragraphs’ and ‘[t]he less administrative law, the more space for the art of administration’, quoted by Michael Stolleis, *Recht im Unrecht* (Suhrkamp, Frankfurt am Main, 1994) 155, 165. On the former Eastern bloc, see Herbert Küpper, ‘Hungary’, *in this volume* XXX, XXX (§ 51 mn 60 ff) and Andrzej Wróbel, ‘Polen’ (n 37) 247. [↑](#footnote-ref-40)
40. Jörn Ipsen, *Der Staat der Mitte: Verfassungsgeschichte der Bundesrepublik Deutschland* (CH Beck, Munich, 2010) 320; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol 4 (CH Beck, Munich, 2012) 226 ff, 247 ff. [↑](#footnote-ref-41)
41. See, for example, the use of Mayer’s dictum in Portugal by Marcelo Rebelo de Sousa and André Salgado de Matos, *Direito Administrativo Geral*, vol 1 (3rd edn, Dom Quixote, Lisbon, 2004) 74. [↑](#footnote-ref-42)
42. See Mayer’s quotation above n 26. More recently, Matthias Ruffert, ‘Die Methodik der Verwaltungsrechtswissenschaft’, in Eberhard Schmidt-Assmann and Wolfgang Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (Nomos, Baden-Baden, 2004) 179. [↑](#footnote-ref-43)
43. Even today the *Conseil d’Etat*, both as a State organ and as a ‘*corps de fonctionnaires*’, combines a variety of functions. (a) It is an advisor to the executive in all areas of law, including private law, European law, and constitutional law. It is considered as an expert of the entire legal system (see arts 38 and 39 of the 1958 Constitution). In 1958, it was also the *Conseil d’État* that assisted Charles de Gaulle’s government during the drafting of the new Constitution. Thus, if compared to the *Conseil constitutionnel* or legal scholars, the *Conseil d’Etat* may claim that it is in the best position to know the intent of the writers (some scholars would say, the ‘authors’) of the 1958 Constitution. (b) A large number of members of the *Conseil d’État* occupy high positions in the ministries and administrations. (c) The *Conseil d’Etat* is the highest administrative court in France. (d) It has functions similar to the legislature: the core elements of French administrative law were set up through judicial precedents of the *Conseil d’Etat*; it is the intellectual author of the statutes passed in recent years on judicial remedies in administrative law. (e) Traditionally, members of the *Conseil d’Etat* have been present in the *Conseil constitutionnel* (see below, at n 199) and it is now common practice to appoint members of the *Conseil d’Etat* to European courts (e.g., the Court of Justice of the European Union, the European Court of Human Rights). (f) Various members of the *Conseil d’État* are actively involved in the academic training of elites (e.g., at several ‘*grandes écoles*’, such as Science Po Paris and the École Nationale d’Administration (ENA), and at law faculties) as well as in scientific research in the field of administrative law and, more generally, public law. Through all these channels, the *Conseil d’Etat* is able to develop its own constitutional discourse. [↑](#footnote-ref-44)
44. Jacques Chevallier, ‘Le droit administratif entre science administrative et droit constitutionnel’, in CURAPP (ed), *Le droit administratif en mutation* (Presses Universitaire de France, Paris, 1993) 11 ff; Luc Heuschling, ‘Frankreich’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE II* (n 11) 494 f. This particular situation of France may be sharply contrasted with the general outline given by Tom Ginsburg, ‘Written constitutions and the administrative state’ (n 1) 117: ‘Administrative law is the poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law.’ [↑](#footnote-ref-45)
45. Louis Favoreu, ‘Droit administratif et normes constitutionnelles: quelques réflexions trente ans après’, in *Mélanges Franck Moderne: Mouvement du droit public* (Dalloz, Paris, 2004) 649, 656. [↑](#footnote-ref-46)
46. Since the ninth edition (1995), however, the title has been: ‘The junction [*jonction*] with constitutional law’ (own translation). [↑](#footnote-ref-47)
47. For this and all subsequent quotations, see René Chapus, *Droit administratif général*, vol 1 (Montchrestien, Paris, 1985) 12 and 71 f. [↑](#footnote-ref-48)
48. Georges Vedel, ‘Discontinuité du droit constitutionnel et continuité du droit administratif’ (n 28). The reference is however misleading. In this article, Vedel indeed spoke of administrative law’s ‘very great indifference’ on constitutional law (777, translation), or ‘very great independence’ from constitutional law (779, translation). Yet, on several occasions in this paper, he also stressed administrative law’s dependence on the Constitution. [↑](#footnote-ref-49)
49. Georges Vedel, ‘Rapport de synthèse’, in Association française des constitutionnalistes (ed), *La continuité constitutionnelle en France de 1789 à 1989* (Presses Universitaires d’Aix-Marseille, Aix-en-Provence, 1990) 178. [↑](#footnote-ref-50)
50. It is noteworthy that in his famous essay ‘Les bases constitutionnelles du droit administratif’, which appeared precisely during that time period—in (1954) 8 Études et documents du Conseil d’État (Imprimerie Nationale, Paris) 21 ff—Vedel did not mention the Two World Thesis, although it would have made the ideal opponent to his own view. Nor did the thesis appear in Charles Eisenmann’s harsh criticism of Vedel’s article. As a disciple of Kelsen, Eisenmann acknowledged the possibility of constitutional sources for administrative law. What he disputed was the method Vedel used to find, in the constitutional text, legal norms that Eisenmann strongly believed were not in it. See Charles Eisenmann, ‘La théorie des ‘bases constitutionnelles du droit administratif’’ (1972) RDP 1345 ff; Georges Vedel, ‘Les bases constitutionnelles du droit administratif’, in Paul Amselek (ed), *La pensée de Charles Eisenmann* (Economica, Paris, 1986) 133 ff; Emmanuel Breen, ‘Le doyen Vedel et Charles Eisenmann: une controverse sur les fondements du droit administratif’ (2002) Rfda 234 ff; Pierre Delvolvé, ‘L’actualité de la théorie des bases constitutionnelles du droit administratif’ (2014) Rfda 1211 ff. [↑](#footnote-ref-51)
51. See Louis Favoreu, ‘Dualité ou unité d’ordre juridique: Conseil constitutionnel et Conseil d’État participent-ils de deux ordres juridiques différents?’, in Université Panthéon-Assas (ed), *Conseil constitutionnel et Conseil d’État* (LGDJ, Paris, 1988) 145 ff. [↑](#footnote-ref-52)
52. See Part 1 of his textbook ‘The legal sources of administrative law’ in which the Constitution is discussed first. The sheer number of pages dedicated to it (over 20 pages) attests to its importance. [↑](#footnote-ref-53)
53. See Théophile Ducrocq, *Cours de droit administratif* (n 27), with further references; Louis Cabantous, *Répétitions écrites sur le droit administratif* (revised by Jules Liégeois, 5th edn, Marescq Ainé, Paris, 1873) 1 ff. [↑](#footnote-ref-54)
54. François Boeuf, *Résumé de répétitions écrites sur le droit administratif* (8th edn, Dauvin, Paris, 1883) IV. [↑](#footnote-ref-55)
55. See Léon Duguit, *Traité de droit constitutionnel*, vol 1 (3rd edn, Boccard, Paris, 1927) 680 ff and 702 ff. See also Olivier Jouanjan, ‘La Constitution’, in [Pascale Gonod](http://www.editions-dalloz.fr/catalogsearch/result/?q=Gonod), [Fabrice Melleray](http://www.editions-dalloz.fr/catalogsearch/result/?q=Melleray), and [Philippe Yolka](http://www.editions-dalloz.fr/catalogsearch/result/?q=Yolka) (eds), *Traité de droit administratif*, vol 1 (Dalloz, Paris, 2011) 388 ff and Oliver Beaud, ‘L’Etat’, in ibid 214 ff. [↑](#footnote-ref-56)
56. For some comparative empirical data on the length of constitutional texts, see Luc Heuschling, ‘La Constitution formelle’, in Michel Troper and Dominique Chagnollaud (eds), *Traité international de droit constitutionnel*, vol 1 (Dalloz, Paris, 2012) 290 ff. [↑](#footnote-ref-57)
57. Implicitly in art 3 of the Constitutional Act of 25 February 1875. [↑](#footnote-ref-58)
58. *Conseil d’Etat*, 28.06.1918, *Heyriès* (recognizing to the government the power of suspending laws during World War One) and *Conseil d’État*, 08.08.1919, *Labonne* (recognizing the President’s autonomous rule-making powers). Both decisions are based by the Council of State on art 3 of the Constitutional Act of 25 February 1875. [↑](#footnote-ref-59)
59. Henry Berthélemy, *Traité élémentaire de droit administratif* (9th edn, Rousseau, Paris, 1920) 9; Raymond Carré de Malberg, *Contribution à la théorie générale de l'État*, vol 1 (Sirey, Paris, 1920) 474 ff (‘The constitutional concept of administrative function’). [↑](#footnote-ref-60)
60. See below D. [↑](#footnote-ref-61)
61. Grégoire Bigot, ‘Les bases constitutionnelles du droit administratif avant 1875’ (2003) Rfda 218 ff. [↑](#footnote-ref-62)
62. See n 4. [↑](#footnote-ref-63)
63. Frequently, however, ordinary courts have been, and continue to be, prohibited from determining the constitutionality of some or all statutes. For example, in France (Constitutions of 1791 and 1793; the case law of the *Conseil d’Etat*, 11 June 1936, *Arrighi*, on the doctrine of the ‘Loi-écran’ [the screen function of statutes]), in the United Kingdom (the principle of parliamentary sovereignty), in Germany (in the nineteenth century; today, art 100 para 1 of the *Grundgesetz*), in Poland (art 81 Constitution 1921), in Finland (from 1919 until 2000), in Belgium (from 1831 to date), in the Netherlands (since 1848, now art 120 *Grondwet*), in Luxembourg (from 1841 to date), in Austria (in the past art 7 of the 1867 *Grundgesetz* on Judicial power, today art 89 para 1 of the *Bundes-Verfassungsgesetz* of 1920), in Switzerland (art 113 of the Constitution of 1874, art 190 of the Federal Constitution of 1999). In some rare cases, judges were even prohibited from reviewing regulations issued by the executive (see art 106 of the Prussian Constitution of 1850). [↑](#footnote-ref-64)
64. Examples, England (*Dr. Bonham’s Case*, 1610), Greece, Norway (since the 1890s), Canton of Geneva (since 1890), France (during the Second Republic) and Germany (during the Weimar Republic). [↑](#footnote-ref-65)
65. For France, see Francine Batailler, *Le Conseil d’Etat, juge constitutionnel* (Pichon & Durand-Auzias, Paris, 1966); Bruno Genevois, ‘Le Conseil d’Etat et l’application de la Constitution’, in Guillaume Drago (ed), *L’application de la Constitution par les cours suprêmes* (Dalloz, Paris, 2007) 31 ff. For the jurisprudence of the Dutch Hoge Raad, see Leonard Besselink, ‘Niederlande’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE I* (CF Müller, Heidelberg, 2007) 357. In Finland (art 92 para 2 of the 1919 Instrument of Government) and Belgium, it seems that this possible mobilization of the Constitution by courts in judicial review of administrative acts had not given rise to a large use. See Dominique Caccamisi and Gautier Pijcke, ‘La constitutionnalisation du droit. Etude d’un bouleversement de perspective (accompli)’, in Marc Verdussen and Nicolas Bonbled (eds), *Les droits constitutionnels en Belgique*, vol 1 (Bruylant, Bruxelles, 2011) 450, 477 f; Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, ‘Rights-based constitutionalism in Finland and the development of pluralist constitutional review’ (2011) 9 ICON 511. [↑](#footnote-ref-66)
66. See Michel Fromont, *Justice constitutionnelle comparée* (n 5); Luc Heuschling, ‘Justice constitutionnelle et justice ordinaire’ (n 5) 103 ff. [↑](#footnote-ref-67)
67. See Benjamin Schindler, ‘Switzerland’, *in this volume*, XXX, XXX (§ 49 mn 10, 12 ff, 19, and 25 ff). [↑](#footnote-ref-68)
68. Art 113 para 3 of the 1874 Constitution entitled the Federal Court to protect the ‘constitutional rights of citizens’ against cantonal decisions. [↑](#footnote-ref-69)
69. In some countries, establishing criminal liability of high ranking political actors (heads of state, etc.), who are accused of having violated the Constitution, is part of the jurisdiction of the constitutional court. It would be quite difficult for an administrative court (but not for a criminal court) to claim competence in this field. [↑](#footnote-ref-70)
70. Two other (minor) models may be contrasted to this mainstream evolution. In the first alternative model, both areas of study are established simultaneously. This happened in Greece when, in 1837, the newly founded University of Athens created, at the very outset, a chair for constitutional law and a chair for administrative law. See Theodoros Panagopoulos, ‘Griechenland’, in Erk V Heyen (ed), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (Klostermann, Frankfurt am Main, 1982) 81 ff. The same happened in Belgium with the Act of Parliament of 27 September 1835 on higher education, art 3, see Yves Chapel, ‘Belgique’, in ibid 1 ff. In the second alternative model, administrative law scholarship succeeded in taking root at university before the politically controversial discipline of constitutional law. On this hypothesis, illustrated by France, see the following para under B. 4. b). A puzzling case is ninteenth-century Spain, which is difficult to classify, see Alberto G Anabitarte, *Formación y enseñanza del derecho público en España (1769–2000)* (n 25) chapter 5 and 6. [↑](#footnote-ref-71)
71. See, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE IV* (n 37), the contributions relating to administrative law science in Germany: Walter Pauly, ‘Deutschland’ 44 ff; Austria: Barbara Leitl-Staudinger, ‘Österreich’ 201; Switzerland: Pierre Tschannen, ‘Schweiz’ 300 f, the United Kingdom: Thomas Poole, ‘Großbritannien’ 127; see also above A. 2. b). See also Herman van den Brink, ‘Niederlande’, in Erk V Heyen (ed), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (n 69) 117 ff; Remco Nehmelman, ‘Niederlande’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber, *IPE II* (n 11) 613; Fausto de Quadros, ‘Portugal’, in Erk V Heyen (ed), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (n 69) 117 ff, 161 ff. In this context, the study of administrative law was either born or it was reformed in the new spirit of liberalism as in many countries, a science of ‘police’ (*Polizeiwissenschaft*) had already developed since the sixteenth century. [↑](#footnote-ref-72)
72. For Germany, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol 2 (CH Beck, Munich, 1992) 381, 193 ff, and the structure of the pioneering work of Robert von Mohl, *Das Staatsrecht des Königreiches Württemberg* (Laupp, Tübingen, 1829), the first volume of which was dedicated to constitutional law and the second to ‘administrative law’ (‘*Verwaltungs-Recht*’). [↑](#footnote-ref-73)
73. Poul Meyer, ‘Dänemark’, in Erk V Heyen (ed), *Geschichte der Verwaltungsrechtswissenschaft in Europa* (n 69) 20 f. [↑](#footnote-ref-74)
74. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30) 380 ff and 394 ff. The first textbook dedicated exclusively to administrative law was Joseph Pözl, *Lehrbuch des bayerischen Verwaltungsrechts* (Bavarian administrative law) (Cotta, Munich, 1856). [↑](#footnote-ref-75)
75. Benjamin Schindler, ‘Schweiz’, *in this volume* XXX, XXX (mn 12); Benjamin Schindler, ‘100 Jahre Verwaltungsrecht in der Schweiz’ (2011) 130 ZSR 331, 343 ff. In smaller countries, the low number of academics was often an impediment to specialization. [↑](#footnote-ref-76)
76. As far as I am aware, there has never been a textbook entitled ‘Constitutional Law and Private Law’. William Blackstone's *Commentaries on the Laws of England* (1765–1769) could be considered to come close to it; yet, the *Commentaries* present the entire legal system of England, and not only two of its legal branches. [↑](#footnote-ref-77)
77. Luc Heuschling, ‘Frankreich’ (n 43) 494 ff; Jacques Chevallier, ‘Le droit administratif entre science administrative et droit constitutionnel’ (n 43) 11 ff; François Burdeau, *Histoire du droit administratif* (Presses Universitaires de France, Paris, 1995) 105 ff and 323 ff; Mathieu Touzeil-Divina, *Eléments d’histoire de l’enseignement du droit public* (LGDJ, Paris, 2007) 439 ff; Mathieu Touzeil-Divina, *La doctrine publiciste 1800–1880* (La mémoire du droit, Paris, 2009). [↑](#footnote-ref-78)
78. In addition to the work of Laferrière, see also Émile-Victor Foucart, *Eléments de droit public et administratif* (Videcoq, Paris, 1834); see Grégoire Bigot, *Introduction historique au droit admininstratif* (n 28); Anselme Batbie, *Traité théorique et pratique du droit public et administratif* (n 28); Maurice Hauriou, *Précis de droit administratif, contenant le droit public et le droit administratif* (L. Larose et Forcel, Paris, 1892). This two-part title goes back to the creation of the first chair in administrative law in France. In 1819, the government established, in the Paris Law Faculty, the chair ‘*droit public positif et administratif français*’ (positive public law and French administrative law), whose first incumbent was de Gérando. [↑](#footnote-ref-79)
79. In addition to the writings of philosophers, thinkers, politicians and civil law specialists, the first professors of administrative law contributed to fill the vacuum of monographs on constitutional law. See, e.g., Louis A Macarel, *Éléments de droit politique* (Nève, Paris, 1833). [↑](#footnote-ref-80)
80. Martin Loughlin underscores this point from the beginning of his English country report, see ‘Great Britain’, *in this volume* XXX, XXX (§ 44 mn 1 ff). For Scotland and Northern Ireland, see above n 12. [↑](#footnote-ref-81)
81. For the most radical position, see Pierre Legrand, ‘European Legal Systems are not Converging’ (1996) ICLQ 52 ff. [↑](#footnote-ref-82)
82. For even older theoretical groundwork that made the idea of constitutional supremacy even thinkable (the redefinition of the concept of sovereignty by the manner and form school), see Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Dalloz, Paris, 2002) 262 ff. [↑](#footnote-ref-83)
83. Martin Loughlin, *The British Constitution. A Very Short Introduction* (OUP, Oxford, 2013) xi. [↑](#footnote-ref-84)
84. See, e.g., Esin Örücü, ‘Looking at Convergence through the Eyes of a Comparative Lawyer’ (2005) 9 Electronic Journal of Comparative Law12. [↑](#footnote-ref-85)
85. Lord Johan Steyn, *The Constitutionalisation of Public Law* (Constitution Unit, London, 1999). [↑](#footnote-ref-86)
86. See below D. [↑](#footnote-ref-87)
87. For ana historical overview, see Jeffrey Jowell, ‘Administrative Law’, in Vernon Bogdanor (ed), *The British Constitution in the 20th Century* (OUP, Oxford, 2003) 373 ff; Martin Loughlin, ‘Why the History of English Administrative Law Is not Written’, in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Hart, Oxford, 2009) 151–77; Carol Harlow and Richard Rawlings, ‘Administrative Law in Context: Restoring a Lost Connection’ (2014) PL 28 ff. [↑](#footnote-ref-88)
88. On Dicey and his influence, see Thomas Poole, ‘Großbritannien’ (n 70) 125 f; Martin Loughlin, *Public Law and Political Theory* (Clarendon, Oxford, 1992) 138 ff; Spyridon Flogaïtis, *Droit administratif et administrative law* (LGDJ, Paris, 1986) 31 ff; Sabino Cassese, *La construction du droit administratif: France et Royaume-Uni* (Montchrestien, Paris, 2000). [↑](#footnote-ref-89)
89. Gaston Jèze, *Les principes généraux du droit administratif* (3rd edn, Giard, Paris, 1925) 1; Stanley A de Smith and Rodney Brazier, Constitutional and Administrative Law (n 13) 504. [↑](#footnote-ref-90)
90. See William Wade and Christopher F Forsyth, *Administrative Law* (n 14) 15; Martin Loughlin, ‘Why the History of English Administrative Law Is not Written’ (n 86), and also the critical account at the time by Frank J Goodnow, *Comparative Administrative Law*, vol 1 (G. P. Putnam’s sons, New York, 1897) 6 f. [↑](#footnote-ref-91)
91. See Robson’s famous phrase of the ‘dead hand of Dicey lying frozen on its [the Donoughmore Committee’s] neck’: William A Robson, ‘The Report of the Committee on Minister’s Powers’ (1932) 3 Political Quarterly 46. [↑](#footnote-ref-92)
92. Whereas Dicey’s concept of rule of law was closely connected to the idea of judicial review of administrative authorities through ordinary courts, Robson and Jennings untied that conceptual link in order to facilitate the growth of the new welfare state. As a matter of fact, the conditions of judicial protection of individual rights deteriorated seriously between 1940 and 1960. William Wade and Christopher F Forsyth, *Administrative Law* (n 14) 14, talk of this period as the ‘great depression’ of judicial review in England. See also Jeffrey Jowell, ‘Administrative Law’ (n 86) 376 ff, and John Mitchell, ‘The causes and effects of the absence of a system of public law in the UK’ (1965) PL 95 ff. [↑](#footnote-ref-93)
93. The famous and most radical example may be found in *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147 (HL). Despite the existence of an ouster clause in the Foreign Compensation Act 1950 (s 4 para 4), the House of Lords granted judicial review of the contested administrative decision. The explicit wording of the Act of Parliament was disregarded. However, not all judges felt committed to Dicey’s constitutional principle of the rule of law. See Jeffrey Jowell, ‘Administrative Law’ (n 86). [↑](#footnote-ref-94)
94. The normative authority of British constitutional principles rises and falls with the social respect that British people pay to tradition. This is not unlimited. Tradition allows for some adjustment; sometimes, even a clear break from it is possible (e.g., the change, in 1918, from the cabinet government to the prime ministerial government in matters of dissolution of Parliament). British courts have even revised constitutional precedents (for example, the British ‘rule of recognition’ has fundamentally changed over time). Many contemporary constitutional principles (such as devolution) have no basis in tradition. Such new principles must rely on other sources of legitimacy (e.g., in the case of devolution: a referendum). This may explain why, in the last twenty years, a growing number of people in Britain argue in favor of an entrenched Constitution for the United Kingdom. [↑](#footnote-ref-95)
95. Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan, London, 1915) cxl ff (‘The true nature of constitutional law’). [↑](#footnote-ref-96)
96. For example, after the sharp judicial and academic criticism of the ouster clause contained in the Asylum and Immigration Bill 2004 (Treatment of Claimants, etc.), the British Parliament dropped it. See Benjamin Schirmer, *Konstitutionalisierung des englischen Verwaltungsrechts* (V & R Unipress, Göttingen, 2007) 383 ff. [↑](#footnote-ref-97)
97. The term ‘constitutionalization’ is understood in the sense of the third reading (see D. 1. c)). The first author of this reading seems to be Lord Johan Steyn, *The Constitutionalisation of Public Law* (n 84). See also Thomas Poole, ‘Großbritannien’ (n 70) 147 f; Tom J Mullen, ‘The Constitutionalisation of the Legal Order’, in United Kingdom National Committee of Comparative Law & British Institute of International and Comparative Law (eds), *UK Law for the Millennium* (UKNCCL, London, 1998) 532 ff; Stathis Banakas, ‘The Constitutionalisation of Private Law in the UK’, in Tom Barkhuysen and Siewert D Linderbergh (eds), *Constitutionalisation of Private Law* (Nijhoff, Leiden, 2006) 83 ff; Benjamin Schirmer, *Konstitutionalisierung des englischen Verwaltungsrechts* (n 95) 21 ff and 361 ff; Martin Loughlin, ‘What is Constitutionalisation?’, in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, Oxford, 2010) 47 ff. Most administrative law scholars talk about the ‘constitutional foundations’ of administrative law, the ‘constitutional principles of administrative law’, see Timothy Endicott, *Administrative Law* (2nd edn, OUP, Oxford, 2011) xvii f and 11 ff; or the ‘constitutional background’, see Peter Cane, *Administrative Law* (n 15) 404 ff. [↑](#footnote-ref-98)
98. See the various contributions in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart, Oxford, 2000). [↑](#footnote-ref-99)
99. Lord Johan Steyn, *The Constitutionalisation of Public Law* (n 84) 5 f; Jeffrey Jowell, ‘Administrative Law’ (n 86) 390 ff; Jeffrey Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ (2000) PL 671 ff (675: ‘a higher order of rights inherent in our constitutional democracy’); Patrick Birkinshaw and Martina Künnecke, ‘Großbritannien’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE II* (n 11) 124, 126 f (‘The common law has developed a constitution of higher rank’). See also the extra-judicial point of view of John Laws, ‘Law and Democracy’ (1995) PL 84: ‘a higher order of law to which even Parliament is subject’, 92: ‘The Constitution, not the Parliament, is in this sense sovereign’. [↑](#footnote-ref-100)
100. According to this traditional doctrine, a statute can implicitly abrogate an older statute, even if the latter affirms its own irrevocability. [↑](#footnote-ref-101)
101. See the landmark decision of the Supreme Court of Israel in 1995 in the case *United Mizrahi Bank Ltd. et al. v. Migdal Cooperative Village*, 49 (4) PD 221. [↑](#footnote-ref-102)
102. [2002] 1 CMLR 50, 101. [↑](#footnote-ref-103)
103. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport, R (on the application of Heathrow Hub Limited and another) (Appellants) v The Secretary of State for Transport and another (Respondents), R (on the application of Hillingdon London Borough Council and others) (Appellants) v The Secretary of State for Transport (Respondent)* [2014] UKSC 3, para. 207. [↑](#footnote-ref-104)
104. This was very clearly set out by two Scottish academics: Aidan O’Neill, ‘Parliamentary Sovereignty and the Judicial Review of Legislation’ (n 20) 198 ff, and Tom J Mullen, ‘The Constitutionalisation of the Legal Order’ (n 96) 532 ff. Many other aspects of the problem are dissected therein (e.g., the role of EU law) that are omitted here for reasons of time. In addition to their analysis, one aspect in particular must be highlighted: the role of the European Court of Human Rights (ECtHR) in Strasbourg, which is not mentioned by these authors. [↑](#footnote-ref-105)
105. See also section 6 para 3 of the Human Rights Act. [↑](#footnote-ref-106)
106. Thus far, all declarations of incompatibility have triggered a change in the offending law. According to Daniel Feldman, ‘Standards of Review and Human Rights in English Law’, in David Feldman (ed), *English Public Law* (n 18) 317, 356, the Government is obliged to do so. However, that author believes that said obligation is only a moral obligation, as it is based on a constitutional convention. [↑](#footnote-ref-107)
107. On the question which constitutional values should inspire this legal area, see Gordon Anthony and others, *Values in Global Administrative Law* (Hart, Oxford, 2011). [↑](#footnote-ref-108)
108. Although history shows neither to be the ‘first’ to study their particular field, they are often hailed as such. [↑](#footnote-ref-109)
109. ‘*Des lois constitutionnelles servant de base au droit administratif*’ is the title of the first section of Joseph Marie de Gérando’s introduction to his book *Institutes du droit administratif*, vol 1 (2nd edn, Nève, Paris, 1842) 3 ff. See also Pellegrino Rossi, *Cours de droit constitutionnel*, vol 1 (Guillaumin et Cie, Paris, 1865) LVIII. [↑](#footnote-ref-110)
110. See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30) 381 ff and 395 ff. [↑](#footnote-ref-111)
111. Lorenz von Stein, *Handbuch der Verwaltungslehre*, vol 1 (3rd edn, Cotta, Stuttgart, 1888) 6. [↑](#footnote-ref-112)
112. Alfred Giron, *Le droit administratif de la Belgique*, vol 1 (2nd edn, Bruyland, Bruxelles, 1885) 10. Already before: [Charles de Brouckere](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Charles+de+Brouckere%22) and [Franciscus Tielemans](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Franciscus+Tielemans%22), *Répertoire de l’administration et du droit administratif de la Belgique*, vol 6 (Weissenbruch, Bruxelles, 1843) 421, entry ‘Droit administratif’. [↑](#footnote-ref-113)
113. Pedro Gómez de la Serna, *Instituciones del derecho administrativo español*, vol 1 (Vicente de Lalama, Madrid, 1843) 13: ‘The basis of administrative law is constitutional law, to which it is intimately linked and of which it may be considered the consequence’. [↑](#footnote-ref-114)
114. Quoted in Alberto G Anabitarte, *Formación y enseñanza del derecho público en España (1769–2000)* (n 25)239. See also Manuel Colmeiro, *Elementos de derecho político y administrativo de España* (3rd edn, Martínez García, Madrid, 1870) part II chapter 3 (*‘Del derecho administrativo’*). [↑](#footnote-ref-115)
115. Alberto G Anabitarte, *Formación y enseñanza del derecho público en España (1769–2000*)(n 25) 165, 222 f, 238 ff. This terminology is still used in Spain, see Juan A Santamaría Pastor, *Principios de Derecho Administrativo general*, vol 1 (Iustel, Madrid, 2004) 75 ff, but also in Italy, see Sabino Cassese, ‘Le basi constitucionali’, in Sabino Cassese (ed), *Trattato di Diritto amministrativo*, vol 1 (2nd edn, Giuffrè, Milan, 2003) 173 ff), in France and, as seen, in England (n 96). [↑](#footnote-ref-116)
116. Frank J Goodnow, *Comparative Administrative Law* (n 89) 3, 8, and 15. [↑](#footnote-ref-117)
117. Frank J Goodnow, *Comparative Administrative Law* (n 89) v. [↑](#footnote-ref-118)
118. Frank J Goodnow, *Comparative Administrative Law* (n 89) 8. [↑](#footnote-ref-119)
119. To quote Sabino Cassese, *La construction du droit administratif: France et Royaume-Uni* (n 87) 11, ‘administrative circulars [*circulaires*] finish to be more important than solemn declarations of the Constitution’. [↑](#footnote-ref-120)
120. See Jacques Ziller, *Administrations comparées* (Montchrestien, Paris, 1993) 285 ff; Michel Fromont, *Droit administratif des États européens* (Presses Universitaire de France, Paris, 2006) 11, 73; Giorgio Napolitano (ed), *Diritto amministrativo comparato* (Giuffrè, Milan, 2007) 24 ff. [↑](#footnote-ref-121)
121. See, e.g., in the context of the new South African Constitution (1993, 1996): Hugh Corder, ‘The Constitutionalization of South African Administrative Law’ (1997) 3 European Public Law 541 ff; in Australia: Daniel Reynolds, ‘The Constitutionalisation of Administrative Law: Navigating the Cul-de-sac’ (2013) 74 AIALForum 73 ff. [↑](#footnote-ref-122)
122. This discourse, applied to domestic law, appears to have French origins. Rainer Wahl, ‘Konstitutionalisierung: Leitbegriff oder Allerweltsbegriff?’, in Carl-Eugen Eberle (ed), *Der Wandel des Staates vor den Herausforderungen der Gegenwart, Festschrift für Winfried Brohm* (CH Beck, Munich, 2002) 192, locates its origins in some English discourse at the beginning of the 1990s. This may be right concerning the so-called ‘constitutionalization’ of EU-law or international law. It is not with regard to the present topic. In France, Louis Favoreu (1936–2004), head of the *École d’Aix* (School of Aix), and strong supporter of the role of constitutional courts, introduced the formulation in the French debate as early as the 1980s. The idea was inspired by the German discourse on the irradiation-effect (‘*Austrahlungseffekt’*) of fundamental rights, but the term ‘constitutionalization of legal order’ was French. See the historical account by Louis Favoreu, ‘La constitutionnalisation du droit’, in Jean-Bernard Auby and others (eds), *L’unité du droit* (n 22) 25 ff. See also, in 1991, Pierre Bon, ‘La constitutionnalisation du droit espagnol’ (1991) Rfdc 35. Favoreu also played a crucial role in the Europe-wide dissemination of this discourse. It was he who suggested the creation of a workshop on ‘Constitutionalisation of law’ which took place, under his chair, at the 15th International Congress of Comparative Law in Bristol (1998). See the questionnaire drawn up by him in [Bertrand Mathieu](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Bertrand+Mathieu%22), [Michel Verpeaux](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Michel+Verpeaux%22), and [Thierry Di Manno](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Thierry+Di+Manno%22), *La constitutionnalisation des branches du droit* (Economica, Paris, 1998) 197 ff, and his final report: Louis Favoreu, ‘La constitutionnalisation de l’ordre juridique: considérations générales’ (1998) Revue belge de droit constitutionnel 233 ff. The workshop was attended inter alia by Gunnar Folke Schuppert: ‘Constitutionalisation of the Legal Order’, in Eibe Riedel (ed), *German Reports on Public Law* (Nomos, Baden Baden, 1998) 18 ff ; Riccardo Guastini: ‘Remarques sur la constitutionnalisation de l’ordre juridique. Le cas italien’, in *Rapports nationaux italiens au XVe Congrès international de droit comparé Bristol 1998* (Giuffrè, Milan, 1998) 449 ff; Tom J Mullen: ‘The Constitutionalisation of the Legal Order’ (n 96); Stephan Breitenmoser: ‘The Constitutionalization in Swiss Law’, in Institut suisse de droit comparé (ed), *Rapports suisses présentés au XVe Congrès international de droit comparé Bristol* *1998* (Schulthess, Zurich, 1998) 127 ff; Sophie C van Bijsterveld: ‘The Constitution in the legal order of the Netherlands’, in Ewoud H Hondius (ed), *Netherlands Reports to the 15th International Congress of Comparative Law* (Intersentia, Cambridge, 1998) 347 ff; and many others. In Germany, the discourse on ‘constitutionalization of (domestic) law’ emerged at the end of the 1990s: see, e.g., Volkhard Schmidt, ‘Konstitutionalisierung des Zivilrechts?’ in *Verhandlungen des 61. Deutschen Juristentages*, vol 2 (CH Beck, Munich, 1996) part O, 43 ff) and became famous through the work of Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (Nomos, Baden-Baden, 2000). For England, see above note 84 and 96. [↑](#footnote-ref-123)
123. Hans-Heinrich Vogel, ‘Schweden’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE I* (n 64) 559; Gunilla Edelstam, ‘Schweden’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE IV* (n 37) 280 f. [↑](#footnote-ref-124)
124. Jacques Ziller, ‘European Models of Government’ (2001) Parliamentary Affairs 102 ff; Jacques Ziller, ‘L’administration’, in Michel Troper and Dominique Chagnollaud (eds), *Traité de droit international constitutionnel*, vol 3 (Dalloz, Paris, 2012) 745 ff. With regard to the localization of administration within the separation of powers scheme, Ziller distinguishes three main types: the classic European model (inclusion of administrative authorities in executive power), the American model (placement of administrative bodies between the legislative and executive powers), and the Swedish model (the recognition of administrative bodies as a fourth power, independent from the executive power, i.e., the Government). Chapter 12 art 2 (Independence of administration) states: ‘No public authority, including the *Riksdag*, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.’ [↑](#footnote-ref-125)
125. See Lena Marcusson, ‘Schweden’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE V* (CF Müller, Heidelberg, 2014) 631 ff. [↑](#footnote-ref-126)
126. The following explanations rely on the legal-culture-studies of Gunilla Edelstam, ‘Schweden’ (n 122); Iain Cameron, ‘Protection of Constitutional Rights in Sweden’ (1997) PL 488 ff; Jaakko Husa, ‘Nordic Constitutionalism and European Human Rights: Mixing Oil and Water’ (2010) 55 Scandinavian Studies in Law 101 ff; Jaakko Husa, *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective* (Peter Lang, Frankfurt am Main, 2002) chapter 4 and 5. [↑](#footnote-ref-127)
127. Gunilla Edelstam, ‘Schweden’ (n 122) 276 ff, 282, 284, 285. [↑](#footnote-ref-128)
128. Mats Kumlien and Kjell Å Modéer, ‘Schweden’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE III* (n 37) 295. [↑](#footnote-ref-129)
129. This expression was coined by Fredrik Sterzel, *Författning i utveckling* (Iustus, Uppsala, 1998). [↑](#footnote-ref-130)
130. Mats Kumlien and Kjell Å Modéer, ‘Schweden’ (n 127) 296 [↑](#footnote-ref-131)
131. Mats Kumlien and Kjell Å Modéer, ‘Schweden’ (n 127) 296 f. [↑](#footnote-ref-132)
132. Joakim Nergelius, *Konstitutionellt rättighetsskydd: Svensk rätt i ett komparativt perspektiv. Constitutional Protection of Human Rights: Swedish Law in a Comparative Perspective* (Norstedts, Stockholm, 1996) 709. [↑](#footnote-ref-133)
133. See the comprehensive analysis by Ian Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 125) in particular 502. [↑](#footnote-ref-134)
134. This requirement has also been adopted in the new Finnish Constitution of 1999, which established for the first time judicial review of the constitutionality of parliamentary legislation. Section 106: ‘If in a matter being tried by a court, the application of an Act of Parliament would be in manifest conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.’ [↑](#footnote-ref-135)
135. Gunilla Edelstam, ‘Schweden’ (n 122) 277. [↑](#footnote-ref-136)
136. See Joakim Nergelius, ‘The impact of EC Law in Swedish National Law—A Cultural Revolution’, in Iain Cameron and Alessandro Simoni (eds), *Dealing with Integration*, vol 2 (Iustus, Uppsala, 1998) 165–82. [↑](#footnote-ref-137)
137. See Jaakko Husa, ‘Nordic Constitutionalism and European Human Rights: Mixing Oil and Water’ (n 125); Iain Cameron, ‘Sweden’, in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe: The ECHR and its Member States 1950–2000* (OUP, Oxford, 2001) 833 ff. [↑](#footnote-ref-138)
138. For recent accounts of transformations of Nordic Constitutionalism, see the symposium published in (2011) 9 ICON 446–547 and the papers in (2009) 27 Nordic Journal of Human Rights 131–303. [↑](#footnote-ref-139)
139. Initially coined by Mattias Kumm in ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 German Law Journal 341 ff, who eventually rejected it as a scientific concept, the phrase ‘total Constitution’ has been reused by Gardbaum in his typology of constitutions with the following meaning: ‘it essentially resolves—or strongly influences—virtually all moral, legal, and political conflicts in a society’. See Stephen Gardbaum, ‘The Place of Constitutional Law in the Legal System’, in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012) 174. [↑](#footnote-ref-140)
140. Otto Bachof, ‘Begriff und Wesen des sozialen Rechtsstaats’ (1954) 12 VVDStRL 51. [↑](#footnote-ref-141)
141. Matthias Jestaedt, ‘Phänomen Bundesverfassungsgericht. Was das Gericht zum dem macht, was es ist’, in Matthias Jestaedt and others, *Das entgrenzte Gericht* (Suhrkamp, Berlin, 2011) 85–6. [↑](#footnote-ref-142)
142. On this sensitive issue, see e.g., Robert Alexy and others, ‘Verfassungsrecht und einfaches Recht. Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit’ (2001) 61 VVDStRL 1 ff. [↑](#footnote-ref-143)
143. Armin von Bogdandy, ‘Wissenschaft vom Verfassungsrecht: Vergleich’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE II* (n 11) 821 ff: ‘claim of the crown’. For a more nuanced account, see Friedrich Schoch, ‘Gemeinsamkeiten und Unterschiede von Verwaltungsrechtslehre und Staatsrechtslehre’, in Helmut Schulze-Fielitz (ed), *Staatsrechtslehre als Wissenschaft* (Duncker & Humblot, Berlin, 2007). [↑](#footnote-ref-144)
144. Fritz Werner, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (1959) DVBl 527 ff. For an outline of the German situation, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30) 226 ff, 247 ff; Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, Springer, Heidelberg, 2006) 10 ff, 43 ff; Dirk Ehlers, ‘Verwaltung und Verwaltungsrecht’ (n 35) 239 ff; Matthias Jestaedt, ‘Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts: Eine deutsche Perspektive’, in Johannes Masing and Olivier Jouanjan(eds), *Verfassungsgerichtsbarkeit* (Mohr Siebeck, Tübingen, 2011) 37 ff; Ferdinand Wollenschläger, ‘Verfassung im Allgemeinen Verwaltungsrecht’ (n 9). [↑](#footnote-ref-145)
145. Christoph Schönberger, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (n 36) 55; for the quotation of Sommermann, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30) 230. [↑](#footnote-ref-146)
146. Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (n 121) 63 ff and 77 ff. [↑](#footnote-ref-147)
147. Christoph Schönberger, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (n 36) n 57. See also Rüdiger Breuer, ‘Konkretisierungen des Rechtsstaats- und Demokratiegebotes’, in Eberhard Schmidt-Aßmann, *Festgabe 50 Jahre Bundesverwaltungsgericht* (Heymann, Köln, 2003) 222: ‘exuberant, inflationary extended argumentation with constitutional principles’ or ‘vulgar expectation of salvation by the Constitution’. [↑](#footnote-ref-148)
148. For a rich overview of the literature see Ferdinand Wollenschläger, ‘Verfassung im Allgemeinen Verwaltungsrecht’ (n 9) 187 ff. [↑](#footnote-ref-149)
149. Christoph Möllers, ‘Methoden’, in Wolfgang Hofmann-Riem, Eberhard Schmidt-Aßmann, Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, vol 1 (2nd edn, Beck, Munich, 2012), 131. For examples and typologies, see also Thomas Groß, ‘Von der Kontrolle der Polizei zur Kontrolle des Gesetzgebers’ (2006) DÖV 856 ff; Jens Kersten, ‘Was kann das Verfassungsrecht vom Verwaltungsrecht lernen?’ (2011) DVBl 585 ff; Ferdinand Wollenschläger, ‘Verfassung im Allgemeinen Verwaltungsrecht’ (n 9). [↑](#footnote-ref-150)
150. Louis Favoreu, ‘Droit administratif et normes constitutionnelles: quelques réflexions trente ans après’ (n 44) 649 ff; Favoreu, ‘La constitutionnalisation du droit administratif’, *Mélanges Epaminondas P. Spiliotopoulos* (Sakkoulas/Bruylant, Athens/Bruxelles, 1998) 97 ff; Pierre Delvolvé, ‘La constitutionnalisation du droit administratif’, in Association française de droit constitutionnel and Bertrand Mathieu (eds), *1958*–*2008.* *Cinquantième anniversaire de la Constitution française* (Dalloz, Paris, 2008) 397 ff. [↑](#footnote-ref-151)
151. See the writings of Georges Vedel and, more recently, Pascal Combeau, ‘Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts: Eine französische Perspektive’, in Johannes Masing and Olivier Jouanjan, *Verfassungsgerichtsbarkeit* (n 143) 67 ff. [↑](#footnote-ref-152)
152. See n 49 and 108. [↑](#footnote-ref-153)
153. See n 121. [↑](#footnote-ref-154)
154. Rainer Wahl, ‘Konstitutionalisierung: Leitbegriff oder Allerweltsbegriff?’ (n 121) 192 ff; Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (n 121) 25; Benjamin Schirmer, *Konstitutionalisierung des englischen Verwaltungsrechts* (n 95) 27–8. [↑](#footnote-ref-155)
155. Louis Favoreu, ‘La constitutionnalisation du droit’ (n 121) 28 ff. [↑](#footnote-ref-156)
156. Georges Vedel, ‘Réflexions sur quelques apports de la jurisprudence du Conseil d’Etat à la jurisprudence du Conseil constitutionnel’, in Marceau Long (ed), *Mélanges René Chapus* (Montchrestien, Paris, 1992) 647 ff; Pascal Combeau, ‘Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts’ (n 150). This view is also represented by State Council members. See, for example, Olivier Schrameck, ‘Droit administratif et droit constitutionnel’ (1995) special issue AJDA 34 ff. [↑](#footnote-ref-157)
157. Georges Vedel, ‘L’unité du droit: Aspects généraux et théoriques’ (n 22) 8; Georges Vedel, ‘Préface’ (n 22) 7. [↑](#footnote-ref-158)
158. Bruno Genevois, ‘Le Conseil d’Etat et l’application de la Constitution’ (n 64) 39, 54. [↑](#footnote-ref-159)
159. It is explicitly rejected by Olivier Schrameck, ‘Droit administratif et droit constitutionnel’ (n 155) 35; for a rare approval, see Franck Moderne, ‘A propos du contrôle de la constitutionnalité des actes administratifs’ (2008) Rfda 915. [↑](#footnote-ref-160)
160. The influence of the Constitution can however also operate casually and indirectly (for an interesting example see Bernardo G Mattarella, ‘Italien’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE III* (n 37) 159. This perspective is not addressed here. [↑](#footnote-ref-161)
161. For another worldwide scale, see Louis Favoreu, ‘La constitutionnalisation de l’ordre juridique’ (n 121) 235 ff. [↑](#footnote-ref-162)
162. Spain: Pierre Bon, ‘Constitution et administration en Espagne’ (1993) AEAP 17 ff; Pierre Bon, ‘La constitutionnalisation du droit espagnol’ (n 121) 34 ff. Poland, see Andrzej Wróbel, ‘Polen’ (n 37) 268–9, 270–1. For Switzerland, see Benjamin Schindler, ‘Switzerland’, *in this volume,* XXX, XXX (mn 15) and Stephan Breitenmoser, ‘The Constitutionalization in Swiss Law’ (n 121) 127 ff. For Belgium, see Dominique Caccamisi and Gautier Pijcke, ‘La constitutionnalisation du droit’ (n 64) 441 ff. [↑](#footnote-ref-163)
163. Netherlands: van Bijsterveld (n 121) 347 ff. Italy (in the past): Bernardo G Mattarella, ‘Italien’ (n 159) 165 f. The United Kingdom, according to Thomas Poole, ‘Großbritannien’ (n 70) 147, it is too early to estimate the impact of constitutionalization in the United Kingdom. [↑](#footnote-ref-164)
164. Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (n 121) 9 ff; Louis Favoreu and others, *Droit constitutionnel* (16th edn, Dalloz, Paris, 2013) 488 ff; Guastini (n 121) 449 ff. See for a very fast pace in Spain, Pierre Bon, ‘La constitutionnalisation du droit espagnol’ (n 121) 34 ff. In Italy, however, the implementation of the 1947 Constitution proceeded only slowly. [↑](#footnote-ref-165)
165. For some—not always convincing—attempts, see Albert Lanza, *L’expression constitutionnelle de l’administration française* (LGDJ, Paris, 1984) 63 ff, or Katharina Sobota, *Das Prinzip Rechtsstaat* (Mohr, Tübingen, 1997). [↑](#footnote-ref-166)
166. Luc Heuschling, ‘La Constitution formelle’(n 55). [↑](#footnote-ref-167)
167. Luc Heuschling, ‘La Constitution formelle’(n 55) 27. [↑](#footnote-ref-168)
168. See, for example, the extremely concise provisions of the Austrian 1920 *Bundes-Verfassungsgesetz* in its current version, on administrative school authorities (title III A ‘Administration’, art 81a and 81b, which are composed of more than 700 words). [↑](#footnote-ref-169)
169. Pierre Bon, ‘Constitution de 1958 et droit administratif’ (1993) 144 Les petites affiches 4 ff. [↑](#footnote-ref-170)
170. Sabino Cassese, ‘Constitution et administration en Italie’ (1993) AEAP 55. [↑](#footnote-ref-171)
171. Several recent Constitutions are particularly representative of this trend. Amongst them, the best example is Portugal (Constitution 1976; see especially, part III, titles 8, 9 and 10 dedicated to ‘Local Government’, ‘Public Administration’ and ‘National Defense’). See also the current version of the Constitutions of Spain (Const. 1978, esp. title IV ‘Government and Administration’), Greece (Constitution 1975 part III section F: ‘Administration’), Sweden (Instrument of Government 1974, chapter 12: ‘Administration’), Belgium, Slovenia (Constitution 1991, part IV and V), Finland (Constitution 1999, chapter VII: ‘State finances’, chapter XI: ‘Administration and Self-government’), Switzerland (Constitution 1999, title V, chapter 3), Romania (Constitution 1991, title III, chapter 5: ‘Public Administration’, and title IV: ‘Economy and Public Finances’), etc. See Jacques Ziller, ‘L’administration’ (n 123); Pierre Bon, ‘Constitution et administration en Espagne’ (n 161) 17 ff; Francis Delpérée, ‘Constitution et administration en Belgique’ (1993) AEAP 119 ff. [↑](#footnote-ref-172)
172. For the French Revolution, see the 1791 Constitution and Albert Lanza, *L’expression constitutionnelle de l’administration française* (n 164) 63 ff. [↑](#footnote-ref-173)
173. Any intervention of the Federal level must be based on a constitutional norm. See the Swiss Federal Constitution of 1999, art 3 (‘The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation’) and art 42 (‘The Confederation shall fulfill the duties that are assigned to it by the Federal Constitution’). [↑](#footnote-ref-174)
174. France (since 1971), Sweden (since 1974/1976/1979), United Kingdom (since the Human Rights Act 1998 which came into force in 2000), as well as all the countries of the former Eastern bloc since the fall of the Berlin Wall. [↑](#footnote-ref-175)
175. For Sweden, see D. 1. a). On the Dutch constitutional culture, see Willem Konijnenbelt, ‘Constitution et administration aux Pays-Bas’ (1993) AEAP 193 ff. As shown before, the traditional British legal culture, which was rather hostile to abstract declarations, is undergoing a major change since the end of the twentieth century. [↑](#footnote-ref-176)
176. Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, Springer, Heidelberg, 1914) 332. [↑](#footnote-ref-177)
177. See, for example, the sharp contrast in the contemporary English administrative law doctrine between, on the one hand, Craig’s openness to broad theoretical assumptions, Paul Craig, *Administrative Law* (n 17) 3 ff and, on the other, Wade and Forsyth’s hostility to theory, see William Wade and Christopher F Forsyth, *Administrative Law* (n 14) 8 f. On the relationship between constitutional law dogmatics and constitutional theory, see Matthias Jestaedt, *Die Verfassung hinter der Verfassung: Eine Standortbestimmung der Verfassungstheorie* (Schöningh, Paderborn, 2009); Luc Heuschling, ‘De l’intérêt de la théorie, de la théorie générale de l’Etat, de la théorie constitutionnelle. A propos d’un livre récent de M. Jestaedt’ (2010) 5 Jus politicum. [↑](#footnote-ref-178)
178. See also Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (n 121) 32 ff. [↑](#footnote-ref-179)
179. The renaissance of natural law theories after World War Two played a key role in this context. For the German doctrine of ‘*objektive Werteordnung*’ (‘system of objective values’), see Ernst-Wolfgang Böckenförde, ‘Geschichtliche Entwicklung und Bedeutungswandel der Verfassung’, in Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie* (2nd edn, Suhrkamp, Frankfurt am Main, 1992) 47 ff. For Switzerland after 1945, see Zaccaria Giacometti, *Allgemeine Lehren des rechtsstaatlichen Verwaltungsrechts* (Polygraphischer Verlag, Zurich, 1960) and Pierre Tschannen, ‘Schweiz’ (n 70) 305 f. [↑](#footnote-ref-180)
180. Pierre Tschannen, ‘Schweiz’ (n 70) 313. [↑](#footnote-ref-181)
181. See the statement made by Georges Vedel, ‘Les bases constitutionnelles du droit administratif’ (n 49) 135, in 1986, when he looked back on his script on the constitutional bases of administrative law: ‘I assumed the idea, that [...] the Constitution contained the introduction to *all* chapters of public law’ (personal translation, emphasis not in the original). See also Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp, Frankfurt am Main, 2003) 416. [↑](#footnote-ref-182)
182. *Locus classicus*: Günter Dürig, ‘Der Grundsatz der Menschenwürde’ (1956) AöR 122 ff. [↑](#footnote-ref-183)
183. Ernst Forsthoff, *Der Staat der Industriegesellschaft* (CH Beck, Munich, 1971) 144, i.e., ‘a kind of juridical genome that contains the DNA for the development of the whole legal system’ (Mattias Kumm, ‘Who is Afraid of the Total Constitution?’ (n 138) 344). [↑](#footnote-ref-184)
184. Stephen Gardbaum, *The Place of Constitutional Law in the Legal System* (n 138). [↑](#footnote-ref-185)
185. Pierre Tschannen, ‘Schweiz’ (n 70) 307, 309. The following Tschannen’s quotes are taken from his oral presentation at the authors’ meeting in Heidelberg. See also the very sharp criticism of Georges Vedel ‘Propos d’ouverture’, in [Bertrand Mathieu](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Bertrand+Mathieu%22), [Michel Verpeaux](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Michel+Verpeaux%22), and [Thierry Di Manno](http://www.google.de/search?hl=de&tbo=p&tbm=bks&q=inauthor:%22Thierry+Di+Manno%22), *La constitutionnalisation des branches du droit* (n 121) 14 ff. [↑](#footnote-ref-186)
186. If this were actually the case, a look at the Constitution would suffice to form a complete picture of the State and its administration. But, if a Martian read Germany’s *Grundgesetz* and even the case law of the *Bundesverfassungsgericht*, he would hardly imagine Germany as a richly developed welfare State, as is the case. Also, in many countries, the large number of independent administrative bodies cannot be deduced from simply reading the constitutional texts. [↑](#footnote-ref-187)
187. In France: Olivier Schrameck, ‘Droit administratif et droit constitutionnel’ (n 155) 35; in Switzerland: Pierre Tschannen, ‘Schweiz’ (n 70) 312 and for Germany: see D. 1. b). [↑](#footnote-ref-188)
188. Moreover, both administrative and constitutional law can be based on different foreign models; see Herbert Küpper, ‘Ungarn’, *in this volume*, XXX, XXX (mn 46 ff). [↑](#footnote-ref-189)
189. See, in Germany, under the Weimar Republic, the classic writings of Richard Thoma or Hans Kelsen on the legal value of fundamental rights provisions; see Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (n 81) 123 f. In France: Raymond Carré de Malberg, *Contribution à la théorie générale de l’Etat*, vol 2 (Paris, Sirey, 1922) 581. [↑](#footnote-ref-190)
190. See below D. 2. g). [↑](#footnote-ref-191)
191. In Luxembourg, for example, the Constitutional Court as well as the administrative and civil courts are very reluctant to use art 11 of the 1868 Constitution which, since 1948, in the context of the natural law renaissance after World War Two, recognizes ‘the natural rights of the human person and of the family’. See decisions of the Constitutional Court no 2/1998, 14/2002, 20/2004, 98/2013, 105/2013. In France and Switzerland, the principle of ‘democracy’ (art 1 French Constitution 1958) has not been mobilized so far by courts; in Luxembourg, the principle of democracy (enshrined in article 1 Constitution 1868 since 1998) has been used as an exclusive normative basis by the supreme Administrative Court (judgements of 19 December 2013 and 5 May 2015), whereas it is still ignored by the Constitutional Court and civil courts. [↑](#footnote-ref-192)
192. For a highly critical account: Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (n 121) 38 (‘*Abwägungsbrei’*). See also, Norbert Achterberg, *Allgemeines Verwaltungsrecht* (CF Müller, Heidelberg, 1982) 63 ff. [↑](#footnote-ref-193)
193. Dirk Ehlers, ‘Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat’ (n 35) 241; Hartmut Maurer, *Allgemeines Verwaltungsrecht* (18th edn, CH Beck, Munich, 2011) § 4 mn 58, 91; Harmut Maurer, ‘Der Anwendungsvorrang im Normensystem’, in *Festschrift für Klaus Stern, Der grundrechtsgeprägte Verfassungsstaat.* (Duncker & Humblot, Berlin, 2012) 107 ff. See also, Georges Vedel, ‘Propos d’ouverture’ (n 184) 16; Pierre Tschannen, Ulrich Zimmerli and Markus Müller, *Allgemeines Verwaltungsrecht* (2nd edn, Stämpfli, Bern, 2005) 80: ‘The solution-finding in each administrative law case starts with ordinary law, not the Constitution’ (translation). [↑](#footnote-ref-194)
194. See, for example: art 266 para 2 of the Portuguese Constitution of 1976; chapter 1 art 9 and chap 12, art 10 of the Swedish 1974 Instrument of Government; art 103 para 1 of the 1975 Constitution of Greece; art 1, para 1 and 20, para 4, of the German *Grundgesetz*; and, in the past, art 377 of the French Constitution of 1795. [↑](#footnote-ref-195)
195. The best example, Georges Vedel, ‘Propos d’ouverture’ (n 184). [↑](#footnote-ref-196)
196. On the distinction between ‘*Constitution-moteur*’ and ‘*Constitution-trésor*’ see Luc Heuschling, ‘La Constitution formelle’(n 55) 294. Similarly, the distinction made by the Portuguese scholar Paulo Ferreira da Cunha, *Traité de droit constitutionnel* (Buenos, Paris, 2010) 26 f, between ‘*Constitution-programme*’ and ‘*Constitution-bilan*’. See also the concept of ‘transformative constitutionalism’ used with regard to the South-African Constitutions of 1993 and 1996, by Karl E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 South African Journal on Human Rights 146 ff. [↑](#footnote-ref-197)
197. On the reigning uncertainty in German administrative law after the traumatic experience of Nazi rule, see Christoph Schönberger, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (n 36) 67 ff. [↑](#footnote-ref-198)
198. See above the quotation by Rüdiger Breuer, ‘Konkretisierungen des Rechtsstaats- und Demokratiegebotes’ (n 146). [↑](#footnote-ref-199)
199. So, more or less strongly, in Sweden, in the Netherlands: van Bijsterveld, ‘The Constitution in the legal order of the Netherlands’ (n 121); in Belgium: see the ‘standstill obligation’ imposed by the Constitutional Court in the context of art 23 Constitution; in Luxembourg; and also, partially, in France: see D. 1. c). [↑](#footnote-ref-200)
200. The two institutions were more than close geographically (the *Conseil constitutionnel* was and still is housed in a wing of the Palais-Royal, the seat of the *Conseil d’Etat*). A large number of members of the Conseil constitutionnel were appointed amongst members of the *Conseil d’Etat*. For statistics, see Dominique Rousseau, *Droit du contentieux constitutionnel* (10th edn, LGDJ, Paris, 2013) 62 ff. Traditionally, the Secretary General of the *Conseil constitutionnel* is a member of the *Conseil d’Etat*. Moreover, the *Conseil d’État* provided most clerks of the *Conseil constitutionnel*. They supplied precious legal expertise to the Constitutional councilors, especially to those who were not trained in law. [↑](#footnote-ref-201)
201. Walter Leisner, *Von der Verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung.* *Betrachtungen zur möglichen selbständigen Begrifflichkeit im Verfassungsrecht* (Mohr, Tübingen, 1964). [↑](#footnote-ref-202)
202. Depending on each society, the Constitution may be viewed as the supreme expression of popular will, as the receptacle of society’s highest values, as the epitome of ancient traditions, as the work of particularly wise founding fathers (e.g., Charles de Gaulle, the saviour of the French nation), as the surrogate for the nation (Germany’s ‘constitutional patriotism’) and/or as the result of a difficult compromise which should not be questioned (Italy). [↑](#footnote-ref-203)
203. Especially striking: Japan. See Yōichi Higuchi, ‘Dignité humaine’, in Rainer Grote (ed), *Die Ordnung der Freiheit: Festschrift für Christian Starck zum siebzigsten Geburtstag* (Mohr, Tübingen, 2007) 798. [↑](#footnote-ref-204)
204. Andrzej Wróbel, ‘Polen’ (n 37) 270. The same applies to Hungary. [↑](#footnote-ref-205)
205. On the ‘struggle for the Constitution’ in Italy, see Mario Dogliani and Cesare Pinelli, ‘Italien’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE I* (n 64) 282ff, 300. [↑](#footnote-ref-206)
206. One interesting French example is the *Conseil d’Etat*’s refusal, in its seminal decision *Syndicat général des fabricants de semoules de France* (1.3.1968), to implement art 55 of the Constitution of 1958, which establishes the primacy of international treaties over national statutes. For a historical account, see Alice Fuchs-Cessot, *Le Parlement à l’épreuve de l’Europe et de la Ve République* (LGDJ, Paris, 2004) 141 ff. This refusal may be explained by the profound illegitimacy of this provision in the eyes of the Gaullist political majority. Art 55 was a remnant of the former 1946 Constitution of the Fourth Republic which, in 1958, during the constituent debates, had been maintained under the pressure of the Ministry of Foreign Affairs. For more examples, seeFrançois Luchaire, ‘Le Conseil d’Etat et la Constitution’ (1979) *Revue administrative* 141 ff; Favoreu, ‘Droit administratif et normes constitutionnelles’ (n 44); Georges Vedel, ‘Discontinuité du droit constitutionnel et continuité du droit administratif’ (n 28); Luc Heuschling, ‘La Constitution formelle’(n 55) 277 ff. [↑](#footnote-ref-207)
207. Gilles Guglielmi, *La notion d’administration publique dans la théorie juridique française* *1789–1889* (LGDJ, Paris, 1991) 295 ff. [↑](#footnote-ref-208)
208. Michel Verpeaux (ed), *Code civil et constitution(s)* (Economica, Paris, 2005). [↑](#footnote-ref-209)
209. Pierre Legendre, *Trésor historique de l’Etat en France* (Fayard, Paris, 1992) 47, 589: ‘administrative law, as our real political law’. In the French literature, it was also very common in the past to talk about France’s ‘administrative Constitution’ established by Napoleon. See Pierre Delvolvé, ‘Rapport introductif’, in Bertrand Seiller and others (eds), *La constitution administrative de la France* (Dalloz, Paris, 2012) 3 ff. [↑](#footnote-ref-210)
210. Despite a common name and similar historic origins, the countries’ *Conseil d’Etat* are not entirely similar these days. [↑](#footnote-ref-211)
211. Thomas Bull, ‘Judges without a Court—Judicial Preview in Sweden’, in Tom Campbell, Keith D Ewing, Adam Tomkins (eds), *The Legal Protection of Human Rights* (OUP, Oxford, 2011) 392 ff. [↑](#footnote-ref-212)
212. On the past and current role of this Committee whose modus operandi is quasi-judicial and guided by mere legal considerations, see Jaakko Husa, *Nordic Reflections on Constitutional Law* (n 125)139 ff; Jaakko Husa, *The Constitution of Finland* (Hart, Oxford, 2011) 158, and also 78 ff. [↑](#footnote-ref-213)
213. Jaakko Husa, *The Constitution of Finland* (n 211) 152 ff. [↑](#footnote-ref-214)
214. Including systems like the Swiss system, where, according to art 190 of the Federal Constitution of 1999, administrative bodies and courts are prohibited from questioning the validity of federal statutes. On their competence to interpret federal statutes in light of constitutional values, see Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (3rd edn, Stämpfli, Bern, 2011) 8, 143 ff. The same applies to administrative bodies in the United Kingdom (see s 6 Human Rights Act 1998). [↑](#footnote-ref-215)
215. In 1852/1860, Robert Mohl—‘Ueber die rechtliche Bedeutung verfassungswidriger Gesetze’ reprinted in *Staatsrecht, Völkerrecht und Politik*, vol 1 (Laupp, Tübingen, 1860) 66 ff, 90 ff—addressed the question when analyzing the legal significance of unconstitutional statutes with regard to courts, administrative authorities, and citizens. Whereas he recognized that judges and citizens have the right to ignore such a statute, as it is void, he believed the administrative authorities were obliged to obey it, given their subordination to the king and the necessity of unified state action. See also Karl-Heinrich Hall, ‘Historische Anmerkungen zum Prüfungsrecht der Verwaltungsbeamten gegenüber dem Gesetz’ (1965) DVBl 556 ff. For a different view in the nineteenth century, see art 30 of the Spanish Constitution of 1869. [↑](#footnote-ref-216)
216. For a case which comes very close to this hypothesis, see below n 238 and 239. [↑](#footnote-ref-217)
217. On Switzerland, see Pierre Tschannen, *Staatsrecht* (n 213), s 11 mn 35 ff; Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel suisse*, vol 1 (Stämpfli, Berne, 2013), mn 1903 f, 1956 ff, 2333 ff; Ulrich Häfelin, Walter Haller and Helen Keller, *Schweizerisches Bundesstaatsrecht* (8th edn, Schulthess, Zürich, 2012) 40, 66; Isabelle Häner, ‘Art 79’, in Isabelle Häner, Markus Rüssli, Evi Schwarzenberg (eds), *Kommentar zur Zürcher Kantonsverfassung* (Schulthess, Zürich, 2007) 737 ff; Peter Saladin, ‘Die Befugnis der Verwaltungsbehörden zur akzessorischen Überprüfung von Verordnungen’ (1966) Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung 193 ff; Hans Nef, ‘Das akzessorische Prüfungsrecht’, in *Mélanges Marcel Bridel* (Imprimieries réunies, Lausanne, 1968) 295 ff; Hans Dubs, ‘Die Zuständigkeit kantonaler Behörden zur akzessorischen Normenkontrolle’ in *Festschrift für Kurt Eichenberger* (Helbing & Lichtenhahn, Basel, 1982) 615 ff. [↑](#footnote-ref-218)
218. BGE 100 Ib 13, *Ligue marxiste révolutionnaire*, 8 March 1974. [↑](#footnote-ref-219)
219. BGE 92 I 480, *Ackermann*, 8 June 1966. See already before BGE 91 I 312, 10 November 1965, *Genossenschaft Migros Luzern*, and later BGE 108 Ia 41, 12 March 1982, *Rivara*. Andreas Auer and others, *Droit constitutionnel suisse* (n 216) mn 2340. [↑](#footnote-ref-220)
220. According to art 79 of the 2007 Constitution of Zurich—an article that goes back to the case law of the Administrative Court of Zurich in the 1960s—‘The Courts and those Cantonal Authorities which are elected by the people do not apply Provisions infringing superior law.’ The 1993 Constitution of Bern (art 66 para 3) contains a similar provision. The 1995 Constitution of Appenzell Ausserrhoden (art 61 para 3, now art 61 para 2), the 2002 Constitution of Schaffhausen (art 38 para 2) and the 1980 Constitution of Aargau (art 90 para 5, introduced in 2005) reserve that prerogative, inside the executive, to the government. [↑](#footnote-ref-221)
221. On the similar regime of judicial constitutional review, see D. 1. a). [↑](#footnote-ref-222)
222. For an overview, see André Salgado de Matos, A fiscalização administrativa da constitucionalidade [Administrative review of statutes] (Almedina, Coimbra, 2004), in particular 152 ff. [↑](#footnote-ref-223)
223. Valerio Onida, ‘Pubblica amministrazione e costituzionalità delle leggi’ (Giuffrè, Milano, 1967); Cesare Pagotto, *La disapplicazione della legge* (Giuffrè, Milano, 2008) and the synthesis by Salgado de Matos (n 221) 123 ff. [↑](#footnote-ref-224)
224. Otto Bachof, ‘Die Prüfungs- und Verwerfungskompetenz der Verwaltung gegenüber dem verfassungswidrigen und dem bundesrechtswidrigen Gesetz’ (1962) AöR 1 ff. This view had already been defended by some scholars under the Weimar Republic, see Otto Bachof, ‘Die Prüfungs- und Verwerfungskompetenz’ 37 f; Karl-Heinrich Hall, ‘Historische Anmerkungen’ (n 214). On the very rich German debate, see also Jost Pietzcker, ‘Zur Inzidentverwerfung untergesetzlicher Rechtsnormen durch die vollziehende Gewalt’ (1976) AöR 374 ff; Hartmut Maurer, *Allgemeines Verwaltungsrecht* (n 195) § 4 mn 63 ff; Peter Gril, ‘Normprüfungs- und Normverwerfungskompetenz der Verwaltung’ (2000) Juristische Schulung 1080 ff; Eberhard Schmidt-Assmann, ‘Gefährdungen der Rechts- und Gesetzesbindung der Exekutive’ in *Festschrift für Klaus Stern* (Beck, Munich, 1997) 745 ff; Matthias Wehr, *Inzidente Normverwerfung durch die Exekutive* (Duncker & Humblot, Berlin, 1998); Hans-Detlef Horn, *Die grundrechtsunmittelbare Verwaltung* (Mohr Siebeck, Tübingen, 1999). [↑](#footnote-ref-225)
225. Otto Bachof, ‘Die Prüfungs- und Verwerfungskompetenz’ (n 223) 40. [↑](#footnote-ref-226)
226. With regard to the legal evolution initiated by EU Law, see below D. 2. g). [↑](#footnote-ref-227)
227. Jaako Husa, *The Constitution of Finland* (n 211) 81. [↑](#footnote-ref-228)
228. Hans Kelsen, *Allgemeine Staatslehre* (Springer, Wien, 1925) 41, 287 ff. [↑](#footnote-ref-229)
229. Ludwig Adamovich, *Die Prüfung der Gesetze und Verordnungen durch den österreichischen Verfassungsgerichtshof* (Deuticke, Leipzig, 1923) 18 ff, 41 ff. [↑](#footnote-ref-230)
230. Hans Kelsen, ‘Verfassungs- und Verwaltungsgerichtsbarkeit im Dienste des Bundesstaates, nach der neuen österreichischen Bundesverfassung vom 1. Oktober 1920’ (1923) ZSR 212; Hans Kelsen, *Allgemeine Staatslehre* (n 227) 292. [↑](#footnote-ref-231)
231. For a restatement, see for example Reinhard Rack, ‘Die Gehorsamsthese—ein Beitrag zum verwaltungsbehördlichen Normprüfungsrecht’ (1971) Österreichische Juristen-Zeitung 89 ff. [↑](#footnote-ref-232)
232. See Reinhard Rack, ‘Die Gehorsamsthese’ (n 230) and, more recently, Ewald Wiederin, ‘Über das elektronische Bundesgesetzblatt und die Folgen von Kundmachungsfehlern’, in *Festschrift für Norbert Wimmer* (Springer, Wien, 2008) 711 ff. [↑](#footnote-ref-233)
233. See David Renders, ‘L’autorité administrative doit-elle d’office refuser d’appliquer une loi inconstitutionnelle?’ (2008) Journal des tribunaux 556 n 12; Paul Lewalle and Luc Donnay, *Contentieux administratif* (3rd edn, Larcier, Bruxelles, 2008) 354 n 1453. [↑](#footnote-ref-234)
234. ‘Seem’ because many Belgian scholars do not formalize these conceptual distinctions. [↑](#footnote-ref-235)
235. That the chronological distinction *ex nunc/ex tunc* does not coincide with the conceptual distinction between annulation and nullity has been stressed by Otto Bachof, ‘Die Prüfungs- und Verwerfungskompetenz’ (n 223) 31 f. See also Hans Kelsen, *Reine Rechtslehre* (Wien, 2nd edn, 1960), 280 f. [↑](#footnote-ref-236)
236. The decision (C.06.0457.F) is published in (2008) Journal des tribunaux 554 f. [↑](#footnote-ref-237)
237. His conclusions are accessible on the website of Juridat, attached to the decision of the Court. [↑](#footnote-ref-238)
238. David Renders, ‘L’autorité administrative’ (n 232) 555 ff. [↑](#footnote-ref-239)
239. Art 94 of the current Dutch Constitution obliges, however, the government and administrative authorities, when adopting a regulation or an individual decision, to refrain from implementing a statute if the latter infringes international law. The Dutch Constitution strongly emphasizes the due respect of international norms; in the hierarchy of norms they are higher than the Constitution. [↑](#footnote-ref-240)
240. In Luxembourg, the jurisdiction of the administration to exercise a concrete review has never been argued or claimed. Yet, one situation may be interpreted as coming close to an abstract review of constitutionality of statutes by the head of state, when she/he exercises the autonomous regulatory power defined by art 76 of the 1868 Constitution. See Tribunal administratif 25 August 2004, no 18582; Rusen Ergec, *Contentieux administratif* (Pasicrisie, Luxembourg, 2010) mn 298. It should be noted that, in contrast to most foreign legal systems, the Luxembourgish executive is denied the right to file a petition to the Constitutional Court. [↑](#footnote-ref-241)
241. For a classic restatement: Raymond Carré de Malberg, *La Loi, expression de la volonté générale. Etude sur le concept de la loi dans la Constitution de 1875* (Sirey, Paris, 1931). [↑](#footnote-ref-242)
242. Council of State, 5 January 2005, *Mlle Deprez, M. Baillard*, *Recueil Lebon* 1: ‘a review of the constitutionality of a statute is excluded at the stage of its implementation’. [↑](#footnote-ref-243)
243. ECJ, Case 101/78 *Granaria* [1979] ECR 640; ECJ, Case 103/88 *Costanzo* [1989] ECR 1861. [↑](#footnote-ref-244)
244. As shown, it is permitted in Switzerland, but the latter is not member of the EU. In Germany, Bachof’s view regarding norms of the *Landesrecht* that infringe federal norms, was unsuccessful under the *Grundgesetz* and largely absent in the past, at least under German Reich (1870–1919). It was, however, supported by the *Reichsgericht* under the Weimar Republic in a case of an obvious contradiction (RGZ 130, 319). In Austria or Belgium, which are also Federations, and Members of the EU, such a rule is totally unknown. [↑](#footnote-ref-245)
245. See, e.g., the Netherlands (all statutes), Switzerland (Federal statutes), the United Kingdom (Acts of Westminster Parliament), and France (statutes adopted by referendum: art 11 of the 1958 Constitution). [↑](#footnote-ref-246)
246. In France, it is called the ‘*loi écran*’ (litt: screen-statute): the statute serves as a screen, protecting regulations and decisions from the Constitution. For the United Kingdom, see s 6 para 2 of the Human Rights Act 1998; but, for the specific legal situation in Scotland, see O’Neill, ‘Parliamentary Sovereignty and the Judicial Review of Legislation’ (n 20) 206. For the Netherlands, see Leonard Besselink, ‘Niederlande’(n 67) 378. For Switzerland, see Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (n 213) 148 ff. [↑](#footnote-ref-247)
247. In Switzerland the strong commitment of the Federal Court is due to procedural reasons: it can only review administrative acts on the basis of constitutional complaints. For Norway, see Eivind Smith, ‘Aux origines de la justice constitutionnelle en Norvège’, in *Mélanges Epaminondas P Spiliotopoulos* (n 149) 411 ff. [↑](#footnote-ref-248)
248. This requires an acculturation and learning process. Aidan O’Neill, ‘Parliamentary Sovereignty and the Judicial Review of Legislation’ (n 20) 200 ff, persuasively shows how in the past, several Lord Judges, who later became very active in the debate on a new fundamental rights culture in Britain, familiarised themselves with abstract constitutional principles by adjudicating constitutional law cases from Commonwealth countries in the Privy Council. After immersion in the spirit of the ECHR and the case law of the ECtHR, some Swedish judges, lawyers, and politicians began to see fundamental rights through different eyes. See Kjell Å Modéer, ‘Schweden’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE II* (n 11) 709 ff. [↑](#footnote-ref-249)
249. For Spain, see Pierre Bon, ‘Constitution et administration en Espagne’ (n 161); for Italy, see Mario Dogliani and Cesare Pinelli, ‘Italien’ (n 204) 284, 300 ff. For the historical background in Italy, see Maurizio Fioravanti, ‘Italien’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE II* (n 11) 590, 594 ff. Above all, it should be noted that such resistance came from the civil courts, not the administrative courts. [↑](#footnote-ref-250)
250. An eloquent example are the differences, in the past, between the German Constitutional Court in Karlsruhe and the Austrian Constitutional Court in Vienna. The key word to describe this cultural gap could be ‘Smend versus Kelsen’. See the papers in Karl Korinek and others, ‘Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, Besteuerung und Eigentum’ (1981) 39 VVDStRL 7 ff. [↑](#footnote-ref-251)
251. In Germany, it was, above all, the civil courts that were critical of the Karlsruhe judgments. In addition, the Federal Administrative Court, which itself was created after 1945 and lacked any tradition, had its own jurisdictional interest in mobilizing the Constitution. See Christoph Schönberger, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’ (n 36) 61 ff; Michael Jestaedt, ‘Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts’ (n 143) 51 ff. [↑](#footnote-ref-252)
252. The distribution of administrative justice (is it entrusted only to administrative courts or, in part, to the Constitutional Court?) would be another interesting perspective. [↑](#footnote-ref-253)
253. Hans Kelsen, ‘Verfassungs- und Verwaltungsgerichtsbarkeit’ (n 229) 186 ff; Hans Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’ (1929) VVDStRL 30 ff; Adolf Merkl, *Allgemeines Verwaltungsrecht* (n 6) 378 ff. [↑](#footnote-ref-254)
254. On the former system, see Walter Berka, *Lehrbuch Verfassungsrecht* (Springer, Heidelberg, 2005) 245 ff and 264 ff; Theo Öhlinger, *Verfassungsrecht* (8th edn, Facultas, Vienna, 2009) 284 ff and 461 ff. The new Austrian public law adjudication system established by the constitutional reform of 2012 (BGBl. I 2012/51) maintains, although to a lesser extent, the key idea of the first ideal type. See art 133 and 144 *Bundes-Verfassungsgesetz*, current version; Walter Berka, *Verfassungsrecht* (6th edn,Verlag Österreich, Wien, 2016) 298 ff. [↑](#footnote-ref-255)
255. In all countries, they are entitled to interpret statutes in light of the Constitution. In Portugal, the constitutionality of the same statute may be fully assessed, in a concrete case, by the ordinary courts and, later, by the Constitutional Tribunal (art 204 and 280 para 1 of the 1976 Constitution). In many countries (France, Germany, Belgium, Luxembourg, Spain, etc.), administrative courts may review the constitutionality of regulations and even of pre-constitutional statutes, whereas only the Constitutional Court may invalidate post-constitutional statutes. In Germany (art 100 *Grundgesetz*), before submitting a preliminary ruling to the Constitutional Court on the validity of a post-constitutional statute, ordinary courts are obliged to consider in detail the various criticisms raised against it and may eventually uphold its validity by rejecting, as unfounded, a request for submission to the Constitutional Court. Thus, ordinary courts in Germany may legally confirm the constitutionality of a post-constitutional statute, but not quash it (the power to invalidate being reserved to the Constitutional Court). [↑](#footnote-ref-256)
256. For a first introduction into this controversial debate, see, for example, Luc Heuschling, ‘Die Regulierungsfunktion der Autorität der *chose jugée* und der *chose interprétée* im polyzentrischen Mehrebenen-Rechtsstaat Frankreichs‘ (2006) 54 JöR 341 ff; Mathieu Disant, *L’autorité de la chose interprétée par le Conseil Constitutionnel* (LGDJ, Paris, 2010); Charles-Edouard Sénac, *L’office du juge constitutionnel. Etude du contrôle de constitutionnalité par les juridictions françaises* (LGDJ, Paris, 2015) 88 ff, 103 ff. For Poland, see Piotr Tuleja, ‘Polen’, in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *IPE I* (n 64) 490 f, 498 ff. [↑](#footnote-ref-257)
257. Such as when, in the past, the Council of State (in France and in Italy) favored the ‘general principles of (administrative) law’, developed by itself, instead of referring to constitutional principles elaborated in the case law of the Constitutional Court. [↑](#footnote-ref-258)
258. Ordinary courts may, on their own initiative, discover new unwritten constitutional norms (see, in France, *Conseil d’Etat*, 3 July 1996, *Koné*) or construe in a totally different way a provision of the constitutional text (see the famous decision of the French Court of cassation, 10 October 2001, *Breisacher*). [↑](#footnote-ref-259)
259. The examples are numerous: Austria (art 140 para 1 Bundes-Verfassungsgesetz), Italy (art 134 Constitution), Germany (art 100 *Grundgesetz*), France (art 61-1 Constitution), Spain (art 163 Constitution), Belgium (art 142 Constitution), Luxembourg (art 95-ter Constitution), Poland (art 193 Constitution 1997), Bulgaria (art 150 Constitution 1991), Slovakia (art 125 and 130 Constitution 1992) etc. [↑](#footnote-ref-260)
260. This procedure is very rare. See, beside the famous example of the EU (Art 267 TFEU), the Benelux Treaty of 1965 (art 6) and Slovakia (art 128 Constitution; ss 45 ff Constitutional Court Act 1993). [↑](#footnote-ref-261)
261. For a rare example, in Luxembourg, of disobedience of the highest criminal court: Jörg Gerkrath, ‘L’obligation du juge a quo de se conformer à l’arrêt préjudiciel rendu par la Cour Constitutionnelle’ (2012) Pasicrisie luxembourgeoise 479 ff. [↑](#footnote-ref-262)
262. In Portugal, all ordinary courts are entitled to exercise a concrete review of the constitutionality of statutes; however, if they disapply a statute, or if they refuse to do so, the prosecutor or a party may lodge an appeal to the Constitutional Court. [↑](#footnote-ref-263)
263. On the role of legal scholarship, especially of professor Eduardo García Enterría, in Spain, see Pierre Bon, ‘Constitution et administration en Espagne’ (n 161). For Germany, after 1945, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (n 30), chapter 3, in particular 231. On the role of legal education in the new human rights culture in Scotland, see Jim Murdoch, ‘Protecting Human Rights in the Scottish Legal System’, in Aileen McHarg and Tom Mullen, *Public Law in Scotland* (n 12) 335 ff. [↑](#footnote-ref-264)
264. See the examples of Hungary: András Jakab, ‘Ungarn’, in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *IPE IV* (n 37) 386 f; Sweden: see above D. 1. a); Spain before 1978: Alberto G Anabitarte, *Formación y enseñanza del derecho público en España (1769–2000)* (n 25) chapter 5 and 6; or, outside Europe, Japan since World War Two (Ryuji Yamamoto, ‘Das japanische Verwaltungsrecht und sein Verhältnis zur Konstitutionalisierung’, in Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht. Zur Tragfähigkeit eines Konzepts* (Mohr, Tübingen, 2008) 901 ff. [↑](#footnote-ref-265)
265. Gunilla Edelstam, ‘Schweden’ (n 122) 277 ff. [↑](#footnote-ref-266)
266. So the resolute methodology by Pierre Legrand, ‘Comparer’ (1996) RIDC 279 ff. [↑](#footnote-ref-267)
267. So also Erik V Heyen, *Kultur und Identität in der europäischen Verwaltungsrechtsvergleichung—mit Blick auf Frankreich und Schweden* (De Gruyter, Berlin, 2000) 32. [↑](#footnote-ref-268)