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INTERNATIONALISATION OF ADMINISTRATIVE LAW: ACTORS, FIELDS AND TECHNIQUES OF INTERNATIONALISATION - IMPACT OF INTERNATIONAL LAW ON NATIONAL ADMINISTRATIVE LAW*

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INTERNATIONALISATION of administrative law is an issue of high *complexity*. It is not a recent phenomenon though, but one with long *tradition*[1]. Internationalisation of administrative law dates back to the second half of the 19th century when technical and economic developments resulted in the emergence of various relations between national administrations, partly in loose co-operations and partly on an institutional basis: International Telecommunication Union (1865), Universal Postal Union (1874/1878). Legal scholars of those days recognised soon that international as well as administrative law must be approached anew - international law as a law of co-operation and administrative law as a law that transcends national borders[2]. In the aftermath of the two World Wars, these findings almost fell into oblivion. Partly, they were driven away by the strong focus public law placed on national sovereignty. However, even between the World Wars, the *Revue internationale de la Théorie du droit (Zeitschrift für die Theorie des Rechts)*, published by Gaston Jèze and Hans Kelsen,

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[1] CHRISTIAN TIETJE, *Internationalisiertes Verwaltungshandeln* (Berlin: Duncker & Humblot, 2001), 50 *et seq.*

[2] See, *e.g.*, ROBERT VON MOHL, *Encyclopädie der Staatswissenschaften* (1859), 424 *et seq.*

represented a forum for analyses on related subjects such as on the concept of international administrative law.

The contemporary issues of concern in the border area between international and administrative law have also been determined by recent developments. These can be characterised as follows:

(*1*) In view of *international law*:

- Its development from a law of mere coordination to a law of co-operation[3];
- The growing importance of international organisations and dynamic treaty regimes[4];
- The constitutionalisation and the strengthening of human rights in international law[5].

(*2*) In view of *administrative law*[6]*:*

- Loosening its territorial bonds by extending administrative action beyond national frontiers;
- Making administrative law work more economical (economisation) and placing it under a stronger influence of private actors (privatisation);
- The tendency in administrative law to informal action, agreements and soft law.

Internationalisation of administrative law has often occurred due to the internationalisation of administrative relations (co-operation among administrations and creation of networks). Nonetheless, it is not identical

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[3] See, *e.g.*, WOLFGANG FRIEDMANN, *The Changing Structure of International Law* (London: Stevens, 1964), 60 *et seq.*

[4] See, *e.g.*, ECKART KLEIN, Die Internationalen und die Supranationalen Organisationen, *in*: WOLFGANG GRAF VITZTHUM (ed.), *Völkerrecht* (Berlin: De Gruyter, 3rd edition 2004), 251 at 257 *et seq.*; JOSE E. ALVAREZ, The New Treaty Makers, *Boston College International & Comparative Law Review* 25 (2002), 213 at 218 *et seq.*; CHRISTIAN TIETJE, The Changing Legal Structure of International Treaties as an aspect of an Emerging Global Governance architecture, *GYIL* Vol. 42 (1999), 26, 35 *et seq.*

[5] THOMAS COTTIER / MAYA HERTIG, The Prospects of 21st Century Constitutionalism, *Max Planck UNYB* Vol. 7 (2003) 261-328; CHRISTIAN TOMUSCHAT, International Law as the Constitution of Mankind, *in*: UN (ed.), *International Law on the Eve of the Twenty-first Century*, 1997, 37 *et seq.*

[6] See EBERHARD SCHMIDT-ASSMANN, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin - Heidelberg: Springer, 2d edition 2004), GUNNAR FOLKE SCHUPPERT (ed.), *Governance-Forschung - Vergewisserung über Stand und Entwicklungslinien* (Baden-Baden: Nomos, 2005).

with the latter, nor with globalization[7]. The following three aspects shall be discussed:

- Internationalisation as a *harmonisation* of national administrative law by means of international law (*A*),
- Internationalisation as a result of international *administrative co-operation* (*B*),
- Internationalisation through formation of complex international *regulatory structures* (*C*).

The impact of the EC law on national administrative law shall not be discussed here[8]. The EC, being a supranational organisation, has reached a unique legal status and therefore differs from the, so to speak, "normal" internationalisation considerably. Also excluded will be the so-called "indirect internationalisation", that is, the cases in which the EU concludes international treaties in addition to or instead of its Member States and, using the legal instruments of the EC, delegates to them the obligations that result from such treaties.

Before I come to deal with the three types of internationalisation mentioned above I would like to raise a daring question: Is an internationalisation of administrative law possible at all? Or, is administrative law rather by definition a national law designed to be applied exclusively by national authorities? Such restrictive interpretation would carry to extremes even the older state-centralized theory on public law that placed the state to the centre of any consideration[9]. I suppose that such view would suit to many for seeing the things in this way, would leave administrative law well structured and easy to be dealt with, using national methods of interpretation. It is nonetheless wrong. Even the state-centred concept of public law allowed for an administrative law of international organisations ("administrative unions"[10]) and thus did not restrict administrative law to the national sphere only. What we need to keep in mind in the first place is the

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[7] *Cf.* BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, The Emergence of Global Administrative Law, *Institute for International Law and Justice Working Paper* 2004/1, 4 *et seq.*

[8] On this topic, see also EBERHARD SCHMIDT-ASSMANN / WOLFGANG HOFFMANN-RIEM (eds.), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden: Nomos, 1999); JÜRGEN SCHWARZE (ed.), *Das Verwaltungsrecht unter europäischem Einfluß* (Baden-Baden: Nomos, 1996).

[9] *Cf.* CHRISTIAN TIETJE, *op. cit.*, fn. 4 above, 34 *et seq.*

[10] See RÜDIGER WOLFRUM, International administrative unions, *in*: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Volume II (1995), 1041.

fact that the extent to which international law can impact national law cannot be ascertained on the basis of an abstract notion of administrative law, but rather according to the monistic or dualistic doctrines on the relation of international and national law.

Thus, internationalisation of administrative law is not limited to the national level. Action must be taken also on the international and maybe even on the transnational levels. But the major perception of national administrative law applies here, too: Administrative law has a "dual function"[11]. It is designed to enable the administrations to work effectively (principle of effectiveness) and at the same time to safeguard the constitutional rights of the citizen as well as the democratic transparency and accountability (principle of protection). These principles must be observed on each level of internationalisation.

A. Internationalisation as a Process of Harmonisation

The first type of internationalisation shall be characterised as harmonisation by international law. It has now become a matter of interest to the community of nations that domestic administrative law shall make provisions on the protection of human rights, the environment protection and the procedural fairness.

I. International Law - A Driver of Change

In particular, we can distinguish between the influences of the international treaties (*1*), the secondary legislation passed by international bodies (*2*), and the interpretation of national laws consistent with the principles of international law (*3*).

1. International Treaties

The major impetus emanates from international treaties. The Geneva Refugee Convention, *e.g.*, has had a considerable influence on the immigration law. The Aarhus Convention has stressed the need for public participation in environmental matters and has provided for the possibility for public interest groups to take legal action against the decisions in these

[11] Eberhard Schmidt-Assmann, *op. cit.*, fn. 6 above, ch. 1 par. 30 *et seq.*

matters[12]. Another important treaty in administrative matters has been the European Convention on Human Rights. According to Art. 13 of the Convention everyone must have an effective remedy before a national authority. Art. 6, which apart from civil rights and obligations also applies to a considerable number of disputes before administrative tribunals, provides for an independent and impartial judicial system. Attention should be also paid to a number of resolutions and recommendations in administrative matters by the Committee of Ministers of the Council of Europe such as on discretionary power, procedures affecting a large number of persons and data protection. Some of the treaties signed under the auspices of the WTO, *e.g.* the Agreement on Government Procurement, the Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) can also be cited as examples for an internationalisation through harmonisation, which in the case of the Member States of the EU is mediated by the EC law.

2. Secondary Legislation

Secondary legislation has an increasing influence on international administrative law[13]. Up to now it has been specific to the international organisations such as the Universal Postal Union (UPU) and the International Civil Aviation Organisation (ICAO), which have been thereto authorised by their statutes. Meanwhile the consensual principle inherent to the traditional international law has been stepping back and majority decisions have been increasing. Flexible schemes of implementation (opting in, opting out) have enabled the organisations to commit even states that had not consented to a provision. Hitherto, such practices have been justified by claiming these were rules of technical character. However, this claim is mostly disputable, *e.g.* as far as the security standards in air traffic are concerned. There has been a steady growth of secondary legislation, in general. Other international bodies and mixed institutions such as the Codex Alimentarius Commission have also passed secondary legislation

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[12] See CHRISTIAN WALTER, Internationalisierung des deutschen und Europäischen Verwaltungsverfahrens - und Verwaltungsprozessrechts - am Beispiel der Århus-Konvention, *Europarecht (EuR)* 2005, 302-338.

[13] See JURIJ DANIEL ASTON, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin* (Berlin: Duncker & Humblot, 2005), 62 *et seq.*

(guidelines, standards, *etc.*), and they have often done so without clarifying the status of these rules.

3. Interpretation

Thirdly, the interpretation of rules consistent with the principles of international law shall be examined.

The fact that this method of interpretation has its origin in national law determines its relevance in this context. Anyhow, it has also served as a means of transformation of international law into national law, so that it is yet another facilitator of the internationalisation of the latter.

In this respect, comparative law is also to be mentioned. Although it is not a separate method of interpretation (other than in the EU context) its meaning is indispensable as far as the impact of multilateral treaties is concerned for their provisions often originate from a comparison of several national legal systems.

II. Transformation into National Law

Internationalisation resulting from harmonisation has affected only certain areas of domestic administrative law so far. Its intensity cannot be compared with that of the influence EC law has exerted on the legal systems of the EU Member States. States with highly developed administrative laws are, as a rule, able to transform these without problems. Sure enough, frictions can arise at certain points, for example, when meeting the demands set by Art. 6 ECHR concerning jurisdiction standards.

This is particularly the case with regard to international treaties that dispose of their own judicial bodies such as the European Court of Human Rights in Strasbourg or the dispute settlement bodies of the WTO. Out of this, new problems can arise as the national courts' interpretation of the Convention provisions transformed into national laws can collide with the interpretation of the Convention by its own judicial bodies. A simple harmonisation formula does not exist. The national courts maintain their competing authority, even though they are committed to follow the jurisdiction of the Convention's own court as far as it is possible. Clashes with national constitutional law can arise. The Federal Constitutional Court expressed this in its decision in "*Görgülü* case" as follows: The *Grundgesetz* (German Constitution) does not allow for a total subjection under Acts of State,

other than such passed by the Federal Parliament and subject to constitutional control[14]. Though, in saying so the Court did not draw a firm line between harmonisation by international law and maintaining national constitutions, it expressed unmistakably that such line exists. Here, one can perceive the tendency of the national constitutional courts to protect the identity of their constitutions against an uncontrolled internationalisation. This phenomenon should not be judged too negatively for the legal order of a multi-level system is, other than in a centralised state, not in every respect hierarchical.

From the point of view of legal politics it is not entirely satisfactory that the harmonisation efforts affect different areas, emanate from diverse international bodies and serve different purposes. As a result, national administrative law must at the same time meet the requirements of the protection of human rights, the consumer protection and the environment protection, which are by no means conflict-free.

The assessment of the secondary legislation is only partly satisfactory. The way it is passed is not always transparent; the legitimation of the bodies involved is sometimes dubious. Although these bodies may be useful for the purposes of harmonisation, coordination and clarification in respect to domestic administrative law, seen from the perspective of administrative law in general they represent a major problem. I shall come back to this issue in the 3rd chapter.

The overall impression of these developments is positive. The harmonisation process indicates a growing readiness within the international community to respect important values (human rights) and major public goods. At the same time, harmonisation serves as a basis for closer co-operation.

B. Administrative Law of International Administrative Co-operation

The international character of this type of cooperation results from the *administrative actions* themselves as they are not limited to a certain national territory but conceived for the purposes of transnational co-operation.

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[14] *Bundesverfassungsgericht*, Judgement of 14 October 2004, E 111, 307, 311 = *Human Rights Law Journal* 2004, 99, 101.

I. Three Examples

To begin with, I shall analyse three areas of co-operation. These will be: co-operation in police matters (*1*), co-operation in issues of tax and social welfare (*2*), and transfrontier activities of neighbouring municipalities (*3*).

1. Co-operation in Police Matters

Co-operation in police matters is a subject of bilateral and recently also of multilateral treaties (*e.g.* the Convention Implementing the Schengen Agreement). Actors of this type of co-operation are the states as such. As soon as the co-operation goes beyond informal contacts, conferences and programmes, it must be given a firmer basis in form of an international treaty. If more detailed rulings are asked for, the administrations have the authority to sign further agreements. The interchange between authorities does not take place through diplomatic channels, but, as a rule, through co-operation centres established for that purpose. In border areas of neighbouring states direct contact can be also allowed. Provisions characteristic of such treaties concern data exchange, maintenance of a common information system, cross-border observation and pursuit, formation of joint troops and cross-border exchange of officers. Even very concrete issues of administrative law such as the liability for joint police actions, are regulated within the scope of such agreements.

Taken as a whole, co-operation in police matters is a sphere still dominated by the idea of state sovereignty. In this sphere, sovereign tasks are performed almost exclusively by national authorities whereas international organisations and private actors are practically not involved. Interpol, other than Europol, is an entity with a vague legal status - it cannot be qualified as an international organisation, but at the most as an intergovernmental institution based on customary law.

2. Co-operation in Tax Law and Social Welfare Law

International co-operation in matters of tax and social welfare has the same state-centric pattern. In these spheres, transfrontier administrative actions belong to everyday practice. They are based on bilateral treaties between states. Model treaties have been drawn up under the OECD's Model Tax Convention. The Convention includes provisions on data exchange, data protection and mutual assistance in matters of law enforce-

ment. Particularly frequent are provisions on the mutual recognition of the authorities' decisions by the authorities of the other state. Mutual recognition is supposed to simplify administrative procedures, particularly of mass administration. Nowadays, it is a quite important and widely spread instrument of international administrative relations.

3. Transfrontier Activities of Neighbouring Municipalities

The third type of administrative co-operation is made up by the transfrontier activities of local communities and regions. These comprise joint settlement of cross-border issues such as infrastructure, environmental protection, regional planning, partnerships and conferences. Many projects are carried out on an informal basis, often under private rather than public law, for example, by setting up an association under private law. The Euroregions, nowadays numbering 60, are organised in this way. The involvement of individuals, businesses and interest groups is desired and does not cause any legal problems.

This does not apply when formal administrative power is to be exercised. According to the present legal opinion, local and regional authorities do not possess their own un-derived competency to conclude agreements. They rather must be authorised thereto by their respective states. First approaches have been made to change this, *e.g.*, with the adoption of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities signed in Madrid in 1981 and the 1st Additional Protocol of 1995. It is likely that a new type of law, neither international, nor national, but a proper law of transnational co-operation, will emerge out of this.

II. Legal Problems

Today, transfrontier co-operation is also typical of the administration in many other fields: in environmental, medical and transport law. These co-operations often have complex structures. They take place not only on the horizontal, that is, between the national administrations, but also on the vertical level - between national and international bodies. Their character varies from singular to permanent and from bilateral to multilateral. Their object usually is data exchange, but sometimes they also deal with matters of consultation and amicable settlements. A tendency to create transnational networks has also become apparent.

Cooperative relations have produced their own *legal problems*. Harmonisation of domestic administrative law discussed above can be of importance in this respect, for example, by way of setting uniform standards in matters of data protection[15]. However, it can serve this purpose within a limited scope only for, in pursuing the traditional concept of administrative law, it leaves out international aspects. This is different in case of the co-operation in police matters and the transfrontier activities of neighbouring municipalities. These contain principles and elements that can be generalised and adjusted so that they are applicable to complex co-operations such as integrated information systems.

1. Regulatory Principles

Which principles are to be followed? In my opinion, a modern law of administrative co-operation should even today derive from the central *role of states*. At the same time, it should incorporate the principles of procedural effectiveness and legal protection. Globalisation may have reduced the importance of states, but they still remain the major point of reference to the citizen. It is the states who oblige themselves to co-operation and, consequently, it is the states who account for the failings that emerge out of it.

A series of principles of international law must be observed when the actors of a co-operation are states. Some are explicitly stated in the treaties. They make up the core of the international law of administrative co-operation. Being only principles, though, they allow for exceptions. The ever growing intensification of international co-operation will lead to a modification of the state-centric notion of these principles.

- *Principle of sovereignty*: According to this principle, states must be able to exercise sovereign powers on their respective territory[16]. Activities of foreign authorities such as pursuit and observation by police officers of

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[15] In the field of financial markets *cf.* PEDRO GUSTAVO TEIXEIRA, Public Governance and the Co-operative Law of Transnational Markets: The Case of Financial Regulation, *in*: KARL-HEINZ LADEUR (ed.), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004), 305, 322 *et seq.*

[16] *Cf.* GEORG DAHM / JOST DELBRÜCK / RÜDIGER WOLFRUM, *Völkerrecht*, Vol. I/1 (Berlin: De Gruyter, 2nd ed. 1989), 318 *et seq.*; ALFRED VERDROSS / BRUNO SIMMA, *Universelles Völkerrecht* (Berlin: Duncker & Humblot, 3rd edition 1984), § 1022 *et seq.*

another state require special authorisation. Exceptions have been made in individual administrative agreements for cases of urgency (*e.g.* Art. 40 II of the Schengen Implementing Convention).

Treaty obligations arise, in principle, for the *state itself*, rather than for its organs and authorities. Notwithstanding, treaties in police and social welfare matters have to a growing extent provided for a direct contact or at least for a contact between the cooperation centres. Here, the new tendency has been to allow subnational entities to become within limited scope actors of international law. The traditional principle of state sovereignty has been added by the demand for the administrations' ability to act. I call this the effectiveness criteria. However, when sovereign tasks are to be performed direct contacts still require at least indirect authorisation.

- *Principle of division*: This principle applies to the organisation of joint actions[17]. Each state is liable for its respective contribution. The division of liabilities is decisive in matters of legal protection and the settlements for costs and damages. On the one hand, such regulation makes a sharp division of liabilities possible, but, on the other, it also burdens those involved with a "*probatio diabolica*" as it is not always possible to make out the components of such cooperative actions once they are completed. For this reason, some treaties have been based on more advanced solutions. For example, treaties on multi-entry information systems, like the Schengen Information System, make provisions on joint liability for risks that is supposed to simplify the access for the victims. Although this has not become a legal maxim yet, it shows that the central role of states still remains the starting point of international administrative cooperation. Furthermore, it is an indicator for the growing importance of other criteria such as the protection of human rights.

2. Mutual Assistance, Data Exchange and Data Protection

A vital part of administrative co-operation represents mutual assistance[18]. Its core is made up by data exchange, which is the subject of nu-

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[17] On its application to different types of administrative cooperation, see CHRISTOPH OHLER, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Tübingen: Mohr Siebeck, 2005), 212 *et seq.* and 223 *et seq.*

[18] See RUDOLF GEIGER, Legal assistance between states in administrative matters, *in*: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Volume III (1997), 186.

merous treaties, conventions and recommendations. While most of them are restricted to special sectors such as the tax law and the social insurance law a few opt for a more general perspective. A comparative analysis shows that basic standards of a law of transfrontier mutual assistance have been formed.

An obligation to *mutual assistance* arises only if it can be deduced at least from the aim of a given administrative task. An obligation to unauthorised data delivery presupposes a special agreement. The scope in which authorities may circulate information depends on the law of the states involved. As a rule, special authorisation is required. The legitimacy of an action of mutual assistance is determined by the law of the authority providing the assistance. The legitimacy of the administrative measure triggering the action of mutual assistance is determined by the law of the requesting authority. Measures that do not meet the minimum standards of human rights protection must not be provided with administrative assistance.

An integral part of mutual assistance is the *data protection*. It means that the protection of human rights has now found its way into international relations, too. A major principle of data protection is the principle of purpose specification, which requires that the transferred data may be used exclusively for the purposes defined. When handling sensitive data such as data concerning the social status of an individual, the principles of necessity and proportionality must be observed, as well. The principle of equal treatment mentioned in some agreements presupposes a minimum level on harmonisation. A too wide margin of divergence among the secrecy standards in different states is simply unacceptable.

3. Mutual Recognition and Transfrontier Administrative Acts

A further important instrument of international administrative law represents the mutual recognition of administrative decisions[19]. Provisions have been made, for example, in matters of university degrees in higher education law and safety certificates in product safety law. Obligations to mutual recognition must be defined in international treaties. They cannot be based on customary law yet. The recognition is an accessory decision: It interlinks the legal systems of the states involved. It presupposes a valid

[19] See SASCHA MICHAELS, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland* (Berlin: Duncker & Humblot, 2004), 52 *et seq.*

act of the state whose authorities have requested mutual recognition. The validity is determined by the laws of the requesting state, but it is a subject to the judgement of the authorities of the recognising state. It is controversial, though, how far this judgement may go. In any case, at least the examination of the compliance with human rights should be allowed for. This field also shows a tendency towards harmonisation and transfrontier legal thinking.

C. Internationalisation by way of Forming Complex International Regulatory Structures

Thirdly, internationalisation of administrative law has been advanced by an ever growing increase in complex international regulatory structures that have either acted as independent administrative entities or exerted influence on national administrations, but, in any case, they have been a source of legal problems in administrative law[20]. A project at the New York University called "Global Administrative Law" refers to a *global administrative space* that must be observed as a whole[21].

Respective structures can be found in the economic law (WTO, banking supervision), environmental law and also in the actions against transnational crime. Here, the simple procedures of administrative co-operation analysed above have been intensified and institutionalised. Such procedures often develop their own dynamics, which at the outset can hardly be controlled.

- These developments take place partly on a formal basis, that is, within the framework of international treaties, and partly informally - through the emergence of real networks.
- Actors of these processes have usually been international organisations whose importance has grown significantly, but other institutions (international agencies, domestic regulatory authorities, expert panels and NGOs) have also been involved[22].

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[20] Christoph Möllers, Transnationale Behördenkooperation - Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung, *Heidelberg Journal of International Law* 2005, 351, 371 *et seq.*

[21] Benedict Kingsbury / Nico Krisch / Richard Stewart, *op. cit.*, fn. 7 above, 12.

[22] See, *e.g.*, Rüdiger Wolfrum / Volker Röben (eds.), *Developments of International Law in Treaty Making* (Berlin - Heidelberg: Springer, 2005).

I shall first introduce three types of international regulatory structures (*I*) and then analyse the legal problems they have in common (*II*).

I. Three Examples of Regulatory Structures

Dispute settlement regimes (*1*), legislative structures (*2*) and implementation structures (*3*) shall be analysed by way of example.

1. Dispute Settlement Regimes

The first type is made up by international courts and arbitration bodies. They are particularly influential in the areas where they have been entitled to jurisdiction outreaching the common forms of consensual dispute settlement applied in international law. The best example is the development of the WTO: Characteristic for the dispute settlement under the WTO have been the existence of a procedural law and a clear shift from merely political to legally binding decision-making. Within this scope, general legal principles (such as the rule of law or the principle of proportionality) have also been introduced, without being mentioned in the treaties themselves[23]. Due to their growing constitutionalisation these regimes have become so effective that now their influence reaches as far as the *administrative level* of the national legal systems. The advantages are undeniable. In this way regulation gaps can be bridged and new legal developments initiated. Nonetheless, frictions between the national law and the international impetus can be observed particularly in this sphere. The opinions on the substance and the status of such principles are divergent on the international and the national levels. Unsolved remains also the question to what extent shall NGOs, in addition to states, be entitled to participate in the dispute settlement proceedings.

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[23] GIACINTO DELLA CANANEA, Beyond the State: the Europeanization and Globalization of Procedural Administrative Law, *European Public Law* 2003, 463, 573 *et seq.*; GÖTZ J. GÖTTSCHE, *Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz* (Berlin: Duncker & Humblot, 2005), 239 *et seq.*

2. Legislative Structures

Some of these are represented by the secondary legislation of international organisations. Other regulations have been adopted at international conferences on the basis of framework conventions, *e.g.* the Kyoto Protocol to the UN Framework Convention on Climate Change (1992). Both types are subject to binding international procedural rules, the transformation into national law included.

However, legislative structures are often *informal*, intransparent and hybrid. The Basel Committee on Banking Supervision, a self-organised institution of banking supervision authorities of leading industrial countries, has set quality standards in matters of banking transactions that have been strictly followed in the national practice. A basis for these standards is not provided for in any national or international law. Some of these bodies are self-organised structures of the industrial branches involved. Although, the standards set by these bodies, *e.g.* the International Accounting Standards or the ISO International Standards have had far-reaching influence on domestic administrative law, national administrations have no significant influence on their formation. Some of these institutions have made attempts to make up for the lack of legitimation by way of bringing out memoranda of understanding and their own procedural manuals. NGOs and other private-law associations may also participate within a certain scope. Nonetheless, a great deal still remains a matter of negotiation. A proper regulation of structures and procedures by means of an administrative law has not yet been developed.

3. Implementation Structures

The implementation of treaty goals is partly assigned to the treaty's own institutions that have been established to perform executive tasks: This form shall be referred to as *direct implementation*. Insofar, there has been an administrative law of international organisations for long time. Up to now, this has been limited to personnel and budget matters, though. For the future, rules must be set in matters of distribution of subsidies, *e.g.* by the World Bank. It is arguable whether the schemes applied so far (*e.g.* conclusion of a contract under private law) will serve this purpose.

More often, implementation structures are entitled to *indirect*, rather than direct *implementation*, that is to say, they perform a supervisory function in respect to the national administrations. Today, such mechanisms are considered to be indispensable integral parts of treaties on international

environmental law[24]. They comprise duties to give reports, instruments for verification of received data such as on-site inspections, as well as measures in case of non-fulfilment. NGOs have been integrated into these procedures only on a small scale. There has been some evidence indicating that their role will increase, *e.g.* in the proceedings before the International Tribunal for the Law of the Sea. In the future, better use should be made of their knowledge and activities in order to optimise the control of treaty fulfilment. Due to the increase of implementation structures and their growing administrative character legal problems have been more frequent and the need for *structure-own compensation regulations* has become even more apparent.

II. Legal Problems: An Ambivalent Impression

All in all, the dispute settlement, legislative and implementation structures create an ambivalent impression. They help to solve problems, but they also are a source of new ones.

- Positive effects have emanated from their flexibility, ability to self-regulation, activation of private actors and establishing regional and local governance structures.
- Negative effects have originated from their intransparency and lack of accountability[25].

The traditional state-centrism inherent to international law is definitely too rigid, today. Nonetheless, in the past it provided the orientation necessary for every society. Now, the situation is dominated by uncertainty, which concerns three major issues: the status of the actors, the procedure of the decision-making and the relevance of the decisions made. The fact that action is often limited to effecting of mere recommendations and memoranda of understanding does not make the situation any better. The "informal" activities, of course, do exert influence so that the question arises whether the actors have the necessary legitimation thereto.

What is to be done? It would be unrealistic to propose a strict return to the old principles of international public law. To some extent, its former advantages could have been reached only by ignoring important phenom-

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[24] See MARKUS EHRMANN, *Die Erfüllungskontrolle im Umweltvölkerrecht* (Baden-Baden: Nomos, 2000), 118 *et seq.*

[25] *Cf.* ELEANOR D. KINNEY, The Emerging Field of International Administrative Law: Its Contents and Potential, *Administrative Law Review* Vol. 54 (2002), 415, 427 *et seq.*

ena occurring in the everyday practice, informal actions in particular. We should state the matters as they are: No legal system can dispense with informal elements and no multi-layer system can exist in a hierarchical structure of a centralistic state. And yet, the structures described above must be organised in a way that allows for a transparent and fair reconcilement of interests. In order to achieve this, international and national laws must work together and harmonise with each other. Two keywords shall be mentioned in this context: order of information streams (*1*) and guidance by legal principles (*2*).

1. Legal Order for Information Streams

Many of the mechanisms acting in the regulatory structures are based upon *information exchange*, which takes place on the *vertical* - between national institutions and international actors - and on the *horizontal* level - between the national administrations involved. The elaboration of an information law that would apply to structures linked up in networks is essential. The following questions arise in this respect:

- Who shall have access to the data saved to the network and who is entitled to data input?
- Within which scope, if at all, is the public to have access to the data and how is the necessary level of secrecy to be guaranteed, for example, when NGOs are involved?
- Who shall account for the quality of the processed data and who is to be made liable for incorrect data?

2. Guidance by Legal Principles

The cooperation of national administrations is subject not only to the respective national law systems, but also to the common legal principles. These are: co-operation of all parties involved in accordance with the requirements of good faith, equal treatment, proportionality and protection of legitimate secrecy interests.

Due process of law is yet another principle that grants to every party involved a fair chance to be heard. This principle has been followed still more, for example, as international bodies have performed their rule-making in public announce-and-comment proceedings.

Participation of NGOs in particular is considered a major means of democratisation. But, its significance should not be overestimated. Allowing

for as many participants as possible need not necessarily be a sign of indisputable democratic legitimation. It can, on the contrary, be misleading.

Therefore, once again moderation is called for. A sufficient number of representative bodies is another important factor. These comprise also the bodies of binding interest arbitration and dispute settlement.

3. Ways of Realisation

The self-legitimation of administrative networks and their ability to meet these challenges appear doubtful, keeping in mind, *e.g.* the experience WTO bodies of dispute settlement have with the *amicus curiae* briefs. Respective regulations should be either included in the organisations' statutes or their adoption provided for in form of protocols that are to follow. It is essential to make a distinction between those who make the decisions on the issues of organisation structures and those who act within the organisations. In addition, national constitutional law should make provisions on the delegation of the competencies to international administrative action among its subnational entities. What we need is a new delegation doctrine designed for the specific purposes of international administration.

FINAL REMARKS

I would like to get back to my original question: What impact has international law had on national administrative law? "International law now governs issues some of which would have been considered domestic affairs up to the middle of the 20th century" (Wolfrum)[26]:

- International law has *harmonised* national administrative law systems in matters of human rights protection and recently, to a growing extent, even in more specific issues (The Aarhus Convention, public procurement law).
- It has multiplied the bilateral *co-operation* between national administrations. As a result, there has been a growing demand for strengthening the transnational mutual assistance, data protection and the law of mutual recognition of administrative action.
- And thirdly, administrative law has produced its own *administrative structures* that have integrated national administrations into

[26] *Op. cit.*, fn. 22 above, Introduction, 1.

their activities so that the latter have lost their exclusive position within the national political systems.

Apart from these three ways in which international law has influenced national administrative law, its overall impact seems to be relatively low: Even in the future, national authorities will still deal prevailingly with purely national affairs and the courts will decide the cases under purely national law. Here, the traditional model of administrative law (separation of power, legality, hierarchy, judicial control) has not lost its importance. Normally, international structures have integrated only national authorities performing very specific tasks (regulatory or supervisory agencies) that are not representative of everyday administrative practice.

This impression is, however, not quite true: The changes in national administrative law due to internationalisation have been such of quality rather than quantity. Internationalisation has touched key positions. To a certain extent, it has loosened national administrations from their traditional context and integrated them into networks that are fragmentary, act informally and obey the principles of economy rather than legality. However, all these tendencies cannot be attributed to internationalisation only. Soft law, New Public Management and a reduction of parliamentary and judiciary control have also played a role in this process.

Nonetheless, internationalisation has intensified and increased these effects while the possibilities to react by means of national law only have diminished. National public law and international law must be better adjusted to each other in the future. First steps could be the development of common principles and joint procedures. Solid forms will be also asked for such as, in particular, the law of administrative agreements that would stand between international and national law. The new *transnational administrative legal system* cannot build upon soft law only, but must also comprise steady legal institutes and hierarchical elements. All depends on the right mixture! The time has come for the academic law profession to make "Internationalisation of Administrative Law" a subject of systematic research.

ABSTRACTS/RÉSUMÉS

The report outlines various aspects of the impact international law has exerted on national administrative law. The author first gives an overview of recent developments in this area, and raises the question whether an internationalisation of administrative law is possible at all. A structured analysis of three main types of internationalisation follows. In the first chapter, internationalisation is addressed as a process of harmonisation in which international law acts as a driver of change. The obstacles and consequences of its transformation into national law are examined.

Second, the focus is placed on the administrative law of international administrative co-operation. Legal problems concerning regulatory principles and instruments are analysed by way of example taken from three areas of administrative co-operation. Last but not least, internationalisation by way of forming complex international regulatory structures such as dispute settlement regimes, legislative and implementation structures is dealt with. The author concludes his analysis by stating that the changes of national administrative law due to internationalisation have been such of quality rather than quantity. Finally, the suggestion is made to build a new *transnational administrative legal system* in order to better adjust national public law and international law to each other in the future.

Le rapport passe rapidement en revue divers aspects de l'impact que le droit international a exercé sur le droit administratif interne. L'auteur commence par donner un aperçu des évolutions récentes en ce domaine et soulève la question de savoir si une internationalisation du droit administratif est possible. Suit une analyse structurée de trois types principaux d'internationalisation. Dans le premier chapitre, l'internationalisation est abordée comme un processus d'harmonisation dans lequel le droit international guide le changement. Les obstacles et les conséquences de sa transformation en droit interne sont examinés. En second lieu, l'accent est mis sur le droit administratif de la coopération administrative internationale. Les problèmes juridiques concernant les principes et instruments de réglementation sont analysés au moyen d'exemples pris dans trois domaines de la coopération administrative. Enfin et surtout, il est traité de l'internationalisation à travers la formation de structures de réglementation internationale complexes, comme les régimes de solution des litiges, les structures législatives et de mise en application. L'auteur conclut son analyse en déclarant que les changements du droit administratif interne dus à l'internationalisation ont été qualitatifs plutôt que quantitatifs. Pour terminer, il propose l'élaboration d'un nouveau *système juridique administratif transnational* en vue d'une meilleure adaptation future du droit public interne et du droit international.

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