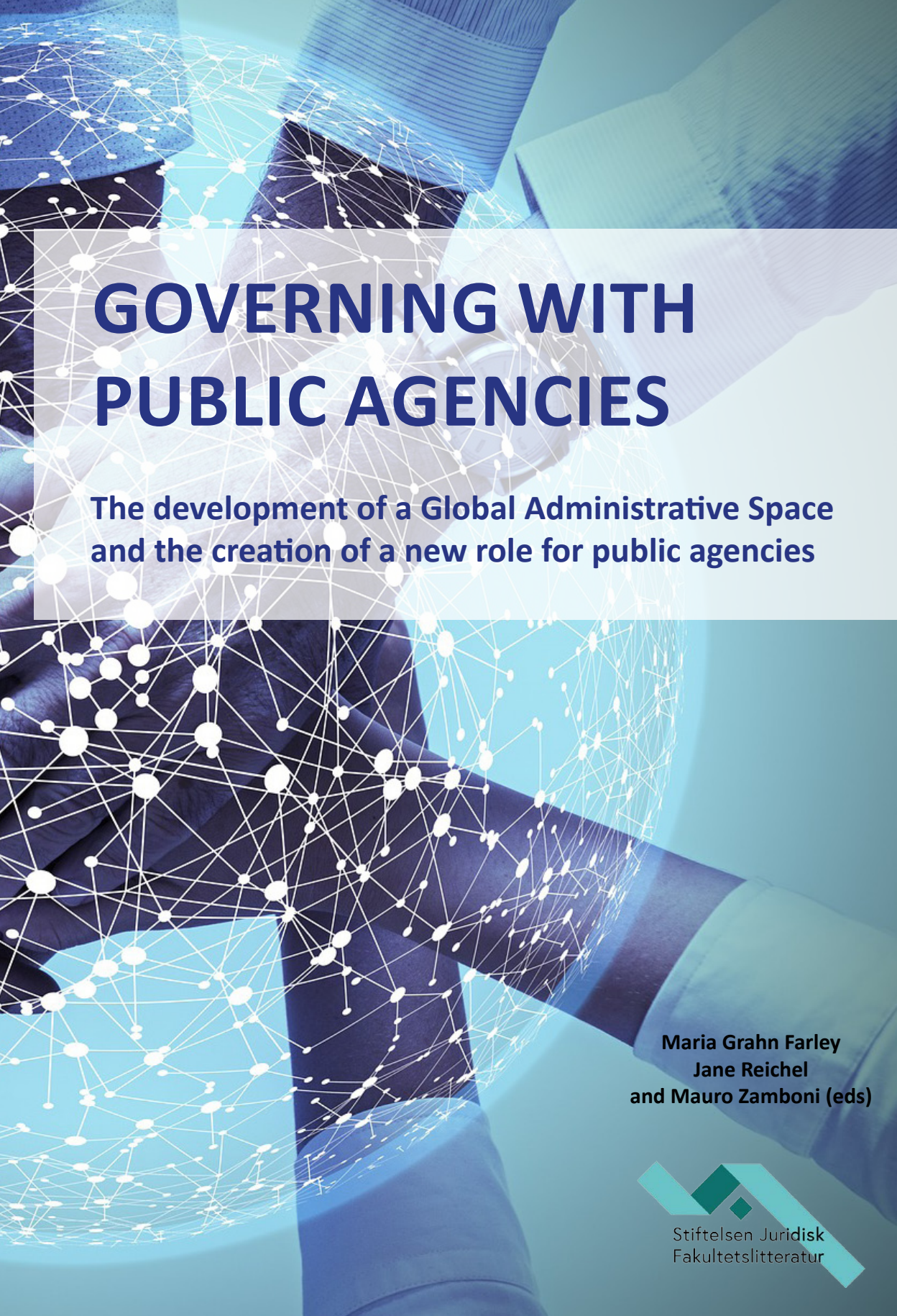

GOVERNING WITH PUBLIC AGENCIES

The development of a Global Administrative Space and the creation of a new role for public agencies

Maria Grahn Farley
Jane Reichel
and Mauro Zamboni (eds)

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Preface

The idea for this edited book finds its roots in a Conference that we organized in Stockholm, Sweden, September 16–17, 2019, under the patronage of the Faculty of Law, Stockholm University, Sweden. The title of the conference was Governing with Public Agencies – The Development of a Global Administrative Space and the Creation of a new Role for Public Agencies.

The theme of the symposium was the new role of public agencies acting as stand-in legis-lators at the international level. We wanted to examine how public agencies respond to the opening of what may be referred to as a Global Administrative Space, a space created through an increased interconnectedness between global, regional and national public and private actors. The question for the symposium was how the development has affected the role of public agencies in legislative procedures at an international level and within states. The result draws on the experiences and observations made by legal scholars from a diverse set of legal systems and cultures, illuminating common threads of developments towards a Global Administrative Space.

For this reason, we would first and foremost thank you all the participants to the conference, without whose contribution this book would have never been possible. We would also like to thank the Cassel Foundation at Stockholm University, the Swedish Research Council, the Riksbankens Jubileumsfond, Law Faculty's Trust Fund for Publications, Stockholm University, and the Emil Heijne Foundation for Legal Research, whose generous financial contributions made possible both the conference and the publication of this book in open access and print format.

Stockholm in September 2021

Maria Grahn-Farley Jane Reichel Mauro Zamboni

Contents

1. Introduction

*Maria Grahn-Farley, Jane Reichel and Mauro Zamboni**

The theme of this anthology is the new role of public agencies within what we have termed a "global administrative space," a space created through increased collaborations and interconnectedness between global, regional and national public and private actors. Within this space policies are adopted, principles developed, and even law is at times enacted. The role and functions of public agencies have hereby undergone fundamental changes. Public agencies at global, regional and national levels act as stand-in legislators in areas within fundamental rights regimes, regulatory frameworks for sector specific areas (financial systems, pharmaceutical regulations, data protection) as well as fishing and agricultural industries, to name only a few.[1] Also private entities partake, as well as other public actors, such as judicial actors of different kinds. The decision-making capacity, procedures and out-comes vary, as well as the degree of 'globalisation'. The global administrative space can thereby be identified as either connected to or separated from the national constitutional arenas. The question on the role of the public agencies within the global administrative space is taken on with an exploratory approach, in order to operationalize the concept. The question will be addressed from an international, regional and national level, providing different interpretations in different contexts. Some are projecting future applications, whilst others are taking stakes of current operations.

The development of administrative law in an era of globalization has been vividly discussed in legal doctrine for a few decades. The move from a national to a global agenda places democratic instruments such as accountability and participation under stress. The Government has traditionally the capacity or representing the state in international affairs, but today that picture is more blurred. In the classic Westphalian view of the sovereign state, until the end of World War II, the nation state was seen as the natural forum for addressing issues relating to the people living within its borders. A central feature in a traditional understanding of sovereignty, even with regards to the concepts being at its core indeterminate, is its focus on states having a right to be left alone, of being protected from out-

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[1] See for example Sabino Cassese (ed), Research Handbook on Global Administrative Law (2016 Edgar Elgar); Eduardo Chiti, Bernardo Giorgio Mattarella, (eds), Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison, (Heidelberg, Springer, 2011)

side interventions.[2] When the state acts on the international arena, the basic point of departure is that the state acts as one uniform entity. The state is represented by the head of state or the government, and for an international agreement to become binding upon a sovereign state, each state involved must consent to be bound by the agreement. A post-Cold War development has been that more treaties and agreements are adopted unanimously, i.e. consensual rulemaking.[3] Further, states have the sovereign right to implement an international agreement within its jurisdiction. Each sovereign state may thus have control over their international activities.

After the World War II, an acceptance among states, at least in the Western sphere, emerged as to the necessity of addressing issues of the non-implementation of international law. Several mechanisms for individuals to file communications or report to different organs within international organizations were subsequently introduced, enabling the organization to investigate the complaint and make known its view on the act at hand.[4] An even more important step was taken when allowing individuals at the national level to bring actions to international courts, inviting them to interpret how the international treaty is to be interpreted in an individual case, and thereby how the international law is to be interpreted in a national context. Mechanisms with this sort of legal teeth were introduced in two European organizations emerging after 1945, the Council of Europe and the EU,[5] and further on, the African and Inter-American Courts.[6] Here international courts were given the mandate to give binding verdicts on whether the Member States of the organization had transgressed their obligations according to the convention or treaty, in its internal implementation and interpretation.

After the fall of the Berlin wall and the end of the cold war in 1989, developments in international law have again entered into a new stage, where activities at the international or global arena have multiplied, both in content and breadth. An interesting development is the growth in the number of actors involved at the global level, and the number of national organs representing the state.[7] It is no longer the sole privilege of the head of state or the government to act on behalf

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[2] Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order', *Stanford Journal of International Law* (2004) 283 283-327, p. 284, referring to Article 2 (7) of the UN Charter; "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

[3] James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012), p.

[4] For example, Article 41 of the International Covenant on Civil and Political Rights and Articles 18 et seq International Covenant on Economic, Social and Cultural Rights.

[5] Article 35 European Convention on Human Rights and Article 267 Treaty of the functioning of the European Union. See further Andreas Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', *European Constitutional Law Review*, 2010 6, p. 175.

[6] Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples'; Article 62 of the American Convention on Human Rights (Pact of San Jose, Costa Rica).

[7] Joseph Corkin, 'Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld', *European Law Journal,* 2013 19 636-661, p. 650

of the nation state. Today public agencies to a large extent have their own contacts with sister-organs in other nation states as well as international organizations active in the respective policy area. This phenomenon is especially evident within the EU, where an integrated or composite administration is taking form[8] but can also be witnessed elsewhere.[9] A further trait of this development is the willingness to open up the procedures to non-state actors.[10] Within the EU, the importance of involving the civil society, stakeholders and business in the EU legislative processes was underlined in the 2001 Commission White Paper on Governance[11] and introduced as part of EU democratic foundation in 2009, via Article 11 of the Treaty of the European Union (TEU).

Against this background, this open access anthology sets out to examine current developments in administrative law from a multitude of perspective and angles. Three common key words for the analysis' can however be defined. All papers relate to one or more of the following key concepts;

The authority of rules enacted by public agencies within the global administrative space. The point of departure is taken from Joseph Raz, i.e. the authority of law is the claim of any system that each law of the system must, simply by virtue of its position as such, serve both as a reason to act in accordance with its terms and as a basis for disregarding reasons to act that are counter to its terms.[12] The questions raised here are, for example, under what circumstances may rules enacted by public agencies within the global administrative space be seen as law, as minimum standard or simple soft law? Can the authority of the rules enacted be regarded as contextual?

The legitimacy of rules enacted by public agencies within the global administrative space. Max Weber has held that the law and its actors are rightful holders of authority and therefore they have the right to prescribe certain behaviour. Their prescriptions are entitled to be obeyed; and laws should then be obeyed, simply because this is the right thing to do.[13] In what way may this understanding of legitimacy be translated to public agencies active at the global arena? Can legitimacy be derived from the problem-solving capacity of global administrative regulatory

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[8] Eberhard Schmidt-Aßmann, 'Introduction: European *Composite* Administration and the Role of European Administrative law', in Oswald Jansen & Bettina Schöndorf-Haubold (eds) The European Composite Administration, (Cambridge, Intersentia, 2011); Hermann C.H Hofmann & Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal* 13 2007 253-271, 253.

[9] See e.g. the literature on Global Administrative Law, Sabine Cassese, 'Administrative Law without the State? The Challenge of Global Regulation', *New York University Journal of International Law and Politics* 2005 37 663-694; Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, 'The Emergence of Global Administrative Law', *Law & Contemporary Problem*s 2005 68, 15-61; Eduardo Chiti & Bernardo Giorgio Mattarella, (eds), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison* (Heidelberg, Springer, 2011).

[10] Dan Wielsch, 'Global Law's Toolbox: Private Regulation by Standards' *American Journal of Comparative Law* 2012 60 1075-1104.

[11] Commission White Paper on Governance COM(2001) 428 final, 14.

[12] Joseph Raz, The authority of law. Essays on law and morality (Clarendon Press 1979).

[13] Max Weber, Economy and Society (University of California Press 1978), 654-658.

regimes themselves, or merely from public international law tools conferring the authority to enact rules from sovereign states involved? How does national law respond to potential discrepancies between powers conferred, decision-making procedures applied and rules enacted?

Accountability for public agencies acting as stand in legislators within the global administrative space. Normanton defines accountability as a liability to reveal, to explain, and to justify what one does; how one discharges responsibilities, financial or other, whose several origins may be political, constitutional, hierarchical or contractual.[14] How can these mechanism function in relation to public agencies at the global arena?

The contributions are divided in four sections; Setting the scene, International Perspective, Regional perspective, and National perspectives. The first section consists of a contribution by Pedro Moniz Lopes entitled: On the validity of a global normative framework for public agencies: A legal theory approach to Global Administrative Law. In his contribution, Moniz Lopez scrutinizes some subjects of Global Administrative Law (GAL), as well as the main legal scholars' accounts of GAL, against the basic hard concepts of legal theory. Moniz Lopez argues the continued value of a scientific approach to law based on Austin's distinction between law as it is and law as it ought to be and to the basic logical distinction between «law» and «non-law». He submits that the basic tenets of methodological positivism are compromised insofar as GAL is seen as an academic enterprise politically oriented to improve the law, under the view that the law's functions are something necessarily external and aprioristic to the law itself. Further, GAL is necessarily confronted with the task of having to explain which of the phenomena it studies that are to be described as law and not simply as management and meta-management. He concludes that GAL legality is not a presupposition, but a contingent result that needs to be evidenced. This endeavor may be more political than scientific.

The following section, International perspectives, includes contributions from Gun Yee Bae and Yukio Okitsu. Gun Yee Bae's contribution is titled The Legal Characteristics and Effects of UN Security Council Resolutions. Bae analyzes the influences of the UN Security Council resolutions (UNSCRs) on inter-Korean relations, especially the thirteen UNSCRs imposing punitive measures on North Korea. The activities of the UN are carried out in a wide range of international administrative areas across all sectors including politics, economy, and society, and the conventions and protocols between the UN member states can be considered to have legislative effects in terms of international and domestic law because they are in the form of codified norms. In addition to these standards in the form of norms, however, the disciplinary measures through UN Security Council sanctions are formally sanctions, but in practice, they act as practical regulatory legislation through the effects of prohibiting and restricting some acts of the Member

[14] Leslie E. Normanton, Public Accountability and Audit: A Reconnaissance, in B. Smith and D. C. Hague, (eds.), *The Dilemma of Accountability in Modern Government* (MacMillian 1971), 311-346.

States. By raising the question on what effects the UNSCRs concerning North Korea have had on the Constitution of the Republic of Korea and the peace on the Korean Peninsula, the contribution aims to provide a basis for discussions on the legitimacy of international standards made by international organizations and others in the future.

Yukio Okitsu's contribution is entitled A Global Administrative Act?: Refugee Status Determination Between Substantive and Procedural Law. Okitsus's contribution addresses the global regime for protection refugees and the division of power of refugee status determination (RSD) between the UN Refugee Agency, UNHCR, and municipal authorities. The question raised is what are the implications, authority, or weight the UNHCR's determination of mandate refugee status has in relation to states' power of RSD from the perspectives of international and global administrative law. Okitsu submits that if UNHCR and states parties are supposed to cooperate in a global administrative space concerning refugees, and RSD is considered a global administrative act conducted in this space, UNHCR's RSD should be given some weight by states parties. Nevertheless, it should not be given weight in the same manner as a domestic administrative act, which has a conclusive legal effect on a person's status; the weight should be given based on its reasoning rather than its conclusion. The conclusion might require UNHCR to be more accountable and transparent.

The third section, Regional perspective, consists of contributions by Rainar Arnold, and Isaac de Paz González. Rainer Arnold's contribution is entitled The Relation between Constitution and Global Administrative Law: Some Reflections. The theme of Arnold's contribution is the essential elements of anthropocentric constitutionalism and its relation to extra-state cooperation. Arnold takes as his point of departure the submission that rule of law, the individual's freedom, and democracy in the classic sense are realized within the state, and that contemporary forms of inter-, supra-, and transnational cooperation show structures which, in part, do not manifestly reflect these concepts. From this, the question rises whether the state-linked pattern of constitutionalism is dispensable, unnecessary, or even inappropriate in the extra-state field? In his analysis, Arnold assesses the transferability of the requirements from the state to the extra-state sphere based on their functions. This question is discussed with regard to the relation of the European Union (EU) and its Member States, but may be relevant also for other forms of state participation in international co-operations.

Isaac de Paz González' contribution is entitled The weak Inter-American Input of International Guidelines into American Convention on Human Rights Member States. Weakness and pathways. de Paz González focuses on the case law of the Inter-American Court (IACtHR) as a part of a new human rights agenda for Member States of the American Convention on Human Rights (ACHR). Taking its point of departure in a presentation of the judicial dialogue between domestic judiciaries and the IACtHR, the contribution shows how the IACtHR has been adapting international law and giving procedural effects to guidelines of the UN Treaty-Based Bodies (UN TBB) in substantive and procedural ways. Hereby, de

Paz González concludes, national courts have received normative international input in terms of jurisprudential and legislative guidelines provided through Inter-American judgments. The aim of the contribution is thus dual. First, to analyze the role of the IACtHR as a regional agency and the dialogue carried out between it and two types of national agencies: courts and legislators. Secondly, to study the influence of international law on national human rights jurisprudence/legislation.

The final section focuses on National perspectives and includes contribution by Oksun Baek and Henrik Wenander. Oksun Baek's contribution is entitled The constitutional status and roles of public agencies participating in legislation in the global domain – The Republic of Korea's establishment of technical norms. In her contribution, Baek examines the status of public agencies which affect either global or domestic legislation within the Korean legislation system in order to determine the role of public agencies participating in legislation in the global domain. Korean law on ship safety standards and nuclear energy standards are taken as examples. Baek concludes that it is not always inappropriate for public agencies to be included as advisory bodies, however, participating as an advisory body and observing the legislation differs from participating as a legislative entity. She submits that there should be an enhancement of the legislation system for the purpose of strengthening the role of public agencies when there is an increasing need to emphasize citizens' legislative cooperation as well. In order to pursue harmony of existing legislation and democratic legitimacy, there ought to be greater discourse about procedural ways to grant legislative rights and to control those rights.

Henrik Wenander's contribution is entitled Public Agencies in International Cooperation under National Legal Frameworks: Legitimacy and Accountability in Internationalised Nordic Public Law. Wenander addresses the inherent tension between independence and governmental steering in the constitutional structures in connection with public agencies, between legitimacy and accountability. The expansion of European and international administrative cooperation adds yet another dimension to this tension. The issue is analysed with the Nordic countries – Denmark, Finland, Iceland, Norway and Sweden – as examples. The article aims at analysing the legal framework for the involvement of Nordic public agencies in EU and international decision-making and implementation of rules. Wenander concludes that the participation of national administrative agencies in European or other international administrative cooperation highlights problems that already exist in the purely domestic settings the lack of democratic legitimacy in administrative rule-making, necessitating a simultaneous discussion in both the national and the international setting. This is especially important in relation to EU law, since the institutional structures are, to a seemingly ever-increasing degree, interlinked by the use of composite decision-making structures.

I. SETTING THE SCENE

2. On the Validity of a Global Normative Framework for Public Agencies

A Legal Theory Approach to Global Administrative Law

Pedro Moniz Lopes *

2.1 Global Administrative Law: Introduction to the methodological shift

One would not be overstating matters if one were to consider Global Administrative Law (GAL) to have become the flavour of the month (or the decade, if you will), given the number of authors who are currently jumping on the wagon disserting about overcoming the state-centered conception of law, the informality of global administrative procedures, the legal relevance of soft law (e.g., recommendations, regulatory networks and intergovernmental cooperative arrangements) and the preferential relevance of the individual – over the State – at a global scale.[1] This is not to say that one should not acknowledge the legal relevance of, for instance, "(i) the transboundary networks of national agencies emerging more or less spontaneously outside the realm of international organizations; (ii) networks of national agencies acting with symbolic and secretarial assistance of international organizations; (iii) expert and administrative staff implementing the objectives of international organizations and (iv) arrangements in which actors from civil society play a significant role and which often lead to a hybridization of public and private governance."[2]

It seems to me, however, that not everything that is legally relevant is necessarily law per se. Recall the difference between naturalistic actions (actions which may be legally relevant) and deontic actions or intrinsically legal acts. Much like

* Law School, University of Lisbon, Portugal. I thank Maria Grahn-Farley for insightful comments on a draft version of my paper.

[1] See, for instance, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, 15 ff.; Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law* in Eur. J. Int'l L., Vol. 20, nº 4, 2009, 23 ff.; Sabino Cassese, *The Globalization of Law*, in N.Y.U.J. Int'l L. & Pol., Vol. 37, n° 4, 2005, 980 ff.

[2] This typology is foreseen in Olaf Dilling, Martin Herberg & Gerd Winter, 'Transnational Administrative Rule-making' in Olaf Dilling, Martin Herberg & Gerd Winter (eds.), *Transnational Administrative Rule-making - Performance, Legal Effects and Legitimacy,* Oxford and Portland, 2011, 4 ff. See also Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, 53.

moves in chess, the latter types of acts are not naturalistic actions – albeit they presuppose such actions, which is an entirely different matter – that is, human actions that anyone can perform as an exercise of natural abilities (such as moving one's arm or shouting)[3]. The types of acts performed pursuant to norms of competence – as an exercise of legal competence – are labelled acts-in-the-law, actes juridiques or $acts_{law}$.[4] There is a specific difference between action1 "moving one's hand and changing the position of a wooden piece on a table" and action2 "making a move for checkmate". The latter is an institutional action and does not exist without a prior normative set making up the constitutive rules of the institution.[5]

Norms of competence are therefore constitutive norms.[6] They are concurrently (some of the) conditions for validly bringing about changes in legal positions. Validity is a systemic relational concept covering the membership of a given $acts_{law}$ (norm or decision) – created through the exercise of competence – within a given legal system.[7] An $acts_{law}$ is therefore valid if its creation was carried out (and its content is in conformity or compatibility, whichever is the standard of legality) in observance of all the applicable norms of the legal system. Among these are norms of competence, deemed conditions for the creation of law and not requirements to be met in the creation of law. Taking into account the categorization of Conte[8] borrowed by Atienza and Manero[9], norms of competence may therefore be dubbed anankastic-constitutive norms, as they establish the necessary conditions for their own object.[10]

My question is, therefore, the following: to what extent may one assert that the actions performed by GAL entities (GAL actions) are valid $acts_{law}$? I am referring to GAL actions comprised in the accepted types of globalized administrative regulation, that is (i) administration by formal international organizations (e.g., actions performed by the United Nations Security Council and the United Nations High Commissioner for Refugees), (ii) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials (e.g., actions performed by the Basel Committee), (iii) dis-

[3] See Herbert L.A. Hart, *The Concept of Law,* Oxford, Clarendon Press, 41 ff.

[4] See Alf Ross, *Directives and Norms.* New York: The Humanities Press, 1968, 130. See Torben Spaak, *Norms that Confer Competence* in Ratio Juris, 16, 1, 91 and Idem *The Concept of Legal Competence - an Essay in Conceptual Analysis*, Aldershot, Darthmouth Publishing Company, 1994.

[5] See Jordi Ferrer Beltrán, Las Normas de Competencia. Un Aspecto de la Dinámica Jurídica, Madrid, Marcial Pons.

[6] See Pedro Moniz Lopes, 'The Nature of Competence Norms' in M.N.S. Sellers and S. Kirste (eds.), *Encyclopedia of Philosophy of Law and Social Philosophy,* Springer (2017), https://rd.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_223-1.

[7] See Riccardo Guastini, *La Sintassi del Diritto,* G. Giappichelli Editore, Torino 2011, 253 ff.; T. Spaak, *Norms that Confer Competence* in Ratio Juris, 16, 1, 91–92.

[8] See Amedeo Conte, *Materiali per una Tipologia delle Regole* in Materiali per una Storia della Cultura Giuridica, 15, 1985, 345 ff.

[9] See Manuel Atienza & Juan Ruiz Manero, 'Sulle Regole que conferiscono Poteri', in paolo Commanducci, Riccardo Guastini, *Analisi e Diritto 1994. Richerche di Giurisprudenza Analitica,* Torino, Giappichelli, 72.

[10] On anankastic propositions as statements to the effect something is (or is not) a necessary condition of something else, see Georg H. von Wright, Norm and Action. New York: The Humanities Press, 10.

tributed administration conducted by national regulators under treaty, network or other cooperative regimes (e.g., actions performed by domestic regulatory agencies on issues of foreign or global concern, such as actions of national environmental regulators), (iv) administration by hybrid intergovernmental-private arrangements (e.g., actions performed by the Codex Alimentarius Commission in defining standards for food safety) and (v) administration by private institutions with regulatory functions (e.g., actions performed by the International Standardization Organization on product and process).[11]

Note that if only $acts_{law}$ can be valid – unlike naturalistic actions, which are neither valid nor invalid – and validity entails conformity or compatibility of an $acts_{law}$ with all applicable norms of a given legal system, then validity entails the existence of such norms and of a legal system. Everything seems to be entangled. I am referring conjunctively to the following type of norms comprised in a legal system:

a) norms of competence enabling the creation of $acts_{law}$;
b) procedural norms setting forth the procedure for the creation of $acts_{law}$;
c) norms setting the applicable form of $acts_{law}$;
d) norms prescribing the content of $acts_{law}$ and;
e) norms prescribing the aim and purpose of $acts_{law}$.

Now, the above is the classical view. In the GAL project, however, informality is the rule.[12] The dogmatic and systematic Handlungsformen der Verwaltung of traditional administrative law seem to be dissolved along the way as this broad sweep of transnational governance phenomena is framed as (global) administrative law. A methodological shift seems to be the antidote found for the "problem": adopting a "wide" and "inductive methodology" based on the "analysis of highly diverse arrangements and norms actually found in the practice of global governance, and with dynamic interactions among these, as well as rapid change, rather than with problems of their legal basis or taxonomical efforts to delineate their precise legal characters".[13] On the other hand, this methodological shift entails several proposals such as "proposing that much of global governance [can] be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests and other forms of regulatory administrative decision and management".[14]

These methodological shifts and "proposals", however, create a number of problems. As A. Somek puts it, within this bundle of GAL conducts, individual acts issued by the Security Council are just as paradigmatic an instance of GAL

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[11] See this taxonomy in Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, 20.

[12] See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, 53 ff.

[13] See Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law* in Eur. J. Int'l L., Vol. 20, nº 4, 2009, 24.

[14] See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law,* L&CP, Vol. 68, Summer/Autumn, 2005, 17.

as standard-setting by the Codex Alimentarius Commission: "there is neither system nor centre, but merely a number of family resemblances among different processes".[15] In this conjunction of multi-shaped formal and (most particularly) informal activities, it is relevant to pause for a minute amid the GAL legality frenzy, take a deep breath, and consider whether all or some of GAL is law in the first place. One would agree that every project – every good project – needs a group of skeptical people alongside the enthusiasts.

2.2 Global Administrative Law and positive law

Edouard Fromageau has written a very interesting article entitled "The concept of positive law in Global Administrative Law: a glance at the Manhattan and Italian Schools".[16] A while back, I had the chance to comment on it. His paper explores the two main schools of thought on this emerging topic, the Manhattan School (B. Kingsbury et al.) and the Italian School (S. Cassese et al.), and aims at detecting a juxtaposed conceptual unity of positive law under these views in connection with GAL. Simultaneously, the paper constitutes an attempt to link the theoretical aspect of legal theory with the realistic view of the multi-shaped procedures of what is commonly known as GAL. Fromageau's take is the following: "The question of whether Global Administrative Law (GAL) exists can receive various answers. GAL may exist as a research project, as a field of studies or as theory. But does it exist as positive law?"[17] He makes a very interesting semantic and pragmatic query into both the meaning and the purpose of the use of the concept "positive law" in connection with GAL; his intents coherently combine the requirement for scientific terminology in legal theory with the realistic approach to the legal phenomena as framed within the most famous two schools of GAL. And even though he intentionally oversteps the boundaries of the strictest concept of legal science qua legal normative science, his use of legal cultures as a factor for understanding a possible – albeit ultimately inexistent – conceptual unity among different cultural views on GAL, under the influence of D. Nelken, seems promising.

The authors who dabble with GAL quite frequently misuse the concept of positive law or, which may be even more problematic, shape this concept to accommodate the field of study under development. It is not irrelevant to note that many authors mention the view of the creators of GAL. Highlighting this aspect seems important, as it strengthens the argument that the GAL project is, to a certain extent, a "self-fulfilling prophecy" – substantiated by the growing number of

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[15] See Alexander Somek, *The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int'l L., Vol. 20, nº 4, 2009, 986. Others, such as Carol Harlow, understand that a universal set of administrative law principles is not only difficult to identify, but also not especially desirable. See Carol Harlow, *Global Administrative Law: the Quest for Principles and Values* in Eur. J. Int'l L., Vol. 17, nº 1, 2006, 211 ff.

[16] See Edouard Fromageau, The Concept of Positive Law in Global Administrative Law: A Glance at the Manhattan and Italian Schools in e-Publica – Revista Eletrónica de Direito Público, Vol. 6, 2015, 121 ff.

[17] See Edouard Fromageau, *The Concept of Positive Law in Global Administrative Law*, 122 ff.

authors who wish and strive for its existence.[18] This theoretical inversion carried out by GAL scholars may be subject to criticism under the positivist tradition, at least in regard to two main aspects: a conceptual one and a methodological one.

2.2.1 The conceptual aspect

Under the conceptual aspect, one must acknowledge the existence of different conceptions of modern legal positivism. They usually overlap in the following features. Law is man-made and an act of human will. All universals are man-made; law is a system of universals; ergo law is man-made.[19] The content of law is contingent, i.e., it is not materially bound by any a priori standard. Therefore, what counts as law in any particular society is fundamentally a matter of social fact or convention ("the social thesis").[20] Morals are not necessarily correlated with the identification of law (inclusive legal positivism) or morals are necessarily uncorrelated with the identification of law (exclusive legal positivism). In fact, the content of law is something contingent and not necessarily materially bound by a pre-legal normative political or moral content (in inclusive legal positivism) or the content of law is something contingent and necessarily not materially bound by a pre-legal normative political or moral content (in exclusive legal positivism).[21] Law is a conjunction of human acts of will, statically composing a body of norms which is subject to dynamic mechanisms of creation and derogation; law therefore equals enacted law under procedural requirements set forth by the relevant legal system (whether "official" procedures or opinion juris vel necessitatis). Additionally (and paradigmatically), law is the law that is, never to be mixed up with the law that ought to be (or the law that some find more politically useful to be).[22]

While addressing the history of the positivist tradition, Fromageau in his paper rightly highlights this last aspect – law as it is versus law as it ought to be – as the lowest common denominator of positivism.[23] But this lowest common denom-

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[18] Alexander Somek, The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury in Eur. J. Int'l L., Vol. 20, nº 4, 2009, 990.

[19] «Laws are commands of human beings». See Herbert L.A. Hart, Positivism and the Separation of Law and Morals in Harvard Law Review, 71, 4 (Feb 1958), p. 601, Note 25 and pp. 602–606. On the topic of universals as man-made, see İlham Dilman, 'Are there Universals?' in Quine on Ontology, Necessity and Experience, London, Palgrave Macmillan, 1984, pp. 42–71.

[20] See, for instance, Alf Ross, 'Validity and the Conflict between Legal Positivism and Natural Law' in Stanley Paulson, Bonnie Paulson (eds.), Normativity and Norms: Critical Perspectives on Kelsenian Themes, Oxford, Oxford University Press, 1998, pp. 147 ff.

[21] See Wilfrid Waluchow, 'Legal Positivism, Inclusive versus Exclusive' in Edward Craig (ed.), Routledge Encyclopedia of Philosophy. London: Routledge. Retrieved September 18, 2008, from <http://www.rep.routledge.com.libaccess.lib.mcmaster.ca/article/T064>. See Jules Coleman & Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed.), A Companion to Philosophy of Law and Legal Theory, Oxford, 1996, pp. 251–252.

[22] The concept of law *qua* positive law (the only one scientifically relevant for positivists) is the enacted law, irrespective of whether it is statutory or customary law. See John Austin, *The Province of Jurisprudence Determined*, London, 1832, p. 175. See also Aldo Schiavello, *Il Positivismo Giuridico dopo Herbert L. A. Hart - Un' Introduzione Critica,* Torino, 2004, pp. 51 ff.

[23] See Edouard Fromageau, *The Concept of Positive Law in Global Administrative Law*, 124 ff.

inator leaves open the question of whether it is feasible to sustain a concept of positive law in connection to GAL different from the one sustained in general legal theory (whichever it is). I, for one, believe it is not. Why would it be? In hard terms' parlance, law is law. What, then, is the purpose of this talk of the specificity of GAL? This is relevant to assess the validity of Kingsbury's "dual concept of positive law," put under scrutiny by the principle of universality held dear within the positivist tradition. On this topic, I suspect that Fromageau made an empathic reading of what he interestingly depicts as Kingsbury's dual positivism (separately applicable to both international law and GAL), mainly his extended positivist concept of law applied to GAL. I will get back to this below. Now, I will turn to the methodological aspect.

2.2.2 The methodological aspect

This second aspect seems critical to me. Authors dealing with GAL and legal positivism rarely distinguish between the three main types of positivism as described by N. Bobbio: (i) theoretical positivism, (ii) ideological positivism, and (iii) methodological positivism.[24] Even though, for instance, Fromageau was more interested in discussing the theoretical aspect of legal positivism as applied to GAL (i.e., a specific concept of positive law and the separation of law as it is from law as it ought to be), the input of methodological positivism seems rather relevant here. In the methodological sense, legal positivism is usually identified as the legal theory that best suits the purpose of performing legal science: it aims at defining the boundaries of legal science.[25] Methodological legal positivism arises from the effort to transform the study of law into a true adequate science – i.e., objective knowledge – a science with the same characteristics as physics, mathematics and natural sciences.[26] Methodological positivism is, in this case, an activity the outcome of which is an evaluative description of the normative reality.

Legal positivists endorse a view shared with all other philosophers self-labelled as positivists (in philosophy of science, epistemology, and elsewhere): a commitment to the idea that the phenomena comprising a given field of knowledge (e.g.,

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[24] See Norberto Bobbio, *Il Positivismo Giuridico. Lezioni di Filosofia del Diritto*, Torino 1961, (Portuguese translation "O Positivismo Jurídico. Lições de Filosofia do Direito" by M. Pugliese, E. Bini e C. E. Rodrigues), São Paulo, 1999, p. 234.

[25] Dividing positivism into *(i)* ideological positivism, *(ii)* theoretical positivism and *(iii)* methodological positivism, see Norberto Bobbio, *Il Positivismo Giuridico - Lezioni di Filosofia del Diritto* (Portuguese Translation "O Positivismo Jurídico", M. Pugliesi, E. Bini and C. Rodrigues, São Paulo, Ícone Editora, 1999), pp. 233 ff. On methodological positivism, see also Carlos Santiago Nino, *Introducción al Análisis del Derecho*, 2nd ed., 12th reimp., Buenos Aires, Ariel Derecho, 2003, pp. 165 ff.; Mauro Barberis, *Introduzione alle Studio del Diritto,* Torino, G. Giappichelli Editore, 2014, pp. 23 ff. and Juliano Maranhão, *Positivismo Lógico-Inclusivo,* Madrid, Marcial Pons, 2012, pp. 33 ff.

[26] Stating that «with a few exceptions, modern analytic approaches to law focus on the tradition of legal positivism and its critics», Dennis Patterson, Introduction in Dennis Patterson (ed.), A Companion to Philosophy of Law and Legal Theory, 2nd ed., Oxford, Wiley-Blackwell, 2010, p. 2.

law, science) are accessible to the human mind.[27] Methodologically, traditional jurisprudence has long been divided into two major subcategories: normative and descriptive. This division was made famous by John Austin, the nineteenth century positivist who aimed at "determining the province of jurisprudence".[28] In Austinian terms, the proper domain of jurisprudence is the descriptive analysis of the positive law, its basic concepts and relations.[29] Normative analysis of law, stated Austin, was the proper domain of legislation, not jurisprudence, and the two should not be confused, just as law and morality should not be confused.[30] This positivist account of law underlies the official definition of jurisprudence found in Black's Law Dictionary: "that science of law which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order … but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation."[31] In Bobbian terms, if science is the evaluative description of reality, then the positivist method is simply the scientific method and, therefore, one must endorse it if one wishes to perform legal science. Otherwise, one will be dabbling in legal philosophy and legal ideology, but not in legal science.[32]

Positive law – whatever this encompasses – should not be affected or constructed by the legal scientist just as any other object of science should not be affected by the one performing acts of science. To put it in a Kelsenian fashion, law should be dealt with as a datum that is subject to some kind of epistemological constructivism by legal scholars – e.g., legal dogmatics – but the legal discourse

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[27] See Jules Coleman & Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed.), A Companion to Philosophy of Law and Legal Theory, 2nd ed., Oxford, Wiley-Blackwell, 2010, p. 228.

[28] See John Austin, The Province of Jurisprudence Determined, Cambridge, Cambridge University Press, 1995, reprint 2001, pp. 18 ff.

[29] See John Austin, The Province of Jurisprudence Determined, pp. 10 ff. As Herbert L. A. Hart puts it, «the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, 'functions,' or otherwise». See Herbert L.A. Hart, Positivism and the Separation of Law and Morals, p. 601, Note 25 and pp. 608–610.

[30] «The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.» See John Austin, The Province of Jurisprudence Determined, p. 159.

[31] See Patricia Smith, *Feminist Jurisprudence* in Dennis Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Wiley-Blackwell, Oxford, 2010, p. 292.

[32] See Norberto Bobbio, Il Positivismo Giuridico, p. 135 and 238. See also Riccardo Guastini, Los Juristas a la Busqueda de la Ciencia, in Distinguiendo. Estudios de Teoría e Metateoría del Derecho, Barcelona, Gedisa Editorial, 1999, pp. 263 ff.

of law should never be mixed with the meta-discourse of the legal theorist or the legal practitioner.[33] Yet this is precisely what seems to underlie the GAL project, right from the beginning. Now, the requirements of methodological positivism are compromised insofar as GAL is seen as an academic enterprise politically oriented to improve the law, under the view that the law's functions are something necessarily external and aprioristic to the law itself. Legal science and legal dogmatics (or legal doctrine) are different concepts (and have different underlying enterprises and endeavours). Sometimes they are erroneously used interchangeably. And let us not forget that legal science is a powerful tool for credibility: history has shown that political projects have been successfully carried out through the usage of scientific parlance, particularly of so-called hard science.[34]

The main epistemological question of legal positivism is «why do we know what we know about law?» If we are certain that we know something, there must be some legal knowledge, which means that it should be possible to identify the objective criteria of truth or falsehood of propositions about the law. The discourse of science (the scientific discourse) is necessarily assertive, as it necessarily aims at describing phenomena (i.e., at describing reality as it is).[35] What is said through a discourse of science is, therefore, true or false, under a certain account of truth. Legal science is thus scientific – if (among other requirements) its discourse is assertive and it aims to describe law as it is (i.e., it is an enterprise of legal cognition). Legal science is legal because such enterprise of scientific cognition and it encompasses a descriptive discourse, the object of which is a mainly prescriptive discourse (albeit sometimes declarative, e.g., the constitutive dimension of legal concepts and norms of competence).

Whether or not the positivist methodology is accepted, there seem to be sound reasons to accept its view, according to which law – any law, including GAL – is a discourse.[36] Law is a discourse, the performance of which is carried out through the language of the law-giving or law-creating authorities, also called the sources of law (whichever they are understood to be).[37] This by no means denies that the

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[33] See Riccardo Guastini, 'Normativism or the Normative Theory of Legal Science: Some Epistemological Problems' in Stanley Paulson & Bonnie Paulson (eds.), *Normativity and Norms - Critical Perspectives on Kelsenian Themes*, Oxford, 2007, pp. 321 ff.

[34] Many times, scholars and legal practitioners have claimed to be performing legal science when they are indeed performing something else (something entirely legitimate, even something necessary, yet not legal science). For instance, it is claimed that Milton Friedman's account of economics was a (liberal) political project conveyed with the usage of *hard sciences* (such as physics and mathematics). See Raquel Franco, *Teoria Económica da Decisão - Percurso Evolutivo e Aplicações Jurídico-Normativas*, Lisbon, 2013, pp. 21 and 123. See also Lawrence Boland, *The Foundations of Economic Method - A Popperian Perspective*, 2nd ed., New York, Routledge, p. 187.

[35] See Hans Kelsen, *General Theory of Law and State*, Cambridge (Mass.), Harvard University Press, 1945, XIV.

[36] See, among others, Riccardo Guastini, *Il Diritto come Linguaggio. Lezione*, 2nd ed., Torino, G. Giappichelli Editore, 2000, pp. 7ff.

[37] See Norberto Bobbio, 'Scienza Giuridica' in Norberto Bobbio (ed.), *Contributi ad un dizionario giuridico,* Torino, G. Giappichelli Editore, 1994, pp. 335 ff.

identification of law-giving authorities is not consensual. But that is beside the point.[38] The point is that there have to be law-giving authorities.

One can therefore say that legal science is ex definition a meta-discourse: a discourse over a discourse.[39] Since, on the one hand, the discourse of science (the scientific discourse) is necessarily assertive and, on the other, law is a discourse that is predominantly prescriptive, then legal science is a descriptive meta-discourse over a predominantly prescriptive discourse.[40] One thing is the discourse of law (a level 1 discourse or object-language); another is the discourse over law or the discourse of jurists (a level 2 discourse or second-order language).[41] It is still imperative to discern Bentham's concept of expository jurisprudence, aiming at the value-free, neutral description of the law, from the concept of censorial jurisprudence: aiming at the moral or political criticism of the law or the conception of lege ferenda addressed at the normative authorities.[42] Censorial jurisprudence, albeit also a meta-discourse, does not abide by scientific standards, as it simply does not relate to any endeavour of cognition (neither scientific cognition nor any other type of cognition), neither is censorial jurisprudence carried out under a descriptive scientific discourse. The distinction between expository jurisprudence and censorial jurisprudence means "crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the Natural Law theorist's assertion that moral evaluation is an integral part of proper description and analysis".[43] One cannot perform science qua tale if through one's discourse one affects (or intends to affect) the object which one is describing in the first place. Therefore, one cannot perform meta-prescription over the law if one intends to perform legal science and one cannot evaluate law

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[38] See Riccardo Guastini, *Fragments of a Theory of Legal Sources* in RJ, 1996, Vol. 9, nº 4, pp. 364 ff.

[39] See Norberto Bobbio, 'Essere e Dover Essere nella Scienza Giuridica' in Tommaso Greco (ed.) *Studi per una Teoria Generale del Diritto*, Torino, G. Giappichelli Editore, 2012, pp. 119 ff.

[40] See Ricardo Guastini, Los Juristas a la Busqueda de la Ciencia, p. 267.

[41] On the difference between language and metalanguage, see Wilfrid Sellars, 'Some Reflections on Language Games' in *Science, Perception and Reality*, New York: Humanities Press, 1963, pp. 321 ff.

[42] Originally, Jeremy Bentham, Deontology Together with a Table of the Springs of Action and the Article on Utilitarianism, Amnon Goldworth (ed.), Oxford, Clarendon Press, 1983, p. 9. Bentham claims that «*[a] book of jurisprudence can have but one or the other of two objects: 1. to ascertain what the law is; 2. to ascertain what it ought to be. In the former case it may be styled a book of expository jurisprudence; in the latter, a book of censorial jurisprudence: or, in other words, a book on the art of legislation*» (see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J. H. Burns and Herbert L. A. Hart (eds.), Oxford, Clarendon Press, 1996, 293 ff.

[43] See Brian Bix, 'Natural Law Theory' in Dennis Patterson (Ed.), A Companion to Philosophy of Law and Legal Theory, Oxford, Wiley-Blackwell, 2010, p. 218. «[to prescribe as it should be or should not be from the point of view of some specific value judgments] (…) is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an object of science, directed at reality». See Hans Kelsen, General Theory of Law and State, XIV.

if one intends to perform legal science (though one may scientifically describe evaluative judgments, which is an entirely different business).[44]

Legal science must therefore abide by certain relevant standards, such as (i) isolating and describing its own object (law)[45], (ii) being neutral (wertfrei)[46]; (iii) being endowed with an explanatory purpose[47]; (iv) aiming at the systematization of operative concepts[48]; and (v) aiming at obtaining universal propositions which are either true or false (under some endorsed criteria for truth)[49]. Legal scholarship or legal dogmatics, on the other hand, may include many other types of academic investigations and endeavours over the discourse arising out of the official sources of law. These may include moral or political criticism of the law or the conception of lege ferenda addressed at the normative authorities.

Keeping this in mind, one should note that methodological positivism is also compromised if one loses track of the unity of the object of legal science by over-inclusion or under-specificity of its components. As you may have guessed, I am referring to Cassese's post-positivistic stance on the extension of the field of legal analysis from simply law in the books to law in action. This must be assessed, naturally, vis-à-vis the necessity of GAL isolating and describing its own object. On this point, for instance, Fromageau clearly states the unclear nature of Cassese's concept of positive law – I will get back to this below.

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[44] One can, however, describe an evaluation. See Herbert L.A. Hart, *The Concept of Law*, 2nd ed., Oxford, Clarendon Press,1994, p. 271. And one may also perform legal science though a kind of epistemological constructivism (Kelsen). In this sense, legal science may recreate its own object (law) through the attempt to understand the law as a unified whole (*sinnvolles Ganzes*): much like natural sciences transform, through cognitive systematization, the chaos of sensorial experiences into a cosmos (*i.e.,* the scientific account of nature as a unified system), so does legal science through cognition and description transform the multitude of norms created by law-creating authorities (the datum) into a unified normative system. See Hans Kelsen, *Reine Rechtslehre,* pp. 81 ff. See also Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism,* 2013, Springer, New York, p. 282. As it is well known, Hans Kelsen claimed that legal science should turn law into a contradiction-free system. However, that is not the case. Many conflicts arise within a systematized account of law – some of which are not solvable within the legal system *per se.* Law is man-made, therefore subject to human error.

[45] «A science has to describe its object as it actually is, not to prescribe as it should be or should not be from the point of view of some specific value judgments.» See Hans Kelsen, General Theory of Law and State, XIV.

[46] For instance, Hans Kelsen, *Reine Rechtslehre,* pp. 1 ff. Scientific statements and ideological statements must be kept apart. By accepting the basic Popperian assumptions, it should be understood that if purely ideological statements are made as regards legal problems, then such statements cannot be falsifiable; if they are not falsifiable, then they cannot be scientific; if they are not scientific – which is entirely legitimate –, then they ought not to be made under the guise of scientific statements.

[47] See Bartosz Brożek, 'Explanation and Understanding' in Bartosz Brożek, Michael Heller, Mateusz Hohol, *The Concept of Explanation,* Coopernicus Center Press, Kraków, 2016, pp. 18 ff.

[48] The so-called *systematized character* of law is, therefore, a product of legal science, not an *a priori* datum (*i.e., law is not science* as commonly it is stated: it is the *object of legal science*). Among other, see Hans Kelsen, *Allgemeinen Theorie der Normen,* Wien, 1979 (French translation "Théorie Générale des Normes", de O. Beaudi e F. Malkani), Paris, 1996, p. 53.

[49] Among others, see Guillermo Lariguet, La Aplicabilidad del Programa Falsacionista de Popper a la Ciencia Jurídica in Iso, 2002, nº 17, pp. 183 ff.

Fromageau concludes that the Manhattan and Italian Schools endorse fundamentally different accounts of positive law. In my view, none of them can realistically be labelled as positivistic accounts of GAL. Kingsbury deems GAL to be an endeavour (the American Initiative) to improve positive law, which logically entails that GAL is not positive law, but something external to it. On the other hand, Cassese views GAL as an example of an emerging positive global law, rooted in the gradual realm of relative normativity. This is not to say, however, that Kingsbury does not also (alongside Krisch and Stewart) see GAL as emerging: "underlying the emergence of global administrative law is the vast increase in the reach and forms of trans-governmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labour standards, and cross-border movements of populations, including refugees."[50] They seemed, however, to find this emergence as an instrument for the development of positive law as it is, not necessarily as emerging positive law as it will be. Both Kingsbury and Cassese's accounts of GAL give rise to interesting, but substantially different, questions. I will address some of them.

2.3 Kingsbury and the American Initiative: Hard tests for the acceptance of GAL

The brief remarks made above, justified as they may be, are directed more towards those who invoke the positivist tradition as the best possible way to frame GAL (i.e., GAL as something other than international law) than towards those who simply disregard the strict concept of positive law as the object of legal science (this is the case of Cassese). It is Kingsbury who invokes the Hartian thought, at the level of inclusive positivism, when addressing GAL. He coherently endorses a Hartian social fact conception of law based on the internal attitude of the participants. He is well aware that legal systems encompass rules for the creation of other legal rules and principles; legal concepts of paramount importance such as validity, competence, obligation and rights are, therefore, systemic concepts.[51] But, as Kingsbury accepts, there is no global rule of recognition necessary to detect a global legal system. He then turns his attention to fragmented rules of recognition.[52] Kingsbury carefully separates international law from GAL

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[50] See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, p. 16.

[51] On the description of the systemic concept of validity of Jerzy Wróblewski, see, for instance, A. Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism*, New York, 2013, pp. 240 ff.

[52] Benedict Kingsbury, The Concept of "Law" in Global Administrative Law in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 31. Kingsbury also speaks of "specific rules of recognition in particular governance regimes" ibidem, p. 57.

(international law is ius inter gentes – based on the will and consent of the States – and any other norms and practices are not international law, but something else) in order to preserve a unified view of an international legal system and, most probably, to justify the independent analysis of GAL. But, again, Somek seems to be right when stating that "Kingsbury does not leave readers in the dark when it comes to explaining what these sources are in the case of GAL: treaties, fundamental customary international law rules, and general principles of law. In a sense, this set appears to cover the conventional sources of public international law".[53] Now, the remaining soft elements of GAL will hardly be labeled positive law by any (inclusive or exclusive) positivistic account of GAL. What, then, is positive law in GAL for Kingsbury? This is a slippery slope.

I suppose Kingsbury's roots on inclusive positivism are aligned with something H.L.A. Hart would likely not have engaged in: having normative ambitions of reshaping law through the development of a field of legal science, notably by promoting the adaptation of law to the functions it ought to seek.[54] This symptom of Kingsbury's aspirations can be detected in Fromageau's accurate depiction of Kingsbury's concept of positive law as emerging and possibly hopeful ("The act of naming such an object is to express the expectation (and possibly the hope) that, when fully emerged, it will take a particular form.").[55] This is much more a Dworkinian stance than a Hartian one, I would suggest.[56] Kingsbury puts forward a materially binding criterion of publicness for the affirmation of GAL by amending the adopted rule(s) of recognition with necessary principles – without which there would not be law: "«Publicness» is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence".[57]

I can certainly see the Hartian influence underlying the requirement of generality: it is Hart's minimum content of natural law.[58] However, the criterion of publicness turns Kingsbury's inclusive positivism into natural jurisprudence: Somek calls it NAL (= Natural Administrative Law). As he puts it, "the (GAL) project is animated by the confidence that from the mush of the decentred paradigm will emerge 'the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative

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[53] See Alexander Somek, The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury, in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 989.

[54] Compare pp. 27 and 29 of Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law* in Eur. J. Int'l L., Vol. 20, nº 4, 2009.

[55] Edouard Fromageau, *The Concept of Positive Law in Global Administrative Law,* 128. As Susan Marks claims, "there is something about the act if naming that seems to work a kind of magic". See right at the beginning of her paper, Naming Global Administrative Law in Int'l L. & Politics, Vol. 37, p. 995.

[56] Compare the Hartian and Dworkinian stance, for instance, in Juliano Maranhão, Positivismo Lógico-Inclusivo, Madrid, pp. 57–58.

[57] Benedict Kingsbury, The Concept of "Law" in Global Administrative Law in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 31.

[58] See Herbert L.A. Hart, The Concept of Law, Oxford, 2004, pp. 193–200.

bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, by providing effective review of the rules and decisions they make".[59] Under positivist canons, you simply cannot (or, at least, should not) create law by developing a field of study. Normative ambitions of GAL, such as the ones underlying a recent paper by M. Savino, should, therefore, be left outside the positivist tradition of legal science.[60] I believe this is an aspect worth highlighting for someone who uses legal positivism as a theoretical and methodological tool for GAL.

In any case, I do not think any positivist would ask himself: "what kinds of approaches to the concept of law might be fruitful in addressing global administrative law?"[61] Here, I suppose there is a fundamental double fallacy, which Fromageau, for instance, does not stress quite enough in his account of the American Initiative: for Kingsbury, the object of study (GAL) – though striving for its existence and despite all the criticism of its lack of normative foundations – is presupposed and needs to exist as such (i.e., as law) and one should seek the best possible way to frame it in a suitable, fruitful and comprehensive manner. [62] However, and at the same time, Fromageau is right in affirming that, for Kingsbury, GAL does not exist qua positive law in the sense of law as it is. How are these views compatible? There is certainly an essentialist (and most likely a purpose-oriented) tone to Kingsbury's take on GAL: the promotion of GAL as an independent field of study. In the scrutinizing process of isolating GAL, however, one should not neglect the fact that areas of law, as any categorization, do not encompass any essential aspects, as they are ultimately academic conventions which may be more or less adequate.[63] If one accepts that law is the object of legal science, GAL cannot exist as a legal research project or as a legal field of studies if it does not exist as positive law, that is, unless these research projects aim precisely at demonstrating

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[59] See Alexander Somek, The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 990.

[60] See Mario Savino, What if Global Administrative Law is a Normative Project? in Int J Const. Law, Vol. 13, nº 2, 2015, p. 498.

[61] See Benedict Kingsbury, The Concept of "Law" in Global Administrative Law in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 27.

[62] Kingsbury further states that "Command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results in addressing global administrative law". See Benedict Kingsbury, The Concept of "Law" in Global Administrative Law' in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 27. It is not new that the GAL enterprise has been severely criticized for the lack of elaboration of its normative foundations. The harshest criticism came from Alexander Somek (The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 993), according to which "GAL is a bootstrapping exercise the success of which depends on denying what it truly is".

[63] See, for instance, Alf Ross, On Law and Justice, London, 1958 (Portuguese Translation "Direito e Justiça", E. Pini, São Paulo, 2000), p. 246. One should not ask the question: What is GAL? Rather one should, that being the case, affirm I will call GAL the set of norms that shape (…). On essentialism versus nominalism, see Karl Popper, The Enemies of the Open Society, II, The High Tide of Prophecy: Hegel, Marx and the Aftermath, London, 1949, pp. 12–15.

why and to what extent GAL does not exist as positive law. Otherwise, we are not talking about legal science qua normative science.

Fromageau is not entirely thorough in addressing Kingsbury's extended positivist claim as necessary to grasp these fields of normativity and study separately what can be considered as law but is not (yet) positive law. However, his concluding remark seems very accurate: for Kingsbury, GAL is not law as it is rather law as it ought to be. Now, we could be dealing with different stages in the evolutionary process of law-making. I believe, however, that one cannot address emerging law with a concept other than non-law: something which can turn out to be useful if and when it meets the criteria for existence, but which may or may not come to exist. Any resemblance between Kingsbury's approach to GAL and the descriptive enterprise of Hart therefore seems to be purely coincidental.[64]

This substantiates the predicament I am currently wrestling with: is Kingsbury a Hartian scholar analysing GAL or is Kingsbury a GAL scholar aiming at creating a new field of legal science (and the recognition of a new set of legal norms) through the advocacy of Hartian criteria in some sort of persuasive manner disguised as being abductive? In that case, is Kingsbury using a school of thought as the hardest test for acceptance of a presupposed phenomenon, disguised as the best explanation for it?

2.4 Cassese and the new Italian public school: Is going beyond positive law doing without the concept of positive law?

In Cassese's legal thought, the issue is not whether a positivist account of law suffices for framing GAL, as Cassese himself understands that positive law is too narrow an object for general legal analysis. It is rather whether the commonly adopted distinction between law in the books and law in action should be dealt with as an extended account of law vis-à-vis the positivistic one, as the former entails that positive law is only law in the books and law is also something other than that.[65] Cassese's conception of GAL is rooted in the new Italian public law scholarship as a reaction to the positivist mainstream thought (of the time).[66] To this extent, I suppose Cassese is more coherent in his approach to GAL than Kingsbury. Cassese's idiosyncrasies are not instrumental in depicting, framing or adequately or fruitfully explaining GAL. They are philosophical starting points that he holds to be universal. For Cassese, general legal analysis – be it GAL or domestic administrative law – should focus on both the study of statutes and the

[64] Kingsbury's view, unlike the Hartian roots he (wrongly or rightly) presupposes, does not contribute much to describing law as it is or as it is not. See Alexander Somek, The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury in Eur. J. Int'l L., Vol. 20, nº 4, 2009, p. 995.

[65] Sabino Cassese, *The Vocation of Our Time for the Study of the Public Law*, available at http://www.irpa.eu/wp-content/uploads/2011/10/The-vocation-of-our-time-for-the-study-ofthe-public-law.pdf, p. 4.

[66] Edouard Fromageau, *The Concept of Positive Law in Global Administrative Law: A Glance at the Manhattan and Italian Schools* in e-Publica – Revista Eletrónica de Direito Público, Vol. 6, 2015, 129 ff.

study of cases. Cassese is therefore an admitted anti-positivist and nothing could describe that view better than his claim that "[…] in the second half of the 20th century […] the idea that law reaches beyond a particular positive legal system began to take root".[67]

In his specific approach to the globalization process, Cassese firstly does without positive law by sustaining the universalization of legal thought: he defleshes the object of legal science, focusing solely on research approaches, techniques and methodologies. Only then comes the empirical stage (which, somehow, seems less important) of comparative analysis and inductive reasoning necessary to extract universal principles of GAL from different legal orders. Evidently, a positivist's parti pris with Cassese's presuppositions goes beyond the issue of GAL per se. Among other obvious disagreements, it deals with Cassese's over-inclusion of elements into his concept of law (i.e., legal practices and all kinds of soft law), which – despite good intentions – jeopardizes the object of legal science as well as its scientific apprehension. If we are talking about so many different things when addressing the concept of law in Cassese's functional approach (the problem-oriented approach), then we may lose sight of the core of what we are discussing: over-inclusion, in this case, leads to dilution. It is no surprise that, in addition to reacting to the mainstream positivist thought of Vittorio Orlando as described by Fromageau, Cassese's take clearly contravenes the strict postulates of methodological positivism as regards the object of legal science. The inclusion of soft law in Cassese's concept of law links with the concept of so-called relative normativity – in both international law and GAL –, a concept championed by P. Weil and later developed by authors such as U. Fastenrath.[68] According to Reisman, "distinctions range along a continuum which is much more inflected than can be described by the dyad 'hard' and 'soft'".[69] Also, Chinkin states that "categories of hard and soft law are not polarized but lie within a continuum that itself is constantly evolving…".[70]

I must confess I am still stuck in the binary concepts of law: soft law and emerging law, though legally relevant by means of enacted and existing legal norms, are not law per se.[71] Relative normativity seems to contradict the Aristotelian principle of bivalence: under the pedigree criteria for ascertaining law,

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[67] Sabino Cassese, *The Globalization of Law* in N.Y.U.J. Int'l L. Pol., Vol. 37, n° 4, 2005, 980 ff.

[68] See Prosper Weil, *Towards Relative Normativity in International Law* in AJIL, Vol. 77, 1983, pp. 413 ff.; Ulrich Fastenrath, *Relative Normativity in International Law* in EJIL, Vol. 4, 1993, pp. 306 ff.

[69] See Michael Reisman, 'The Conceptions and Functions of Soft Law in International Politics' in Emmanuel G Bello / Prince Bola A. Ajibola (eds), *Essays in honour of Judge Taslim Olawale Elias,* Dordrecht 1992, Vol. I, 135–144.

[70] See Christine Chinkin, 'Normative Development in the International Legal System' in Shelton, Dinah (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, 2000, pp. 21–42. See also Matthias Goldmann, Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority in German L. J., Vol. 9, 2009, pp. 1872 ff.

[71] On binary (absolute) and gradual (relative) concepts, with a different opinion, see Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority* in German L. J., Vol. 9, 2009, pp. 1872 ff.

a certain content is either law or it is not.[72] I agree with Somek that the problem that arises for the GAL project is that "owing to its practical ambition it is inclined to describe processes which do not give rise to legally binding acts as though they were constituted by administrative law, while these very same processes can equally plausibly also be described as mere instances of permissible conduct".[73] "Instances of permissible conduct" or "legally binding acts"? That is the core question against the background of inference to the best explanation reasoning in GAL. Here resides the scientific need to separate (administrative) law from pure, simple and convenient (administrative) good governance. GAL is necessarily confronted with the task of having to explain which of the phenomena it studies that are to be described as law and not simply as management and meta-management. For instance, judicial review presupposes legality, but one need not necessarily presuppose judicial review in GAL, as it may simply entail instances of material supervision: legality in GAL is, therefore, not a presupposition but a contingent result that needs to be evidenced.

The concept of positive law in Cassese's thought is left unclear. I understand it does not take a pivotal part in Cassese's account of GAL. While Kingsbury is interested in theoretically affirming GAL, Cassese is much more preoccupied with sustaining lawful behaviour in the global sphere than in linking this lawful behaviour to the source of such lawfulness. This latter view is internally coherent, but it basically kills the problem. It is sustained that global positive law is an operative idea and that one can demonstrate it through inductive reasoning, notably by recurring to case law in which some rights are widely recognized (e.g., audi alteram partem). However, it is deemed quite irrelevant whether such rights are based on custom or not: the source problem is left aside in the process of universalization of legal thought. This is similar to viewing court decisions as sources of law in civil law legal systems without analysing whether such decisions are instances of an underlying custom (i.e., where the source of lawfulness is the underlying custom, rather than the manifestation of such custom) or sources of law per se. Cassese is, therefore, interested in surpassing the Kelsenian view of law as state-centred – but, simultaneously, bypasses the fundamental aspect of what Kelsen could have meant at the time of his writings. Law need not be state-centred, even in a Kelsenian view, one may argue; however, it is still relevant to stress that law is to be understood as a product of the exercise of specific norms of competence (i.e., power-conferring norms).[74] And the duty to obey norms and acts issued by competence holders needs to be addressed in all cases. Fromageau shows us how optimistic Cassese (and his followers) is: not only Cassese accepts

[72] On the evasion of the central question in differentiating law and non-law, to which the remedy can only be a positivistic reliance on a *pedigree* or source-based theory, see Jason Beckett, *Behind Relative Normativity: Rules and Prerequisites of Law* in Eur. J. Int'l L., Vol. 12, 2001, pp. 629 ff.

[73] See Alexander Somek, The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury in Eur. J. Int'l L., Vol. 20, nº 4, 2009 p. 987.

[74] See, for instance, Jordi Ferrer Béltran, *Las Normas de Competencia. Un Aspecto de la Dinámica Jurídica*, Madrid, 2000, pp. 13 ff. and 123 ff.

that, given the stage of maturity, GAL can already enter the realm of positive law, but he also sustains that as such law is good. It is created by "international organizations of different kinds, […] a well-developed administration, governed by a well-developed set of administrative laws". While Kingsbury's approach – in Somek's view – does little for identifying the law that is in GAL, Cassese bypasses this entirely.

2.5 Global Administrative Law and Juristenrecht

Fromageau's intention in the aforementioned article is simply to grasp a conceptual unity of positive law between two mutually influenced schools of thought. He finds none whatsoever. I am not sure that this result is due simply to the existence of different legal cultures. He leaves this question open. I believe that GAL should be explained as dogmatic statements of Juristenrecht or, at least, an attempt at Juristenrecht.

Juristenrecht is a discourse over law or a discourse of jurists (a level 2 discourse or second-order language). It is not legal science; rather is the object of legal science. It aspires – and sometimes rightfully succeeds – at becoming law that is accessible to the human mind. Legal scholarship «lato sensu» includes (i) descriptive scientific statements over the discourse of law (in force); (ii) adjudicative interpretations ascribing one out of several possible meanings to normative sentences; (iii) creative interpretations ascribing unsupported meanings to normative sentences; and, notably (iv) adoption of background theoretical assumptions that normatively frame the law-applying process. General legal construction (Juristenrecht) takes place in several steps of the law-applying process. As regards GAL, I believe it is fundamentally anchored in the adoption of background theoretical assumptions that normatively frame the law-applying process.

It becomes clear that some concepts per se require a theoretical background on which they can rely in order (i) to be significantly understood and (ii) for the norms arising out of such normative sentences to be applied. The formulation or adhesion to theoretical backgrounds (certain legal, moral, philosophical or economic theories) are a vehicle for the creation of ought sentences (obligations, prohibitions and permissions) which simply do not form part of any legal system (i.e., they are a vehicle for the pure creation of norms).[75] This too has to do with theoretical background assumptions, e.g., a certain theory of legal sources (e.g., legal positivism versus «law as integrity») or a certain theory of interpretation (e.g., originalism, textualism, purposivism, etc.). Theoretical background assumptions therefore provide for the implicit creation of legal norms. Some implicit legal norms are derived from the conjunction of the discourse of law together with a theoretical background assumption: e.g., hierarchical superiority of EU law, boni mores, "good administration". Other implicit legal norms are derived purely from theoretical background assumptions: e.g., arguments from «natur der sache», parliamentary government, human personalism, the principle of favor laboratoris or

[75] See Riccardo Guastini, Juristenrecht. Inventando Derechos, Obligaciones y Poderes, p. 213.

global "natural" administrative law obligations. These implicit norms, necessary as they may sometimes be, are not a product of legal science, as stressed above.

Juristenrecht enriches its own field of study because the most interesting thing happens: a second-order language of jurists derived purely from theoretical background assumptions "descends" to the first-order object language of law (i.e., it creates obligations, permissions and prohibitions, be this *ex nihilo*, be this interstitially). It may be that Juristenrecht is formally (officially) accepted in the discourse of law with membership in any legal system (e.g., official positing of the audi alteram partem principle in global proceedings). It may be that Juristenrecht is formally (but unofficially) accepted in the discourse of law with membership in the legal system (e.g., if it becomes customary law). But it is certainly also so that Juristenrecht is purely presupposed in the law-applying GAL proceedings in everyday life as a background premise under seldom enthymematic legal conclusions. An accurate (scientific) description of GAL must take into account the language of the law (i.e., the source-based legal sentences), but also the language of Juristenrecht.[76]

[76] Paradigmatically, see Riccardo Guastini, Juristenrecht. Inventando Derechos, Obligaciones y Poderes, p. 221.

II. INTERNATIONAL PERSPECTIVES

3. Legal Characteristic and Effects of UN Security Council Resolutions

*Gun Yee Bae**

3.1 Introduction

South Korea and North Korea[1] joined the United Nations (hereafter, UN) as members with separate seats at the 46th General Assembly of the UN on September 18, 1991.[2] Since then, UN Security Council resolutions (hereafter UNSCRs) have had stronger influence on inter-Korean relations, with a total of thirteen UNSCRs imposing punitive measures on North Korea in 2021.[3] UNSCRs are international measures with the nature of peremptory norm (jus cogens) that impose obligations regarding peace and security on member states. The nature of such resolutions is political, i.e., they relate to political decisions and strategies of the relevant states and their people and domestic and overseas environment, rather than objective scientific criteria that leave little room for the discretion of the relevant authorities with expertise in specific areas, like the international technical standards presented by the International Atomic Energy Agency.

Since a UNSCR is an international measure under the UN Charter approved by its members, it cannot be expected to gain legitimacy to the same extent as measures that have undergone a domestic legislative process. If a UNSCR conflicts with the constitutional goals of the member states and if such conflict goes against the values of international peace and security that the UN seeks, this could negatively affect the status and role of the international organization. This paper aims to analyse what effects the UNSCRs concerning North Korea have had on the Constitution of the Republic of Korea[4] and the peace on the Korean

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[1] The official name of North Korea is the Democratic People's Republic of Korea, and that of South Korea is the Republic of Korea. For clear and neutral expression on the divided situation on the Korean Peninsula, the two nations will in this paper be described as North Korea and South Korea.

[2] Lee Jang-hee, "Lessons from Joining the United Nations by East and West Germany and Their Reunification," in National Assembly Bulletin No. 299 (The Secretariat of the National Assembly, September 1991) 74.

[3] Choi Myeong-soon, "Legal Issues and Suggestions for Inter-Korean Exchange under UN Sanctions – with a Focus on the Gaesong Industrial Complex," Monthly seminar of Korea Society of Unification and North Korean Law Studies, Feb. 28, 2019, 02. 28, at 4.

[4] The terms "South Korea" and "North Korea" are generally used to describe the two-party status of unification based on the geopolitical circumstances on the Korean Peninsula. However, "Republic of Korea," the official name of South Korea, is used for official phrases, such as "Constitution of the Republic of Korea." Thus, this paper uses the official names of South Korea and North Korea in official phrases.

Peninsula, and to provide a basis for discussions on the legitimacy of international standards made by international organizations and others in the future.[5]

3.2 The main contents and effects of the UN Security Council resolutions on North Korea

3.2.1 South and North Korea's simultaneous entry into the UN

The two Koreas achieved their first political merger when they joined the international organization of the UN in 1991, 43 years after the division of the peninsula in 1948. From the perspective of international politics, their joining the UN can be considered positive, as it formally laid the foundation for peaceful coexistence within the framework of international norms.

However, the negotiation process of the joint entry of the two Koreas into the UN had many difficulties, both at home and abroad. South and North Korean authorities had a wide disparity in their positions in joining the UN. Since the UN recognizes only sovereign states as members, South Korea sought to join the UN on its own, based on the logic that it was the only legitimate government on the Korean Peninsula. On the other hand, North Korea opposed joining the UN unless it joined alone, claiming that South Korea intended to solidify the division of the peninsula. When South Korea gained the support of the Soviet Union and China through diplomacy and cooperation from non-aligned countries, North Korea changed its position and agreed to join the UN in 1991, for fear of being isolated in international relations.[6]

The following questions were raised in Korean academic circles at the time of negotiations for the simultaneous entry of the two Koreas into the UN.[7] Many legal scholars argued that only laying the legal foundation for peaceful coexistence between the two Koreas internally, before their joining the UN, would reduce the possibility of hostile relations and increase the possibility of peaceful reunification, with a basis in the case where East and West Germany reached and signed a

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[5] It is difficult to analyse the impact of such resolutions on the Constitution of the Republic of Korea due to the unique situation with the division of the Korean Peninsula. This paper analyses the effect of such resolutions on the Constitution of the Republic of Korea. South Korea is not a direct target of UNSCRs sanctioning North Korea, but it is one of the countries that is most affected through its exchanges and cooperation with North Korea. Considering this, an analysis of the effect of the UNSCRs is imperative for future unification policies as well.

[6] In the 1950s and 60s, South Korea insisted on joining the UN on its own, but changed its stance to the joint entry to the UN with North Korea after the 6.23 declaration in 1973. North Korea has consistently insisted on their joining the United Nations as one nation under the name of the unified "Democratic Confederal Republic of Koryo." This means "unification first, joining the United Nations later." However, at the 9th session of North Korea's highest people's congress held on May 24, 1990, Kim Il Sung made a different proposal in his speech: to join the UN as a single seat even before reunification. This was a major change that seemed to be relatively closer to simultaneous entry into the United Nations with South Korea's in terms of the description of "before unification" and "joint entry": See Lee Jang-hee, supra note 2, at 76, Lee Young-joon, "The Legal Issues of the Two Koreas and the Korean Peninsula" in 36th volume of the International Law Conference (1991) 142.

[7] See Lee Jang-hee, *supra note* 2, at 74.

basic agreement before joining the UN.[8] East and West Germany's entry into the UN (September 18, 1973) was made based on the principle of "one nation – two states" which outlined the two Germanys as two foreign states externally and as one nation internally. The two Germanys normalized bilateral relations through the signing of a basic treaty and gained support from neighbouring countries.[9] On the other hand, South Korea held that the only legitimate government on the peninsula was its own and that North Korea was an anti-state organization in accordance with Article 3 of its Constitution. Considering that UN membership is given only to states, South Korea was concerned that joint entry into the UN might send a signal that South Korea had recognized North Korea as a legitimate state,[10] in contravention of the provision in said Article 3, which would be unconstitutional. Given the internal political situation in South Korea, it would not be easy to revise the Constitution through a national referendum, which would require support from the entire people; a revision of Article 3 under the influence of the Korean War could turn into an ideological confrontation rather than a strategic option for peace. Scholars argued that it would be more effective in the long run to increase the possibility of reunification by joining the UN on a peaceful premise that recognized the two Koreas in a special relationship, like East and West Germany, since it would be difficult to revise the Constitution immediately.[11]

In particular, considering a possible peace treaty between the parties in the future, there are some issues that could arise. The Korean Peninsula has been in a state of armistice since 1953; the parties have not signed a peace treaty ending a war.[12] In the traditional sense, an armistice agreement is an agreement between two sides to temporarily halt a war, and the right to conclude such an agreement rests with the commanders of the armed forces responsible for the military at that time.[13] If those who signed the armistice agreement on July 27, 1953 are considered the parties to the armistice agreement, these would be North Korea,

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[8] See Lee Young-joon, *supra note* 6, at 142–152.

[9] Min Byung-chun, "The Origin of the Entry of East and West Germany into the UN" in North Korea Book No. 1 issue 11, (North Korea's Institute, 1973) 31–37.

[10] Article 3 of the Constitution of the Republic of Korea: The territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands.

[11] Under the argument, the parties to the armistice were limited only to the UN, and the joining of North Korea to the UN would establish peace, along with the end of the war. Therefore, there would be no need for U.S. troops to be stationed on the Korean Peninsula. However, this would be possible only when North Korea fulfilled its peacekeeping obligations following its entry into the UN. There have been 13 UN Security Council sanctions since the two Koreas joined the UN, which clearly shows that the theoretical premise and the political reality differ. It may have been procedurally necessary for the two Koreas to join the UN simultaneously in order to gather and establish a new state, but it is believed that this did not have to be considered as a priority for unification. Rather, if the agreement on mutual recognition had been made first between the two Koreas, on the sidelines of the simultaneous UN entry, this might have been a faster path to reunification.

[12] South Korean President Moon Jae-in met with Kim Jong Un, the Supreme Leader of North Korea, at Panmunjom on April 27, 2018 and announced the denuclearization of Korean Peninsula and the official end of the war within the year (a.k.a. The Panmunjom Declaration). However, no declaration of the ending of the war has been made.

[13] Lee Young-joon, *supra note* 6, at 143.

China, and the commander of the UN forces who carried out military operations against North Korea and China. Since the military operational command authority of the UN commander is a mandate given by the UN, the parties to the peace treaty should be North Korea, China and the UN.[14] Under this interpretation, North Korea's entry into the UN could be considered an expression of its stance toward the UN after the war, as it accepted all obligations of the UN Charter, which automatically nullified the 1953 armistice. This would eventually lead to the coexistence of two sovereign states on the Korean Peninsula: South and North Korea. The goal of peace on the Korean Peninsula could then easily be achieved by signing a bilateral agreement to improve political relations after joining the UN, without the need to sign a peace treaty to end the war between the two Koreas. However, peace on the Korean Peninsula in this case may not occur through reunification between the two Koreas, but may lead to a permanent division of the peninsula. That would mean that the peaceful reunification stated in Article 4 of the Constitution of the Republic of Korea would remain to be done by the next generations.[15] Reviewing past arguments and discussions, we can see that scholars of the time were mainly concerned that the simultaneous entry of the two Koreas into the UN, without peaceful measures such as recognizing the special relationship between the two Koreas in advance, could lead to a permanent division of the peninsula.

Despite such concerns among local scholars, the simultaneous entry of the two Koreas into the UN was eventually carried out without prior consultation on mutual recognition. The leaders of the two Koreas met at the Peace House in Panmunjom on April 27, 2018, 27 years after their entry into the UN in 1991, and agreed to improve inter-Korean relations, resolve war risks and establish a permanent peace regime including denuclearization, through the Panmunjom Declaration for Peace and Prosperity on the Korean Peninsula.[16] Still, issues remain as to

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[14] It was South and North Korea who were the main belligerent countries when the Korean War broke out on July 25, 1950. However, the military operational command authority was handed to the commander of the UN on and after July 27, 1953. Therefore, the signing by the UN Commander, who had exercised operational command over the Korean military, of the armistice agreement on July 27, 1953 was effective for the Korean military and resulted in the halting of the war. From this perspective, it can be argued that the main parties of all subsequent matters related to the armistice agreement must be the two Koreas.

[15] Article 4 of the Constitution of the Republic of Korea: The Republic of Korea seeks unification, establishes and implements a policy for peaceful unification based on the basic order of free democracy.

[16] "The Panmunjom Declaration consists of three articles and 13 paragraphs. Pursuant to Article 1, the two Koreas agreed to implement all existing inter-Korean declarations and agreements, to establish a joint liaison office with resident representatives of both sides in Gaesong area, to endeavour to resolve the humanitarian issues, and to relink and modernize railways and roads on the eastern and western coasts. Article 2 states the agreement to defuse the military tensions, including to completely cease all hostile acts against each other, to transform the DMZ into a peace zone, and to turn the area of the Northern Limit Line in the West Sea into a maritime peace zone. Article 3 agrees to build a permanent and stable peace regime by declaring the end of war within 2018, carrying out disarmament in a phased manner, peace treaty, and complete denuclearization…" Ryu Ji-sung, *The Study of Legislation on the Development of Inter-Korean Relations*, The Korea Legislation Research Institute, 2018, p. 64–67.

whether this Declaration can be interpreted to end the war, or whether it can be seen as a peace treaty signed by the two Koreas.

3.2.2 The development and effect of UN Security Council resolutions on North Korea

The legal nature and characteristics of the UN Security Council resolution imposing sanctions on North Korea[17]

The UN Security Council (hereafter UNSC) shall act on behalf of the member states in carrying out its mission and primary responsibility of international peace and safety in order to ensure prompt and effective action.[18] The UNSC shall determine all measures necessary to maintain and restore international peace and safety (military and coercive measures), when it expects any threat to the peace, breach of the peace, or act of aggression by any individual country, which its members shall comply with.[19] In addition, the duty under the Charter of the UN shall take a priority over any obligations under other international agreements, if there are any conflicts.[20] Thus, collective sanctions through UNSCRs pursuant to Article 41 of the UN Charter have the characteristics of international enforcements, making the member states primarily obliged to implement them. In addition, the general form of such collective sanctions is "non-military enforcement" which includes restrictions or bans on exports and imports to the target countries, on financial and economic relations, and on communication and transportation. In general, in international politics, economic sanctions have been used as a means to change the policies or specific actions of countries subject to sanctions.[21] Moreover, since such economic sanctions through the implementation of UNSCRs are multilateral, the target country would fear the effects of economic sanctions not only from the UN member states, but also from non-UN states – which are likely

[17] As for the contents and effects of UNSCRs in the nature of sanctions against North Korea, this paper will mainly refer to Choi Chang-ho, *The Effect of Sanctions and Trade Substitution* (Korea Institute for International Economic Policy, 2016), and Son Hyun-jin, *Legal Issues Regarding Sanctions against North Korea and Lift Thereof* (Korea Legal Research Institute, 2018), which are the main prior studies in Korea.

[18] UN Charter Article 24 (1) says that in order to ensure prompt and effective action by the UN, its members confer on the UNSC's primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the UNSC acts on their behalf.

[19] UN Charter Article 39, Article 41, and Article 42.

[20] Article 25 of the UN Charter; Choe Seung-hwan, "Measures for Inter-Korean Exchanges and Cooperation After the UNSCR on North Korea Sanctions" in *Unification and Law No. 34* (Ministry of Justice 2018) 101.

[21] Kim Sang-ki, Feasibility Analysis of Economic Sanctions against North Korea: Status and Effects (Korea Development Institute 2007) 8.

to be reluctant to get involved economically with the target country.[22] Economic sanctions have become the most efficient means of control in modern society, where free economic exchanges are growing in importance.[23]

UN Security Council resolution adoption procedure

Economic sanctions imposed on individual countries under UNSCRs are economic measures whose legitimacy is guaranteed under international law. Their significance can be found in protecting international law and the international economic order.[24] However, it is worth noting that frequent imposition of economic measures by the UN has recently become a general trend in international relations serving to narrow the scope of national sovereignty and expand the scope of control through international law. That is because the nature of most of the disputes in which these economic sanctions have been imposed is essentially domestic.[25] While universality can be gained as an international legal standard, the subject and process are linked to domestic legal sovereignty. Thus, there should be controversy and conflicting assessments of the effectiveness of these economic sanctions. In particular, the effectiveness of such economic sanctions is disputed, given that they will only be effective if many countries participate, take a considerable period of time to have a substantial effect, and in some dictatorships may be more burdensome for ordinary citizens than for the rulers.[26]

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[22] The U.S. included sanctions against North Korea in its domestic laws, including the Export Control Act of 1949 and the North Korea Policy Act of 2016. Such legislation on sanctions against North Korea was made on the premise of a Second Boycott effect. Since there was virtually no economic relationship between North Korea and the U.S., the U.S. needed "multilateral sanctions in the form of bilateral sanctions" to achieve any effect. However, it was impossible to gain the consent of China and the Soviet Union on the sanctions against North Korea at the UNSC during the Cold War era. Thus, such enactment was designed to achieve the Second Boycott effect; Choi Jang-ho et. al, *North Korea's neighbouring countries' sanctions on the North and trade substitution effect* (Korea Institute for International Economic Policy, 2016) 23.

[23] According to Kim Sang-ki: Economic sanctions can be classified into trade sanctions, financial sanctions, asset freeze, other travel or navigation sanctions according to the means of sanctions. There is also a type of individual (individual companies or individuals) sanctions, depending on what sanctions are imposed. It is also divided into targeted sanctions targeting only a specific item and comprehensive sanctions targeting a number of items according to the subject of the sanctions. Also, there are multilateral sanctions which are a collective decision by multiple countries and bilateral sanctions which are a decision of one particular country. Kim Sang-ki, ibid, 8–12.

[24] Choi Seung-hwan, International Economic Law, 2014, p. 532–545.

[25] N. Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective* in H. Post(ed), International Economic Law and Armed Conflict (Martinus Nijhoff Publishers, 1994) 155–156; Son Hyun-jin, *Legal Issues Regarding Sanctions against North Korea and Lift Thereof* (Korea Legal Research Institute 2018) 20.

[26] Son Hyun-jin, *supra note* 17, at 21.

The main contents and effects of the UN Security Council resolutions on North Korea

Economic sanctions against North Korea by the international community began with the Korean War on June 25, 1950. The first measures imposed were not UNSCRs, but U.S. sanctions that took effect in 1950. The U.S. imposed an overall ban on export to North Korea under the Export Control Act of 1949 on June 28, 1950, and prohibited imports and financial transactions involving North Korean products. Further, the U.S. froze all U.S. assets pursuant to the Trading with the Energy Act of 1917 and its enforcement ordinance, the Foreign Assets Control Regulations, on December 16, 1950.[27] These sets of sanctions served as a precedent for later U.S.-led sanctions against North Korea in the international community.[28] A resolution on sanctions against North Korea began in 1948. In 2019, all eleven sanctions imposed by the UNSC were economic sanctions, except UNSCR No. 84,[29] which is a military sanction.[30]

UNSCR No. 702 (August 8, 1991) recommended the joint entry of the two Koreas in 1991 to the UN General Meeting. However, the UNSC later reinforced its economic sanctions on North Korea, after North Korea announced its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons in 1993 and conducted its first nuclear test in 2006.[31] In particular, UNSCR 2270 on March 2, 2016 not only extended sanctions to areas that indirectly affect development of weapons of mass destruction (WMDs), but also completely banned the export of minerals such as coal and iron ore, which account for more than 40 percent of North Korean exports. UNSCR 2321, adopted in November 2016, imposed an

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[27] Lim Soo-ho, The Ease of U.S. Economic Sanctions on North Korea and Inter-Korean Economic Cooperation, Samsung Economic Research Institute (2008) 9; Kim Sang-ki, ibid.

[28] Currently, more than 14 domestic laws of the U.S. impose economic sanctions on North Korea, many of which require the U.S. government to punish Americans for doing business with North Korea in violation of such regulations, as well as having foreigners pay a corresponding economic price. In other words, a third country that transacts with North Korea in violation of U.S. sanctions is at a disadvantage in its economic dealings with the U.S. Therefore, a country, a business or an individual with economic ties to the U.S. voluntarily is likely to give up economic transactions with North Korea, unless they expect to benefit more than what they gain from the U.S.; Kim Sang-ki, Ibid, 23.

[29] USCR No. 84 (1950. 7. 7), which recommended the countries which provided troops and other assistance to South Korea provide such troops and assistance to the Combined Forces Command under U.S. command, was approved by seven member states of the UNSC from the timetable of the UNSC's sanctions against North Korea (Yeonhap News, October 7, 2018).

[30] The most recent UNSCR No. 2464 in 2019 is a resolution mainly aimed at extending the term of a panel of experts under the UNSC's North Korea Sanctions Committee by one year. The panel's main task is to monitor violations of sanctions against North Korea and prepare and submit reports and annual reports. This paper will not introduce the details of the resolution, as the UNSC has not made additional sanctions against North Korea.

[31] The USCR No. 825 resolution urging North Korea to reconsider its declaration to leave the Treaty on the Non-Proliferation of Nuclear Weapons was passed unanimously on May 11, 1993. The UNSC adopted No. 1695 and unanimously agreed to resolve the North Korean issue, after North Korea conducted its first nuclear test in 2006, from the timetable of the UNSC's sanctions against the North Korea (Yeonhap News, October 7, 2018).

effective ban on such export, as it introduced a quota on the export of minerals and only allowed transactions of minerals for the people's livelihood.

Major sanctions on North Korea by the UN Security Council

UNSCR No. 1695 (2006. 07. 15)	As a response to North Korea's Taepodong-2 test A ban on missiles and missile-related items A ban on technology transfer to North Korea
UNSCR No. 1718 (2006. 07. 15)	As a response to North Korea's first nuclear test The establishment of the Democratic People's Republic of Korea Sanctions Committee
UNSCR No. 1874 (2009. 06. 12)	A countermeasure against North Korea's second nuclear test A ban on exports of all weapons and related items to North Korea A prohibition of financial transactions related to weapons Search of cargo of ships departed from North Korea (no compulsory measures)
UNSCR No. 2087 (2013.1.22)	Denunciation on North Korea's launch of a long-range missile Eunha-3 Clause on bulk cash Grave measures to be implemented in case of further provocation (trigger clause)
UNSCR No. 2094 (2013.3.7)	Denunciation on North Korea's third nuclear test Financial asset freeze Inspection of suspicious ships and flights and prohibition against entering ports
UNSCR No. 2270 (2016.3. 2)	As a response to North Korea's fourth nuclear test A prohibition on minerals (excluding Najin coal) A prohibition on aviation fuel to North Korea excluding supply of aviation fuel to civilian passenger aircraft Sanction on the bank accounts of North Korea in UN member states Sanction on all public and private financial support that could affect the development of WMDs Catch-all controls on exports related to WMDs
UNSCR No. 2321 (2016. 11, 30)	As a response to North Korea's fifth nuclear test A prohibition on leasing profits from real property A prohibition on registration of vessels Sanction on all public and private financial support for trade with North Korea

UNSCR No. 2375 (2017. 09. 12)	As a response to North Korea's sixth nuclear test Imposition of an annual cap on oil supply to North Korea A prohibition on transactions with textiles No work authorization for North Korean nationals in the UN member states A prohibition on the opening, maintenance, and operation of all joint ventures or cooperative entities with North Korea Close-down of existing joint ventures or cooperative entities within 120 days
UNSCR No. 2371 and UNSCR No. 2379 (2017. 12.23)	As a response to North Korea's launch of long-range ballistic missiles Transfer of North Korean nationals working in territories of the member states Search and suppress of suspected ships Limit on oil supplies to North Korea: 4 million barrels per year Annual ceiling of oil refining products to 500,000 barrels (exclusively for livelihood) A ban on exports of produce, machinery, electronic appliances, etc.

* More details of the table are attached as an appendix.

After examining the main contents of the UNSCRs, it becomes clear that the level of economic sanctions against North Korea has been raised gradually. In particular, the ban on almost all items imported to and exported from North Korea since UNSCR No. 2270 turned the sanctions into more effective and compulsory measures is equivalent to almost all-out trade controls. With this long-standing strengthening of the UNSC resolution, it is clear that sanctions against North Korea are now becoming a standard in the international community.

However, despite the UNSC's decision to impose strong sanctions on North Korea, their effectiveness remains questionable. That is because – even though the UNSC has strengthened its sanctions – compliance with the resolutions is ultimately dependent on the will of the member states and there is no means to enforce them for executory or partial implementation. The lower rate of submission of implementation reports on UNSCRs by UN member states clearly shows this. Currently, UN member states are required to report to the UN any violations of sanctions against North Korea. In case of UNSCR No. 2379, which was adopted on December 2017, the number of countries submitting implementation reports to the UN in 2018 was 58, accounting for only 30 percent of the total UN member states.[32] Not only the low rate of submission but also the perfunctory

[32] Son Hyun-jin, *supra note* 17, p. 77–78.

preparation of reports by the member states contributes to a skeptical view on the feasibility of the UNSCRs on North Korea.[33]

Furthermore, the limits of international law as to the UNSCRs on sanctions against North Korea also constitute a factor that does not enhance their effectiveness. First, the UNSC defined the scope of sanctions comprehensively, which has led to a lack of specificity of the sanctions' targets. This has resulted in several modifications of the sanctions in the resolution process. For example, the definition of luxury goods differs from country to country. In the end, the resolutions did not define luxury goods, but shifted to item regulations. Second, the UNSC needs voluntary cooperation among its member states for its resolutions to be implemented effectively. Since the resolutions are not legally binding, like domestic laws, the UNSC cannot restrict a member state for violations of sanctions or perfunctory implementation. This puts fundamental limitations on the implementation of UNSCRs.

Although South Korea and Japan were major trading partners of North Korea prior to North Korea's first nuclear test in 2006, North Korea-Japan trade and inter-Korean trade were transferred to North Korea-China trade when the UNSC began to impose sanctions on North Korea. A balloon effect occurred, especially when both South Korea and Japan started their own sanctions against North Korea (bilateral sanctions, South Korea's sanction against North Korea, Japan's sanction against North Korea). Bilateral sanctions by South Korea and Japan on North Korea have been added on top of the UNSCRs, which has resulted in an explosive increase in the trade between North Korea and China (a substitution effect for trade countries).[34] As a result, China currently almost monopolizes North Korea's foreign trade, and the role of China in imposing sanctions on North Korea has become greater.[35]

China is not only a member of the UNSC, but also a border country with North Korea and its largest trading partner – with 91.8 percent of North Korea's trade. Under the UNSCRs which state that trade in prohibited items for people's livelihoods is possible, North Korea was allowed to export anthracite coal and iron ore during the sanction period. This was also helped by the geographical proximity between China and North Korea. The two countries continue to engage in close friendly relations, in part because they are neighbouring border states and share the ideology of socialism. Moreover, North Korea has created a structure where it exports and imports sanctioned items through China with the excuse of people's livelihoods and has formed a bypass trade structure by not only

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[33] "In September 2017, UNSCR No. 2375 banned visa issuance and visa extension for overseas North Korean workers. China has to send back all North Korean workers, including North Korean restaurant workers in China, by December. 22, 2019, unless sanctions are eased. The North Koreans disable it by visiting North Korea every month or are allowed to work or perform without a work or performance visa. This is how they circumvent the sanctions." Dong-A Newspaper report, "Beijing, extend the stay of North Korean Workers' by circumventing the Sanctions."

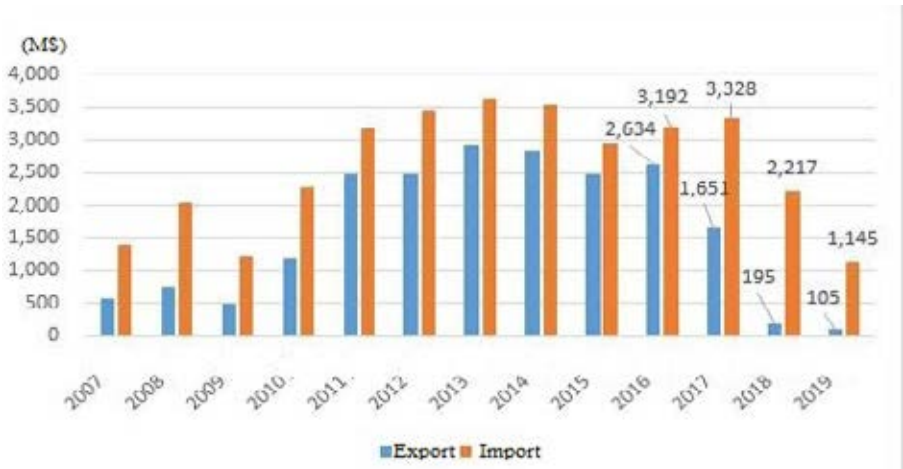
[34] Choi Jang-ho, *supra note* 22, p. 129

[35] Son Hyun-jin, *supra note* 17, p. 79

exporting non-sanctioned items directly to China but also using China's bonded areas to export such items to third countries.

Furthermore, China is the main source for North Korea to earn foreign currencies through North Korean workers. The North-China economic cooperation, especially between Dalian in China and Nampo in North Korea, is accelerating and the trade relationship between North Korea and China is expected to grow even stronger in the future. Trade between North Korea and China has been on the rise since March 2019, after the collapse of the second U.S.-North Korea summit in February 2019. From January to June 2019, North Korea's exports to China increased by 14 percent to $105 million and its imports from China during the same period increased by 15.5 percent to $1.14 billion.[36]

Chart 1: North Korea-China's Export-Import Trend (2006-2019)



Source: Korea International Trade Association

The UNSC economic sanctions against North Korea have been active for a long time and it is clear that they are increasingly putting pressure on Pyongyang's economy. The UNSC wanted to have North Korea give up on its WMD and bal-

[36] Due to the sanctions, North Korea's imports from China are mostly non-sanctioned ingredients such as food products (soybean oil, flour, fruits, and marine products) and raw materials (clock parts, textiles), while exports to China are mostly non-sanctioned products such as watches, wigs and minerals (tungsten and molybdenum). The import items from China have recently changed from light industry items, including foods and shoes, to the development of non-sanctioned items for foreign currency supply and the increase of domestic items, which shows the changed economic situation in North Korea. While North Korea is increasing exports of non-sanctioned items due to UN Security Council sanctions on its key products, such as coal and clothing, this is not enough to replace the sanctioned items. North Korea, which is hard pressed to supply foreign currency due to sanctions, is in a structure where its trade deficit is only deepening as trade with China is increasing. The increase in trade with China means an increased demand on lifting sanctions against North Korea, from North Korea's Trade Dependence in China Further, (Korea Trade Daily 12 August, 2019)
https://www.kidd.co.kr/news/210533.

listic missiles program in a "complete, verifiable and irreversible way" through its sanctions. However, it is hard to say that the goal has been achieved, as North Korea has been reported to continue its test firing by launching a projectile in 2019. Also, as mentioned earlier, the North Korean economy has continuously grown through trade with China, in spite of the UNSC's sanctions on North Korea. This means that the UNSCRs were not as effective as was hoped. Furthermore, the UNSCRs against North Korea have had an unintended effect: increasing China's role in the process of reunification of the Korean Peninsula.

3.3 Legal issues related to UN Security Council resolutions on the Korean Peninsula

3.3.1 Peaceful reunification and UN Security Council resolutions

The first legal issue that UNSCRs might cause on the Korean Peninsula is a conflict with Article 4 of the Constitution of the Republic of Korea.[37]

Article 3 of the Constitution of the Republic of Korea, "the territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands," does not recognize North Korea as a state. Therefore, claiming that the efforts of the UN to ban nuclear proliferation and maintain peace pose a possible conflict with the Constitution maybe be considered an illogical and self-centred interpretation, because South Korea agreed to join the UN together with North Korea without any amendment to the Constitution or an agreement that saw the two Koreas in a special relation. However, the two Koreas have recognized each other as partners for reunification and made efforts for exchanges and cooperation in many ways since the signing of the Panmunjom Declaration (April 27, 2019) after the North-South Agreement for the Peaceful Reunification of the two Koreas. Although inter-Korean exchanges, cooperation and partnership have been severed and hostile acts have been repeated due to changes in the political situation, the two countries have continued to maintain the framework for unification and cooperation. The two countries are currently in talks to launch a railway project that involves inter-Korean railways. What this paper would like to propose is not a matter of right or wrong in the UNSCRs, but an objective analysis of how special economic sanctions by international organizations, such as those in the UNSCRs, affect a divided nation as special as the Korean Peninsula.

Thus, in this light, there should be two ways to make a decision when an international legal order intervenes in domestic law. Firstly, a determination should be made as to whether the subject is a matter of international law or a matter of domestic law. Secondly, when domestic law is intervened in, a determination as to whether any conflicts with domestic law are acceptable to the country, in accordance with internationally acceptable legal procedures. In this view, mutual

[37] Under Article 4 of the Constitution of the Republic of Korea, Korea seeks unification, establishes and implements a policy for peaceful unification based on the basic order of free democracy.

recognition between the two Koreas can be achieved through agreement, and the issue with Article 3 of the Constitution of the Republic of Korea can be managed through constitutional amendments. Therefore, this is not a matter of international law, but of domestic law.

South Korea has not made any constitutional amendment, but recognizes North Korea as a partner in dialogue and cooperation for reunification through the interpretation of the constitutional court.[38] In addition, South Korea is currently establishing and operating an institutional foundation for inter-Korean exchanges for unification through the Inter-Korean Exchange and Cooperation Act, the Act on the Development of Inter-Korean Relations, the Act on the Inter-Korean Confirmation of the Life and Death of Separated Families and Promotion of Exchanges, and the Inter-Korean Cooperation Fund Act.

The recognition of a partnership between the two Koreas is a matter of mutual approval and of domestic law, as the most essential bilateral relationship, but the activities of the two Koreas as partners for reunification are the areas of international law, subject to member states' obligations due to their simultaneous entry of the UN. Therefore, apart from humanitarian aid such as medicine to North Korea, the economic exchanges between South and North Korea (the Gaesong Industrial Complex,[39] Mount Geumgang tourism in North Korea) and the Moon Jae-in administration's inter-Korean economic cooperation (the inter-Korean railways, etc.) could all be subject to the sanctions according to the UNSCRs.[40] Excepting humanitarian aid, items and contents must be approved by the UNSC for shipment to North Korea, and therefore must be subject to a formal pre-verification process. Thus, while inter-Korean exchanges are important to determine the future of the nation in relation to the constitutional goal of reunification,

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[38] The Constitutional Court resolved the issue of conflict between Article 3 of the Constitution and Article 4 of the Constitution by interpreting the dual status theory that North Korea is in a partnership that requires dialogue and cooperation for reunification, and that if it wants to harm the basic order of free democracy of South Korea, it also has the nature of an anti-state group.

[39] The Gaesong Industrial Complex began in 2000 with the adoption of the Agreement on the Development of Industrial Zone between Hyundai Asan Company and North Korea. It started operation in December 2004 as an inter-Korean economic cooperation project between South Korea's funds and facilities and North Korea's manpower, forming an industrial park of about 3.3 million square meters in the North Korean city of Gaesong. North and South Korea both enacted the Gaesong Industrial Zone Act. The project started with 880 workers in 2008 and grew to the point of achieving $2 billion in gross production in 2013, which led to the expectation of a successful inter-Korean exchange. However, when North Korea conducted its third nuclear test in February 2013 and its fourth nuclear test in January 2016, the South Korean government decided to join the UNSC in imposing economic sanctions on North Korea and announce an all-out suspension of the complex. By 2015, a total of $120 million in the South Korean capital flowed into the complex, and investment totaling 1.09 trillion won at the government and private levels flowed in. The UNSC found that the foreign currency North Korea earned through the Gaesong Industrial Complex was used as funds to make nuclear weapons, and unanimously adopted a resolution to tighten sanctions. The complete shutdown of the complex involved only the withdrawal of manpower from the two Koreas, and 124 South Korean companies operating in the complex remain in place.

[40] In December 26, 2018, South Korea's preparations for the inter-Korean railroad connection were also presented to North Korea after the approval of the UN sanctions committee.

they are also an area of international law where the UN's restrictions and support coexist.[41]

In addition, regarding the application of UNSCRs to domestic issues, it should be considered whether these are internationally acceptable standards and are directly applicable to domestic laws without any separate procedures or are not likely to conflict with domestic laws. The meaning of international approval would mean first acceptability as a general standard in the international community, and second acceptability in the application and conversion of international standards to domestic laws.[42] UNSCRs are unique in that they have direct application standard; they do not go through this secondary process of transitioning into domestic laws. Therefore, the secondary issue of international approval is excluded from this paper.

The UN, with more than 165 countries around the world as members, is a global organization. Since membership of the UN establishes a duty of compliance with the UN Charter, the general mandate set by the UN Charter may have a general character as an acceptable standard for member states. However, there is a fundamental question as to whether compulsory measures in UNSCRs established through the UN Charter are valid under the mandatory provisions for UN member states (Articles 41, 42 and 103 of the UN Charter). This is because the UN Charter delegates major decisions related to world peace to the UNSC and ensures that their outcomes reach the UN as a whole; one cannot be sure whether the decisions of the 15-member council truly represent the UN as a whole (legitimacy of delegation).

Moreover, it may be difficult to see that a UNSCR has legal characteristics, because it does not take the form of legal provisions and has not gone through a decision-making process in the UN General Assembly. The UNSCRs are seen as pre-emptory norms simply because the sanctions that are implemented by the UN member states actually bring about effects such as trade sanctions and economic blockage due to the international legal peculiarity where normativity is recognized through inter-state agreement.[43]

Even if one acknowledges the international legal nature of the UNSCRs, the question of whether the UNSC's comprehensive right to peace is justified under the UN Charter remains unanswered. It would be difficult to have generality and universality as the criteria for international legitimacy in making decisions based on such an unclear mandate structure. In Article 6(1) of the Constitution of the

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[41] Lee Hyo-won, Understanding the Unification Law, Park Young-sa, 2014: p. 91–106.

[42] As Han Soo-woong explains: Whether all countries have approved international laws and the Republic of Korea has approved them are also not a crucial criterion in determining whether international laws are generally approved. Even if not approved by the Republic of Korea, such international law can be called a general and universal international law with universal effect if approved by the majority of countries in the international community. Han Soo-woong, *Constitutional Study*, (Beobmunsa2011) 333.

[43] Most international law textbooks do not discuss the characteristics of the legal enforcement of a UNSCR, but describe the characteristic of pre-emptory norm of a UNSCR based on its practical effects of enforcement.

Republic of Korea,[44] respect of international law does not mean that it is simply a member of the UN; "observation of the schematic international law order" does not mean that a member will automatically comply with its obligations to implement such an order. It is a constitutional decision to respect the order of international law, which means that it will not rule out the legal effects of domestic laws, if an international standard is generally approved on the basis of the universality and rationality of mankind, even if it is not directly approved by South Korea.

Despite fundamental uncertainty over the legal nature of the UNSCRs, the UNSC's sanctions on North Korea are exercising practical normative power on the Korean Peninsula. In this regard, this paper will briefly introduce the cases of the Gaesong Industrial Complex, which relates to the currently closed inter-Korean economic cooperation case, and the ongoing "South-North Railway" project, to take a closer look at the practical effects of the UNSCRs.

The closure of the Gaesong complex may have been a unilateral decision by both Koreas, as the UN made no mention of the complex at that time.[45] However, with the UNSCRs (No. 2094, No. 2270 and No. 2321) further tightening sanctions on North Korea and the media continuously reporting on speculations of North Korea using the money from the Gaesong Industrial Complex for the nuclear tests, the South Korean government did not have a wide range of political options if it wanted to survive as a member of the international community, at the risk of continuing war. South Korea, a liberal democracy with active economic exchanges with multinational companies, could suffer too many political and economic losses if it worked for the complex's maintenance, at the risk of international condemnation and war.

Importantly, while the two Koreas' decision to pull out of the complex was their choice, there was very little room for the South Korean government to freely use policy tools related to reunification. This would mean ignoring the international sanctions imposed by the UNSC in Northeast Asia, a region adjacent to permanent members of the UNSC like China, Russia and other countries. It is also clear that the UNSC did not intend to shut down the complex, but it provided a fundamental clue to its stance through a series of decisions to tighten sanctions.

The current Moon Jae-in administration planned a connection of the two Koreas' railways to create an East Asian (North and South Korea – China – Rus-

[44] The treaties signed and promulgated under the Constitution of the Republic of Korea and the generally approved international laws have the same effect as domestic laws.

[45] The South Korean government provided continuous support for companies of the Gaesong Industrial Complex as the complex was shut down. President Moon Jae-in mentioned the resumption of the Gaesong Industrial Complex in talks with U.S. President Trump. The U.S.-led sanctions against North Korea within the UN as a permanent member of the UNSC. In particular, the U.S. is one of the most important dialogue states in inter-Korean relations, and there is substantial U.S. military spending in South Korea, as the U.S. military is stationed there. Therefore, before the resumption of the Gaesong Industrial Complex becomes a subject of discussion at the UNSC, South Korea has no choice but to raise the need for the complex through diplomatic channels with the U.S. However, most U.S. experts on the Korean Peninsula oppose the resumption of developing the Gaesong Industrial Complex and tour to Mount Geumgang, saying that it would only serve as a means for the North Korean regime to earn foreign currency and could possibly lead to the development of nuclear missiles.

sia) rail link. The two Koreas' governments agreed on this at the Panmunjom summit in April 27, 2018. In December, an inter-Korean investigation team spent 16 days in a joint study and conducted a survey of 1,200 kilometres of North Korean railways.[46]

This inter-Korean railway cooperation is subject to both UNSC sanctions and the approval of the UN Command, since the UN Command currently has control and jurisdiction over the Demilitarized Zone (hereafter DMZ), which covers two kilometres south of the Military Demarcation Line (hereafter MDL). Though the two Koreas want to jointly excavate remains in the area under a military agreement after the April 27 Panmunjom Declaration in 2019, approval or consent from the UN Command is required. Also, in order for Seoul to send goods or exchange goods with North Korea, the items and human exchanges must be approved by the Ministry of Reunification for customs clearance and stay, which is a domestic legal process in practice. Despite such domestic legal approval procedures, sending items and human exchanges are allowed only when approval is also granted by the UNSC and the sanctions committee.

So far, the UNSC's sanctions against North Korea have not produced a direct clash against the establishment of a unification policy sought under Article 4 of the Constitution of the Republic of Korea. However, it is clear that the limits of the inter-Korean exchange, the contents of the exchange and the formal suitability of the unification process are determined by the criteria for the UNSC's resolution on sanctioning North Korea. In addition to providing aid to North Korea at the South Korean government level, the UN will check in advance whether any exchange or cooperation at the private level is on the list of banned goods.

The UNSCRs have a proactive limiting effect on virtually all exchanges and cooperation in South Korea. The UNSC's sanctions on North Korea do not directly violate Article 4 of the Constitution and accepting the sanctions is inevitable. Even though they are a real impediment to South Korea's unification policy, they should be accepted, unless they have clear and direct encroaching effects on the Constitution of the Republic of Korea.

Does the special nature of international politics and international diplomacy of UN member states give UNSCRs precedence despite potential transgressions of local constitutions through UNSC decisions? Is it certain that world peace, the fundamental goal that the UN Charter has sought, is difficult to achieve at a local level, for instance through a series of local measures for reunification made by the two Koreas? Is it achievable only if pursued within the scope of UNSCRs?

The UN has made a series of resolutions and sanctions in response to the missile launches of North Korea. It is only North and South Koreans and their future generations who will suffer the burdens of the incidental effects of the UNSCRs (such as the difficulty of the livelihood of North Koreans and the need for more international cooperation from China and Russia over the unification of the Ko-

[46] Items to be used for the signing ceremony also had to be checked for shipment from South Korea to North Korea.

rean Peninsula). Is this a way toward the ultimate peace that the UN aims for on the Korean Peninsula? There are no clear criteria for answering such questions. However, fundamental discussions must be held on how much the domestic legal effects of international standards can be accommodated in political situations such as the unification of the Korean Peninsula.

3.3.2 Self-determination and UN Security Council resolutions

It is thus necessary to analyze how the UNSCR requirements and procedures affect the possibility of reunification through the exercise of the right to self-determination of South and North Koreans.[47] In view of the requirements and procedures of UNSCRs from the right of self-determination perspective, it is necessary to prepare supplementary requirements for the following situations.[48]

Take the example where the people of the two Koreas on their own agree upon economic cooperation as a preliminary measure of reunification[49], prohibit any invasion or hostile acts against each other, and agree to form an economic foundation through economic exchange.[50] It is worthwhile to consider whether temporary suspension of sanctions could be requested of the UNSC during the

[47] The right to self-determination is gradually expanding. The highest level components of the federal state in which the state is released may be recognized as the subject of self-determination, if the existing state is seriously defunct and if the right of self-determination is realized by an agreement between the parties. In inter-Korean relations, the subject of self-determination can be North and South Koreans residing on the Korean Peninsula.

[48] In "A Study on the Integration of the Korean Peninsula and the Application of Self-determination," Professor Hong Sung-pil explains that the exercise of self-determination is complete only under the following circumstances: First, a system with a state should be formed based on the principle of democratic rule with the will of the people, and secondly, territorial integrity should be conserved. In other words, except for extreme racial or political oppression, it was not considered acceptable under international law to claim independence based on self-determination in a way that would harm the nation's territorial integrity.

Hong Sung-pil, "Reviewing the Integration of the Korean Peninsula and the Application of Self-determination" in *Journal of Law at Ewha Womans University 20(3)* (Ewha Womans University 2016) 150–154.

[49] The form of a state based on unification, or the manner of unification, is a domestic legal matter to be decided by the people of the two Koreas. The international legal situation related to the UNSCRs will be "a prior agreement on economic exchanges before reunification."

[50] If the ban on hostile acts between the two Koreas is at the level of a memorandum of understanding between the two countries, it can be resolved through domestic legal measures between the two Koreas. However, if it is to have a formal form, such as signing a peace treaty, it is a matter of international law in some respects.

In accordance with this view, the parties to the armistice agreement (UN, North Korea, and China) will become parties to a peace treaty, but South Korea will be excluded as it did not have the right to command military operations in the event of a ceasefire. However, the issue of the parties to a peace treaty is a matter of international law, which can be changed depending on diplomatic circumstances, and it is not yet clearly defined who is the party to such a peace treaty. However, in accordance with the formal interpretation theory of the parties involved in the armistice agreement, some literature and articles implicitly describe North Korea and the United States as being the main parties. However, what is important here is that the series of exchanges related to unification is a highly political decision made autonomously by the people of the two Koreas, which is linked to the survival of the people, and therefore should not be ignored – a formal discussion should be held within international society.

period of cooperation.[51] Can we interpret North Korea's exercise of the right of self-determination, which is close to a prior agreement on unification, as contrary to UNSCRs on the grounds that the party has not reached the "complete denuclearization" stage?

In the context of domestic law, public opinions and intentions can be delivered through people's initiatives or a national referendum.[52] For its part, the UNSC must form a structure where the public opinions of its member states can be collected and considered, at least procedurally, in order for its resolutions to be justified by international enforcement standards, even if the UNSC may be accepted to make a different decision from that of its member states to achieve world peace.

It would be impossible to apply the same structure of legislative legitimacy at the level of domestic law to the order of international law, but the normative power of international organizations will only be followed by member states if measures and standards with legislative effects are justified. A basic premise on legislative legitimacy must be applicable to domestic and international law equally. In order for a UNSCR to be justified as an international norm, it must have a structure that at least formally matches the intentions of the member states concerned.

This collection of opinions also requires, at an informal level, an undisclosed, confidential diplomatic negotiation, and formal gathering of opinions in the form of documents or remarks. At such time, opinions may differ as to how far the scope of the member states whose opinions are to be collected opinions should extend. Generally, it is thought that countries directly affected by economic exchanges with the sanctioned countries should be included. However, if the meaning of direct influence is not limited to narrow economic exchanges, but also includes economic exchanges based on the political purpose of reunification,

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[51] According to Professor Hong Sung-pil: The terms of the exercise of the right of self-determination are linked to the duty of a third party to tolerate the process and consequences of the event. In conclusion, the international community, including the United Nations, and interested parties as third parties should recognize the great power of the right to self-determination and prohibit direct, approval, or indirect aid and support of results that go against the exercise of the right to self-determination. The ICJ also said that the outside world has an obligation not to approve at least illegal situations against the right to self-determination, or not to provide aid or support so that the situation arises, as to who is responsible for recognizing the right to self-determination on the premise of the governing effect of self-determination (Case concerning East Timor (*Portugal v. Australia*)). Hong Sung-pil, *supra note* 4, 153

[52] An amendment of the Constitution of the Republic of Korea is proposed by a majority of the National Assembly members or by a presidential motion. The proposed amendment bill should go through a resolution at the National Assembly and finally go through a national referendum (Constitution, Article 128, 130). According to Article 7 and Article 8 of the Resident Voting Act, major decisions of a local government which may excessively burden or significantly influence residents, which are prescribed by a municipal ordinance of the local government, may be put to the residents' voting. When the head of a central administrative agency deems it necessary to hear opinions of residents on the formulation of national policies, for instance in case of discontinuance, division and amalgamation of a local government, or district change, installation of major facilities thereof, he/she may demarcate a district where residents' voting is to be conducted and request the head of the relevant local government to conduct residents' voting.

both South and North Korea, as members of the UNSC, must express opinions on sanctions against North Korea and such opinions should be considered in the process of UNSCRs.

However, there is currently no formal process for collecting opinions on UNSCRs. There is a process for expressing opinions on the contents of a UNSCR submitted by a permanent member of the UN, but there is no procedural opportunity for the countries affected by sanctions and the countries that have economic exchanges with them to make comments. Therefore, objections or responses to the UNSCRs are difficult to express and can only made through unofficial diplomatic channels or at the UN General Assembly. Further, such comments can be made and heard only if they come from a member of the UN. There is no statement specifying the requirements for sanction relief or dismantling of UNSCRs, only one stating that the UNSC makes a decision on requests and notices for the exclusion of sanctions. In other words, opinions of countries outside the UNSC are not collected, and countries involved in sanctions have to wait for decisions following discussions in the UNSC. As an exception, there are two methods to make requests for delisting from sanctions. One is an indirect way where UN member states may request sanction relief from the UN 1718 Committee (Sanctions Committee).[53] The other is a direct way, where individuals or entities subject to sanctions ask for lifting of such sanctions using the "Focal Point for De-Listing." However, this is only for the targeted individuals or entities and there is no room for other countries whose economic exchanges are directly affected by sanctions to use this avenue.

Unification is accomplished through a series of continuous processes and a political decision called an integrated agreement. Even though international sanctions on sovereign states affect the process of continuing efforts for reunification, UNSCRs can only be subject to one of two decisions: easing or dismantling sanctions on compulsory measures. There is no room for a series of temporary situations, like those in the unification process. In general, in the domestic legislative process, there are methods for evaluating the effectiveness and validity of temporary legislative initiatives through experimental legislation or sunset clauses. On the other hand, sanctions through UNSCRs are intended for the international community, which is based on diversity, but only two options are available: mitigation and dismantling. In other words, no "procedural means" are required, such as defining temporary easing of sanctions by setting a period for a UNSCR.

Reunification of the Korean Peninsula is a political decision made through a phased process of inter-Korean postal and economic cooperation and railway exchanges. Thus, if the UNSCRs do not allow economic exchanges, except for humanitarian exchanges and cooperation on the condition of "denuclearization,"

[53] Under Article 41 of the UN Charter, the UN may impose enforcement restrictions in addition to military measures to maintain peace, and may form a sanctions committee to monitor the implementation of general and compulsory measures under UNSCRs. Currently, the 1718 Committee is working on sanctions against North Korea.

the unification process between the two Koreas will hardly win international support.

In fact, collecting of opinions occurs only during the UNSCR negotiation process and does not necessarily taken place ahead of a UNSC decision. If a UNSCR is highly political and diplomatic, it can be deemed necessary to give some countries affected by the sanctions and the target countries a chance to express their opinions on the resolution through formal procedures, in order to avoid the resolution being mistaken as forced implementation and interruption of the self-determination of a country. If a UNSCR is made official and published, it may be the basis for similar sanctions and decisions, even economic sanctions, being imposed on the same issue or similar cases, unless there are any special changes in the circumstances. These sanctions could act as indirect controls on the UNSCR. Despite the dynamics of international politics in which the logic of power operates, the international law order may become normative when international organizations constantly strive for self-control through these institutional mechanisms.

3.4 Conclusion: Legitimacy as international legislation and UN Security Council resolutions

This paper intended to analyze the influence of sanctions against North Korea through UNSCRs in the context of the high-level political and diplomatic situation of reunification of the Korean Peninsula. The first issue in the analysis was whether the UNSCR sanctions against North Korea could be recognized as an international legal order serving as peremptory norms. The analysis found that the character of UNSCRs is not that of peremptory norms based on the general premise of the international legal order that is universal and generally approved, but rather on the voluntary cooperation of the UN member states, where failure to comply could result in sanctions. Criticism of the effectiveness of the UNSCRs is expressed often, because the degree of cooperation varies depending on the dynamics and characteristics of the UN member states. However, South Korea, while not under direct sanctions, has no choice but to faithfully comply with the UNSC sanctions against North Korea.

After examining the relationship between the peaceful unification and the UNSCRs, the paper found that the UNSC's sanctions on North Korea did not contravene the Constitution of the Republic of Korea directly, but did create a de facto infringement. In addition, after reviewing the requirements for UNSC sanctions against North Korea from a perspective of self-determination, it was found that there was no direct and formal process for collecting opinions of stakeholders involved in the sanctions. Moreover, the UNSCRs on sanctions against North Korea can be phased out in only two ways: easing or dismantling. There has been no structure in place for temporary changes for reunification based on changed circumstances, such as inter-Korean exchanges.

Legislative standards and premises that could be fully accepted in a domestic legislative situation are usually included in the area of political consensus between countries under international politics and international diplomacy in the UN. Even if a situation or a target is highly political and diplomatic, a resolution must be legitimate and justifiable in its content and format in order for a political agreement between countries to be fully acceptable.

Although there is a critical view on some UNSC decisions, the UN still plays an important role in maintaining international peace. That is because the UNSC is rational enough not to force the imposition of sanctions on countries in general. Improvement of the delegation and decision-making structure of the UNSC might reinforce the role of the UN in maintaining international peace in the future.

Appendix. UN Security Council Resolutions on North Korea

UNSCR No. 1695 (2006.07.15)[54]

UNSCR No. 1695 was adopted as the first UN-level economic sanctions resolution against North Korea in response to Pyongyang's Taepodong-2 test. In the resolution, the contents of the sanctions are only a two-stage comprehensive request: first, a ban on missile and missile-related items and on technology transfer to North Korea. Second, a ban on the transfer of WMD-related financial support to North Korea.[55]

UNSCR No. 1718 (2006.07.15) [56]

UNSCR No. 1718 was adopted as a response to North Korea's first nuclear test, and all subsequent UN resolutions on sanctions against North Korea were adopted in a way that specified UNSCR No. 1718 and leveled up from urgings to obligations. In particular, UN sanctions against North Korea are currently enforced by the 1718 Democratic People's Republic of Korea Sanctions Committee established under UNSCR No. 1718. Its primary roles and authority are 1) taking appropriate measures against violations of sanctions, 2) collecting information on the implementation of sanctions by UN member states, and 3) taking any request and notification on the exemption of sanctions into deliberation and decision, 4) designating individuals and groups who are the subjects of sanctions and making a decision on additional sanction items, and 5) submitting to the UNSC a report on the sanctions against North Korea every 90 days.[57]

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[54] UNSCR S/RES/1695(2006) https://undocs.org/S/RES/1695(2006).

[55] "In the international diplomacy, 'request' is stronger than 'call upon' and 'underline', but weaker than 'decide, determine' or 'shall'. Generally, decision and obligation are only taken as mandatory duty." Choi Jang-ho, *North Korea's neighbors' sanctions on the North and the effect of trade substitution*, Korea Institute for International Economic Policy, 2016, page 26; Shin Heung-kyun, *Legal Issues on the missile lunch by North Korea: Characteristics and Limits of USCRs*, (2016)149.

[56] UNSCR S/RES/1718(2006) https://undocs.org/S/RES/1718(2006).

[57] Cho Sung-ryul, A Study on Laws and Systems Related to the Lifting of U.N. and U.S. Sanctions Against North Korea for the Denuclearization of the Korean Peninsula (Institute for National Security Strategy 2018) 8.

UNSCR No. 1718 stipulates that the export of WMD-related items and technologies to North Korea "shall" be banned and calls upon cooperation in the inspection of cargo in and out of North Korea in the search for WMD-related items and technologies.[58]

Mandatory measures	– Prohibit the export of WMD-related item technology to North Korea. – Prohibit the import and export of seven conventional weapons (tank, armored combat vehicle, large-caliber artillery, military aircraft, attack helicopters, warships, missiles or missile systems) and related accessories to North Korea. – Prohibit export of luxury goods to North Korea. – Freeze financial assets and economic resources held and secured since adoption by individuals and organizations involved in North Korea's WMD programs. – Prevent the provision of financial and economic benefits to North Korea's citizens. – Prevent individuals and their families involved in North Korea's WMD programs from entering or transferring the country.
Demand	– Cooperate in the search of cargo originating from North Korea or bound for North Korea in WMDs.

UNSCR No. 1874 (2009.06.12)[59]

UNSCR No. 1874 was adopted as a countermeasure against North Korea's second nuclear test, and the level of sanctions was tightened compared with in UNSCR No. 1718. UNSCR No 1874 provided that the arms-related sanctions referred to in UNSCR 1718 should be expanded to all weapons, called for a ban upon exports of all weapons and related items to North Korea, except for light weapons, and decided to prohibit financial transactions, technical training, advice, services and assistance to North Korea.[60] In addition, it also reinforced its measures by expanding the search targets from WMDs to all weapons and luxury goods as cargo on ships departed from North Korea, by allowing UN member states to search cargo of ships departed from North Korea at its airports, ports and within its territory, and not only to search suspicious ships in the open sea upon the agreement of the ships but also to seize and dispose prohibited items if found, and lastly by banning any support to such ships, including fuel.[61] It was also urged freezing of assets and resources held by individuals and entities involved in WMD-related programs of North Korea in parallel with UNSCR No. 1718. In the event of possible

[58] Choi Jang-ho, *supra note* 22, at 26–27.

[59] UNSCR S/RES/1874(2009) <https://undocs.org/S/RES/1874(2009)>.

[60] Cho Sung-ryul, *supra note* 57, at 8.

[61] Son Hyun-jin, *supra note* 17, at 26.

contribution to North Korea's WMD-related programs, UNSCR No. 1847 urged that a member state not provide financial aid (export credit, guarantee, insurance) related to trade with North Korea and urged to reduce free aid, financial aid and concessionary loans to North Korea, except for the purpose of promoting humanitarian and denuclearization.[62]

UNSCR No. 2087 (2013.1.22)[63] and UNSCR No. 2094 (2013.3.7)[64]

UNSCR No. 2087 is a resolution adopted in 2012 to condemn North Korea's launch of a long-range missile and to strengthen the UN's resolve toward North Korea. In particular, it decided to add four individuals and six groups related to its ballistic missile program to the sanctions list, and apply a travel ban and asset freeze on the sanctions targets.[65] The resolution called upon tighter monitoring on the obligations of banning financial transactions with North Korea and underlined voluntary catch-all by the member states, deploring North Korea's use of large amounts of cash to evade sanctions.[66]

UNSCR No. 2094 (March 7, 2013) was adopted as a response to the third nuclear test conducted in 2013, reaffirming the demand for abandonment of any activities related to North Korea's nuclear development and stating for the first time that North Korea's Enriched Uranium Program violated UNSCRs.[67]

Key contents of sanctions against North Korea under UNSCR No. 2094

Mandatory measures	– Provision of non-monetary and non-financial assets, including bulk cash supporting North Korea's nuclear and ballistic missile development, is prohibited. – Domestic financial/non-financial assets are frozen. – All cargo within or transiting through the member states' territory that has originated in North Korea, or is destined for North Korea, or has been brokered or facilitated by North Korea or its agencies shall be inspected, if there are grounds to believe the cargo contains prohibited items. – Ships that do not comply with inspection are not allowed to enter a port. – Banned items to North Korea are to be added and materialized items of luxury goods that are banned from exporting to North Korea are to be specified.

[62] Cho Sung-ryul, *supra note* 57, at 9.

[63] UNSCR S/RES/2087(2013) <https://undocs.org/S/RES/2087(2013)>.

[64] UNSCR S/RES/2087(2013) <https://undocs.org/S/RES/2094(2013)>.

[65] Son Hyun-jin, *supra note* 17, at 26.

[66] Cho Sung-ryul, *supra note* 57, at 29.

[67] Son Hyun-jin, *supra note* 17, at 27.

Demands	Related to support for North Korea's Nuclear and Missile Development – North Korean banks are banned from opening in the country. – Joint equity investments in North Korean banks and establishing a correspondence relationship with North Korean banks are banned for financial institutions. – Opening of offices, branches or accounts in North Korea by financial institutions is banned. – Aircraft are prohibited from landing, taking off or flying over the airways if they are suspected of shipping prohibited goods. – Strengthening self-regulated export controls (catch-all). – Strengthening vigilance to prohibit North Korean diplomats from engaging in illegal activities.

UNSCR No. 2270 (2016.3.2)[68] and UNSCR No. 2321 (2016.11.30)[69]

UNSCR No. 2270 followed North Korea's fourth nuclear test and long-range missile launch and is considered the strongest and most effective non-military sanctions in the history of the UN.[70] The scope of sanctions was expanded to include areas that indirectly affect the development of WMDs, as opposed to the previous ones which restricted only the areas that directly related to WMD development. These were inserted with the expression "decide" and it was mandatory for member states to implement them. In particular, this UNSCR completely banned the export of minerals such as coal and iron ore, which account for more than 40 percent of North Korean exports, as these were deemed to be a source of WMD financing.[71]

UNSCR No. 2321 in November 2016 was adopted to counter North Korea's fifth nuclear test. It supplemented UNSCR No. 2270 and introduced an export quota in the regulation of minerals in North Korea.[72] The resolution exceptionally allowed transactions that were not related to those subjects to sanctions or those for the purpose of the people's livelihood. The export ban against North Korea included a ban on exports of silver, copper, zinc, nickel, and statues, expulsion of individuals working under or on behalf of North Korean banks and financial institutions, and a ban on activities in North Korea by financial institutions of a member state. In addition, existing offices

[68] UNSCR S/RES/2270(2016) <https://undocs.org/S/RES/2270(2016)>.

[69] UNSCR S/RES/2321(2016) <https://undocs.org/S/RES/2321(2016)>.

[70] U.S. Ambassador to the UN Samantha Power called them the strongest economic sanctions in the most recent 20 years, from VOA article entitled: "UN Security Council unanimously adopts new North Korea Sanctions" (March 3, 2016) <https://www.voakorea.com/a/3216292.html>.

[71] Cho Sung-ryul, *supra note* 57, at 31.

[72] In particular, coal exports in excess of $400 million or 7.5 million tons per year, whichever is lower, were banned <https://undocs.org/S/RES/2321(2016)>.

and accounts (irrespective of WMD-related conditions) were decided to be close down within 90 days, and public and private financial support related to trade with North Korea was prohibited.[73]

Key contents of sanctions against North Korea under UNSCR No. 2270 and UNSCR No. 2321

Mandatory measures	– Enforcement of the embargo and autonomous catch-all related to weapons and dual-use items. – Reaffirmation of technical training, advice, services and support bans on WMD-related items and technology exports and exports to North Korea. – Prohibit export and import of all weapons including small arms. – Prohibit import and export of conventional weapons and any items that may contribute to development or export of WMD. Food and medicine are excluded from the prohibition. – Allow member states to inspect cargo at their discretion. – Prohibit aircrafts from taking off, landing or overflying, if they are suspected of carrying banned items. – Prohibit leasing, chartering or provision of crew service for aircraft or vessels of North Korea. – Prohibit registering of vessels in North Korea, using North Korean flag, owning, leasing, operating, providing certification or associated service, or insuring vessels of North Korea. – Prohibit North Korean banks from overseas financial activities. – Prohibit UN member states from being involved in financial activities in North Korea. – Prohibit private/public financial support for WMD-related trade with North Korea. – Prohibit import of gold/titanium ore/vanadium ore/rare earth minerals/silver/lead/zinc/nickel from North Korea. – Prohibit import of iron ore in principle (excluding for livelihood purposes) and export of North Korean sculpture products. – Prohibit export of aviation fuel/rocket fuel to North Korea (excluding supply of aviation fuel to civilian passenger aircraft outside North Korea).

[73] Son Hyun-jin, *supra note* 17, 30.

UNSCR No. 2375 (2017.09.12),[74] UNSCR No. 2371 and UNSCR No. 2379 (2017.12.23)[75]

UNSCR No. 2375 was adopted in response to North Korea's sixth nuclear test. It imposed an annual cap on oil supply to North Korea (500,000 barrels/year from October to December of 2017, 2 million barrels/year from 2018), leading to a drastic reduction in the supply of oil products. It also banned the supply of condensate and liquefied natural gas altogether, in response to North Korea's intercontinental ballistic missile tests. Furthermore, UN member states employing North Korean workers who were sent abroad were required to return them to North Korea within 24 months under the resolution. Maritime sanctions also required the detention, search and freezing of ships in the event of suspected involvement in transport of WMD-related contraband goods or activities of ships entering the ports of the member states. In addition, the resolution stipulated a ban on the trading of fishing rights in connection with the ban on the export of fishery products from North Korea.[76] North Korea's exports of coal, iron ore, lead and fishery products were all banned in July 2017 due to a resolution on sanctions against North Korea after its test-firing of the intercontinental missile Hwasong 14.

UNSCR No. 2397 was adopted in response to the launch of long-range ballistic missiles by North Korea, with the main focus being to drastically lower the annual ceiling of oil refining products to 500,000 barrels from the previous 2 million barrels, and to limit oil supplies to North Korea to 4 million barrels per year. Particularly, maritime sanctions required the member states to capture, search and suppress ships suspected of acts prohibited in the port of entry as well as their own territorial waters, and made it an obligation of member states to swiftly exchange of information on suspicious vessels among member states.[77]

[74] UNSCR S/RES/2375 (2017) <https://undocs.org/S/RES/2375(2017)>.

[75] UNSCR /RES/2379 (2017) <https://undocs.org/S/RES/2379(2017)>.

[76] Son Hyun-jin, *supra note* 17, p. 31.

[77] Son Hyun-jin, *supra note* 17, p. 31

4. A Global Administrative Act?

Refugee Status Determination between Substantive and Procedural Law

*Yukio Okitsu**

4.1 Introduction

A person is subject to the jurisdiction of a state, personally and territorially, and belongs to the international community through said state. Refugees are people who have become unable to receive the protection from their country of nationality because of the fear of persecution and have had their personal ties with the state cut. They are linked to the state and the international community only by the fact that they exist and may be granted asylum in the territory of the host state. Under international law, immigration control is subject to the exercise of territorial sovereignty by a state, and it is unanimously recognized that a state has no obligation to grant entry to a person who does not have the nationality of that state unless international agreements or customary international law imposes restrictions.[1] Refugees or asylum seekers are primarily subject to this legal principle and to the right of immigration control enjoyed by the state that they have reached after fleeing their country of origin. In contrast to Thomas Jefferson's affirmation, they do not have the 'right to live somewhere on the earth.'[2]

International refugee law is a body of international norms that restricts state discretion on immigration control. It includes the 1951 Convention Relating to

* Graduate School of Law, Kobe University, Japan. This work builds on and develops my previous article written in Japanese: Yukio Okitsu, 'Gurōbaru Gyōsei-kōi?: Nanmin Nintei o meguru Kokka to UNHCR no Kengen no Sōkoku' [A Global Administrative Act?: Refugee Status Determination by the State and UNHCR under Its Mandate] (2019) 27 Yokohama Law Review 291. I am grateful for all the comments I received when I gave presentations on previous versions of it at the 2019 annual conference of the International Society of Public Law (I CON-S) and a workshop at Stockholm University. It was supported by JSPS KAKENHI Grant Number 17H02452, 19K21677, 19H00568, 19H00570, 19H01412, 18H03617, 15H0192.

[1] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 608; Jean Combacau and Serge Sur, *Droit international public* [Public International Law] (12th edn, LGDJ 2016) 371; Sōji Yamamoto, *Kokusai-hō* [International Law] (2nd edn, Yūhikaku 1994) 514 (Japan).

[2] Thomas Jefferson, 'First Annual Message' (8 December 1801) in Paul Leicester Ford (ed), *The Works of Thomas Jefferson*, vol 9 (GP Putnam's Sons 1905) 341 fn 1, cited in Kaoru Obata, 'Imin, Nammin hō ni okeru Seigi-ron Hihan: "Chikyū-jō no Doko ka ni Sumu Kenri" no tame ni' [Criticism of Justice Theory in Immigration and Refugee Law: For "the Right to Live Somewhere on Earth"] (2015) 34 Sekai hō Nempō [YB World L] 111, 113 (Japan).

the Status of Refugees[3], the 1967 Protocol Relating to the Status of Refugees[4], and customary international law concerning the international protection of refugees.[5] Refugees are entitled to territorial asylum[6] backed by the principle of non-refoulement (a prohibition on the return of refugees to their country or region where there is a risk of persecution) and enjoy the rights and legal statuses guaranteed by the Refugee Convention and Protocol if the country of refuge is party to them. International refugee law can be seen as a framework to help individuals who have lost their personal ties to the international community through a network of international cooperation.

Paradoxically, to be accepted into such an international protection framework, an asylum seeker must be recognized as a refugee by the host state. As will be explained in detail in Part I, the Refugee Convention and Protocol define the term 'refugee' and provide for the requirements that must be satisfied for an individual to be a refugee. Those who meet these requirements should be able to receive refugee protection wherever they are in the world. In reality, refugee status determination (hereinafter 'RSD') under procedural law precedes the implementation of protection under substantive law. The Refugee Convention and Protocol are silent regarding the organ in charge of and the procedure involved in RSD. The consequence of this silence is the application of the principle of state territorial sovereignty, and RSD is to be conducted by the government of the country to which the asylum seeker wishes to be allowed entry and to be accepted as a refugee. At least in principle, anyone who meets the requirements for refugee status must be recognized as a refugee in any country, but the reality is that there are large differences between countries in the number and rate of recognition of ref-

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[4] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

[5] Regional treaties and other international instruments are also important, e.g., Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (Organization of African Unity (currently African Union) Refugee Convention); Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) (Cartagena Refugee Declaration) <www.refworld.org/docid/3ae6b36ec.html> accessed 19 March 2021. Nevertheless, this paper focuses only on general international refugee law and mentions regional instruments in relation to cases in which they are in question.

[6] Territorial asylum refers to the acceptance and sojourn in the host state of persons who are at risk of political persecution from the state of origin. A person who is granted territorial asylum can escape the accusation of the authorities of his own state as an effect of territorial sovereignty. On asylum, see generally Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed., OUP 2007) 355–58. See also P. Weis, 'Territorial Asylum' (1966) 6 Indian J Intl L 173, reproduced in Hélène Lambert (ed), *International Refugee Law* (Ashgate 2010) 13.

ugees.[7] As described above, the current situation of international refugee law can be described as 'substantive law is global, procedural law is domestic'.

This article focuses on the fact that in most countries the authority to grant refugee status is in the hands of administrative bodies, and that RSD is conducted as an administrative act and is regulated under administrative law. Here, an administrative act refers to a concept known in administrative law scholarship within civil law jurisdictions (Verwaltungsakt in German, acte administratif in French, and gyōsei kōi in Japanese), which indicates the type of a decision by an administrative agency to apply general norms of law to specific cases and to determine the legal status (rights and obligations par excellence) of particular parties. Although common law jurisdictions do not use this concept, the legal phenomenon in which administrative authorities make decisions that directly regulate the legal status of private persons can be seen there, too. Regardless of whether or not the term 'administrative act' is used, such a phenomenon is considered common among administrative legal systems.[8]

Because it is primarily the state that has the authority to regulate directly the legal status of private persons, the concept of an administrative act has conventionally been peculiar to domestic law. However, it has recently been recognized that international organizations and supranational entities in charge of global governance may make specific decisions to regulate directly the rights and obligations of individuals, and this has attracted theoretical interest.[9] For example, Global Administrative Law (GAL) scholars often cite the determination of mandate refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR),[10] along with the decisions of the Executive Board of the Clean Devel-

[7] According to UNHCR statistics, in 2016, Japan recognized 28 refugees and rejected 9,604 applications while Germany recognized 263,622 (the largest number in the world for that year) and rejected 196,184. UNHCR, *UNHCR Statistical Yearbook 2016* (16th ed., 2018) Table 9 <www.unhcr.org/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html> accessed 19 March 2021.

[8] Jaime Rodríguez-Arana Muñoz and others, 'Foreign Administrative Acts: General Report' in Jaime Rodríguez-Arana Muñoz (ed) *Recognition of Foreign Administrative Acts* (Springer 2016) 1 ('an administrative act—either "unilateral" or "individual"—could be defined as an individual decision taken by a public authority to rule a specific case, submitted to public law and immediately executed without judicial intervention, understanding that, except in the case of a specific statutory reserve, it refers to the decision, the final act—the one that ends a process—and not to the intermediary ones'). Compared to this definition, my definition only refers to the 'prescriptive' effect of an administrative act, and does not include the 'self-enforcement' or 'self-executory' character thereof. In civil law jurisdictions, administrative agencies are enabled to enforce and execute administrative acts without judicial intervention in many cases, while in common law jurisdictions, they generally need to ask the judiciary for authorization for enforcement or execution. I put this point aside because I am not interested in the self-enforcement or self-executory character of an administrative act here. I would like to concentrate on the commonalities between civil law and common law jurisdictions to make a cross-cutting analysis.

[9] See, e.g., Jakub Handrlica, 'International Administrative Law and Administrative Acts: Transterritorial Decision Making Revisited' (2016) 7 Czech YB Public & Private Intl L 105.

[10] BS Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law' (2005) 37 NYU J Intl Law & Pol 799, 819–26; Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 NYU J Intl Law & Pol 869; Emma Dunlop, 'A Globalized Administrative Procedure: UNHCR's Determination of Refugee Status and its Procedural Standards' in Sabino Cassese and others (eds) *Global Administrative Law: The Casebook* (3rd ed., Kindle 2012) pt IIIB3.

opment Mechanism (CDM) that determines the eligibility of projects in relation to the CDM and greenhouse gas emission reduction credits and the U.N. Security Council's 1267 Committee listing decisions freezing the assets of listed persons.[11]

'Mandate refugees' are refugees covered by UNHCR's mandate, as opposed to 'convention refugees' that come under the Refugee Convention and Protocol. Whereas the authority to recognize convention refugees rests with states, the recognition of mandate refugees is left to UNHCR. Although the definitions of mandate refugees and convention refugees are not identical, the requirements and elements to be recognized as such are mostly the same, and few fall under either. If UNHCR's mandate RSD complements, if not replaces, convention RSD by states, the abovementioned statement 'procedural law is domestic' would need to be considerably re-evaluated. In other words, the possibility of a global administrative act by an international organization that is comparable to an administrative act by a national agency should be discussed.

This article analyses the correlation between the authorities of states and UNHCR concerning the recognition of refugee status. To this effect, it refers to international administrative law and GAL as analytical frameworks. They are both theoretical frameworks that intend to understand cross-border activities for public interest as administrative activities and regulate them with legal rules and principles derived from (domestic) administrative law. However, they differ in that the former still emphasizes state rights and obligations and their roles in international administrative cooperation, while the latter comprehensively covers global governance developed in a space beyond states (global administrative space[12]).[13] International administrative law suggests an approach to constrain the discretionary right of a state with reference to international instruments such as the Refugee Convention and Protocol, and GAL gives an idea that a global administrative body such as UNHCR takes an administrative act vis-à-vis a private person directly. From this perspective, I analyse the RSD systems of states and UNHCR and their relationship.

I first outline the mechanisms of convention RSD by states (Part I) and of mandate RSD by UNHCR (Part II). Then, I analyse the legal implications of UNHCR's mandate RSD in relation to a state's RSD using Japanese and British cases (Part III) before concluding the article (Part IV).

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[11] Richard B Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?' (2005) 68(3/4) L&CP 63, 89. The listing of persons subject to the assets freezing is cited because '[a]lthough member states must implement freezes of listed persons' assets, implementation in many states is automatic, making the effective impact of committee listing decisions direct' (ibid 89 fn 96).

[12] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3/4) L&CP 15, 18–27.

[13] On international administrative law as compared to global administrative law, see Yukio Okitsu, 'International Administrative Law, a Precursor of Global Administrative Law?: The Case of Soji Yamamoto' in Jean-Bernard Auby (ed) *Le futur du droit administratif / The Future of Administrative Law* (LexisNexis 2019).

4.2 Convention refugee status determination by States

4.2.1 The Refugee Convention and the Refugee Protocol

Article 1A(2) of the 1951 Refugee Convention defines the term 'refugee' as any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[14]

This definition has a temporal limitation expressed by 'as a results of events occurring before 1 January 1951' and paragraph B(1) of the same article admits the possibility of geographic limitations leaving each contracting state to choose whether the scope of the 'events' is limited to events occurring in Europe or whether it includes events occurring in other countries.[15] The 1967 Refugee Protocol removes the temporal and geographic limitations imposed by the Refugee Convention. Article I, paragraph 2, of the Protocol abolishes the temporal limitation by providing that:

> For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words '... as a result of such events', in article 1 A (2) were omitted.[16]

Paragraph 3 also abolishes the geographic limitation by providing that '[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation' except the case provided for by its saving clause.[17] The Refugee Convention and Protocol are separate treaties that are independent of each other, which enables states to be party to one or the other if they choose, and the latter does not have the effect of amending the former.[18] However, Article I, paragraph 1 of the Protocol provides that '[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined',[19] and if a state becomes party to the Protocol, it will concurrently bear obligations under the substantive provisions of the Convention.

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[14] Refugee Convention (n 3) art 1A(2).

[15] ibid art 1B(1).

[16] Refugee Protocol (n 4) art I2.

[17] ibid art I3.

[18] Goodwin-Gill and McAdam (n 6) 508.

[19] ibid art I1.

4.2.2 *The Immigration Control and Refugee Recognition Act of Japan*[20]

The general framework

Upon its accession to the Refugee Convention and Protocol in 1981, Japan promulgated a relevant legislative act to implement them, which entered into effect on 1 January 1982.[21] The then Immigration Control Order, the fundamental statute in this field, was renamed the Immigration Control and Refugee Recognition Act[22] (hereinafter 'ICRRA'), into which related provisions were inserted. Article 2, item (iii-2), of ICRRA defines the concept of a refugee as follows: '[t]he term "refugee" means a refugee who falls under the provisions of Article 1 of the Convention Relating to the Status of Refugees (…) or the provisions of Article 1 of the Protocol Relating to the Status of Refugees.'[23] ICRRA does not provide its own definition of a refugee and its own substantive requirements that an asylum seeker is required to fulfil to be recognized as a refugee. Instead, it refers to provisions of the existing international instruments, and the same concept of a refugee as that defined by the Refugee Convention also applies in Japanese law. Thus, the substantive law is kept uniform under international and domestic law.

As a matter of procedural law, the Refugee Convention and Protocol provide for nothing on how and what organ shall determine refugee status although Article 9 of the Convention assumes that RSD will be conducted by states parties.[24] The general understanding is that each state party has the authority to carry out RSD on its own given that it actually assumes the task and responsibility to implement the Refugee Convention and Protocol and to grant asylum to refugees where necessary.[25] ICRRA entrusts the Minister of Justice with the authority for

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[20] See, generally, Osamu Arakaki, *Refugee Law and Practice in Japan* (Routledge 2008) (a comprehensive book written in English about the Japanese law and practice on the implementation of international refugee law).

[21] Nammin no chii ni kansuru jōyaku tō eno kanyū ni tomonau Shutsunyūkoku Kanri Rei sonota kankei hōritsu no seibi ni kansuru hōritsu [Act Relating to the Revision of the Immigration Control Order and Other Related Laws upon Accession to the Convention Relating to the Status of Refugees, etc.], Act No 86 of Shōwa 56 (1981) (Japan).

[22] *Shutsunyūkoku Kanri oyobi Nammin Nintei Hō* [Immigration Control and Refugee Recognition Act], Cabinet Order No 319 of Shōwa 26 (1951) (Japan) (ICRRA), translated in Ministry of Justice, Japanese Law Translation <www.japaneselawtranslation.go.jp/law/detail/?id=1934&vm=&re=&new=1> accessed 19 March 2021. The translation in this text is with my own modifications.

[23] ICRRA (n 22) art 2(iii-2).

[24] Refugee Convention (n 3) art 9: 'Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, ***pending a determination by the Contracting State that that person is in fact a refugee*** and that the continuance of such measures is necessary in his case in the interests of national security.' (emphasis added).

[25] UNHCR, 'Note on Determination of Refugee Status under International Instruments', UN doc EC/SCP/5 (24 August 1977) paras 7, 11. See also James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 129 Harvard Intl LJ 129, 166–8.

RSD,[26] by providing in Article 61-2 (1) that '[t]he Minister of Justice may, if an alien in Japan submits an application in accordance with the procedures provided for by a Ministry of Justice ordinance, recognize said alien as a refugee (…) based on the materials submitted by him or her'.[27] In this situation, we can see that 'procedural law is domestic'. In the following, analysing the legal effects of and requirements for RSD in Japanese law, I will discuss how the domestic procedural law affects the premise that 'substantive law is global'.

Effects of an RSD

The principal legal effect of an RSD is to 'authoritatively determine that the alien concerned fulfils the requirements for refugee status stipulated in the Refugee Convention and therefore is a refugee, as the premise [for the government] to perform the various obligations set forth in the Convention'.[28] This effect puts the person in a legal position to be treated as a refugee by the relevant authorities. It can be analysed into two types of sub-effects: a constructive (creative) one and a declaratory (confirmative) one. I will compare both with examples.[29]

First, the constructive (creative) effect creates a legal status that cannot be claimed without an RSD. A case in point is that it constitutes a necessary condition for the issuance of a refugee travel document. The Refugee Convention, on the one hand, under Article 28 (1), obliges contracting states to 'issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory'.[30] It does not require, at least on its face, obtaining an RSD, but just requires being a refugee in order to receive a travel document. ICRRA, on the other hand, in Article 61-2-12 (1), provides that '[t]he Minister of Justice shall, if an alien residing in Japan who has been recognized as a refugee seeks to depart from Japan, issue a refugee travel document based on an application from said alien, in accordance with the procedures provided for by a Ministry of Justice ordinance'.[31] According to this provision, an applicant for a refugee travel document must be one 'who has been recognized as a refugee', which means one who has previously obtained an RSD. In other words, an asylum seeker who has not been recognized as a refugee by an RSD is not entitled to a refugee travel document even if this person may objectively and substantively fall under the definition of

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[26] While ICRRA only uses the term 'recognition of refugee status' (***nammin no nintei***) instead of 'refugee status determination', I use both terms interchangeably throughout this article because they have the same meaning.

[27] ICRRA (n 22) art 61-2(1).

[28] Shutsunyūkoku Kanri Hōrei Kenkyūkai [Research Group on Immigration Control Laws and Regulations] (ed), ***Chūkai Hanrei Shutsunyūkoku Kanri Jitsumu Roppō*** [Annotated Cases and Statutes on Immigration Control for Practice] (2019 edn, Nihon Kajo Shuppan 2018) 131 (Japan).

[29] On the effects of RSD, including those not discussed below, see Nihon Bengoshi Rengōkai, Jinken Yōgo Iinkai [Japan Federation of Bar Associations, Human Rights Protection Committee] (ed), ***Nanmin Nintei Jitsumu Manyuaru*** [Manual of Refugee Status Determination Practice] (2nd edn, Gendai Jimbun Sha 2017) 152–7 (Noriko Watanabe) (Japan).

[30] Refugee Convention (n 3) art 28(1).

[31] ICRRA (n 22) art 61-2-12(1).

a refugee. This provision presupposes the constructive effect of an RSD that creates refugee status as a necessary condition for a refugee travel document.

How can it be justified to add such a requirement by domestic law that the Refugee Convention does not impose?[32] A justification may be offered as follows: a state party disposes of procedural discretion, which is supposedly and implicitly left to it by the Convention. When it determines whether or not to issue a refugee travel document, the relevant state agency must preliminarily determine whether the applicant fulfils the requirements for being a refugee in any case. If this preliminary determination has already been done by an RSD, it is redundant to reiterate the same determination only for the issuance of a travel document. If agencies authorized for RSD and travel documents are not the same, there is a risk that one agency's determination of refugee status may conflict with another's. Therefore, it is reasonable for a state party to grant the authority for RSD to one agency and require other agencies to comply with its determination. This treatment can be justified in the framework of procedural discretion.

Second, a declaratory (confirmative) effect confirms a legal status that is supposed to have existed before an RSD was done. An example can be found in Article 70-2 of ICRRA, which sets forth a requirement for the exemption from the penalty for a crime such as illegal stay. The article stipulates that '[a] person … may be exempt from penalty if it is proved that each of the following items is the case', and item (i) lists the case 'the person is a refugee'.[33] For this provision to apply, the accused must prove that she is a refugee before the criminal court, but literally need not have been previously recognized as a refugee by an RSD. It does not presuppose a refugee status that is created by the constructive effect of an RSD as a premise for the exemption. The accused has two choices. First, if she has already been recognized as a refugee by an RSD, she can present her certificate of refugee status issued by the Minister of Justice as a piece of evidence, which the relevant authorities, including courts, are required to treat as proving that she is a refugee. Second, if she has not, she can directly prove to the criminal judges that she actually fulfils the refugee requirements on other evidence. In the first case, the effect of an RSD is declaratory and not constitutive, because other modes of proof aside from an RSD are possible in the second case.

There are also benefits or protection given independently of refugee status, albeit originating from the Refugee Convention. The principle of non-refoulement is a case in point. Article 53 (3) of ICRRA applies it not only to refugees, but to all

[32] See, for example, UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN doc HCR/1P/4/ENG/REV.3 (December 2011) para 28 ('A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'); Goodwin-Gill and McAdam (n 6) 51 ('In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive').

[33] ICRRA (n 28) art 70-2.

foreign nationals who are deported from Japan. Another example is the national treatment with respect to public relief, public assistance, and other forms of social security accorded to refugees by Articles 23 and 24 of the Refugee Convention. Upon its accession to the Refugee Convention and Protocol, Japan amended the related legislation to abolish the nationality requirement so that these payments can be offered to all foreign nationals and not just to refugees. In these cases, RSD naturally has no effect on the application of the principle of non-refoulement or social security laws.

Requirements for RSD

When the Minister of Justice determines whether an applicant for RSD fulfils the definition of a refugee, the Minister must carry out a fact-finding exercise and apply the law.[34] The question is whether or not the Minister is given discretionary power in so doing. Some authors deny it because an RSD is not constitutive, but declaratory, or a fact-confirming act, by which the Minister just applies the legal concept of refugee as set forth in the Refugee Convention to facts and confirms whether the applicant falls under the definition or not.[35] I agree with the conclusion that there is no ministerial discretionary power, but it has yet to be justified. Merely characterizing an RSD as declaratory does not seem sufficient as a reason, for such an act is often accompanied by a certain margin of appreciation, at least a de facto one. Fact-finding draws facts from evidence and the application of the law determines whether these facts fulfil given legal criteria to infer a legal effect. If the legal criteria are given in the form of an indefinite term, such as 'persecution', there is supposed to be a margin of appreciation as to what this term exactly means and what kind of facts fall within its scope.[36] It is not necessarily true that any decision maker would not arrive at the same conclusion on a particular case. Therefore, just simply being a declaratory, fact-confirming act does not deny the existence of discretion. To deny it, it is necessary to argue that such a margin of appreciation should not be legally allowed; in other words, that the law that authorizes officials to carry out fact-finding and application of law delineates the scope of the term in question so that it prohibits deviating from it.

Although ICRRA grants Japanese officials the authority for RSD, the law that delineates the scope of the term 'refugee' is the Refugee Convention and Protocol because the relevant articles of ICRRA[37] simply refer to their provisions in defining it. If the Convention and Protocol granted discretion to states on RSD, it follows that they would allow a situation in which a person who reaches State A is granted asylum as a refugee and another who reaches State B is denied refugee status, even if both have fled from the same persecution in the same country. I

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[34] Arakaki (n 20) 77–8.

[35] Tatsuo Yamamoto, 'Nanmin Jōyaku to Shutsunyūkoku Kanri' [The Refugee Convention and Immigration Control] (1981) 34(9) Hōritsu no Hiroba 20, 23; Shigeki Sakamoto, *Jinken Jōyaku no Kaishaku to Tekiyō* [Interpretation and Application of Human Rights Conventions] (Shinzansha 2017) 319 (Japan).

[36] Arakaki (n 20) 20 (pointing to the difficulty of fact-finding and normative aspects of RSD).

[37] ICRRA (n 28) art 61-2 (1), 2 (iii)-2.

argue that this is not the case; the Convention and Protocol should be interpreted to aim at a universal system for the protection of refugees, and that asylum seekers escaping from the same persecution must be granted the same protection under the same conditions from any state party. This argument is supported by the Preambles to the Refugee Convention and Protocol. The former states: 'it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement',[38] referring to the UN Charter[39] and the Universal Declaration of Human Rights.[40] The latter reads: 'it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951',[41] and thereby abolishes the aforementioned temporal and geographic limitations. UNHCR's notes on the extraterritorial effect of RSDs, requesting that one country approve the effect of an RSD by another, also reinforce this argument.[42] States parties should not be allowed discretionary power to deny refugee status to asylum seekers who objectively and substantively fall within the scope of the concept of a refugee as delineated by the Convention and Protocol. Japan's ICRRA should be interpreted to the same effect.

Nevertheless, it is still occasionally true that a person who would be recognized as a refugee in State A may not be recognized as such in State B. This is because whereas substantive law is global, procedural law is domestic. While the Refugee Convention and Protocol deny state parties discretionary power as a matter of substantive law, it is still the case that they leave them a certain discretion in terms of procedure, including the rules relating to proof,[43] which belong to the procedural discretion left to each state party. Even if the substantive concept of a refugee is identical among states, different procedures can lead to different conclusions even in very similar cases. For example, if State A grants the benefit of the doubt to assess the credibility of the accounts of asylum seekers and State B does not, the two states can arrive at different conclusions in cases where the accounts in question are uncertain.

Under domestic administrative law, divergences among cases are reviewed by courts so that the procedural application of the substantive criteria will be unified. If there were an international judicial body such as an international refugee court, it would review decisions made by state authorities under international law, and it would become meaningless to distinguish between substantive and procedural law to determine whether or not states are allowed discretionary power. The

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[38] Refugee Convention (n 3) preamble.

[39] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter).

[40] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).

[41] Refugee Protocol (n 4) preamble.

[42] UNHCR, 'Note on Determination of Refugee Status' (n 25) paras 20–21. See also UNHCR, 'Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' UN doc EC/SCP/9 (24 August 1978) para 33.

[43] In relation to problems of proof in Japanese refugee status determination procedures, see Sakamoto (n 35).

denial of discretion as a matter of substantive law would result in the procedural subjection of decisions made by states to de novo review by the court that may substitute their decisions. Such a court does not (yet) exist in reality, and the discrepancy between substantive and procedural law still exists.

4.3 Determination of mandate refugee status by UNHCR[44]

4.3.1 Foundation for the Authority

The determination of mandate refugee status (mandate RSD) by UNHCR is called so because it is based on the mandate given to UNHCR under the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute).[45] The UNHCR Statute was adopted by a resolution of the United Nations General Assembly dated 14 December 1950. UNHCR itself was established on 1 January 1951 by a resolution of the United Nations General Assembly dated 3 December 1949,[46] and both these preceded the Refugee Convention and Protocol. It is characterized as a subsidiary organ of the General Assembly[47] and is supposed to exist independently of the Refugee Convention and Protocol. Although Article 35 (1) of the Refugee Convention and Article 2 (1) of the Refugee Protocol assign it a 'duty of supervising the application' of the provisions of these instruments,[48] UNHCR has no authority to implement them. Accordingly, mandate RSD finds no direct basis in the Refugee Convention or Protocol. It is carried out under UNHCR's independent authority based on its Statute.

4.3.2 The concept of mandate refugees

Mandate refugees can be divided into two categories: those in the narrow sense as set forth in the UNHCR Statute (almost identical to convention refugees), and those in the broad sense as recognized by UNHCR on its own. Both are substantive concepts. In terms of a procedural method of RSD, there can be a 'prima facie' recognition of refugee status, which is mostly conducted through a group-based assessment, instead of an individual assessment, of eligibility for refugee status. UNHCR also has a mandate to protect 'persons of concern' in addition to refugees per se, whose relationship with mandate refugees is not really clear.

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[44] For further details, see Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority in International Institutions: Advancing International Institutional Law* (Springer 2010).

[45] Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res 428 (V) (14 December 1950) (UNHCR Statute).

[46] UNGA 319 (IV) (3 December 1949).

[47] UN Charter (n 39) art 22.

[48] Refugee Convention (n 3) art 35(1); Refugee Protocol (n 4) art 2(1).

Mandate Refugees in the Narrow Sense

Mandate refugees in the narrow sense are people to whom the competence of the High Commissioner for Refugees shall extend, as defined in paragraph 6 of the UNHCR Statute. Section B of that paragraph provides:

> Any other person[49] who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.'[50]

This definition almost overlaps with that under Article 1A (2) of the Refugee Convention,[51] except that no temporal limitation ('as a result of events occurring before 1 January 1951') is imposed, that 'membership of a particular social group' is omitted as a reason for persecution,[52] and that the 'well-founded fear of persecution' need not currently exist and can be one that existed previously.[53] Furthermore, paragraph 8 of the Statute requires the High Commissioner to protect those refugees who fall under the definition. To discharge this obligation to protect, the High Commissioner needs to find out who a refugee is under the Statute,[54] and, consequently, his authority to conduct mandate RSD in the narrow sense is justified.[55]

Mandate Refugees in the Broad Sense

Mandate refugees in the broad sense are defined as those who are 'outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting

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[49] 'Any other person' means any person other than those falling under paragraph 6A of the UNHCR Statute, who: (i) have been considered as refugees under previous international treaties (corresponding to Article 1A (1) of the Refugee Convention), or (ii) meet the definition set forth in 6A (ii), which is almost identical to that in paragraph 6B, 'as a result of events occurring before 1 January 1951' (corresponding to Article 1A (2) of the Refugee Convention).

[50] UNHCR Statute (n 45) para 6B.

[51] James C Simeon, 'Refugee Adjudication under the UNHCR's Mandate and the Exclusion Dilemma' (2018) 2 Cambridge L Rev 75, 84 (asserting that UNHCR applies the definition of refugee in the Refugee Convention and Protocol in practice).

[52] However, it is determined that those who fall under the scope of the term 'convention refugee' also fall under the mandate of UNHCR, and, therefore, this point is not considered a major difference (UNHCR, *Refugee Status Determination: Identifying who is a refugee, Self-study module 2* (UNHCR 2005) 8).

[53] The text of the Statute, para 6B, reads 'because he has *or had* well-founded fear of persecution' (emphasis added), while the text of the Convention, art 1A(2), reads 'owing to well-founded fear of being persecuted'.

[54] High Commissioner's Advisory Committee on Refugees (First Session 1951), Item 6 of the Agenda, 'Memorandum by the High Commissioner on certain problems relating to the eligibility of refugees' (Conference Room Document No 1, 15 November 1951) <www.unhcr.org/4419921c2.pdf> accessed 19 March 2021.

[55] UNHCR, 'Note on Determination of Refugee Status' (n 25) para 8 ('[c]ompetence to determine refugee status under the Statute of UNHCR obviously rests with the High Commissioner for Refugees.').

from generalized violence or events seriously disturbing public order'.[56] They are different from convention and mandate refugees in the narrow sense in three ways: (1) instead of 'a well-founded fear of persecution' (Refugee Convention art 1A(2); UNHCR Statute para 6A(ii)), 'serious … threats' to life, physical integrity or freedom are sufficient (the existence of such threats having to be established with a reasonable likelihood as in the Refugee Convention); (2) such threats must originate in generalized violence or circumstances that seriously disturb public order, that is, circumstances wherein the state's capacity to provide protection has generally collapsed as may be a result of armed conflict, control or interference, occupation or colonization by a foreign country, or any other manmade disaster; (3) such threats may be indiscriminate (if there is a selective or individual risk of harm, the Refugee Convention may apply in most cases).[57]

The definition expands the scope of protection given that the concept of 'persecution' under Article 1A (2) of the Refugee Convention often entails a negative evaluation of the country of origin[58] and frequently shackles the recognition of refugee status.[59]

Prima Facie Recognition of Refugee Status Through a Group-based Assessment

In principle, the assessment of refugee status is conducted on an individual basis. However, it is often the case that a large group of people flee at once and are all considered refugees, judging from the circumstances. Although each could be recognized as a refugee if they were to be assessed on an individual basis, the urgent need for protection may make it impractical and impossible to carry out an individual assessment of each member of the group. In such cases, group recognition is conducted, whereby the members of the group are treated prima facie as refugees unless proven to the contrary.[60] Prima facie recognition differs from provisional or interim recognition, and, therefore, a person who has been recognized on a prima facie basis can enjoy full rights and status as a refugee as long as the recognition is valid.[61]

Persons of Concern

Ever since the adoption of its Statute, UNHCR has expanded the categories of persons to whom its competence extends by virtue of several UN General Assembly (UNGA) resolutions.[62] As a result, its personal scope currently covers asy-

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[56] UNHCR Division of International Protection, *UNHCR Resettlement Handbook* (rev. edn, UNHCR 2011) 81. See also UNGA, *Note on International Protection*, UN doc A/AC.96/830 (7 September 1994) paras 31–32.

[57] *UNHCR Resettlement Handbook* (n 56) 89.

[58] In this article, the term 'country of origin' means either the country of nationality or, in the case of a stateless person, the country of her former habitual residence.

[59] See Obata (n 2) 121–4.

[60] *UNHCR Resettlement Handbook* (n 56) 77.

[61] UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status', UN doc HCR/GIP/15/11 (24 June 24 2015) para 7.

[62] See UNHCR Statute (n 45) para 9.

lum seekers, returnees, stateless persons, and, under certain conditions, internally displaced persons. These persons, together with refugees, are collectively referred to as 'persons of concern to the UNHCR'.

Asylum seekers refer to persons 'whose refugee status has not yet been determined by the authorities but whose claim to international protection entitles him or her to a certain protective status on the basis that he or she could be a refugee, or to persons forming part of large-scale influxes of mixed groups in a situation where individual refugee status determination is impractical.'[63]

They have been included under the UNHCR's mandate since the term 'asylum seeker' was first used in a UNGA resolution in 1981.[64]

Returnees are 'former refugees who have returned to their country of origin spontaneously or in an organized fashion but are yet to be fully integrated'[65] including those to whom the Refugee Convention no longer applies because the circumstances on which the RSD was based have ceased to exist.[66] While at first UNHCR's mission had been thought to end once the repatriation was completed, monitoring returnees was also brought under its mandate following a conclusion by the UNHCR Executive Committee[67] and a UNGA resolution in 1985.[68]

Among stateless persons, those who qualify as refugees were originally included under the competence of UNHCR, and those who do not are now also covered by it. Pursuant to the 1961 Convention on the Reduction of Statelessness, 'a body to which a person claiming the benefit of the Convention may apply for the examination of his or her claim and for assistance in presenting it' is to be established within the framework of the United Nations,[69] and UNHCR came to bear this role under a UNGA resolution[70] thereafter.[71]

Internally displaced persons are 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular, as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or hu-

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[63] UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office' (October 2013) 3–4 <www.refworld.org/docid/5268c9474.html> accessed 19 March 2021.

[64] UNGA res A/RES/36/125 (14 December 1981) paras 5(a), 6, 13.

[65] UNHCR, 'Note on the Mandate' (n 63) 7.

[66] Refugee Convention (n 3) art 1C(5)(6).

[67] UNHCR Executive Committee Conclusion No 40 (XXXVI), 'Voluntary Repatriation' (1985) para. (l).

[68] UNGA res A/RES/40/118 (13 December 1985) para. 7.

[69] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175, art 11.

[70] UNGA res 3274 (XXIX) (10 December 1974); UNGA res A/RES/31/36 (30 November 1976).

[71] See, generally, UNHCR Executive Committee Conclusion No 78 (XLVI), 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons' (1995); UNHCR Executive Committee Conclusion No 106 (LVII), 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' (2006).

man-made disasters, and who have not crossed an internationally recognized border.'[72]

Although the reasons for fleeing are similar to those for refugees in the broad sense, internally displaced persons remain within their own countries and do not cross international borders. UNHCR does not have a general or exclusive mandate for them and operates based on the authorization by each UNGA resolution.[73]

Its intervention can be allowed based on specific requests from the UN Secretary-General or the competent principal organs of the United Nations with the consent of the concerned state by taking into account the complementarities of the mandates and expertise of other relevant organizations, and in situations calling for UNHCR's particular expertise, especially where such efforts can contribute to the prevention or solution of refugee problems.[74] Under the Inter-Agency Standing Committee's Cluster Approach (designating lead agencies for each cluster from among the various agencies involved in international humanitarian support and clarifying responsibility), UNHCR currently plays the role of the lead agency for the protection cluster while also sharing the role of the lead agency for the emergency evacuation site cluster jointly with the International Federation of Red Cross and Red Crescent Societies, and the role of lead agency for the refugee camp coordination and camp management cluster jointly with the International Organization for Migration.[75]

Besides, UNHCR may support people who do not fall within its conventional mandate through its 'good offices' upon a request by a UNGA resolution or by the UN Secretary-General where necessary.

Among the abovementioned 'persons of concern', the distinction between those who are refugees and those who are not is clear at least in theory. However, the UNHCR Resettlement Handbook states, 'UNHCR may also under certain circumstances conduct refugee status determination (RSD) under its mandate to identify persons of concern',[76] which seemingly suggests that people who are not refugees can be eligible for refugee status.[77] This is probably not true because this statement was made in the context that non-refugee 'persons of concern' are also eligible for UNHCR protection policies including resettlement, and also suggests that determination of such persons will be carried out by the same procedures as those followed for RSD.

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[72] *UNHCR Resettlement Handbook* (n 56) 24, citing UNHCR, *Guiding Principles on Internal Displacement*, ADM 1.1,PRL 12.1, PR00/98/109 (22 July 1998) 5.

[73] UNHCR, 'Note on the Mandate' (n 63) 9.

[74] UNGA res A/RES/48/116 (20 December 1993) para 12.

[75] UNHCR, 'Operational Guidelines for UNHCR's Engagement in Situations of Internal Displacement', UN doc UNHCR/OG/2016/2 (1 February 2016) 3.

[76] *UNHCR Resettlement Handbook* (n 56) 75.

[77] ibid 75 fn 1 ('Besides asylum-seekers and refugees, "persons of concern to UNHCR" also include returnees, stateless persons and, under certain circumstances, internally displaced persons.').

4.3.3 Relationship between Mandate RSD by UNHCR and Convention RSD by States

Because the recognition of mandate refugees by UNHCR is performed independently of the Refugee Convention and Protocol, it is possible for a person to be recognized as either a convention refugee or a mandate refugee or both.[78] However, in states that are party to the Refugee Convention and Protocol, refugee protection is primarily the responsibility of the state,[79] and protection by UNHCR is merely supplementary. Therefore, if a person has been recognized as a convention refugee by a state party, it will not be necessary for this person to be recognized as a mandate refugee again by UNHCR. Conversely, a state is very unlikely to recognize as a convention refugee a person whom UNHCR refuses to recognize as a mandate refugee given that the definitions of a mandate refugee in the narrow sense and a convention refugee mostly overlap.

UNHCR's mandate RSD is performed:

> In countries which are not Party to the 1951 Convention / 1967 Protocol; or
> In countries which are Party to the 1951 Convention / 1967 Protocol, but where asylum determination procedures have not yet been established; or
> the national asylum determination process is manifestly inadequate or where determinations are based on
> an erroneous interpretation of the 1951 Convention; or
> As a precondition for the implementation of durable solutions such as resettlement. [80]

When UNHCR conducts mandate RSD, it concludes agreements or memorandums of understanding with the host state so that it allows UNHCR to conduct mandate RSD in its territory, or obtains its approval in some form.[81] Nevertheless, in some cases, UNHCR is unable to receive explicit approval and even makes RSDs contrary to the will of the host state.[82] This is probably because refugee protection limits immigration control based on territorial sovereignty,[83] and can create tension with national interests.[84]

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[78] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN doc HCR/1P/4/ENG/REV. 4 (April 2019) paras 16–7.

[79] UNHCR, 'Note on Determination of Refugee Status' (n 25) para 7; UNHCR Executive Committee, 'Refugee Status Determination', UN doc EC/67/SC/CRP.12 (31 May 31 2016) para 14.

[80] UNHCR, *Refugee Status Determination* (n 52) 11.

[81] Smrkolj (n 44) 173–4.

[82] Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 Intl J Refugee L 251, 252.

[83] Mari Takeuchi, 'Nammin Jōyaku' [The Refugee Convention] (2015) 423 Hōgaku Kyōshitsu 113, 115, reprinted in Tadashi Mori and others (eds), *Bun'ya-betsu Kokusai Jōyaku Hando Bukku* [Handbook of International Treaties] (Yūhikaku 2020) 97 (Japan).

[84] Michael Kagan, '(Avoiding) The End of Refugee Status Determination' (2017) 9 Journal of Human Rights Practice 197, 198.

That said, statistics show that UNHCR's mandate RSD is by no means supplementary. According to UNHCR statistics for 2014, of the 173 countries and regions for which data were available, refugee status was determined by the state in 103 countries (60%), by UNHCR in 51 countries (29%), and by the state and UNHCR either separately or jointly in 19 countries and regions (11%).[85] Of the approximately 1,661,300 applications and appeals for RSD made the world over, 1,402,800 were made to states, 245,600 to UNHCR, and 12,900 to a state and UNHCR jointly, meaning that applications to UNHCR accounted for 15% of the total.[86] Of the approximately 1,061,400 substantive decisions made in response to these applications, 957,400 were made by states, 99,600 by UNHCR, and 4,400 jointly, with UNHCR accounting for 9%.[87] Only Russia (274,744) received more applications than UNHCR in 2014,[88] and this demonstrates the significance of mandate RSDs by UNHCR.

4.3.4 Effects of Mandate RSD

If recognized as meeting the requirements for mandate refugee status, a UNHCR refugee certificate will be issued to certify that the holder is a refugee.[89] However, because mandate refugees are not linked to the Refugee Convention and Protocol as discussed above, and are not approved by national law in many cases, it is not always clear what the legal effects and consequences of a mandate refugee status are. It is sometimes explained that the main effect is to identify those who are eligible for UNHCR's protection policies, which include the application of the principle of non-refoulement, permanent solutions, and social and economic support.[90] The first two are interesting enough to be discussed below because they can involve the relationship with state territorial sovereignty, while I will not develop the last any further because it is a direct grant by UNHCR and does not seem to be directly at odds with state sovereignty.

Application of the Principle of Non-refoulement

The principle of non-refoulement is set forth in Article 33 of the Refugee Convention. It prohibits the expulsion or return of a refugee to a country or region where the refugee's life or freedom is likely to be threatened. While it is not agreed

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85 UNHCR, *UNHCR Statistical Yearbook 2014* (14th edn, UNHCR 2015) 51 <www.unhcr.org/statistics/country/566584fc9/unhcr-statistical-yearbook-2014-14th-edition.html> accessed 19 March 2021. For specific details about each country and region, see ibid., Excel Annex Tables, table 10 <www.unhcr.org/statisticalyearbook/2014-annex-tables.zip> accessed 19 March 2021. Although the last edition of the UNHCR Statistical Yearbook is the 2016 edition (n 7), I use the 2014 edition because the format has changed and the figures on UNHCR's mandate RSD cannot be discovered in the 2016 edition.

86 *UNHCR Statistical Yearbook 2014* (n 85) 52.

87 ibid 54.

88 ibid Excel Annex Tables, table 9.

89 UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003) para 8.1.

90 Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 Intl J Refugee L 1, 4.

among scholars whether the principle is jus cogens under international law,[91] it is generally accepted that the principle is at least customary international law[92] and thus binding even on states that are not party to the Refugee Convention and Protocol.[93] In reality, however, in countries where RSD cannot be conducted on their own and domestic laws relating to refugee protection are not in place, voluntary compliance with the principle of non-refoulement is most unlikely, irrespective of whether the state is party to the Refugee Convention and Protocol. Therefore, UNHCR concludes agreements individually with the host state[94] to request the application of the principle of non-refoulement to those who are recognized as mandate refugees.

For example, Egypt had concluded an agreement with UNHCR in 1954 to grant residence permits to mandate refugees before it acceded to the Refugee Convention and Protocol in 1981.[95] UNHCR assists the Egyptian government to abide by the principle of non-refoulement, while seeking the resettlement of refugees in third countries as Egypt refuses to issue permanent residence permits.

In contrast, Lebanon is not a party to the Refugee Convention and Protocol and did not grant residence permits to refugees or asylum seekers even for short stays until 2003. In the early 2000s, it reportedly cracked down on illegal immigrants even if they were refugees or asylum seekers, and hundreds of people were deported to Iraq, in particular. UNHCR was refused interviews with detained refugees and asylum seekers in some cases. However, a memorandum of understanding was concluded between UNHCR and the Lebanese government in 2003, allowing refugees and asylum seekers to be granted residence permits for a maximum of 12 months and guaranteeing UNHCR access to detainees.

In the absence of such an agreement, the treatment of those recognized as mandate refugees generally depends on each country's domestic laws. In 2005, the Japanese government was criticized by UNHCR[96] for the possible violation of the principle of non-refoulement when it refused to grant convention refugee

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[91] For a detailed account, see Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2016) 2015 Netherlands YB Intl L 273, 306–9 (arguing that it constitutes *jus cogens*). See also Evan J Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (OUP 2016) 268–70 (explaining the customary nature and *jus cogens* status of the principle of non-refoulement based on the fiduciary theory of sovereign states acting on behalf of humanity).

[92] Goodwin-Gill and McAdam (n 6) 346.

[93] Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement; Opinion' in Erika Feller and others (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 149.

[94] When opening a local office in the host country, UNHCR sometimes concludes special agreements in order to 'promot[e] … the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection' (UNHCR Statute para 8(b)), in addition to a comprehensive cooperation agreement with its government. The application of the principle of non-refoulement is usually included in these special agreements. See Marjoleine Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal Publishers 2006) 52–3, 62–70.

[95] The examples from Egypt and Lebanon are all as reported in Kagan (n 90) 4–6.

[96] UNHCR, 'Deep concern over refugee deportation from Japan' Press Release (8 January 2005) <www.unhcr.org/news/press/2005/1/41ed2b804/unhcr-deep-concern-refugee-deportation-japan.html> accessed 19 March 2021.

status to Kurdish people from Turkey, Mr Ahmet Kazankiran and his eldest son, under Japan's ICRRA, and deported them to Turkey even though they had been recognized as mandate refugees by UNHCR.[97] In response, the Director-General of Japan's Immigration Bureau of the Ministry of Justice refuted that the deportation of the Kazankirans was not in breach of the principle of non-refoulement because the Japanese court had rendered a clear judgment that they were not convention refugees.[98] The point at issue in this exchange was not whether the principle of non-refoulement was breached, but rather what legal implications UNHCR's mandate RSD had when Japan's relevant agency examined whether the Kazankirans were refugees. The assertion of the Japanese government (the Director-General of the Immigration Bureau) was merely a consequence of the interpretation that was repeatedly given by Japanese courts that UNHCR determination had no legal effect on the examination of convention refugee status by the domestic agency. I will return to this point later (Section III 1 below).

Durable Solutions

UNHCR provides support as durable solutions for refugees in three forms, namely voluntary repatriation, in which refugees return in safety and with dignity to their country of origin and re-avail themselves of national protection;[99] local integration, in which refugees legally, economically, and socially integrate in the host country; and resettlement, in which refugees are selected and transferred from the country of refuge to a third country that has agreed to admit them as refugees with permanent residence status.[100] Voluntary repatriation supposedly does not involve state territorial sovereignty because the repatriated refugees usually have the nationality of their country of origin or another qualification for permanent residence. Neither local integration nor resettlement is inconsistent with state territorial sovereignty because refugees have no right to seek acceptance and the state is not obliged to accept them. To be eligible for resettlement, a person must have been recognized as a mandate refugee by UNHCR and resettlement must be identified as the most appropriate solution after an assessment of the

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[97] Arakaki (n 20) 216–7. For reports by supporters of the Kazankirans, see Kurudo-jin Nanmin Ni-kazoku o Shien suru Kai [Association for the Support of Two Kurdish Families] (ed), ***Nanmin o oitsumeru Kuni: Kurudo-jin Nanmin suwarikomi ga uttaeta mono*** [The Country That Runs Down Refugees: What the Kurdish Refugees' Sit-in Called for] (Ryokufū Shuppan 2005); ***Bakkudoroppu Kurudisutan*** [Backdrop: Kurdistan], documentary film directed by Masaru Nomoto (Uplink 2007) (Japan).

[98] Document issued by Masaharu Miura, then Director-General, Immigration Control Bureau, Ministry of Justice, to the UNHCR Representation in Japan (25 January 2005), collected and stored in the National Diet Library's Web Archiving Project (WARP) <warp.ndl.go.jp/info:ndljp/pid/285792/www.moj.go.jp/NYUKAN/nyukan34-01.pdf> accessed 19 March 2021 (Japan).

[99] Monitoring returnees is included within UNHCR's mandate as discussed above under Section 2 (4).

[100] See, e.g., UNHCR, *Resettlement Handbook* (n 56) 28.

prospects of all durable solutions.[101] The candidate host state usually conducts its own screening as well.[102]

4.4 Legal implications of mandate RSD by UNHCR on Convention RSD by States

As described above, the determination of convention refugee status rests with states parties to the Refugee Convention and Protocol, not with UNHCR (Sections I 2 and II 1). The determination of mandate refugee status is conducted only under UNHCR's mandate and cannot replace convention RSD. Nevertheless, the need for protection is not different between convention and mandate refugees. This is all the more evident because the concept of a mandate refugee in the narrow sense and the concept of a convention refugee are almost identical (Section II 2 (1)) and the application of the principle of non-refoulement, which lies at the core of refugee protection, is strongly required not only for convention refugees, but also for mandate refugees (Section II 4(1)).

How should a state party to the Refugee Convention and Protocol treat a person who has been previously recognized as a mandate refugee by UNHCR when it considers the application made by the same person to be recognized as a convention refugee? In other words, what are the legal implications of UNHCR's mandate RSD for the convention RSD of states? I analyse precedents from Japanese and British courts to answer this question.

4.4.1 Japan

The Supreme Court of Japan has not ruled on the treatment of UNHCR's mandate RSD in Japanese law, but there are several precedential rulings passed by lower courts. The points of their rulings are summarized as follows: (i) UNHCR determination on refugee status is not binding on state authorities,[103] and Japan's Minister of Justice, who is authorized to conduct RSD under ICRRA (see Section I 1), may determine whether an asylum seeker is a convention refugee or not on his own.[104] (ii) The burden of proof cannot be shifted to the Minister of Justice in

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[101] ibid 75.

[102] For example, for the conditions for permission to resettle in Japan, see 'Daisankoku Teijū ni yoru Nammin no ukeire no Jisshi ni tsuite' [Regarding the Acceptance of Refugees by Resettlement] (Cabinet Understanding, 4 January 2014) <www.cas.go.jp/jp/seisaku/nanmin/pdf/140124ryoukai.pdf> accessed 19 March 2021. For an example from the United Kingdom, see Katia Bianchini, 'The Mandate Refugee Program: a Critical Discussion' (2010) 22 Intl J Refugee L 367. For the conditions for acceptance imposed by each state, see UNHCR, *Resettlement Handbook* (n 56) Country Chapters.

[103] Tōkyō Kōtō Saibansho [Tokyo High Court], 20 January 2005, Heisei 16 (2004) (Gyō-ko) No 113, available at LEX/DB 28101882. This means, at the same time, that the Minister of Justice cannot rely, to deny that the applicant is a refugee, on the fact that UNHCR has not yet made any decision on an application for mandate RSD (Nagoya Chihō Saibansho [Nagoya District Court], 25 September 2003, Heisei 14 (gyō-u) No 19, 1148 Hanrei Taimuzu 139).

[104] Tōkyō Kōtō Saibansho [Tokyo High Court], 20 September 2000, Heisei 11 (gyō-ko) No 103, 47 Shōmu Geppō 3723.

favour of the applicant for an RSD, who originally bears it,[105] on the grounds of UNHCR's RSD.[106] (iii) However, the fact that the applicant has previously been recognized as a mandate refugee by UNHCR is one of the factors the Minister of Justice should take into consideration when the Minister examines the application.[107]

As discussed repeatedly above, point (i) is a logical consequence of the fact that the UNHCR's mandate RSD is not based on the Refugee Convention and Protocol. Other countries such as Bulgaria[108] and France[109] recognize the effect of UNHCR's mandate RSD under their domestic law, but this is because their domestic legislation provides so, and by no means does international law require that such legislation be enacted.

Point (ii) derives from point (i). However, it may turn out to be unfair to the applicant if the burden of proof always lies on the applicant, considering the difficulty that asylum seekers encounter in submitting effective evidence to support their claim. It is possible to conceive of techniques that alleviate the burden imposed on the applicant. Such techniques can include a de facto presumption that the applicant who has a mandate refugee status recognized by UNHCR is also a convention refugee. In this case, the applicant should be granted a convention refugee status unless refuted with other relevant evidence. Nevertheless, such a presumption is not adopted by the Japanese administrative authorities and courts.

Point (iii) can also be accepted reasonably because the requirements for mandate refugee status in the narrow sense (see Section II 2 (2)) and convention refugee status overlap substantially.[110] However, none of the rulings that suggested point (iii) has stated anything more than 'apart from the fact that a mandate RSD has been made is one of the factors that should be taken into account for the determination of refugee status [by the Minister of Justice] …' and deduced any

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[105] On the general discussion and case law of the burden of proof of refugeehood in Japanese law, see Arakaki (n 20) 142–8; Sakamoto (n 35) 319–20, 323–7.

[106] Ōsaka Chihō Saibansho [Osaka District Court], 27 March 2003, Heisei 12 (gyō-u) No 13, 1133 Hanrei Taimuzu 127; Ōsaka Kōtō Saibansho [Osaka High Court], 10 February 2004, Heisei 15 (gyō-ko) No 36, 51 Shōmu Geppō 80.

[107] Ōsaka Chihō Saibansho, 27 March 2003 (n 106); Ōsaka Kōtō Saibansho, 10 February 2004 (n 106).

[108] Article 10 of the Law for the Asylum and Refugees stipulates that 'refugee status shall also be provided to an alien who is within the territory of the Republic of Bulgaria, and has been recognized as refugee under the mandate of the United Nations High Commissioner for Refugees' (Law for the Asylum and Refugees (as amended in 2007) [Bulgaria], 16 May 2002, art 10 <www.unhcr.org/refworld/docid/47f1faca2.html> accessed 19 March 2021, cited in 'National law and practice…' (cited below, n 120) para 9).

[109] Article L711-1 of the Code on the Entry and Stay of Foreigners and on the Right to Asylum stipulates that '[a]nyone persecuted for their action in support of liberty is recognised as a refugee, as is anyone who falls within the mandate of the United Nations High Commissioner for Refugees as set out in Articles 6 and 7 of its Statute adopted by the General Assembly of the United Nations on 14 December 1950, or who fulfills the definition set out in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees. Their situation is regulated by the provisions of the abovementioned Geneva Convention which are applicable to refugees.' (Code de l'entrée et du séjour des étrangers et du droit d'asile, art L 711-1, cited in 'National law and practice…' (cited below, n 120) para 17).

[110] Sakamoto (n 35) 330.

consequence from this fact. These rulings have not clarified how the mandate RSD should be considered and what weight should be given to it.

Some courts pointed out that the materials and information on which UNHCR had based its determination were unclear,[111] indicating that the necessary condition is lacking for the determination to be factored in by national courts. For these courts, what can be considered is not the conclusion reached by UNHCR that the applicant is a (mandate) refugee, but the reasons for which it reaches that conclusion. This is a logical consequence of point (i) in that national authorities are by no means bound by UNHCR's decisions.

4.4.2 The United Kingdom: The Case of IA

A 2014 decision of the Supreme Court of the United Kingdom is interesting because it aimed to make the significance of UNHCR's mandate RSD on the domestic refugee recognition procedure clearer and to examine whether and how UNHCR should submit information and materials on which it has based its RSD to national courts.

The Facts

The case in question is IA v Secretary of State for the Home Department. IA, a Kurd from Iran, was allegedly at risk of persecution by the Iranian government because of his previous engagement with the Kurdistan Democratic Party of Iran (KDPI), and on these grounds, applied to the UK government for the recognition of refugee status and asylum[112] upon his arrival in Scotland in 2007 via Turkey. As the Secretary of State for the Home Department of the United Kingdom (hereinafter 'Home Secretary') refused his application on 10 November 2008, IA filed an appeal against this decision of refusal. One of the grounds of appeal was that the Home Secretary had not given due consideration to the fact that he had been recognized as a mandate refugee by the local UNHCR offices in Kurdistan in 1998 and in Turkey in 2003 before reaching Britain. Focusing on this point, I analyse the rulings by the Asylum and Immigration Tribunal, the Court of Session, and the Supreme Court of the United Kingdom.

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[111] Nagoya Chihō Saibansho [Nagoya District Court], 16 January 2002, Heisei 12 (2000) (Gyō-u) No 24, Saibansho Saibanrei Jōhō [Saibansho Web] <www.courts.go.jp/app/hanrei_jp/detail4?id=7793> accessed 19 March 2021; Tōkyō Kōtō Saibansho, 20 January 2005 (n 103).

[112] In the United Kingdom, an application for determination of refugee status and an application for asylum are synonymous (Ian A Macdonald and Ronan Toal (eds), ***Immigration Law and Practice in the United Kingdom***, vol 1 (9th ed., LexisNexis 2014) para 12.2).

The Asylum and Immigration Tribunal

The Asylum and Immigration Tribunal (hereinafter 'AIT')[113] dismissed the applicant's appeal by a decision dated 14 December 2009. Immigration Judge (IJ) Agnew addressed how UNHCR's mandate RSD should be taken into consideration:

> As I have noted, independent documentary evidence regarding the procedures used to issue the appellant the refugee certificate in Iraq and refugee status in Turkey by-the [sic] UNHCR was not before me, nor evidence regarding on what basis the appellant applied for this status and on which it was granted. The appellant's evidence was most vague. Therefore, whilst the granting of refugee status to the appellant should be regarded as a starting point, it is not necessarily a very strong one, on its own, without any helpful evidence as to the basis and procedures for the previous grant. I, however, do bear in mind that it is a starting point, that it is significant and that whilst considering the substantive merits of the case, the most clear and substantial grounds, if they exist, must be provided for coming to a different conclusion[.][114]

Just looking at the last passage, Agnew IJ appeared to have placed considerable weight on UNHCR determination. However, she evaluated the evidence and upheld the Secretary's decision of refusal on the grounds that the applicant had not discharged the burden of proof that rested with him to show that he had a well-founded fear of persecution.[115]

The Court of Session

The appeal by IA was permitted and the case was heard in the Court of Session. The judgment by Lord Clarke dismissed the appeal.[116] Before analysing its reasoning, let us first look at the judgment cited by the court. It was rendered on a similar case after the AIT's decision on IA.

This judgment was written by Sullivan LJ in the Court of Appeal on the case of MM. In this case, similar to IA, the refusal to grant refugee status to a Kurd from Iran was challenged, and the approach toward considering a mandate RSD

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[113] The AIT was an administrative tribunal for hearing appeals against decisions relating to immigration control and asylum claims, which existed from 2005 to 2010. Its predecessor was the Immigration Appellate Authority, which comprised the Immigration Adjudicator for the first tier and the Immigration Appeal Tribunal for the second tier. The AIT was replaced by the Immigration and Asylum Chamber created in 2010 within the First-tier Tribunal that was established in 2007.

The Nationality, Immigration and Asylum Act 2002, which was in force at the time of this case, allowed appeals to the AIT against decisions by the Home Secretary to refuse asylum (s 83) and applications to a higher court for an order requiring the AIT to reconsider its decision on the appeal (s 103A). Here I discuss the second AIT decision on *IA* that was made after reconsideration. A further appeal against the reconsidered decision may be brought on a point of law to the appropriate appellate court, which is the Court of Appeal for England and Wales, the Court of Session for Scotland, or the Court of Appeal in Northern Ireland for that area only with the permission of the AIT or the competent appellate court (s 103B). An appeal against the decisions by the appellate court may be filed with the Supreme Court of the United Kingdom under the requirements and procedures governing appeals in general.

[114] *IA v Secretary of State for the Home Department* (2009) (AIT) [25], cited in [2014] UKSC 6 [21]. As the original text of the AIT's decision could not be found in law reports or websites, it is quoted second-hand from the judgments of the Scottish Court of Session and the Supreme Court of the United Kingdom.

[115] *IA* (n 114), cited in [2011] CSIH 28, [8]–[9].

[116] IA v Secretary of State for the Home Department [2011] CSIH 28 (Lord Clarke).

made by UNHCR in Turkey was at issue. Sullivan LJ confirmed that UNHCR determinations had no binding force on the administrative authorities and courts of the United Kingdom, and then stated:

In reality, a decision by the UNHCR as to refugee status will, given the UNHCR's particular expertise and responsibilities under the Refugee Convention, be given considerable weight by the Secretary of State and the tribunal unless in any particular case the decision taker concludes that there are cogent reasons not to do so on the facts of that individual case. It would be just as unrealistic to contend that a decision by the UNHCR as to refugee status must always be given considerable weight regardless of any indications to the contrary as it would be to contend that it could be given less than considerable weight for no good reason.[117]

Based on this, Lord Clarke in IA wrote:

> While UNHCR decisions as to status, therefore, have no binding legal effect they are to be treated with great respect in the interests of legal diplomacy and comity having regard to their source. The mind of the decision maker, in this jurisdiction, where an applicant can lay claim to UNHCR status, as a given datism [sic], must in its decision- making process not lose sight of that fact in reaching its disposal of the case before it. A decision of the UNHCR on refugee status will be a very important piece of evidence throughout the decision maker's journey. But it has ultimately no greater claim than that and, if the other material before the decision maker leads him/her to considerations that point cogently against the conclusion arrived at by the UNHCR, then the decision maker is fully justified in departing from the latter conclusion.[118]

Then, he concluded that the AIT's decision had taken UNHCR's decisions into account 'in a perfectly appropriate way, namely by assuming that they were properly reached by a competent decision maker with a particular expertise' while deciding at the same time that considering 'other evidence', there were 'clear and substantial grounds for departing from' UNHCR's decisions.[119] The appeal was refused.

[117] *MM (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 1457 [27] (emphasis in the original).

[118] *IA* (n 116) [15].

[119] ibid.

UNHCR's Case for the Intervener

An appeal by IA to the Supreme Court of the United Kingdom was permitted. Before analysing its ruling, let us look at the 'case for the intervener' that UNHCR submitted to the Court.[120] UNHCR argued as follows:

Having regard, however, to UNHCR's unique international mandate and authority, and its expertise and experience, the fact that UNHCR has recognised an individual as a refugee is relevant to RSD carried out by States. It should be the starting point of any exercise in the determination of whether the individual should be recognised as a refugee by the State. In considering the asylum claim of an applicant who has been recognised as a refugee by UNHCR, the State should give the recognition considerable weight and take it seriously into account.[121]

It also maintained that the 'State decision-maker cannot disregard UNHCR's recognition of refugee status in evaluating the individual's claim unless there are cogent reasons for doing so'.[122] Here are a few examples of 'cogent reasons':

a. Where reliable information is available to the State decision-maker which supports a finding that the applicant does not meet the definition of a refugee in Article IA(2) of the 1951 Convention, for example where changes have occurred in the circumstances of the applicant or his or her country of origin which directly affect the assessment of the claim for refugee status. Other examples could include where previously unavailable or new information is now before the State decision-maker and which directly affects the assessment of the claim for refugee status. Information of this sort will often be information which post-dates UNHCR's decision.
b. Where reliable information is available to the State decision-maker which brings the applicant within the exclusion clauses in Article IF of the 1951 Convention.
c. Where reliable information is available to the decision-maker which, when considered in the light of all the available information, supports a finding that the applicant's statements on material elements of the claim are not credible.[123]

UNHCR stated that this treatment must not be changed even if the evidentiary materials that it had used as the basis for its RSD were not disclosed to the national administrative authorities or courts. UNHCR's procedural standards stipulate

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[120] UNHCR, '*IA v Secretary of State for the Home Department*: Case for the Intervener', UKSC 2012/0157 (27 October 2013) <www.refworld.org/docid/52a098e34.html> accessed 19 March 2021. Also of interest is 'National law and practice regarding the weight given by states to UNHCR mandate recognition, Annex to UNHCR intervention in *I. A. v. Secretary of State for the Home Department*'
<www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52eba1b84> accessed 19 March 2021, which offers a brief summary of how the main states parties to the Refugee Convention and Protocol treat UNHCR's mandate RSD under their domestic law. The cases of Bulgaria (n 108) and France (n 109) were previously mentioned on the basis of this report.

UNHCR also submitted observations to the Court of Session on *IA* ('UNHCR intervention before the Court of Session in the Application for Leave to Appeal by IA against a Decision of the Asylum and Immigration Tribunal' (22 October 2010) <www.refworld.org/docid/4cdbc2e02.html> accessed 19 March 2021) and the Court of Appeal on *MM* (n 117) ('UNHCR intervention before the Court of Appeal of England and Wales in the case of MM (Iran) v. Secretary of State for the Home Department', C5/2009/2479 (3 August 2010) <www.refworld.org/docid/4c6aa7db2.html> accessed 19 March 2021). However, I discuss only the observations submitted to the Supreme Court because they are the most recent and, in my view, the most refined.

[121] UNHCR, 'Case for the Intervener' (n 120) para 4 (emphasis added).

[122] ibid.

[123] ibid paras 4, 28.

confidentiality in order to ensure the safety of the applicants themselves, their families, and UNHCR staff, and the information and evidentiary materials used in examining applications are disclosed only under strict conditions.[124] Even when the applicant herself makes a request for disclosure, only materials submitted by her will be disclosed, but the records of interviews and surveys conducted during the examination process will not be disclosed as a general rule. Therefore, national administrative authorities and courts may suspect that UNHCR's RSD procedures lack transparency and wonder how reliable its determinations are. The AIT, as well as some Japanese courts[125], also pointed out that evidentiary material had not been submitted.[126]

However, UNHCR argued that its RSDs are made 'in accordance with its internal standards and in a robust and informed manner such that UNHCR's recognition must be given considerable weight'.[127] Thus, it continued, the absence of the disclosure of evidentiary materials does not reduce the weight to be given to UNHCR determinations, and it may be unfair and discriminatory if the parties who submitted evidence and those who did not are treated differently.[128] IA acquired interview surveys and other materials relating to his own RSD made in Turkey in 2003 from UNHCR and submitted them to the Supreme Court of the United Kingdom. But UNHCR emphasized that because this treatment had been tolerated before the confidentiality and information disclosure standards were established, and now nondisclosure has become the general rule, it does not affect the abovementioned argument that the weight of a UNHCR determination should not change even if materials are not disclosed or submitted.[129]

The Supreme Court of the United Kingdom

The Supreme Court judgment was written by Lord Kerr.[130] It dismissed the appeal, but at the same time suggested the possibility that IA would be recognized as a refugee if he intended to apply for asylum again. I analyse the grounds of the judgment relating to the weight to be given to UNHCR's mandate RSD.

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[124] UNHCR, *Procedural Standards* (n 89) para 2.1.2. In addition to the relevant person's informed written consent, the following requirements must be met: Disclosure (i) is required for a legitimate purpose; (ii) would not jeopardize the security of the individual concerned, his/her family members, or other persons with whom the person is associated; (iii) would not compromise the security of UNHCR staff and; (iv) would be consistent with UNHCR's international protection mandate, including its humanitarian and non-political character, and would not otherwise undermine the effective performance of UNHCR's duties.

[125] Text to n 111.

[126] Text to n 114.

[127] UNHCR, 'Case for the Intervener' (n 120) para 32.

[128] ibid paras 31–37.

[129] ibid paras 55–57.

[130] IA v Secretary of State for the Home Department [2014] UKSC 6 (Lord Kerr).

Lord Kerr made his position clear by quoting and refuting a judgment of the Immigration Appeal Tribunal on another case,[131] which had ruled on the weight to be given in the United Kingdom to an RSD by the government of another country (the Democratic Republic of Congo in that case) under the Organization of African Unity Refugee Convention. The writer of the judgment, Ouseley IJ, stated as follows:

> 18. The earlier grant of asylum is not binding, but it is the appropriate starting point for the consideration of the claim; the grant is a very significant matter. There should be some certainty and stability in the position of refugees. The Adjudicator must consider whether there are the most clear and substantial grounds for coming to a different conclusion. The Adjudicator must be satisfied that the decision was wrong. The language of Babela[132] is that of the burden of proof: their status is prima facie made out but it can be rebutted; the burden of proof in so doing is on the Secretary of State. We do not think that that is entirely satisfactory as a way of expressing it and it leaves uncertain to what standard the burden has to be discharged and what he has to disprove. The same effect without some of the legal difficulties is established by the language which we have used.
> 19. But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change in circumstances since the grant was made. Clear and substantial grounds may show that the grant should never have been made by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way. Exclusionary provisions may be relevant. The procedures adopted for examination of the claim may also be relevant. Considerations of international comity may be rather different as between EU member states and those with less honest administrations or effective legal systems.[133]

Lord Kerr of the Supreme Court, admitting that UNHCR determinations have no binding effect on national agencies (administrative authorities or tribunals and courts),[134] thought that they should be respected in some cases while not in others. Then, the question is under what circumstances the UK national agencies may arrive at a conclusion different from the determination by UNHCR. Lord Kerr contrasted the above-cited reasoning of Ouseley IJ with that of Sullivan LJ of the Court of Appeal which was also quoted by the Court of Session[135] and laid

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131 Secretary of State for the Home Department v KK (Congo), [2005] UKIAT 00054 <www.refworld.org/cases,GBR_AIT,42c947c02.html> accessed 19 March 2021. This judgment is also quoted in the AIT's decision on *IA* (n 114), cited in [2014] UKSC 6 [21]) and in UNHCR's intervention (UNHCR, 'Case for the Intervener' (n 120) para 46).

132 Babela v Secretary of State for the Home Department [2002] UKIAT 06124 <www.refworld.org/cases,GBR_AIT,51b9dc0f4.html> accessed 19 March 2021. This was a prior case in which the weighting of an RSD by the government of another country (South Africa) was at issue. The 'language' of the burden of proof was as follows: 'The Appellant's previous refugee status [determined by the South African government] should therefore not be questioned unless there is a very good reason for doing so. No such reason has been put forward here in our view and, therefore, prima facie he has made out his entitlement to refugee status in the United Kingdom. However, that is rebuttable, and we consider that the correct approach is to say that the burden of proof in rebutting that is on the Respondent [the Secretary of State]' (ibid., [29]). The general rule is that an asylum seeker bears the burden of proving that she is a refugee in the United Kingdom (Macdonald and Toal (eds) (n 112) para 20.122).

133 *KK (Congo)* (n 131) [18]–[19] (emphasis in the original; footnote added).

134 *IA* (n 130) [29].

135 Text to n 117.

out the following two views: (i) the view that allows a different conclusion if UNHCR's decision is incorrect at the time of its determination; and (ii) the view that allows a different conclusion if the applicant does not fall under the definition of a refugee when the UK national agency makes its decision.[136]

View (i) corresponds to Ouseley IJ's statement that '[t]he Adjudicator must be satisfied that the decision was wrong'.[137] However, there are two problems with view (i). First, it is meaningless to examine the correctness of the UNHCR decision at the time of its issuance, for it is sufficient to consider the national decision of refusal lawful if the applicant does not fall under the definition of a refugee at the time of the UK agency's decision.[138] Second, if the UNHCR determination can be overturned only if it is mistaken, it is presumed correct. However, considering that the grounds and materials for the decision of UNHCR may not always be available because of confidentiality and the nondisclosure rule, such a presumption is not convincing.[139]

Lord Kerr supported view (ii) for these reasons. Nevertheless, he did not say that the national agency may conduct a de novo determination of refugee status without any regard for UNHCR's previous determination. He held that given 'the accumulated and unrivaled expertise' of UNHCR, 'its experience in working with governments throughout the world, the development, promotion, and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determination', UNHCR determinations must be accorded 'considerable authority'.[140] He wrote:

> 47. Fitting the fact of an earlier UNHCR decision in favour of refugee status into (in the case of a determination by the Secretary of State) the quasi-judicial and (in the case of the tribunal) the judicial model of determination of a claim to asylum is not easy. It does not supply evidence which can be independently evaluated by the decision-maker. Nor does it, in my opinion, raise a presumption by which the adjudicator's assessment of the evidence is adjusted. It does not impose a burden of proof on the state authorities who resist the claim. It must be given weight but the manner in which it should be accorded weight does not conform to any conventional trial norm. Unsatisfactory though it may be, it seems to me that the influence that such a decision has on the determination of a claim to asylum must be expressed in general (and consequently, fairly imprecise) terms.
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> 48. The circumstance that the weight to be given to the UNHCR decision cannot be articulated in an exact way must not be allowed to detract from the influence that it wields. Quite apart from the respect that is due to such a decision by reason of the unique and matchless experience and expertise of UNHCR, considerations of comity, legal diplomacy and the need for consistency of approach in international protection of refugees demand no less. The United Kingdom's obligation to cooperate with UNHCR also impels this approach. Moreover, as a general

[136] *IA* (n 130) [35].

[137] *KK (Congo)* (n 131) [18], cited in text to n 133 (emphasis added).

[138] ibid [36].

[139] ibid [37].

[140] ibid [44].

rule, the UNHCR decision will have been taken at a time more proximate to the circumstances which caused the claim to have been made. Frequently, it will have been made with first-hand knowledge of and insight into those conditions superior to that which a national adjudicator can be expected to possess.

49. All of these factors require of the national decision-maker close attention to the UNHCR decision and considerable pause before arriving at a different conclusion. The approach cannot be more closely prescribed than this, in my opinion. The UNHCR conclusion on refugee status provides a substantial backdrop to the decision to be made by the national authority. A claimant for asylum who has been accorded refugee status by UNHCR starts in a significantly better position than one who does not have that status. But I would be reluctant to subscribe to the notion that this represents "a starting point" in the inquiry because that also hints at the idea of a presumption. Recognition of refugee status by UNHCR does not create a presumption, does not shift the burden of proof and is not a starting point (if by that one implies that it is presumptively assumed to be conclusive) but substantial countervailing reasons are required to justify a different conclusion.[141]

Because the national agency is not supposed to evaluate whether the original determination by UNHCR was appropriate, but rather to examine whether the applicant currently fulfils the requirements for refugee status, it can independently assess the evidence and determine refugee status. However, the national agency also takes the following two factors into account.

First, it considers changes in circumstances after the original determination by UNHCR. For example, the national agency can examine the situation in which, after UNHCR determined refugee status, the political situation in the country of origin has changed so that the fear of persecution has disappeared, or the refugee's personal circumstances have changed so that he now falls under a cause for exclusion, or the like, and come to a conclusion different from that of UNHCR (namely a refusal to grant asylum).

Second, on the assumption that such changes in circumstances have not occurred, the fact that UNHCR has previously decided on refugee status may have some sort of significance, which the national agency can (and should, according to Lord Kerr) take into consideration.

Lord Kerr held that UNHCR determinations had 'considerable authority' and 'weight' and that to reach a different conclusion and deny refugee status would require 'substantial countervailing reasons'. However, the authority or weight is not assured by the techniques of procedural law such as the presumption or a shift in the burden of proof, and simply binds the decision maker by a general rule or policy expressed in general, imprecise terms. How this will function in the process of RSD will depend on future cases as the present ruling does not make it clear.

Let us look at the result of IA. Lord Kerr, based on the general theory above, held that Agnew IJ of the AIT had given due consideration to the UNHCR determination, and had lawfully upheld the Home Secretary's decision of refusal, judg-

[141] ibid [47]–[49].

ing that the credibility of IA's testimony she had heard herself had been dubious when assessed in conjunction with other evidence from the evidentiary materials available at the trial.[142] She had supposedly shown 'substantial countervailing reasons' although Lord Kerr did not explicitly reveal what they were. The appeal was dismissed. Lord Kerr also pointed out that had she been able to refer to the materials from the 2003 RSD that were submitted to the Supreme Court, particularly the interview records, Agnew IJ could have reached a different conclusion regarding the credibility of IA's testimony, and suggested that IA file another application with the Home Secretary so that he could receive a new, reconsidered decision.[143]

How should Lord Kerr's opinion, on behalf of the UK Supreme Court, be read? My analysis is as follows. Even though UNHCR determinations should have considerable authority and weight, they cannot be considered to prevail in all cases because national agencies are also authorized to make their own decisions on RSD. Instead, they should be considered in the process of dialogue between UNHCR and the national authorities. For this purpose, states are responsible for explaining and demonstrating that their own decision is more reasonable than UNHCR's. However, such an explanation and demonstration will be possible only when the materials and grounds on which UNHCR based its determination are disclosed and available to the national agencies.

If they are not disclosed because of confidentiality, national agencies will have no choice but to provide a unilateral explanation that their perusal and evaluation of the evidence is appropriate. The authority and weight of UNHCR determinations are at best a psychological brake on a different decision to be so lightly taken. IA appears to suggest that if UNHCR determinations must have greater weight than that, it is necessary to share materials and information between UNHCR and states in ways that are compatible with the duty of confidentiality so that they are accountable to each other.[144]

4.5 Consideration from the global and international administrative law perspectives

4.5.1 International Administrative Law

International refugee law has been noted as an example of international administrative law. Sōji Yamamoto presented the Refugee Convention and the related Japanese legislation (ICRRA) as an example of the 'coordination function' of international administrative law. By this, he meant the function of multilateral treaties to 'make public the ways states exercise their jurisdiction (policy, legislation, and regulatory measures) individually and in accordance exclusively with the

[142] ibid [50]–[53].

[143] ibid [58]–[61].

[144] See ibid [26].

domestic law of each state and seek to standardize and coordinate them so that an 'obligation of result' can be assumed.'[145]

Yamamoto cited this as an example in which domestic measures to ensure the implementation of the Convention were forced to be specified because the Refugee Convention guarantees a legal status to individuals, thus limiting the freedom of each country to choose methods and means. To put it differently, he considered it an example of international administrative law restricting state discretion most distinctly.

This is certainly true if we look at the domestic implementation of the effects provided for in the Refugee Convention (notably the national treatment in relation to social security), which is evidenced by the fact that, when Japan acceded to the Refugee Convention in 1981, it became necessary to revise not only the then Immigration Control Order but also social security laws (see Section I 2 (2)). However, as I have argued thus far, state authority over RSD is still a perfect and independent presence. The reality is that while international standards are guaranteed in terms of the contents of refugee protection, the access thereto is highly decentralized among states, some of which are more generous and others more stringent.

Because the Refugee Convention and Protocol provide for the requirements for being refugees in a unified manner, which are binding on states parties conducting RSD, it is not correct to say that each state has a discretionary right over RSD (Section I 2 (2)). Those who meet the requirements should be treated and recognized as refugees anywhere in the world. States are not allowed to consider their diplomatic or internal policy factors when they decide whether or not to recognize an asylum seeker as a refugee. The statement that RSD is not a constitutive but a declaratory act[146] should be understood in this sense.

But this is a story of the world of substantive law. When procedural law is taken into consideration, things begin to change. Even if the requirements under substantive law are stipulated in so unified and specified a manner that there is no room for discretion, a certain margin of appreciation cannot be denied in terms of fact-finding and application of the law (Section I 2 (2)). In order to prevent this, it is necessary to establish a review body with a general jurisdiction to examine individual decisions made by each state so that fact-finding and application of law are standardized and unified throughout the world. Although in a domestic setting, judicial review by domestic courts takes care of that, there is no such review body in international (refugee) law. In terms of procedure, there is no mechanism to unify RSDs carried out separately and even haphazardly by each state.

Scholarship on international administrative law sometimes focuses on the 'coordination function' of international administrative institutions, which are tasked with coordinating domestic implementation of international administration by

[145] Yamamoto (n 1) 114–5.

[146] See n 32.

each state's agencies.[147] A case in point is the function of international administrative unions to standardize and unify the relevant domestic laws of each state based on the foundational treaty.[148] In international refugee law, UNHCR is perhaps expected to assume that role. However, as mentioned earlier, while UNHCR bears the 'duty of supervising the application' of the Refugee Convention and Protocol, it is not accorded the status of an implementing agency for these instruments (Section II 1). Compared to implementing agencies for human rights covenants, such as the Human Rights Committee for the International Covenant on Civil and Political Rights,[149] UNHCR is not authorized to review the information provided by states parties, and is not expected to play such a role as assumed by human rights implementing agencies in the reporting system in which they supervise the compliance of states parties with treaty obligations through report reviews.[150] UNHCR is not provided with a procedural mechanism that enables it to perform a coordination function in relation to RSDs.

4.5.2 Global Administrative Law

Is UNHCR's mandate RSD a global administrative act by a global administrative body? This is the question raised in the Introduction, which I try to answer in this last section. The answer seems to be negative because it is primarily an act made by UNHCR to identify those who fall under its mandate, and, from this viewpoint, it can be seen as an internal act of UNHCR. Although UNHCR also issues a refugee certificate to those who are recognized as mandate refugees, which can be seen as an external act, the certificate is no more than an ID card with no legal effect to modify the holder's legal situation. The legal implications of UNHCR determinations are limited, if any (Part III). It is difficult to say that UNHCR's mandate RSD has an essential element for an administrative act, that is, prescription of legal status.

However, such an analysis may be contrary to the intent of global administrative law (GAL) scholarship. According to Karl-Heinz Ladeur, in global governance, which is GAL's main target, the importance of the concept of an administrative act will decline because the state acts not as an integrated entity, but as a component of networks dispersed in various regulatory and policy fields, and the decision-making process becomes less and less consolidated because of the

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147 Okitsu (n 13).

148 Soji Yamamoto, 'Kokusai Gyōsei-hō no Sonritsu Kiban' [The Positive Basis of International Administrative Law] (1969) 67 Kokusai-hō Gaikō Zasshi [J Intl L & Diplomacy] 529, 569–79, reprinted in Atsuko Kanehara and Akio Morita (eds), *Kokusai Gyōsei-hō no Sonritsu Kiban* [The Positive Basics of International Administrative Law] (Yūhikaku 2016) 41–7.

149 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

150 Takeuchi (n 83), Hōgaku Kyōshitsu 116, *Bun'ya-betsu* 100.

fragmentation and diversification of global governance bodies and its regimes.[151] Benedict Kingsbury also points out that 'understanding global administrative law as "law" involves not only questions of validity ("is this a valid legal rule?"), but also assessments of weight ("what weight should Public Entity X give to a norm set by Public Entity Y?")'.[152] Interestingly enough, this coincides with the UK Supreme Court's approach toward UNHCR determinations.

Based on what has been said above, theoretical and normative issues relating to the global administrative act theory are clarified. If the legal significance of a 'global administrative act' is its weight or persuasiveness over other entities, rather than its legal effect, it is not the conclusion of the global administrative act, but the process thereof, that matters. In other words, the focus should be on what facts are found and considered, what law applies in what way, and for what reasons the act is taken. GAL scholars who are interested in refugee law tend to emphasize the lack of accountability, due process, and an effective review system in the UNHCR determination procedure, particularly when it refuses an application for RSD or delays in response.[153] However, principles such as accountability and transparency are not necessarily limited to the cases of refusal and delay, but can be extended to assure the legitimacy of global administrative acts.

This is exemplified by UNHCR's reluctance to provide national courts with the materials and information on which it based its determination (Section III 2 (4) (5)). There is unquestionably a reasonable need for the confidentiality of information held by UNHCR. For UNHCR determinations to be treated with due respect and accepted by the international society and states comprising it, it will be necessary to consider ways to share information and materials with the relevant national agencies in a manner that is compatible with the duty of confidentiality.

4.6 Conclusion

The attention of GAL scholars to individual decisions that are similar to administrative acts by global administrative bodies illustrates the decline of the dualism between the world of international law where states are the main subjects and that of domestic law where individuals are the main subjects.[154] Indeed, UNHCR's

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[151] Karl-Heinz Ladeur, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law' 16/2011 Osgoode Comparative Research in Law & Political Economy. Research Paper 27–8 <digitalcommons.osgoode.yorku.ca/clpe/54/> accessed 19 March 2021.

[152] Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23, 27 (emphasis added).

[153] See n 10.

[154] Yukio Okitsu, 'Gurōbaru Gyōsei-hō to Akauntabiriteii: Kokka naki Gyōsei-hō wa hatashite, mata ikanishite Kanō ka' [Global Administrative Law and Accountability: How Can Administrative Law Exist without the State?] in Yuki Asano and others (eds), *Gurōbaru-ka to Kōhō Shihō Kankei no Saihen* [Globalization and the Re-formation of the Relationship between Public Law and Private Law] (Koubundou 2015) 47, 54. But see Lorenzo Casini, 'Global Administrative Law scholarship' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 548, 563–4 ('For example, international law has always studied how international norms have directly affected individuals; when … international law was not sufficiently considered when examining them, it could not be implied that the topic was "discovered" by GAL and its scholarship.').

mandate RSD cannot replace the convention RSD of states. In other areas, too, this picture will remain more or less the same, at least in a procedural arena, as long as the state retains territorial sovereignty and the power to implement international agreements. But it is not useless at all to think of the concept of a global administrative act. The conclusion is that the meaning of this concept consists in its heuristic function to identify problems to be solved in the process of dialogue between global administrative bodies and states.

III. REGIONAL PERSPECTIVES

5. The Relation between Constitution and Global Administrative Law

– Some Reflections

*Rainer Arnold**

5.1 Essential elements of anthropocentric constitutionalism for extra-state cooperation

The rule of law, the individual's freedom, and democracy in the classic sense are realized within the state. Contemporary forms of inter-, supra-, and transnational cooperation show structures which, in part, do not manifestly reflect these concepts. The following fundamental question arises: Is the state-linked pattern of constitutionalism – which is essentially based on the three aforementioned elements and characterizes the relation between public power and the individual – dispensable, unnecessary, or even inappropriate in the extra-state field? This question is here discussed with regard to the relation of the European Union (EU) and its Member States, but is also relevant for other forms of state participation in international cooperation.

Before an answer to this question is given, the essential aspects of state-related constitutionalism will be characterized in greater detail. Understanding the function of these aspects is important for the question of their transferability to the extra-state sphere; this is essentially a matter of functional, not institutional, comparison.

The rule of law, which in its current form is value-oriented and linked to the individual's freedom, proves to be the fundament of state constitutionalism. The basic finality of the state as an institution is the protection and promotion of the individual. Law itself finds its ultimate legitimacy in its purpose to serve, directly or indirectly, the welfare of the individuals in recognition of the values of dignity, freedom, and equality.

The modern state is a constitutional one; the rule of law is correspondingly based on the principles of legality and, in particular, constitutionality. The principle of freedom, which is embraced by the rule of law, is the basis for human and fundamental rights and results directly from the supreme value: human dignity. The rule of law is a functional unit of freedom, equality, and democracy. The latter is an expression of political self-determination and therefore an essential part of freedom.

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This is the core of contemporary liberal constitutionalism, with universal validity. This concept is individual-related and anthropocentric.[1]

For reasons related to the rule of law, the legislative, executive and judicial powers are separated (though to some extent interconnected) and categorized into a relatively clear-cut sources of law system. Private action (which is often involved at the transnational level) is generally not included. The sources of law are strictly defined, with soft law and informal actions (which play an important part in inter- and transnational relations) principally falling outside this category.[2]

As the sovereignty of the people is the basis of legitimation of public power in a state, the executive function must be derivable from the will of these people. This will is expressed through legislation: the specific will of the people formulated by its representatives in Parliament or through a referendum, as well as in the Constitution, which is an expression of the general will of the people. The specific will has to be in harmony with the general will. Thus, constitutionality of legislation is the core of today's rule of law, while legality for the executive action means compatibility with legislation which, itself, must conform with the Constitution.

To return to the question asked above: Is the need to comply with these basic, state-related requirements limited to the state, as they have been developed within the state's vertical power hierarchy, or does it extend also to extra-state action?

To reiterate: the transferability of these requirements from the state to the extra-state sphere must be assessed based on their functions. Some of the most relevant questions are therefore:

(i) Are the individual's rights in the extra-state sphere affected in the same or a similar way as they might be affected within the state? This concerns the individual's freedom, specified through fundamental and human rights.
(ii) Furthermore: Do the extra-state governance activities have an impact on individuals and society comparable to the impact which is exercised within the state through internal political power? How is this to be assessed, as the participation of the individual in the exercise of governance and the legitimacy link between people and governance institutions are crucial for democracy?
(iii) Third, the rule of law and the principle of freedom require efficiency in their realization and, in particular, the guarantee of a comprehensive judicial control. Can these requirements be fulfilled outside the state?
(iv) A number of important rule of law aspects must also be included in this consideration: in particular the principle of proportionality, which is an instrument for determining the boundary between freedom (which is the default) and restriction of freedom (which is the exception and has to be legitimized). Furthermore, there is a requirement of clearness and transparency (as conditions for understanding normative contents and having actions reviewed by courts) as well as of the respect for

[1] See Rainer Arnold, "National and Supranational Constitutionalism in Europe" in Gagik G. Harutyunyan (ed), *New Millennium Constitutionalism: Paradigms of Reality and Challenges* (NJHAR publisher 2013) 121–136.

[2] However, in the context of the "new" administrative science, these last aspects have been debated in a number of countries. See, for Germany, Martin Burgi (ed), *Zur Lage der Verwaltungsrechtswissenschaft* (Die Verwaltung. Beihefte 12. Duncker & Humblot 2017).

acquired rights and legitimate expectations. Are these rule of law aspects respected in extra-state relations?

The next question is whether the constitutional requirements related to the action within the state must be upheld also in the extra-state field in case there is an impact either on the freedoms or the political destiny of the individuals in this state. From the perspective of the state, as the keeper of the people's sovereignty, this would have to be democratically (co-)determined by them.[3]

Anthropocentric constitutionalism is an indispensable condition for any type of governance. It cannot matter whether governance takes place inside the state or at the inter-, supra-, or transnational level. If the impact on the individual is functionally equivalent to the impact within the state, it seems inevitable that the same guarantees and standards must be available even if some formal or instrumental modifications have to be applied.

The high complexity of inter- and transnational governance and administrative activity does not allow an insight into all the details. Only a rough overview, focusing on some major problems, can be outlined here.

To summarize: Which are the core elements of contemporary liberal constitutionalism that are to be preserved the context of global governance? They are:

(1) The principle of freedom of the individual, based on the concept of dignity, expressed in human and fundamental rights, to be restricted for legitimate reasons of common good, under the observance of proportionality and the safeguarding of the essence of these rights;
(2) The rule of law, at least in the form of checks and balances (if not in the traditional form of separation of powers), based on the link of legitimacy from the people to the actor (a connection of the rule of law to democracy), the political accountability of the political governance actors, and the legal accountability of the executive branch implementing and executing the political actions;
(3) The justiciability of the governance actions (and inactions). The efficient judicial control by fully independent judges is indispensable for constitutionalism. A general political question doctrine would not be compatible with contemporary rule of law and the requirement of the primacy of the Constitution.
(4) Democracy has already been indicated as a core element in connection with the rule of law. Democracy as political self-determination is an expression of freedom, a fundamental right, not only an objective constitutional structural element. It is not separable from human dignity, as the German Federal Constitutional Court (FCC) has rightly remarked.[4]

[3] In regard to this question, see also Christoph Möllers, "Constitutional foundations of global administration" in Sabino Cassese (ed), Research Handbook on Global Administrative Law (E-E 2016) 107–128, in particular 109–111 "A Reformulation of Constitutionalism", 113–121 "Constitutional Standards for International Administration"; Matthias Ruffert, Die Globalisierung als Herausforderung an das Öffentliche Recht (Boorberg 2004) 35–45, 57–67.

[4] FCC vol. 123, 267, 341.

5.2 Some significant particularities of inter- and transnational governance

Inter- and transnational governance differs in important ways from the pattern of national governance;[5] some of the differences are mentioned below.

Traditional categorizations as developed in the national order cannot be used in the same way in inter- and transnational settings: Law-making through legislation and the execution of laws by the administration is often not realized as clearly as in the internal law. This distinction is essentially based on the fact that the national legislator represents the people and realizes the people's sovereignty. This is not the case in international organizations of the traditional type or in transnational horizontal executive or hybrid (public/private) networks.[6] There is an indirect democratic legitimacy link to the national parliaments of the participating states which, however, seems not to have any real functional efficiency. Democratic legitimacy is an anthropocentric fundament and therefore cannot be substituted. It must be upheld under the aspect of laws which affect the freedom of the individual in giving consent to freedom restriction through a democratically legitimized law. Furthermore, essential political decisions, even if they do not affect freedom, must lie in the hands of the people's representatives. Political self-determination is a basic requirement of constitutionalism in an objective sense and, at the same time, a very important part of individual freedom.

While the exercise of public power within the state is based on a hierarchical relation to the individuals, the transnational sphere is characterized by horizontal coordination and cooperation, often within networks. Instead of clearly defined and distributed competences, diffuse and complex deliberation and decision-making are practiced. Here, soft law is more common and important than hard law. The instruments of action are not strictly categorized and the range of actors is complex: states, groups of states, international organizations, sub-state entities, private persons,[7] often acting together. There is a "fluid, flexible organization" and a "grey area" of "mixed global-domestic network of offices" (Cassese).[8]

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[5] See Lorenzo Casini, "The expansion of the material scope of gobal law" in Sabino Cassese (note 3) 25–44, 39–42 "patterns of legal globalization"; Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "L'émergence du droit administrative global", (2013) Revue international de droit économique 37–58, paras. 1–16. https://www.cairn.info/revue-internationale-de-droit-economique-2013-1-page37.htm#xd_co_f=MjhjNDc2ZWEtYzQyOC00 NWQxLWEzMTAtYTUxZDNlM2U0NzM2~.

[6] See Paul Craig, "Global networks and shared administration" in Sabino Cassese, *Research Handbook on Global Administrative Law* (EE 2016) 153–172. See also Benedict Kingsbury, Nico Krisch and Richard B. Stewart (note 5), paras 14, 46.

[7] See Fabrizio Cafaggi, "Transnational private regulation: regulating global private regulators" in Sabino Cassese, *Research Handbook on Global Administrative Law* (EE 2016) 212–241.

[8] On the mentioned divergencies, see Sabino Cassese and Elisa D'Alterio, "Introduction: the development of Global Administrative Law" in Sabino Cassese (ed), Handbook (n 3) 1–21, posing the crucial question at 3: Administration without a Constitution?; on the rule of law specificities, see 7–9; on the influence of the American culture, see 8. See also Sabino Cassese, "Adminstrative Law without the State? The challenge of global regulation", 37 NYU Journal of International Law and Politics (2005), 663–694, specifically 674, 677, 679, 680 (https://www.iilj.org/publications/administrative-law-without-the-state-the-challenge -of-global-regulation/).

It is evident that the rather strict internal state patterns for the organization and exercise of power do not appear at the extra-state, global level. Therefore, the well-developed legal solutions on democracy, freedom, and rule of law – as they appear within the state – are essentially challenged in the transnational and global sphere.

In this context, one should also take a look at the establishment and activity of extra-state entities that form their own autonomous functional units.

A distinction must be made between

(1) the establishment of an entity, which brings it into being, gives it statutes, and empowers it to make autonomous decisions within the framework of its own purpose,
(2) the participation of the state representative in the preparation and making of decisions, and
(3) the implementation of the entity's decisions in the internal legal order, insofar as the decisions do not relate solely to the extra-state level.

The question is whether the state Constitution is to be taken into account in these processes or whether only the "constitution" of the entity expressed in the statute is decisive for the decisions of the entity itself and the participation of the state representative in the decisions and other activities of the entity. It seems possible that only the constitutional order of the entity, as it results from the statute (which is aimed at the realization of the purpose of the entity), is decisive for the decision-making and activity of the state representative.

If the state establishes such an autonomous entity outside the state, does it waive the validity of its own Constitution (and the requirements for the structure and activity of the entity flowing from the national constitutional order) in favour of the requirements of the statute of this entity? Does the state Constitution permit such a waiver (fully, to a certain degree, or not at all)?

It should be emphasized that the question here concerns entities that are founded by several different states (or other entities derived from states). There are thus several constitutional orders involved in the establishment and operation of such entities, so that the decision of the entity, which – as noted – has an autonomous character, ultimately derives from several constitutional orders. This makes it questionable to see a single national Constitution as the yardstick for the decisions of said entity.

This question is here discussed in the context of the supranational EU. This involves the supranational law of the EU, directly applicable in the Member States, which intensifies the question of whether and to what extent EU law must conform to the constitutional law of the Member States. In the international sphere relevant at this point, these interventions in the state legal order are not endowed with great effectiveness. Rather, they are acts and declarations which often constitute soft law, often produce legal effects only at the international level, and affect the courses of action of states only in a recommendatory manner or might have

a binding normative character – but in the traditional manner of international law will only enter an internal legal order with the consent of that state.

If we look at this question from the point of view of the actions of the national bodies and representatives involved, we must note that they are bound by the national constitution. This is true even when they perform acts that produce effects outside the state. This is a case of extraterritorial application of the national constitution, as was made clear – to take the example of Germany – by the jurisprudence of the FCC.[9] In German constitutional law, this conclusion can be drawn from Articles 1.3 and 20. 3 of the Basic Law (BL), where the constitutional obligation is derived from the exercise of one of the state functions by German organs, without the effect of the act being restricted to German national territory. As a general rule, in constitutional law, other states also do not restrict the normative effect of their constitutional order to their national territory.

If, therefore, we state that the national Constitution must be observed in our context, it must nevertheless be borne in mind that the Constitution expressly or implicitly permits the creation of international entities with their own entity-specific objectives and competence to make autonomous decisions arising from the structure of each entity as such. The autonomy of these entities prevents the national Constitution from exclusively determining the contents of their decisions as well as their activities implementing their objectives; this would conflict with the constitutions of other states participating in these entities.

This leads to the recognition that, on the one hand, the autonomous decisions of the entity are not to be measured against the national constitutions, but, on the other hand, the creation of and participation in this autonomous entity is permitted by the constitutions only if the indispensable fundamental structures of anthropocentric constitutionalism are not infringed or endangered.

Such a threat or infringement could occur in three ways:

i) The activities and decisions of the extra-state entity damage the basic structures of anthropocentric constitutionalism in the state itself.
ii) The basic structures in the entity in question are themselves seriously inconsistent with what is indispensable to constitutionalism.
iii) A state which acts within an extra-state entity abandons its liberal democratic structure and important parts of the basic anthropocentric relationship.

The first case is not very probable, because, as a rule, it is impossible for the extra-state entities to cause such internal constitutional infringements with direct effect. The second case only applies if the extra-state entity itself is able to interfere, through its activity, with the freedom or rights of individuals and would have a significant impact on individuals' lives. In the third case, the negative change in the internal constitutional structure and practice might jeopardize the foundation of the common values on which the extra-state entity is based. The latter must try

[9] See, recently, BVerfG (FCC), Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17 - paras. 1–332, http://www.bverfg.de/e/rs20200519_1bvr283517en.html

to counteract this threat in order to preserve the value orientation that is essential for the entity as a whole and which represents its essential ideal foundation.

The problem with which we are concerned here has heightened significance in the context of the EU, since this legal order is integrated with the national legal orders of the Member States. The EU legal order has come into being through the transfer of national sovereign rights making its structural coherence – and thus the linkage of constitutional law – even more significant than in the area of the extra-state entities referred to here.

5.3 Supranational/supranationalized administrative law

State-like constitutionalism is (with some modifications) fairly well-realized within the EU, with respect to political governance, legislation, administration, and the judiciary. EU administrative action is carried out either (albeit only exceptionally) directly through EU institutions or by a supranationalized action, where EU law is applied, executed, or implemented by Member States. The rule of law, fundamental rights, and democracy (shared with the Member States' democratic systems) are the main pillars of EU constitutionalism, which is essentially rooted in Article 2 of the EU Treaty.[10]

In contrast to the multiple forms of international and transnational administration, the EU system is highly integrated and in many respects state-like in its organization, though the EU itself cannot be qualified as a state (at least not in the traditional sense).[11]

The EU legal order is autonomous, but in many respects interwoven with the national orders of the Member States. It owes its origin to the transfer of national sovereign rights to the supranational institutions. As the EU power substitutes former national power of the EU Member States, it is evident that national politics are now essentially carried out by supranational institutions and the former national competences have been transformed into Europe-wide supranational competences. It has therefore been a prerequisite to transfer the basic requirements of constitutionalism from Member States to Union. This is clearly expressed in the integration treaties and confirmed and detailed by the European Court of Justice jurisprudence. The concepts of rule of law and fundamental rights have grown in the initial phase of the supranational communities' existence, first structured by jurisprudence and then confirmed in written text.[12]

The principle of legality is clearly anchored in the supranational legal order and under the control of the European Court of Justice. Legality, in the supranational sense, means conformity of secondary law with primary law which, in its turn, can be qualified as constitutional law (in a larger, functional sense) – either

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[10] See Marcus Klamert, Article 2 TEU in Manueal Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) paras 11–14.

[11] This has been clearly pointed out by the German FCC in the Maastricht decision vol. 89, 155, 185/186.

[12] See Andrew Williams, "Human Rights in the EU" in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 249, 252–253.

the whole body of primary law or, more appropriately, the fundamental primary law provisions as expressed mainly in the EU Treaty and in the EU Fundamental Rights Charter.[13]

Legality and constitutionality cannot be conceptually separated in the EU, as this must be done in a national legal order. Neither the normative hierarchy, nor the distinction between constitutional law and legislation, nor the distinction between the legislative and the executive function are clearly determined in the EU. Separation of powers is not realized in the same way in the EU legal order as in the Member States. This is also reflected by the sources of law system. In principle, regulations and directives have normative character, while decisions and the many other unspecified action modalities belong (at least essentially) to the executive function. It can therefore be said that the supranational sources of law and institutional functions cannot be clearly classified in the same way as in the national order. Nevertheless, it can be confirmed that the rule of law does exist in the EU. The well-developed and effective jurisdiction ensures the constitutionality of secondary law, which is largely generated by the European Parliament in cooperation with the Council through the so-called ordinary legislative procedure. It cannot be of decisive importance that the institutional assignment of legislation and administrative measures is not carried out as clearly as in the state systems in every respect. What is essential, however, is the dependence of administrative action on authorization in primary law; the principle of conferral, which is effectively monitored by the judiciary, means constitutionally sufficient separation of powers.

It must also be said that the traditional distinction between public and private law is relativized within the framework of the EU legal system, since modern challenges – such as environmental protection, technology development, consumer protection, health care etc. – must be addressed, in all their complexity, through regulation. It appears constitutionally imperative to relativize the boundaries between civil and public law and to dissolve them, at least in part, in order to achieve efficient legislation. This issue has not yet been clearly identified as a problem in the EU and its Member States. However, such a relativization or dissolution of the traditional boundaries is in no way a violation of the principle of the rule of law.[14]

In the sphere of inter- and transnational action patterns, the supranational field is essentially compatible with the requirements of rule of law and the idea of the anthropocentric foundation and finality of all power exercise.[15]

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[13] See Vassilios Skouris, Demokratie und Rechtsstaat. Europäische Union in der Krise? (C.H. Beck 2018) 25–27.

[14] See Bernhard Stüer, "Öffentliches Recht und Privatrecht. 79. Jahrestagung der Vereinigung der Deutschen Staatsrechtslehrer in Marburg" (2019) DVBl 1525–1532.

[15] See Rainer Arnold, "L'universalità dei valori costituzionali. Alcune riflessioni sull'assioma antropologico e su impatto sulla comparazione di diritto" (forthcoming, blog constitutional law R. Toniatti, Trento 2021); Rainer Arnold, "Anthropocentric Constitutionalism in the European Union – Some Reflections" in Nadezda Sisková (ed), *The European Union - What is Next? A Legal Analysis and the Political Visions on the Future of the Union* (Wolters Kluwer 2018) 111–122.

However, the democratic legitimation is twofold, being both national and supranational.[16] The reason for this is that the EU is an autonomous organization created by the transfer of national sovereignty, with its own legal decision-making power, its own parliament, and an anchoring in the entirety of the Union's citizens. There is thus, through elections, a direct democratic link back to the European people. However, this differs from the democratic legitimation of the public authority in the Member States in that the citizens of the Union are all also citizens of the Member States.

If we ask the aforementioned test questions on the compatibility of the supranational structures and values with those of a Member State, we can conclude – from the perspective of German constitutional law, which can also be generalized under the aspect of the universal anthropocentric values of a constitutional order – that there are no legal obstacles to the establishment of supranational communities or to participation in them, as a result of the fundamental functional equivalence of national and supranational constitutional values. Reference can be made to Article 23(1) BL, which addresses the functional dependence of national and supranational legal systems in a particularly pronounced manner: this provision makes the creation of and membership in the EU dependent on the existence of value structures on the part of the EU that are functionally equivalent to the fundamental values existing in national constitutional law. This is the case, as has been briefly explained. These basic structures (rule of law, fundamental rights, democracy) are of fundamental importance also for EU administrative law, which is impacted in multiple ways by constitutional law.

As far as the constitutional design of the organization of the EU is concerned, it is not the German model as such that is to be transferred to the area of the EU; this would not be compatible with the principle of equality of the EU Member States, which each have constitutional concepts shaped by their own tradition. The German FCC has stated this, among other things, with regard to the question of the democratic legitimacy of EU actions. There need be no "congruence" here. The power to transfer sovereign rights to supranational communities, which is made possible by the first sentence of Article 23(1) of the BL, permits "deviations from the domestic requirements for the democratic organization of the administration" if these are "necessitated by the requirements of integration."[17] The FCC considers it sufficient that "as long and insofar as a union of sovereign states with clear elements of executive and governmental cooperation adheres to the principle of conferral, […] legitimation at member state level is derived from the national parliaments and governments, which is complemented and underpinned by the European Parliament […]."[18]

The supranational modifications of the democratic legitimation of the exercise of executive power – as permitted under Art. 20 (1) and (2) BL, and which take

[16] Skouris, Demokratie und Rechtsstaat (n 4) 36–42.

[17] BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 - paras. 1–320, http://www.bverfg.de/e/rs20190730_2bvr168514en.html, para. 125. (English translation by the Court).

[18] Ibidem. Reference there to the FCC vol. 123, 267, 364.

place through the Europeanization of the administration and the creation of independent institutions of the EU (such as the European Central Bank) – must, however, be limited and compensated for.[19] The limited lowering of the level of democratic legitimacy must be justified, constitutionally legitimate, and must not undermine the principle of sovereignty of the people.[20]

Further, Article 23 (1) BL contains constitutional protection against legal acts of the EU with normative effect within the German legal order, which are not compatible with the basic constitutional structures of BL. According to the case law of the German FCC, the principles contained in Articles 1 and 20 of the German Constitution, which are essentially in line with the values mentioned and constitute the so-called constitutional identity of Germany, are exempt from the supranational law.[21]

The task of the German state authorities to ensure that the aforementioned constitutional principles continue to exist within the framework of the EU and that EU legal acts do not interfere with Germany's basic constitutional structure is the so-called integration responsibility of the German state authorities, a constitutional obligation developed through case law.[22]

The state representatives acting within the supranational entity must also comply with the national constitution, in particular insofar as the responsibility for integration resulting from Art. 23 (1) BL requires it. Thus, they must abide by the competences transferred to the EU, i.e., they must not contribute to the creation of an EU legal act "ultra vires"[23] or a legal act that violates the national constitutional identity.[24]

The legal order of the EU is, as already stated, autonomous, and thus not subject to national constitutional law. The participation of the representatives of the Member States – the members of the Council of Ministers, and, in a broader sense, the Heads of State and Government in the European Council – has the aim of creating EU legal acts, or in general terms, to participate in conducting EU policy, in addition to the actual, "a priori" EU institutions. However, the participation of the genuine supranational institutions – such as the Commission, European Parliament, European Central Bank, etc. – is not subject to any national constitution. This follows from the fact that they are, by virtue of their creation, "a priori," supranational actors.

In the context of the EU, this issue is clearly highlighted. With the transfer of national sovereign rights, the legal acts of the EU do not belong to any national legal order, but to a separate normative category which is outside the reach (at least the direct reach) of national constitutions.

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[19] Ibidem, paras 208–230.

[20] Ibidem, paras 127, 130–132, with many references on jurisprudence and literature. See also FCC vol. 107, 59, 87 et seq.

[21] See FCC vol. 123, 267, 344, 353–354, 398–400, 403, 414.

[22] FCC vol. 123, 267, 356; vol. 126, 286, 307; vol. 132, 195, 238–239; vol. 146, 216, 250.

[23] FCC vol. 126, 286, 304.

[24] FCC vol. 123, 267 (see footnote 11).

A certain dilemma becomes apparent here: Let us take the example of a regulation that is adopted jointly by the Council of Ministers and the European Parliament in the ordinary legislative procedure. Germany's representative, usually a federal minister, is bound by the BL by virtue of his/her national ministerial office. This also applies if the minister negotiates in the Council of the EU and participates in the decision-making process. Of course, the representatives of the other Member States who participate in the Council are bound by their own constitutions, not by the BL; nor are the Members of the European Parliament, who play a decisive role in the procedure for the final decision on the legal act, bound by a national constitution. It is obvious that no such commitment applies to the proposal of the legal act by the Commission. However, the conduct of the German representative in the Council must comply with the BL,[25] which must also be reflected in his/her vote. This could be decisive in matters where unanimity is required. In areas where a majority vote is foreseen, the negotiating and voting behaviour of the German Council member must also comply with the national constitution. If an act is adopted by majority vote, it is not to be measured against the national constitution, but only against EU primary law, including the EU Charter of Fundamental Rights. This is also recognized in the case law of the FCC.[26]

This also applies to other strict law and soft law acts and political agreements. EU acts take precedence over national law. This is the perspective of the EU itself, expressed through the case law of the European Court of Justice, but also in principle the perspective of the national constitutional courts and supreme courts.[27] For Germany, it can be said that the FCC has recognized the primacy of Community/EU law, but has developed restrictions, as already pointed out, when the constitutional identity of Germany, as expressed in Art. 79(3) BL, is in question and in regard to ultra vires acts.[28] The relevant protection of fundamental rights is guaranteed by the EU Charter of Fundamental Rights as regards the activities of EU institutions themselves and as soon as the Member States implement EU law and are bound to do so under EU law.[29]

If, however, the Member States are not completely bound by EU law, the protection of fundamental rights is guaranteed by the BL in the case of Germany; this must also guarantee the level of protection of the EU Charter of Fundamental Rights. In cases where the BL does not guarantee the EU Charter, the Charter itself must be applied directly.[30]

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[25] Wolfram Höfling, "Art. 1 GG", in Michael Sachs, *Grundgesetz Kommentar* (C.H. Beck, 8th ed., 2018) para (= Rn) 94.

[26] FCC vol. 22, 293, 296; vol. 37, 271, 277–278.

[27] See Monica Claes, "The Primacy of EU Law in European and National Law" in Anthony Arnull and Damian Chalmers (n 6), 178–211.

[28] FCC vol. 29, 198, 210; vol. 37, 271, 278; vol. 85, 191, 204; vol. 123, 267, 400; vol. 126, 286, 301–302; vol. 140, 317, 335. For the reservations, see footnotes 13 and 14.

[29] See Art. 51.1 EUCh.

[30] BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 16/13 - paras. 1–157, http://www.bverfg.de/e/rs20191106_1bvr001613en.html.

In conclusion, it can be said that EU law is not subject to any national constitution. Nevertheless, the representatives of the Member States, insofar as they help to shape the supranational legal acts, in cooperation with the representatives of the other Member States and with the supranational institutions, are bound by the provisions of their own constitutions. For the German sphere, this is shown by Article 23(1) of the Basic Law, which constitutionally lays down the conditions for participation in the framework of the EU; this article even includes the responsibility for integration, which is referred to by the FCC. It includes all German institutions, in addition to the government and the parliament, as well as the national representatives in the EU institutions.

5.4 How can constitutional achievements be upheld at the transnational and global level? Some reflections on possible solutions

As already underlined, the basic anthropocentric requirements – human rights protection, democracy, and the rule of law – cannot be abandoned. This is ultimately based on the finality of law and in particular of constitutional law to protect and promote the individual. The functions of these requirements must be maintained, albeit the forms, instruments, and procedures therefore can be adapted to the needs of the transnational and global field of cooperation.

a) A first reflection relates to the protection of freedom of the individual: fundamental and human rights must be respected also in extra-state activities.[31] They are the core of constitutionalism within the state, the supranational organizations, and the international community, where a process of "constitutionalization" is going on through the recognition of human rights.

Fundamental and human rights concretize the principle of freedom, which is inherently connected to human dignity and the human being, thus having universal validity. In every legal order, be it national, supranational, regional, or universally international, freedom is guaranteed, albeit in different texts, wordings, and degrees of intensity. They depend, at least historically, on a specific tradition and culture, but all refer to one and the same basic phenomenon: the human being. The principle of freedom is always comprehensive, written or unwritten in a legal text, and always aims at a substantially and functionally effective protection.

From this basic idea, it can be deduced that such protection is always an essential part of a legal and constitutional order; while there may be formal differences in regulations, they are functionally the same. Since this protection is indispensable, it must always be present where impairments are possible. This can be said for the state and in the same way for a supranational legal order, and also for the international sphere, where the freedom of humans can be affected through cooperation or in other forms.

[31] See also Christoph Möllers (note 3), 118–119; Matthias Ruffert (note 3) 66–67.

b) In the actions of states (whether undertaken alone or in cooperation with extra-state actors), the fundamental rights resulting from their constitutions will apply also for violations which take place outside their territories; it is generally held that national fundamental rights hinder violations by state agents both within and outside the State.[32] This corresponds to the idea of protection efficiency[33] and is also confirmed by international guarantees such as the European Convention of Human Rights,[34] which reinforces the national rights.

The concept of the extraterritorial effects of national fundamental rights is familiar to many states. This might enable us to speak of an emerging common body of fundamental and human rights which can be qualified as general principles resulting from national constitutions.

The influence of the international human rights covenants on international organizations and other organizational bodies set up by states must also be taken into account. While these covenants are formally binding only on the contracting states, they must at least have analogous validity for international organizations.

If international entities or forms of cooperation that are not signatories to the human rights covenants and cannot be so, for lack of subjectivity in international law, they are nevertheless bound by human rights. If these entities are derived from states, the fundamental rights as recognized by these states apply to the activities of these entities. Even if such entities are in principle detached from the states' constitutions because of their legal autonomy, the fundamental and human rights contained in the constitutions will apply to these entities as well. Since, as a rule, several states have created any such entity, the constitutions of these states are relevant; the common fundamental and human rights principles resulting from these constitutions must be applied to each entity.

A further question arises: can private subjects (enterprises, NGOs, etc.) be obliged to comply with human rights?

Up until now, it has not been assumed that private subjects, such as transnational corporations, are recognized as subjects of international law.[35] Nevertheless, the participation of private subjects in administrative processes at the international level, as well as civil law operations, such as transnational contracts or acts of multinational companies – whether they are intended to fulfil public functions in a private form or whether they are purely civil law processes – must also be subject to regulations on human rights. This can be affirmed with reference to the

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[32] See, for Germany, FCC vol. 6, 290, 295; vol. 45, 83, 96; recently BVerfG, Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17 - paras. 1–332,
http://www.bverfg.de/e/rs20200519_1bvr283517en.html (English version) (accessed 07 December 2020).

[33] See Rainer Arnold, "Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus" in Max-Emanuel Geis, Markus Winkler and Christian Bickenbach (eds), Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag (C.H. Beck 2015), 3–10.

[34] See Christian Johann, "Art. 1 EMRK" in Ulrich Karpenstein and Franz C. Mayer (eds), Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar (C.H. Beck 2nd ed 2015) paras. 19–22. See also Christoph Grabenwarter and Katharina Pabel, Europäische Menschenrechtskonvention (C.H. Beck, Helbing Lichtenhahn, MANZ 6th ed 2016) § 4 paras. 2, 3 and § 17 para. 8.

[35] See Andreas von Arnauld, *Völkerrecht* (C.F. Müller 3rd ed. 2016) 23, (para. 64), 275 (para. 629).

horizontal effect, the third-party effect of fundamental and human rights, vis-à-vis other private subjects.[36]

This horizontal effect can be affected by fundamental and human rights at the national, the supranational, or the international legal level. In addition, fundamental and human rights, as objective values, impose a so-called duty to protect. This means that the state, which has a direct relationship with the individual, must ensure adequate protection of these rights in its legal system.[37]

c) The rule of law – in its contemporary national concept – is value-oriented and based on the idea of human dignity which comprises the principle of freedom, as was pointed out above. Furthermore, it recognizes the basic values and institutional structures as determined by the Constitution. Constitutionality (what is compatibility with primary law in the EU or the basic statute in international organizations or transnational networks) complements legality. Transferred to the supra- and international level, it is conformity of executive action with the basic law of the institutions or networks involved; it is the absence of arbitrariness and the compliance with the foundations expressed in a treaty, statute, or other agreement.

The fact that the rule of law is not only a national phenomenon is also made manifest in the development of the rule of law system by the European communities, through the reference to the rule of law in the ECHR and the preamble of the United Nations Charter, claiming respect for the obligations arising from treaties and other sources of international law. The basic rule of law requirements can be qualified as a general principle, which is binding also in the sphere of international law. What has been said about fundamental and human rights with regard to private subjects can be transferred also to the rule of law requirements.

Basic elements of the rule of law, such as clarity and security of law, the protection of legitimate expectations, proportionality, etc., have also to be recognized as general principles in the extra-state sphere.[38]

d) This leads to the question of democratic legitimation[39] – the accountability of the transnational activities. This has already been discussed with a focus on the EU. However, it is of general importance and is to be considered also with regard to other forms of extra-state activities.

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[36] Ibidem, 274–276 (paras. 628–630).

[37] See, in general, Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights. From Principles to Practice* (Routledge 2016).

[38] See Council of Europe, "Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016)" CDL-AD(2016)007-e https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (accessed 14 January 2021) and Christoph Möllers (note 3) 113–115; Matthias Ruffert (note 3), 65–67. See also Marco Macchia, "The rule of law and transparency in the global space" in Sabino Cassese (note 3), 261–281 (263–265 on "the principles of cogency, proportionality and adequacy" developed in case law; observance of law and the "relationship between the rule of law, human rights and civil liberties", 264; on further aspects of rule of law such as legality, legal certainty, transparency, effective judicial review, etc., 268–273.

[39] See also Christoph Möllers (note 3), 115–118.

It is inherent in a democratic system that actions which impact individual freedom or regulate important matters with obliging or only motivating impact on the individuals, even without interference with freedom, must get the consent of the individuals as the members of the people, through their representatives in Parliament or through a direct vote. This basic concept of self-determination is the only way that public power exercise is compatible with human dignity, which is the accepted value in constitutional law.

It is not excluded that transnational cooperation entities or international organizations have parliamentary assemblies, such as the Council of Europe or (with a direct link to the EU citizens, but with an in part intergovernmental election system) the EU.[40] If such organs have only an advisory function and can ultimately make only recommendatory decisions, they are debating deliberative bodies, but not mediators of the will of the people. Expressing the people's will presupposes that an assembly is elected by the people, i.e., the sum of the individuals in a given area, in an electoral procedure that corresponds to democratic principles, and that the assembly has the power to regulate, by legislation, the essential issues of the community. The participation of other bodies representing, for example, the territorial subdivisions of the country is possible. Representations by experts or national agents may be useful, but do not satisfy the requirement of democracy.

In conclusion, we can say the following: if democracy in the traditional sense is to be maintained (and it seems necessary to do so), we must not lose sight of the link to the national parliaments.

The national parliament has to realize the democratic link with inter- and transnational activities. If a transnational network or body is established or co-established by a state, the transfer of functions is limited and constitutionally permitted only if the basic requirements of constitutionalism are ensured at the transnational level. This must be predetermined by the structures and functional system of the network or body. This has been described for the EU, where there is exercise of authentic state functions transferred to the extra-state level.

The need for a democratic link between people and entities established at the international level and a correspondence to basic constitutional requirements applies also to entities in the international sphere, if they are entrusted with decision-making or, by means of recommendations, with influencing the actions of states or other bodies at the international level. In the latter case, this is on the basis of their involvement in specific subject areas, which means that they, at least in important matters, help to shape the political decisions of states and can even cause restrictions to be placed on the freedom of individuals.

A state's national act of consent to creating an entity – in the case of the conclusion of international treaties establishing international organizations: the parliamentary act of approval – conveys democratic legitimacy to the entity created. This legitimacy is extended by the fact that this entity creates further decision-making or advisory bodies, which in turn have influence over the political

[40] See also Vassilios Skouris, *Demokratie und Rechtsstaat* (n 8), 31–41.

decisions of the aforementioned state. The act of approval or other form of consent which legitimizes the entity formation in the international sphere also passes on the constitutional requirements.

Core elements, such as the protection of human rights or the basic requirements of the rule of law, must then also be taken into account at a more distant entity level, provided that there is a need for legitimacy. This would include when the legal sphere of the individual is affected, in particular when there is the possibility of a conflict with human rights, and – which in view of the highly differentiated transnational tasks is probably most common – when state policy is co-designed through the provision of expert knowledge, advice, observation of ongoing processes, etc. Ultimately, the aim is to protect the freedom and rights of individuals and to legitimize international activity in terms of democracy and the rule of law, in favour of the self-determination of individuals.

The act of approval gives legitimacy, on the condition that the authorization for such activity is sufficiently predetermined in this act. In the case of transnational executive agreements which need no act of approval, the Parliament must nevertheless consent before the conclusion of the agreement in order to legitimize far-reaching decisions at the transnational level.

Furthermore, the permanent subsidiary control on the national side, including judicial review, must be upheld. Of course, the control criteria cannot be purely national insofar as other states or entities composed by various states are involved. A certain self-restraint for the application of the own national constitutional standards seems necessary. Experience of the collision of different constitutional orders has already been gained through the EU. It should be mentioned here that Article 24 (1) BL (and Article 23 (1) specifically for the EU) allows, according to the jurisprudence of the FCC, reduction of the own control criteria to the indispensable minimum expressed by the constitutional identity (in Germany corresponding to the intangibility clause for constitutional reforms, Article 79 (3) BL)[41]. It can therefore be said that the acceptance of foreign constitutional standards to this extent is compatible with the own Constitution, which promotes international integration and adheres to the concept of "open statehood".[42] However, the core elements of constitutionalism (dignity, freedom, democracy, and rule of law) must be maintained in general, and also specifically for the state in question (for Germany: the federal state and Republic, which form the intangibility clause and the German constitutional identity, in the view of the FCC).

In summary, it can be said that the principle of democracy is realized, at least indirectly, also in case of transnational networks or similar activities by reference to the national democratic institutions. If the freedom of the individual is impacted or important matters are decided on, parliamentary authorization is necessary, which can be granted through the act of approval (if sufficiently detailed) or

[41] FCC vol. 123, 267, 353,354, 398–400.

[42] See Rudolf Geiger, *Grundgesetz und Völkerrecht* (C.H. Beck 2013), 1–4.

through a separate act of Parliament, giving democratic legitimation to the transnational activity.

The complicated case that private subjects are involved in the transnational activities and in particular in the decision-making also requires a democratic link, even an indirect one, with the national parliaments (through a precise authorization in the act of approval or in a separate parliamentary act or/and a parliamentary guarantee; these aspects fall outside the scope of this text).

The renewal of democratic power by elections, the very essence of democracy, takes place in the national sphere and must have an effect also on the transnational network. Thus, the founding act of a network must provide a clause which makes it possible for a new political majority to terminate the cooperation.

Elements of participatory democracy can and should be realized at the transnational level, which seems increasingly possible in view of digital technology. However, these elements can only be complementary and cannot substitute the essentials of democracy.

6. The weak Inter-American Input of International Guidelines into American Convention on Human Rights Member States. Weakness and pathways

*Isaac de Paz González**

6.1 Introduction

As of the first judgment of Velasquez Rodriguez v. Guatemala in 1988, the Inter-American system has been playing the role of a regional authority issuing human rights guidelines to seek accountability of domestic authorities. As a legitimate regional public agency, the Inter-American Court of Human Rights (IACtHR) has developed patterns for the adoption of human rights into the national laws, national jurisprudence, and public policies of Member States. Such patterns can be noted in the growing internationalization of constitutional law and the creation of democratic/human rights-based institutions. However, the effectiveness of the guidelines provided by the IACtHR strongly depends on how national public agencies adopt the orders issued by the regional court.

For instance, the legislators and executive powers in Member States are not always receptive to the Court. Examples of political branches of the American Convention on Human Rights (ACHR) Member States issuing anti-human rights measures include Ortega in Nicaragua[1] and multiple events in Brazil (Temer[2] and Bolsonaro[3]). At a different scale, there are countries that, in the aftermath of a judgment, do not comply with any restorative measure ordered by the IACtHR. For example, Paraguay has now delayed, for over 15 years, the adjudication of indigenous lands in accordance with the Yakye Axa judgment of 2005.[4] In 2019,

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[1] See the Press Release of the Inter-American Commission on Human Rights *Nicaragua: Must stop reprisals against journalists, say human rights experts* (R212/19, 26 August 2019) <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1152&lID=1> accessed 19 November 2019; see also Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human rights violations and abuses in the context of protests in Nicaragua* (18 April–18 August 2018, Geneva).

[2] See Isaac de Paz González, The Social Rights Jurisprudence in the Inter-American Court of Human Rights. Shadow and light in international human rights law (Edward Elgar 2018) 178.

[3] Rejecting international aid, showing total disrespect for human rights, and behaving in a dangerously passive way in the Amazon fire crisis, and therefore violating key environmental standards, not only in national legislation but also in international law.

[4] IACtHR, *Yakye Axa v. Paraguay,* Supervision of Compliance (Resolution, 14 May 2019), paras 1, 14, 17.

five countries questioned the legitimacy of the IACtHR on the ability to interpret the ACHR's provisions. These countries signed a press release with three requests on the role of the Inter-American system overall: 1. Strict application of subsidiarity and a margin of appreciation principles. 2. Respect for a State's autonomy in the issuing restorative measures. Lastly, they stated: 'None of us can be accused of weakening the Inter-American system.[5]

The aforementioned press release raises certain political and legal concerns on how Member States see the current role of the IACtHR as a regional agency. Therefore, it is essential to pay attention to claims based on the lack of legitimacy of the IACtHR as a regional body that represents the international community. Moreover, such allegations might have a negative influence on the other political branches that keep international human rights law steady, rather than fluid, in the national spheres.

Within this context, this chapter's aim is to analyse the role of the IACtHR as a regional agency and the dialogue carried out between it and two types of national agencies: courts and legislators. A second aim is to study the influence of international law on national human rights jurisprudence/legislation. The narrative of this chapter is divided in three parts. The first describes the judicial dialogue between domestic judiciaries and the IACtHR, based on international law provisions and the creation of domestic rules under the ACHR's standards. The second part shows how the IACtHR has been adapting international law and giving procedural effects to guidelines of the UN Treaty-Based Bodies (UN TBB) in substantive and procedural ways. Lastly, in the third part, I will explain how national courts are receiving normative international input in terms of jurisprudential and legislative guidelines provided through Inter-American judgments.

6.2 The Dialogue Between Domestic Judiciaries and the IACtHR

The Inter-American doctrine is slowly being adopted by national high courts, as first responders to the input of the regional system of human rights. National high courts are the first channel of communication to spread the rules and the guidelines developed by the Inter-American Commission and the IACtHR. For that reason, constitutional courts are the ideal thermometer for measuring how the IACtHR, as regional agency, is applying international law – or not – in domestic spheres within Latin America. This encompasses how all kinds of regional human rights standards (rules and jurisprudence) and even the standards of the UN, are received, re-interpreted and expanded (or restricted) by national high courts.

Considering the diversity of high courts and the particularities of each country (politics, economy, legal tradition), various factors can weaken the influx of the

[5] Press Release of the Colombian Government Comunicado de prensa del Ministerio de Relaciones Exteriores sobre el Sistema Interamericano de Derechos Humanos. 24 April 2019 <https://id.presidencia.gov.co/Paginas/prensa/2019/190424-Comunicado-de-prensa-del-Ministerio-de-Relaciones-Exteriores-sobre-el-Sistema-Interamericano-de-Derechos-Humanos.aspx> accessed 9 May 2020.

Inter-American guidelines into the Member States. A first factor is the lack of uniformity to follow-up of the Inter-American rules within national jurisdictions due to differing internal organisation: high courts with different techniques of judicial review, and interpretation by multiple federal judges, provincial judges, administrative judges, municipal judges and so on. Another problem arises from the opposition of some high courts and political branches, aiming to delegitimise the IACtHR's role, accusing it of an ultra vires interpretation of the ACHR.[6] Hence, when studying how Member States are following the guidelines from the IACtHR and international law, we can see ups and downs, contrasts, political speech both for and against human rights, and different approaches in high courts, rather than uniformity.

For Huneeus, the interaction between national judges and the IACtHR puts the national judges in a central role. From her viewpoint, domestic judiciaries are more aware of and open to human rights adjudication.[7] However, other voices argue that there is an emerging trend of deference and that the IACtHR's legitimacy is under risk.[8] In fact, there are critics of the IACtHR's doctrine of conventionality control, related to its weakness and lack of legal basis, who label the IACtHR's doctrine as an incomplete attempt at harmonisation between domestic and regional laws.[9] In fact, the current state of affairs in the ACHR Member States[10] demonstrates that human rights are barely being applied and are not fully understood within public policy and the administrative arenas. As will be noted, on the one hand, there are concrete reasons behind the absence of domestic strategies to adapt international human rights law into national legislation and public policy; on the other hand, the few steps taken by domestic authorities are fragmented, vertical and not designed for all branches of government or the whole of the judiciary.

Another important factor that is influencing how national courts interpret the ACHR provisions and set their own guidelines to follow the IACtHR's jurisprudence, is the recognition and adoption of international human rights law in constitutional provisions. A brief review of ACHR Member States' constitutions reveals strong, moderate and weak recognition of international law at several levels in their domestic legal systems. For instance, the Argentinian constitution

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[6] Delivered by judiciaries from Costa Rica, the Dominican Republic and Argentina in response to the judgment of *Fontevecchia and D'Amico v. Argentina*. IACtHR, Supervision of Compliance (Resolution, 17 November 2017).

[7] See Alexandra Huneeus 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' [2011] 44 *CILJ* 498 <http://scholarship.law.cornell.edu/cilj/vol44/iss3/2> accessed 27 January 2020.

[8] Nino Tsereteli 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights?' [2016] 20 IJHR 1097.

[9] Jorge Contesse, 'The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine' [2018] 22 IJHR 1168.

[10] Involving, for instance, high levels of violence against women in Mexico, mass migration from Honduras and Nicaragua, harassments of indigenous peoples from the Amazonas and biodiversity corridors in Central America and Ecuador. See a complete list of provisions in Table 1 in De Paz Gonzalez (n 2) 87.

adopts the Universal Declaration of Human Rights (UDHR) as a legally binding document. Mexico has recognised human rights in its constitution since 2011 through a set of international principles. Paraguay has included international law in its Constitution (Articles 137–141), while Ecuador recognises that international law must be observed by its national authorities and even establishes mandatory compliance with UN recommendations and general comments.[11]

Thus, international law is the common source for all the ACHR Member States, which have developed it into national jurisdiction, legislation and public policy, to differing degrees. In this regard, the role of the IACtHR as an effective regional agency that protects and promotes human rights strongly depends on three factors: a) the recognition of international law in Member States' constitutions; b) the scope of the interpretation of international human rights made by national courts; and c) the type of adoption of international law performed by the executive branch. These three factors differ in each political and legal sphere, shaping the interactions between Member States and the IACtHR. Further, there may be concerns because of the clash between international and constitutional law within national courts, which may delay or prevent compliance with Inter-American obligations.[12]

The factors mentioned above have varying influence on the adoption of the IACtHR's rulings in each respective country. Depending on the scope of a ruling, Member States may follow orders or delay or prevent compliance. However, thus far, the only political branch directly persuaded by the IACtHR's guidelines is the judiciary (high courts and, to a lesser extent, civil and criminal courts). In the next section, I will describe the approaches of national courts to the IACtHR's rulings. This empirical evidence will be used to further discuss the role of the IACtHR as an effective or weak public agency in the promotion of both international guidelines and human rights practices.

6.2.1 Receptive courts

In some cases, we can observe advances in the compliance to restorative measures ordered by the IACtHR. For instance, as a result of the case of Barrios Altos and La Cantuta, Peru derogated national amnesty laws and re-launched investigations into crimes and human rights violations committed during the civil conflict (1980–1995). Under the rules of the ACHR, national legislators are – not without difficulty – recognising the limits imposed on their authority, legitimacy and capacity to shape constitutional provisions when creating amnesty laws.

An example of how receptive a Member State can be – at least in certain aspects – in changing its own constitution can be found in Chile. As an outcome of Olmedo Bustos (The last temptation of Christ) v. Chile, the Chilean congress derogated the 'previous censorship' established in Articles 19 and 25 of the Chil-

[11] See Articles 10, 11.3, 17, 57, 86.3, 93, 163 and 248 of the Constitution of Ecuador.

[12] Eréndira Salgado Ledesma, 'La probable inejecución de las sentencias de la Corte Interamericana de Derechos Humanos' [2012] 26 CCRMDC 221.

ean Constitution. The legislative process was fast-tracked and there was no political opposition.[13] Another example of deference to the IACtHR is seen in the compliance with Radilla Pacheco v. Mexico. In 2011, the Mexican congress issued a wide range of constitutional amendments to recognise the imperative effect and principles of international human rights law and to adopt the judgment.[14] However, these are exceptions. Not all the Inter-American rulings to strike down national and constitutional legislation are quickly accomplished with the full support of domestic legislators. There are cases (in Chile and Mexico) where the IACtHR has ordered amendments to domestic legislation in order to separate a military jurisdiction from an ordinary one and allow civil justice to prosecute members of the armed forces who have committed human rights violations against civilians in a non-military context. The legislative advances requested by the IACtHR have only been made in part and are still being interpreted in national high courts.[15]

Peru is a unique example, having gone through many ups and downs, with a constant political pressure to comply with the IACtHR's judgments. As a result of the cases Barrios Altos v. Peru (2001) and La Cantuta v. Peru (2006), Peruvian courts struck out its amnesty laws and nullified judicial processes which granted benefits to perpetrators of crimes of the civil conflict in 1991–2000.[16] In late 2017, the Peruvian executive power, for 'humanitarian reasons', pardoned former president Alberto Fujimori for his crimes against humanity. Through monitoring compliance with the judgments Barrios Altos v. Peru and La Cantuta v. Peru, the IACtHR found that such pardon represented a disproportionate barrier to the right of access to justice for victims of crimes against humanity.[17] The IACtHR left it to Peruvian tribunals to exercise judicial review of Fujimori's pardon, taking into account the primacy of the Inter-American jurisprudence.[18] Later, in October 2018, applying the reasoning of the IACtHR, but also taking into consideration that crimes against humanity cannot be pardoned, according to the International Criminal Court's jurisprudence, a Peruvian criminal court nullified Fujimori's pardon. The domestic criminal court reiterated the prohibition of am-

[13] See 'Ley de Reforma Constitucional N° 19.742' available at <https://www.leychile.cl/Navegar?idNorma=188827> accessed 18 March 2020.

[14] See more on the Mexican advances and setbacks in De Paz Gonzalez (n 2) 24–25.

[15] See for example the ambiguous response of the Mexican legislation (Article 57 of *Código Militar*) in the case IACtHR, *Cabrera Montiel v. Mexico*, *Supervisión de Cumplimiento (Resolución de la Corte,* 17 April 2015), paras 17–20. On Chile, see IACtHR, *Palamara Iribarne v. Chile*, *Supervisiòn de cumplimiento de Sentencia* (*Resolución de la Corte,* 1 September 2016), paras 30–35.

[16] For more detail, see Pablo Saavedra Alessandri, 'Algunas reflexiones en cuanto al impacto ecisions de las ecisions de la Corte Interamericana de Derechos Humanos' in Armin von Bogdandy and others, *Ius Constitutionale Commune en América Latina. Textos básicos para su comprensión* (Instituto de Estudios Constitucionales del Estado de Querétaro, Max Planck Institute 2017) 480.

[17] IACtHR, *Barrios Altos* and *La Cantuta v. Peru*, Supervision of Compliance (Resolution, 30 May 2018), paras 46–57.

[18] According to Contesse, this would be understood as 'constrained deference; the Court defers to domestic authorities as the proper locus to decide the merits of a pardon decision, but it does so in a way that nonetheless constrains what domestic courts may legally do'. Contesse, Jorge, 'Case of Barrios Altos and La Cantuta v. Peru' AJIL 113 [2019] (3) 568–574.

nesties as an Inter-American outcome and referred to Article 110 of the Rome Statute and the guidelines of the Criminal Court Tribunals for former Yugoslavia, Rwanda and Sierra Leone.[19]

6.2.2 Difficult dialogue: courts rejecting Inter-American guidelines

In Chile, Argentina, the Dominican Republic, Paraguay and Brazil,[20] there have been no significative advances of the Inter-American guidelines within constitutional interpretation. In fact, the withdrawal of Venezuela from the Inter-American jurisdiction was a consequence of a judgment issued by the constitutional court of Venezuela which declared violations of its autonomy and the authority of both the Venezuelan congress and the judiciary. As a consequence, the Venezuelan constitutional court declared the orders issued by the IACtHR in the case of Apitz Barbera v. Venezuela (2008) as inapplicable.[21]

In 2017, Argentina's Supreme Court challenged the role of the IACtHR in terms of legitimacy, as a regional body that cannot impose unwritten obligations and cannot interpret the scope of the ACHR on its own. The controversy arose as an outcome of Fontevecchia and D'Amico v. Argentina in which the IACtHR, on a basis of freedom of expression, gave an order to 'leave without effects in all its extremes' a civil judgment made against two journalists in 2001 and confirmed by the Argentinian Supreme Court.[22]

In February 2017, the Argentinian Supreme Court stated that '1. In light of the constitutional order, and the interpretation of subsidiarity, the IACtHR is not a fourth instance to review judicial decisions. 2. Imposing the revocation, the IACtHR overturns the res judicata nature of constitutional judgements by means of an illegal restitutory mechanism.'[23] This position was pointed out by Sagües as erratic, concerning and regressive.[24] The response to that legal challenge was delivered in late 2018. The IACtHR highlighted two aspects: i) an international judgment cannot be left to the will of a Member State or even to an internal branch of government, and ii) the Argentinian Supreme Court 'were suggesting that, as an internal body, its decisions cannot be overturned despite violating

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[19] Juzgado Supremo de Investigación Preparatoria, Exp. 000062001-4-SU-PE-01 (Resolución Diez, 3 October 2018), 123, 128, 142–145.

[20] See the state of the art in the compliance of Inter-American judgments in Laura Alicia Camarillo Govea and Andrés Rousset Siri (eds), *Dossier Ejecución de sentencias de la Corte Interamericana de Derechos Humanos* [2019] RRYD 4(21).

[21] Sala Constitucional de la República Bolivariana de Venezuela, exp. 08-1572 (Judgment, 18 December 2008) 25–28.

[22] IACtHR, *Fontevecchia and D'Amico v. Argentina*, Supervision of Compliance (Resolution, 18 October 2017), paras 1, 14, 17

[23] De Paz Gonzalez (n 2) 23, 26.

[24] Nestor Sagües,*¿Puede válidamente la Corte Interamericana abligar a que una corte suprema deje sin efecto una sentencia* cuya? 831. <https://archivos.juridicas.unam.mx/www/bjv/libros/10/4633/36.pdf> accessed 8 November 2019.

human rights'.[25] Therefore, according to international law, which state body or political branch caused the internationally wrongful act is absolutely irrelevant, because any state body – regardless of its functions or hierarchy – can produce international responsibility, and Argentina is obliged to comply with the international order.[26]

Other national courts are passive, rather than actively challenging of the IACtHR's judgments. In the Brazilian jurisdiction, compliance of Gomes Lund v. Brazil (2010) and Hacienda Brazil Verde v. Brazil (2016) is delayed and implicitly rejected by the Supreme Federal Court.[27] In the case of Gomes Lund, the IACtHR ordered that Brazil must derogate amnesty laws in accordance with general duties of adopting domestic legislation compatible with the ACHR's provisions. However, during the procedure of compliance, the Supreme Federal Court rejected such order, arguing that it did not have the mandate to exercise judicial review of amnesty laws.[28]

With this snapshot of the advances and setbacks of the substantive authority of the Inter-American judgments in various national jurisdictions and legislative bodies, we cannot identify uniform and solid mechanisms or effective procedures to follow up on the Inter-American guidelines within legislative and judicial arenas in the Member States.

One visible and positive indicator of the capacity of sharing international human rights insights in national scenarios is the level of cross-fertilisation between the IACtHR and domestic judiciaries. This level of dialogue between the IACtHR and national courts based on international guidelines has two aspects: i) the constitutional approach to create an Inter-American jurisprudential foundation, and ii) the constitutional interpretation of certain rights.

Supported by Articles 1 and 2 ACHR (obligations to adopt all human rights provisions within national legislations in other frameworks), the IACtHR highlights how national constitutions protect conventional rights. Therefore, the Court has created its own normative assumptions based on international guide-

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[25] IACtHR, *Fontevecchia and D'Amico v. Argentina,* Supervision of Compliance (Resolution, 18 October 2017), para 31.

[26] Ibid., paras 31–33.

[27] This, through legislative and administrative barriers to avoid labour regulations and bypass criminal proceedings on slave labour practices. See De Paz González, *The Social Rights Jurisprudence* (n 2) 177.

[28] Rosa De Almeida, 'Las paradojas de la ejecucion de las sentencias de la Corte Interamericana de Derechos Humanos en Brasil: Notas sobre el cumplimiento, deber de sancionar e investigar en el caso Gomes Lund' in Laura Alicia Camarillo Govea and Andrés Rousset Siri (eds), *Dossier Ejecución* (n 20) 23.

lines and case law to set wide standards on different rights and measures to be adopted by Member States.[29]

For instance, in Awas Tigni v. Nicaragua, the IACtHR highlighted that Nicaragua's Constitution had enough legal provisions (Articles 5 and 89) to protect indigenous rights, but without effective methods of adjudication.[30] Hence, the Court declared that Nicaragua breached its legal obligation to adopt legislative measures to allow a proper procedure on identification and demarcation of indigenous lands. Thus, the Court did not interpret the ACHR in isolation, but within the framework of pre-existing national legal provisions. Taking legal reasoning and normative dimensions from national courts is an effective method of the IACtHR to be in concordance with its national counterparts.[31]

6.3 The Second Level of Dialogue: Inter-American Guidelines and National Legislation

In the last six years, there have been backlashes against the Inter-American judgments. The first came from the Uruguayan Constitutional Court. In 2013, it tried to negate the Gelman v. Uruguay judgment (2011) regarding the statute of 'constitutional limitations' created to prosecute forced disappearances. The impediment was enshrined into a law called 'Ley de caducidad de la pretension punitiva del Estado'. Challenged by many victims of the dictatorship, Uruguay's Supreme Court declared that in light of the 'constitutional prohibition of retroactivity against an individual, the law should prevail and the crime would not be prosecuted'.[32] In its supervision of compliance, the IACtHR emphasised that, contrary to the core obligations of Uruguay as recognised in the ACHR, such law was an impediment to launch investigations, perform prosecutions, and constituted an effective barrier in access to justice for victims. Therefore, the IACtHR declared the Uruguayan law unenforceable and left it without effects.[33]

A similar controversy was seen in Costa Rica. As an outcome of Artavia Murillo v. Costa Rica (2012), the IACtHR ordered Costa Rica to create a legislative

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[29] In its first judgment, the IACtHR followed legal approaches from the International Court of Justice (ICJ) to create an argument and study effects of proofs and to develop a doctrine on reparations for the victims and cited *Corfu Channel*, (Judgment I.C.J. Reports 1949; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). On reparations, the IACtHR considered *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184). See IACtHR, *Velasquez Rodriguez v. Honduras* (Reparations and Costs, 29 July 1989), para 25, and *Velasquez Rodriguez v. Honduras* (Merits, 29 July 1988), para 127.

[30] IACtHR, *Awas Tigni v. Nicaragua* (Judgment, 31 August 2001), paras 116–118, 127.

[31] The IACtHR took arguments on discrimination developed by high courts from Argentina, Colombia and Costa Rica. IACtHR, *Gonzales Lluy et al v. Ecuador* (Judgment, 1 September 2015), paras 256–257, 265–266; on the justiciability of social rights the IACtHR noted that labour law protections are explicitly recognised into national legislation and constitutions of Member States, IACtHR, *Lagos del Campo v. Peru* (Judgment, 31 August 2017), para 145.

[32] De Paz Gonzalez (n 2) 21.

[33] IACtHR, *Gelman v. Uruguay*, Monitoring Compliance with judgment (Resolution, 20 March 2013), paras 37–39.

framework allowing in vitro fertilisation (IVF). To comply with the order, in September 2015, the head of the executive branch issued a Decree, 39210-MP-S, that allowed the IVF technique. However, the Constitutional Chamber of the Supreme Court of Costa Rica nullified that decree. Reaffirming its capacity to exercise positive judicial review on domestic legislation, the IACtHR declared that: a) the prohibition of IVF could not persist in Costa Rica; b) the Executive Decree 39210-MP-S must remain in force.[34]

This method of supranational judicial review used by the IACtHR can be seen in a range of judgments and supervisions of compliance and makes it an agency of supranational supervision of domestic legislation, in accordance with the ACHR's provisions. For example, as a result of the orders stated in the cases of Massacres of El Mozote and nearby places v. El Salvador (2012), Contreras et al v. El Salvador (2011), and Serrano-Cruz Sisters v. El Salvador (2005), the constitutional chamber of El Salvador in 2016, under its obligations derived from international law on crimes against humanity, declared the unconstitutionality of 'Ley de Amnistía General para la Consolidación de la Paz' issued in 1993 by the Congress of El Salvador.[35] This is a concrete example of how the Inter-American authority is replicated in domestic scenarios of judicial approaches when dealing with impunity and criminal prosecutions.

However, in the spring of 2019, the national congress of El Salvador began a legislative process (Ley Especial de Justicia Transicional y Restaurativa para la Reconciliación Nacional) in order to draft a list of cases and dates/facts on the human rights violations and massacres perpetrated by the military that are to be investigated. With a quick response, the IACtHR in May 2019 halted such legislative project in order to prevent a structural violation of the right of access to justice for victims of the civil war in El Salvador.[36]

The same incompatibility of legislative measures made in an attempt to avoid the Inter-American judgments was seen in Guatemala. In compliance with the judgment of Molina Theissen v. Guatemala (2004), four high-ranking officials of the Guatemalan army were, in late May 2018, found guilty of the forced disappearance of Henry Molina. In the aftermath, the executive branch proposed changes in the criminal legislation to limit the scope of investigations. In late 2018, the Guatemalan congress proposed changes to nullify criminal provisions (envisaged to be included in Article 8 of 'Ley de Reconciliación Nacional de 1996') that ordered investigating and prosecuting of crimes against humanity.

The strong legitimacy and authority of the IACtHR can be seen in the supervision of compliance with various judgments related to massacres. In early 2019, the president of the IACtHR halted the legislative process under approval

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[34] IACtHR, *Artavia Murillo v. Costa Rica,* Monitoring Compliance with judgment (Resolution, 26 February 2016), paras 31–36.

[35] *Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador,* Proceeding 144-2013/145-2013, 'Ley de Amnistía General para la Consolidación de la Paz' (Judgment, 13 July 2016), 40–42.

[36] IACtHR, *Massacres El Mozote and nearby places v. El Salvador,* Supervision of Compliance (Resolution, 28 May 2019), paras 17–44.

in Guatemala. In the resolution, it highlighted the legally binding obligations of Guatemala recognised within international law, and the res judicata effect of the Inter-American judgments. Hence, the IACtHR ordered Guatemala to refrain from the legislative process of reforming the law to provide a general amnesty for serious human rights violations.[37]

Chile represents a contrasting example as regards how political branches adopt or refuse to adopt the Inter-American guidelines. For instance, compliance with Palamara Iribarne v. Chile (2005), in which the IACtHR ordered specific adaptations of internal legislation to satisfy the ACHR standards – leaving civilians out of the military jurisdiction and protecting freedom of expression – has been difficult. In spite of some positive steps and internal discussions and legislative projects in the Chilean congress,[38] military jurisdiction still applies to civilians and Chile has exceeded the time considered reasonable to adapt its national military legislation to the ACHR's standards.[39] In 2006, as a result of Claude Reyes and others v. Chile, regarding freedom of information, the Court declared that Chile was in violation of Article 13 ACHR and ordered the country to create a legislative framework and other fundamental legislative and institutional measures to grant access to information as a matter of public interest. In 2008, Chile approved this framework in 'Ley 20.285' and the IACtHR declared that Chile had adopted enough internal measures to harmonise its internal institutions with the ACHR's provisions.[40]

In 2018, as a result of the supervision of compliance with the judgment in Mapuche Leaders v. Chile (where unidentified witnesses were the grounds for incarceration of six indigenous leaders), the IACtHR noted that Chilean national congress had not modified its criminal law provisions related to unlawful evidence, terrorism or methods for identifying protected witnesses.[41] In addition, the IACtHR declared that Chile was legally bound to comply with all judicial, administrative or other measures, and nullify the criminal sentences issued against the Mapuche leaders. Despite delays and political opposition in the Chilean congress on this issue, the Supreme Court of Chile in May 2019 declared that, in order to satisfy the IACtHR's request, and under obligations imposed upon Chile under

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[37] IACtHR, *Members of Aldea Chichupac, 'Aldea El Rabinal', Molina Theissen and other 12 cases v. Guatemala*, Monitoring Compliance with judgment (Resolution, 12 March 2019, paras 28–29, 49–53. The rest of cases one prohibitions of amnesty when dealing with gross human rights violations cited by the Court were: *Bámaca Velásquez, Myrna Mack Chang, Maritza Urrutia, Masacre Plan de Sánchez, Molina Theissen, Carpio Nicolle y otros, Tiu Tojín, Masacre de Las Dos Erres, Chitay Nech y otros, Masacres de Río Negro, Gudiel Álvarez y otros (Diario Militar), García y tudiors, Miembros de la Aldea Chichupac*, ibid., para 50.

[38] Bárbara Ivanschitz Boudeguer, 'Un tudio sobre el cumplimiento y ejecución de las sentencias de la Corte Interamericana de Derechos Humanos por el Estado de Chile' [2013] 11 EC, 275.

[39] IACtHR, *Palamara Iribarne v. Chile*, Monitoring Compliance with judgment (Resolution, 1 September 2016), paras 24, 33–36.

[40] IACtHR, *Claude Reyes and others v. Chile*, Supervision of Compliance (Resolution, 24 November 2008), paras 14–22.

[41] IACtHR, *Norín Catrimán and others (Mapuche leaders) v. Chile*, Monitoring Compliance with judgment (Resolution, 28 November 2018), paras 61–66.

international law, the effects of the sentences handed down against the Mapuche leaders were stayed.[42] Currently, the Chilean Constitutional Court is facing an internal crisis due to accusations between justices regarding delays of cases on gross human rights violations.[43]

Thus, Inter-American guidelines have been adopted in different and contrasting ways by national agencies, courts and legislators. One example can be seen in the Dominican Republic (DR). Since 2010, the DR has been trying to breach the IACtHR's compulsory jurisdiction. Through different legal and judicial means, the DR has tried to avoid compliance with Yean and Bosico v. Dominican Republic (2005) and Expelled Dominicans and Haitians v. Dominican Republic (2014). In keeping with its public policy restricting citizenship of persons with Haitian background, which has been adopted by all DR branches of government, the Constitutional Court of DR issued two infamous judgments. The first one, TC/168/13, limited the concept of the right to a nationality, excluding all 'migrants in transit'. In 2014, the same court issued a second judgment and declared that acceptance of the Inter-American compulsory jurisdiction'[44] was carried out in breach of national DR law. In response, the IACtHR declared such judgment without effect. However, after this, DR authorities have not attended further hearings on compliance with the judgments Yean and Bosico v. Dominican Republic and Expelled Dominicans and Haitians v. Dominican Republic.[45] In fact, up until 2019, the IACtHR highlighted that judgment TC/168/13 continued to have legal effects. In analysing this behaviour on the part of DR, the Court invoked two international law concepts: the importance of Articles 26 and 27 of the Vienna Convention, which legally bind the DR to the ACHR,[46] and the lack of grounds for the estoppel doctrine, argued by the DR's Constitutional Court.[47]

6.4 Soft Law and General Comments to Expand ACHR Provisions: The Inter-American Universalist Approach

6.4.1 Defining the scope of ACHR provisions

Undoubtedly, Inter-American approaches to the ACHR are being complemented, redefined and shaped by the guidelines of international human rights bodies. In the last few years, the IACtHR has been developing an evolutive interpretation of Articles 1(1), 2(1), 19, 21, 29 and 26 ACHR, to entrench international provisions

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[42] Resolución del Pleno de la Suprema Corte de Justicia de Chile AD-1386-2014 (16 May 2019), paras 14–15.

[43] Jorge Contesse, *The Downfall of a Constitutional Court*, 28 April 2020, available at <https://verfassungsblog.de/the-downfall-of-a-constitutional-court/>

[44] See the critical approach of Nassef Perdomo Cordero, 'Análisis crítico de la sentencia TC/0168/13' [2016] 28 RDHADC 93.

[45] IACtHR, *Yean and Bosico and Dominican-Haitians expelled v. Dominican Republic,* Monitoring Compliance with judgment (Resolution, 12 March 2019), paras 27–30.

[46] Ibid., paras 31–37.

[47] Ibid., paras 52–56, 65–67.

and general comments. In fact, based on the merits of several judgments, the IACtHR uses contextual information on how human rights should be understood and implemented according to a range of UN TBB. This methodology can also be seen in national high courts. In particular, international law defines the Inter-American framework for indigenous and environmental rights based on international law,[48] children's rights, migrants, reproductive health, the right to education, and labour law.[49]

Most of the approaches of the IACtHR serve to cover the absence of clear Inter-American regulations. Ibañez Rivas identifies various fields in which international insights have been useful and relevant, such as definition of internal armed conflicts and the value of truth commissions in defining the context of gross human rights violations (for instance in cases from Guatemala and El Salvador).[50] After forty-odd years of compulsory jurisdiction, the integration of international law into the Inter-American approaches is growing and the adoption of international guidelines is reinforcing judicial legitimacy and expanding the argumentative basis of the ACHR. Such integration has a normative root: Article 29 (d), which states: 'No provision of this Convention shall be interpreted as: […] d. Excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.'

Some of the ACHR's provisions are quite simple and short. From a purely legal standpoint, the rights of the child established in Article 19 ACHR do not recognise the right to decent living conditions.[51] In the same vein, the rights to property and cultural identity of indigenous people are not textually recognised within Article 21 ACHR[52] and the right to truth in a democratic society is not explicitly part of the right to information (Article 13 ACHR). However, the IACtHR is aware of the necessity to settle a new human rights culture within domestic jurisdictions by adopting the interpretations of international law.

For instance, in order to build a strong jurisprudential foundation and define a precise scope when a violation of Article 19 ACHR is claimed, the IACtHR links

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[48] Marco Odello, 'Indigenous Peoples' Rights and Cultural Identity in the Inter- American Context' [2016] 16(1) *The International Journal of Human Rights;* on the wide range of environmental provisions, see the IACtHR, *Advisory Opinion OC-23/17* (15 November 2017), paras 123–130.

[49] The flow of international human rights law is providing broad solutions to common problems. This is part of the global human rights' contextualised language and struggles in pursuit of social justice, based on environmental protection, accountability of transnational corporations, indigenous rights protection and children's rights. De Paz Gonzalez (n 2) 40.

[50] Juana Ibañez, 'El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos' [2016] 36 RDE 167.

[51] The ACHR establishes: '*Article 19. Rights of the Child*. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.'

[52] This right does not say anything on indigenous property: '*Article 21. Right to Property*. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.'

it to many provisions recognised in the Convention on the Rights of the Child, its protocols and General Comments of the Committee of the Rights of the Child (CRC).

Essentially, the IACtHR's reasoning departs from soft law guidelines to define States' obligations as regards children's dignity, right to life, personal integrity, right to a name, identity, education, nationality, and access to justice. My assertion is based on landmark cases such as Street Children (Villagrán-Morales et al.) v. Guatemala,[53] Juvenile Reeducation Institute v. Paraguay,[54] Servellón-García et al v. Honduras; Yean and Bosico v. Dominican Republic, Contreras et al v. El Salvador; González et al (Cotton field) v. Mexico, Atala Riffo and daughters v. Chile, Gelman v. Uruguay, and Chitay Nech and Others v. Guatemala.[55]

In the cases of Mapiripan Massacre v. Colombia and Massacres of Santo Domingo v. Colombia, the IACtHR reasoned regarding the importance of the Geneva Convention of 1949 (and the Protocol II Additional) in defining the scope of absolute provisions and positive obligations of a State to protect children's lives and personal integrity in armed conflicts.[56] In the case of Massacres El Mozote, the Geneva Convention was also cited, to argue regarding prohibitions of extra-judicial executions, and to define a legal framework for protecting children and members of civil society in armed conflicts.[57]

According to Pentassuglia, the IACtHR 'ha[s] generally embraced a dynamic, evolutionary interpretation in light of a variety of international law text'.[58] Overall, there are three indicators of the increasing Inter-American integration of the guidelines from international law.[59] The first corresponds to the factual study of the contexts in a range of cases, in order to enable objective reasoning on the merits. The second approach is the integration of the ILO Convention 169 (Articles 7, 13–15), the UN Declaration on Indigenous Peoples Rights, and Articles 1(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), to expand the scope of Article 21 ACHR, creating a whole framework for the right to indigenous property (linked to their right to land and natural resources), previous consultation, cultural identity based on traditional patterns of use and occupation of ancestral territory. This approach is highlighted in several cases related to indigenous people: Awas Tingni v. Nicaragua, Yakye Axa v. Paraguay, Sawhoyamaxa

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[53] IACtHR (Judgment of Merits, 19 November 1999), paras 192–195.

[54] On the rights of life, personal integrity, social rights for children deprived of liberty, and best interest of the child, IACtHR (Judgment, 2 September 2004), paras 149, 159–163, 172.

[55] For a broad explanation of these cases, see De Paz Gonzalez (n 2) 95, 103.

[56] IACtHR, *Mapiripan Massacre v. Colombia* (Judgment, 15 September 2015), paras 114–115; *Massacre of Santo Domingo v. Colombia* (Judgment, 30 November 2012), paras 212–213.

[57] IACtHR, *Massacres El Mozote and nearby places v. El Salvador* (Judgment, 25 October 2012), paras 141, 149.

[58] Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' [2011] 22 EJIL 181.

[59] This wide interpretation has been described as an attempt at universalist conception of human rights. See Ludovic Hennebel, 60 'The Inter-American Court of Human Rights: The Ambassador of Universalism' RQDI [2011] h-s *Septembre*.

v. Paraguay, Xákmok Kásek v. Paraguay, Xucuru Indigenous People v. Brazil, Saramaka v. Suriname, The Kichwa people of Sarayaku v. Ecuador, Kuna and the Emberá v. Panama and Kaliña Lokono Community v. Suriname.[60]

6.4.2 International evidence and the factual study of the context

The IACtHR has been using information and documentary evidence provided by UN Human Rights Committees, the different Special Rapporteurs, General Comments of UN Treaty bodies, and specific findings of monitoring bodies. The utility of this information is the output of visits, reports, contextual meetings, and field-based interviews, carried out by UN Special Bodies/Rapporteurs in domestic scenarios, including closer communication with national NGOs, survivors, victims and local authorities. The IACtHR's technique of taking contextual information to capture a genuine picture of the facts has been a key factor to gain legitimacy for its own assumptions when dealing with patterns of discrimination, political and structural violence against vulnerable groups (indigenous people, women, children, migrants or people deprived of liberty) within Member States.

For instance, information provided by UN bodies has been used in all cases related to massacres. In Massacre of Pueblo Bello v. Colombia (2006), Mapiripan Massacre v. Colombia (2006) and La Rochela Massacres v. Colombia (2007), the Court incorporated as documentary evidence information related to forced displacement provided by the Special Rapporteur on Extra Judicial Executions and reports of the UN High Commissioner on the human rights situation in Colombia.[61] Knowing the context has been essential to capture the truth of the facts in gross human rights violations. In the case of Massacres Las Dos Erres v. Guatemala, the Court noted how national authorities used a broad and illegal 'internal enemy's doctrine' to target political opponents, indigenous leaders and people from Mayan communities and kill them. The international evidence gathered by the Working Group on Enforced or Involuntary Disappearances captured a plurality of events and high levels of aggressions. This evidence was used to study the facts and the types of violations committed by members of the Guatemalan army.[62]

With the same international lens, this time on the context of general discrimination, we can see that, in Norín Catrimán (Mapuche leaders) v. Chile (2014), the IACtHR gathered factual evidence to unveil patterns of stigmatisation from both governmental agencies and the Chilean media. Taking into account the information from the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the IACtHR obtained a broad picture of facts related to marginalisation, political stigmatisation, exclusion and dis-

[60] This analysis can be seen broadly in De Paz Gonzalez (n 2) 45–90.

[61] IACtHR, *Mapiripan Massacres v. Colombia* (n 56), paras 90, 96.57; see also the case of *Massacres La Rochela v. Colombia* (Judgment, 11 May 2007), paras 64, 80, 83, 168; *Massacre of Pueblo Bello v. Colombia* (n 56), paras 78, 79.

[62] IACtHR, *Massacre Las Dos Erres v. Guatemala,* Monitoring Compliance with judgment (Resolution of 2012), paras 56 and 112.

crimination of indigenous groups and minorities.[63] In Expelled Dominicans and Haitians v. Dominican Republic (2014), the IACtHR studied some facts citing relevant information provided by the Committee on the Elimination of Racial Discrimination, and United Nations' Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Hence, the IACtHR highlighted three vulnerability conditions: i) the socio-economic situation and the alleged discriminatory institutional policy against Haitians, ii) the alleged problems for Haitians to obtain official documents, and iii) the systematic practice of mass expulsions.[64] In the case of Afrodescendants from Cacarica River Basin v. Colombia (2013), the IACtHR applied several provisions from international humanitarian law (Principle 21.3 of the UN Guiding Principles on Forced Displacement), indicating that property and possessions left behind by displaced people must be protected against destruction or illegal appropriation or use.[65]

A substantive concept that feeds the Inter-American approach to environmental law and the importance of natural resources for indigenous people was unveiled in Kaliña and Lokono Peoples v. Suriname. Here, the IACtHR linked the role of cultural and living practices of indigenous peoples to environmental protection and sustainability of the territories where they live. These guidelines emerged from international standards enshrined in the UN Convention on Biological Diversity, the World Heritage Convention and the UN Convention on Climate Change.[66]

In several cases of massacres, the IACtHR took evidence and information provided by the committees of the specialised bodies, to determine the contents of certain rights and to uncover patterns in states' behaviours. For instance, within the framework of human rights damages and compensations to victims, in the case of Ordenes de Guerra v. Chile (2018), the IACtHR considered the non-restrictive approaches elucidated by the Special Rapporteur on Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms in order to have a wide framework on the prescription of actions to claim human rights damages and compensation.[67]

In the case of Women victims of sexual torture in Atenco v. Mexico (2018), the IACtHR analysed international guidelines on the proportionality of the use of force (by the police) and the prohibition on treating a civilian population as the enemy. In particular, the guidelines of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association were fundamental in identifying obligations to protect human rights in police intervention on social

[63] IACtHR, *Norin Catriman and others (Mapuche leaders) v. Chile* (Judgment, 29 May 2014), paras 76–79, 82–83.

[64] The general facts were analysed in light of the information provided by the victims to the state's representatives. Ibid., paras 154, 158, 160.

[65] Ibid., para 81.

[66] Ibid., paras 174–180.

[67] IACtHR, *Ordenes de Guerra v. Chile,* Monitoring Compliance with judgment (Resolution, November 2018), paras. 79–83.

protest contexts.[68] More important was the legal approach of the IACtHR to sexual torture of women – as an instrument of domination in non-war contexts. Bearing in mind the guidelines of the International Criminal Tribunal for former Yugoslavia Prosecutor v. Kunarac, Kovac and Vukovic, and the Special Court for Sierra Leone, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao), the IACtHR noted that police officers and public servants – who in this case had the group of women under their control – used sexual torture as a symbolic way to dominate and humiliate them based on their gender and as members of civil society.[69]

6.5 Domestic Implementation of International and Inter-American directives

Other important support for the legitimation of the IACtHR and the international guidelines in Member States is provided by the significant diversity of measures deriving from the IACtHR's judgments improving the work of national agencies: domestic judiciaries, the executive branches, prosecutors and legislators. The Inter-American judgments can be seen as a bridge between international law's legitimacy and the necessary adoption of judicial and political actions within ACHR Member States. The question is how transpose this narrative into real and long-term preventive measures and a diversity of remedies in the field of human rights. Below, I will refer to judgments where compliance requires legislative actions and judicial proceedings.

In order to appreciate the work-in-progress regarding legitimation of international law in diverse jurisdictions, we must consider that each judgment issued by the IACtHR represents a set of political and legal challenges to be implemented in ACHR Member States. In the last ten years, the IACtHR has developed specific parameters to legally and politically bind Member States to comply with a wide range of measures and reparations.

However, unlike in the European model of sentencing, the Inter-American judgments provide that Member States must: a) adopt measures of restitution/rehabilitation, b) adopt measures of satisfaction (including cultural programmes, human rights training programmes, budgetary allocations), c) adopt guarantees of non-repetition; and d) pay pecuniary damages to victims/survivors.[70] The diversity of reparations issued by the IACtHR has granted the IACtHR legitimacy among scholars and survivors. Every judgment is welcomed with hopes for changes and new routes towards human rights, but the reality of each country reveals unique barriers.

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[68] IACtHR, *Women victims of sexual torture in Atenco v. Mexico*, Monitoring Compliance with judgment (Resolution, November 2018), paras. 170, 174–177.

[69] Ibid., paras. 200–207.

[70] See all the specific individual and communitarian measures ordered by the IACtHR in Jacqueline Sinay Pinacho Espinosa, *El derecho a la reparación del daño en el Sistema Interamericano* (Comisión Nacional de los Derechos Humanos, 2019) 44–83.

6.5.1 *The approach of national courts on international human rights law*

In judging, national courts are catching up with the ACHR general obligations. For instance, a difficult task is the prosecution of perpetrators of gross human rights violations. One can observe that there is no uniformity on procedures and judicial approaches in how national courts adopt the Inter-American doctrine. From Mexico to Argentina, there are some courts that are more proactive than others. Each national court is developing its own dialogue with the IACtHR, with the current political powers being an additional factor to consider.

The common condition among Member States is that they do not have a proper method to adopt Inter-American judgments. This situation can be observed in the Chilean Constitutional Court (CCC).[71] In fact, Nogueira points out that the CCC cites foreign doctrine more often than IACtHR case-law.[72] Another contrasting model is the Constitutional Chamber of Costa Rica, which partially accepts the supra-constitutional efficacy of international human rights law, but only when the Inter-American standard protects the right in question to a greater extent than domestic law does.[73] The Mexican Supreme Court's (MSC's) model on the value of the IACtHR's standards is quite similar. In 2013, the MSC stated that the IACtHR's jurisprudence would be applied only if the Mexican constitution/jurisprudence did not provide a better protection of human rights. Another concerning issue in Mexico is that victims and survivors recognised by the IACtHR usually have to begin new administrative or constitutional litigation proceedings to obtain compensations for human rights damages.[74] Meanwhile, during the term of Lula Da Silva, Brazil showed advances related to the then-unsolved case of Hacienda Brazil Verde v. Brazil (2016), as regards the creation of specialised administrative and labour legislation to prevent slavery and forced labour. However, in late 2017, former president Temer issued a decree restricting the definition of slave labour to extreme circumstances, creating serious obstacles to the inspection of slave labour, and undermining public accountability in regard to the procedures for inclusion of employers on the black list of slave labour.[75]

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[71] Jimena Galdámez Zelada, 'El valor asignado por la jurisprudencia del Tribunal Constitucional a la jurisprudencia de la Corte Interameircana de Derechos Humanos', [2014] 12 CCRMDDC 329.

[72] For instance, judgments of the German Federal Court, the Supreme Court of the United States, and the Spain's *Tribunal Constitutional*. Humberto Nogueira Alcalá, 'El uso del derecho convencional internacional de los derechos humanos en la Jurisprudencia del Tribunal Constitucional chileno en el período (2006–2010)' [2012] 39 RCD 184–5.

[73] Victor Orozco Solano, 'La ejecución de las sentencias de la Corte Interamericana. El caso de Costa Rica' in Camarillo Govea and Rousset Siri (n 20) 26.

[74] See the particular and contrasting Mexican model built by the Mexican Supreme Court through the context of CT 293/2011 (MSC, Judgment, 3 September 2013). Additionally, the Inter-American compliance in Mexico very much depends on the work of a wide range of local agencies, authorities and even political actors. In fact, there are no concrete mechanisms or procedures to follow-up each judgment.

[75] See De Paz Gonzalez (n 2) 177.

As has been highlighted in this chapter, domestic courts are an ideal thermometer for measuring how deeply international law is – or is not – penetrating into the legislative and judicial branches of ACHR Member States. In terms of a driving force of international human rights, national courts are pushing new insights designed by the regional specialised agency: the IACtHR. However, there is one relentless factor preventing further advances that can be seen in several Member States: a complicated pursuit of accountability of perpetrators (military agencies) that have historically caused gross human rights violations and that still hold power. Nonetheless, and alongside this narrative, both international law and the IACtHR itself are gaining legitimacy because the IACtHR has been the last resort in the pursuit of justice for victims and survivors of gross human rights abuses. In the next part of this chapter, I will highlight some concrete examples of the contrasting interpretations of the ACHR and international law in various ACHR Member States.

6.5.2 Pursuit of justice in Guatemala

Guatemala is en route to compliance with the Inter-American rulings related to forced disappearances and massacres committed by members of the army and death squads during in the eighties. In 2004, the IACtHR handed down the judgment of Marco A. Molina Theissen v. Guatemala (2004), which ordered investigations to be carried out in accordance with internal laws and criminal proceedings. Up until May 2018, a national court from Guatemala found guilty for crimes against humanity four defendants (former members of the army) committed against Marco Antonio and Emma Guadalupe Molina Theissen. In the judgment issued by a low court, it was highlighted that the offenders had breached the principle of humanity and international humanitarian law obligations recognised by Guatemala within the framework of the Geneva Conventions and the Convention against Torture and Cruel Treatment.[76] As regards its legal reasoning, the Guatemalan Criminal Court highlighted the 'abundant international jurisprudence' derived from the Nuremberg Tribunal, the International Criminal Tribunals for Rwanda and former Yugoslavia, and the Special Courts for Sierra Leona and Cambodia.[77]

Such conviction of former military officers is not an isolated case. Since 2011, the Guatemalan criminal courts have been issuing landmark decisions to punish (among others) the perpetrators of the Massacre of Las Dos Erres, observing both Inter-American guidelines and international law jurisprudence.[78] It is undeniable that national judicial agencies – when dealing with gross human rights violations within domestic criminal justice – are using international guidance. Most

[76] Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente de Mayor Riesgo Grupo "C" de Guatemala (Judgment, 23 May 2018) 92–94, 223, 269–272.

[77] Ibid. [1021–1022].

[78] See Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente de Mayor Riesgo Grupo "C" de Guatemala, case C-01076-2010-00003 (Judgment, 2 August 2011).

likely, without the IACtHR's supervision of compliance, it would have not been possible to bring those who have committed crimes against humanity before national judges.

6.5.3 The Peruvian constitutional court

Peru seems to represent a positive model in receiving the Inter-American guidelines. The Peruvian courts are gaining legitimacy through courts judging on historical facts, creating certain accountability for crimes committed by the political-military power during the nineties. The consequences of the IACtHR's judgments Barrios Altos and La Cantuta (two massacres perpetrated by death squads under Fujimori's orders in 1991 and 1992) had various effects within the legislative and constitutional system in Peru. The first effect was the derogation of the amnesty law 'Ley 26479' from 1995, issued under Fujimori's regime in favour of police, military officers and civilians who had committed crimes between 1980 and 1995. In 2005, during the process of compliance with the La Cantuta judgment, the IACtHR declared the incompatibility of amnesty laws with Article 1(1) ACHR, leaving all such laws without effect. Rather, criminal investigations into crimes against humanity committed during Fujimori's Reich were relaunched. As a result, in 2005–2007, Fujimori and members of his government were convicted for crimes against humanity.[79]

Another effect of the Inter-American input in the Peruvian Constitutional Court is the adoption of soft law as a parameter of reference on human rights. In the case 2834/2013-PHC-TC, the Constitutional Court declared that Peru had been adopting instruments on the rights of elderly people that might be used to create a framework within the Peruvian Constitution and the Inter-American treaties.[80] This is a very recent approach and can be considered a step forward, given that the Peruvian government has in the past not readily agreed with the results of individual complaints procedures before the UN Committees. For instance, in 2005, the Human Rights Committee disclosed violations of Articles 2, 7, 17 and 24 of the ICCPR in the case of a woman excluded from therapeutic abortion.[81] Only in 2015 did the Peruvian authorities partially recognise the violations and compensate the woman for failing to ensure an effective remedy (ther-

[79] IACtHR, *La Cantuta v. Peru,* Monitoring Compliance with judgment (Resolution, 20 November 2009), paras 7–8. Fujimori not only ordered massive killings, he also carried out privatisation of key Peruvian public enterprises, controlled the judiciary, supressed the national congress, and created decrees to dismiss thousands of public servants. See John Crabtree, 'The Collapse of Fujimorismo: Authoritarianism and Its Limits' [2001] 20 BLAR 287.

[80] Case 2834/2013-PHC-TC, Judgment of 25 January 2017, paras 27–28. See the concurrent opinion of Justice Eloy Espinosa Saldaña-Barrera.

[81] The victim claimed 'that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy'. HRC, CCPR/C/85/D/1153/2003, 22 November 2005.

apeutic abortion) and for causing her physical and mental suffering (degrading treatment).[82]

6.5.4 Mexican courts: UN TBB's General Comments shaping constitutional rights

The role of the IACtHR as a public agency promoting a wide-ranging culture of human rights in Member States can also be noted in recent Mexican human rights approaches. Thus far, the most visible are the new insights into human rights derived from the judicial system. In particular, Mexican judges are introducing and clarifying new perspectives on education, gender, indigenous rights, labour law and environmental rights obtained from the qualities of progressive and interrelated human rights standards enshrined in the ICESCR and ILO Conventions.

For instance, in relation to the principle of progressivity and non-regressive measures regarding education, the MSC stated that national public universities must pursue a no-fee policy. That was not to say that public universities must provide education for free. However, the MSC defined a new method that obliged legislators to provide a sufficient budget for public universities to grant gratuity of university education in the long term. The reasoning of the MSC emerged from the interpretation of Articles 1, 2(1) and 13 ICESCR, adopted by the Committee on Economic, Social and Cultural Rights. Using such legal considerations, the MSC ordered a local government to transfer enough economic resources to cover university fees for all students.[83] Moreover, the MSC argued that limits and budgetary restrictions on education must be justified on a rational – and evident – basis of the availability of resources, as ordered in Article 2(1) ICESCR.[84]

The most significative advances in the Mexican approach to international social rights law can be seen in litigations to stop infrastructure projects that erode local ecosystems and their environmental services. In key amparo proceedings, taking the Inter-American guidelines into consideration, the Mexican judiciary is increasingly implementing a set of positive obligations (under the precautionary principles of the Stockholm and Rio Declarations that halt mega-projects in order to protect ecosystems (ecological services) and ordering measures to prevent environmental damages).[85]

In November 2018, Mexico ratified the ILO Convention 49 on the Right to Organise and Collective Bargaining. Due to the unions' political power and high level of involvement in the Mexican economy, trade agreements and political life, this convention might be the start of a new age, ending corporate power and dis-

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[82] 'Peru compensates woman in historic UN Human Rights abortion case' <https://www.ohchr.org/EN/NewsEvents/Pages/PeruAbortionCompensation.aspx> In 2005, Peru was condemned by the HR Committee (202/1986) for the Case of Graciela Alto del Avellanal because of the gender discrimination in the Peruvian civil code that prohibited women from representing their own interests during marriage.

[83] MSC, *Amparo en revisión* 350/2017 (*Primera Sala*, Judgment, 20 April 2016), paras 173–175.

[84] Ibid., paras 169–171.

[85] Isaac De Paz González and María del Refugio Macias Sandoval, 'La justiciabilidad de los derechos sociales y los altibajos de su interpretación en el sistema constitucional mexicano' [2019] RLDS (29) 25.

crimination that subjugate unions and workers' rights to political power. Regarding indigenous rights, ILO Convention 169 has been a key instrument in giving a shape and legal dimension to cultural identity and protecting the right of indigenous peoples to be consulted. As an illustration, the Community of Juba Wajin challenged a federal concession that allowed a gold mining project on their territories. When they challenged such concession through an amparo proceeding, the federal authorities alleged lack of identity as an indigenous group. However, the federal district court granted protection in favour of the Juba Wajin community based on the Inter-American guidelines from Saramaka people v. Suriname (2007) and Kichwa of Sarayaku v. Ecuador (2012), the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and General Comment 23 of the Human Rights Committee on the Rights of Minorities (Article 27 ICCCPR). Hence, the federal judge nullified the concessions for gold mining and granted territorial and cultural protection to the Juba Wajin's lands and their way of life.[86] Regarding agri-business, Mayan communities from the southeast of Mexico halted Monsanto's concession granted by the executive branch in 2010 for soybean farming on 500 hectares. Since 2010, Mayan communities have lodged several lawsuits and amparos against concessions granted in favour of Monsanto and Pioneer. In a case based on constitutional grounds, the MSC in 2017 halted several concessions under the principle of precautionary protection of environment enshrined within the Rio Declaration and recognised the right of indigenous communities to be consulted in accordance with the ILO Convention 169 guidelines.[87]

6.6 Conclusions

As a regional human rights agency, the IACtHR serves as a complementary work-in-progress on substantive and procedural ways forward that Member States, on their own, would not be able to achieve. In this regard, human rights are a point of convergence of regional and national agencies in the Latin American region. Here, the IACtHR has assumed three important functions that promote the slow but steady penetration of new human rights practices into domestic spheres.

The first function is the development of new interpretations giving concrete significance to the ACHR's provisions on the rights of the child, indigenous rights, education rights, reproductive health rights and labour rights, connecting the ACHR with the General Comments, Rapporteurs and Recommendations provided by the UN TBB. The second function is that the IACtHR provides legitimation on international grounds, causing Member States to change to specific legislations preventing or suppressing amnesty laws in the case of gross human rights crimes in Guatemala, Peru, Paraguay and El Salvador. The third function is

[86] *Amparo indirecto* 429/2016 (Judgment, 28 June 2017) First District Court of Guerrero, 48–58.

[87] MSC, *Amparo indirecto* 921/2016, (Judgment, 5 April 2017) Second Chamber, 44–58. This judgment must be read in connection with precedents where international guidelines were highlighted in *amparos en revisión* 198/2015, 270/2015, 498/2015 y 499/2015 of the Supreme court of the Nation, Second Chamber.

that extensive interpretation of the IACtHR is opening for broad dialogues and arguments in national courts, expanding domestic constitutional rights.

However, there are other hotspots that demonstrate the difficulty of implementing international standards in national legislations and courts. Legislatures show resistance to creating legal frameworks when dealing with citizenship (Dominican Republic), judicial review (Argentina) and reproductive rights (Costa Rica) or in issues that involve the military jurisdiction (Mexico, Brazil, and Chile).

In procedural terms, there are three positive indicators of the integration of the Inter-American guidelines and international law into Member States. Such integration can be observed in domestic procedures to punish crimes against humanity on the grounds of international law. A second indicator is the procedural and substantive approach using soft law for cases related to indigenous rights, using case-law from both the IACtHR and domestic courts derived from ILO Convention 169, connected to Article 21 ACHR. The same basis can be seen in the articulation of the rights of the child in Article 19 ACHR, in accordance with the General Comments in the Convention on the Rights of the Child. The third sphere of influence is the construction of new jurisprudence on reproductive health rights, labour rights and social security, derived from the General Comments of the Center for Economic and Social Rights and the new scope of positive environmental obligations recognised by Member States in several conventions and declarations on biodiversity, global warming and environmental protection.

Overall, there are no clear patterns on how national authorities are following or adopting the General Comments and Concluding Observations of the TBB. My assumption is that international law strongly depends on the subjective views of each respective government. For instance, under the guidelines of the Center for Economic and Social Rights, the MSC expanded the progressivity principles enshrined in Article 1 of the Mexican Constitution. This implicit adoption was performed without a clear methodology and with no general provisions in national legislation. Rather, elements of coherence, formal recognition and determinacy can – slowly – be identified[88] to legitimise the enforceability of international law within national agencies.[89]

On the one hand, I can affirm that the IACtHR is influencing the adoption of soft law in some Member States, building a new scope of constitutional rights under international guidelines. This influence is highly dependent on the particular vision in each country of three normative aspects: the place (hierarchy) of international law in constitutional provisions, the type of judgments issued against the

[88] Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen, Keller and Ulfstein, Geir, (eds.) *UN Human Rights Treaty Bodies: Law and Legitimacy*, (CUP 2012) 138–159.

[89] For instance, in a major turn of events, the Mexican government on 30 August 2019 accepted the competence of the Committee on Enforced Disappearances. Joint Press Release, Mexican President and Home Office Secretary, government (*Conferencia matutina AMLO, 30 August 2019*.) <https://www.youtube.com/watch?v=-L8u-ALWUfhw>

Member State in question, and the type of constitutional interpretation provided by the national courts. However, the full influence on national spheres of human rights inputs provided by the Inter-American judgments depends on a wide range of actors and human rights practices. Overall, despite important achievements on the 'internationalization' of high courts, combined with the lack of effective mechanisms to remedy human rights violations, lower domestic courts can still act as a barrier for access to justice. In addition, each Member State has different means of compliance and none has a procedural remedy or specialized national agency for implementation and follow-up of Inter-American judgments.

On the other hand, and bearing in mind the plethora of guidelines, methods, reports, indicators, protocols, as well as General Comments of the UN TBB, we can see that soft law might expand the normative contents of domestic human rights provisions and public policy. Hence, international guidelines enshrined in soft law might be a good starting point for improving the human rights practices in Member States that are activating the inputs of international law and agencies in authoritative ways. In the short term, this work would require the creation of a new international-national legal culture in each country, with international agencies working along with domestic courts and the legislative and executive branches on the convergence of human rights issues. If such multidimensional and permanent task of adoption and harmonisation of international law occurs in domestic spheres, it will be possible to increase the accountability for human rights violations in the Americas.

IV. NATIONAL PERSPECTIVES

7. The Constitutional Status and Roles of Public Agencies Participating in Legislation in the Global Domain

The Republic of Korea's establishment of technical norms

*Oksun Baek**

7.1 Introduction: Who makes the law?

To answer the question of who makes the law, it is often explained that it has changed from God to the king, and then to the public, and on to the public administration in modern days.[1] The increase in the number of areas that require expertise and the limitations of legislation for such areas has resulted in an emphasis on the government enacting legislation, which was an inevitable change given the development of technology. However, it is increasingly being shown in modern days how administration is being expanded and transferred from the traditional role of government (and administrative agencies) in administrative legislation to public agencies.[2] This phenomenon is, at least in the Republic of Korea, admitted without notable criticism because the status of public agencies in recommending a draft legislation is apparent. However, the suitability of admitting them inside domestic law becomes an issue when public agencies also play the role of legislators in the global domain and there is no room for the nation to intervene. The recent trend identifies the role and participation of public agencies in legislating internationally common norms (hereinafter referred to as "global norms" for convenience) and adopting them into domestic law. It seems that the debate regarding this issue was introduced in the Republic of Korea approximately fifteen

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[1] Choe Song Hwa, "Law-makers and Law-making Institutions in Korea" (1984) 25 *Seoul Law Journal* 87.

[2] This is a concept that should be newly defined in this paper. When viewing public agencies broadly, they could also include administrative agencies, such as governmental branches. In this paper, the term "public agency" is limited to organizations that perform public duties, except organizations such as the state and related ministries.

years ago.[3] Formerly, Korean administrative law viewed international law as such that regulates the relations between nations and hence a limited amount of debate was related international and domestic administrative law. The concept of international administration itself was also considered to be contradictory and unacceptable.

"Globalization of administrative law" or "Global administrative law" are names of the initiatives that lay the foundations for governments to intervene and regulate at the very lowest level to cope with the growing role of international organizations in the global domain. Discussions on this are related to the perspective of partly withdrawing a nation's regulating power when it fails to successfully manage the nation, limitations of domestic jurisdiction, and the necessity to reform the existing overall structure of administrative law.[4] Meanwhile, the perspective of arguing the necessity of preparing international administrative law can also be related to transnational administrative action (transnationale Verwaltungsakt), which is a phenomenon through which administrative actions based on one nation's legislation affect other nations as well.[5] In fact, these discourses are being expanded and generalized into various domains which demand global norms such as human rights, health, environment, and also finance and trade. Awareness of the necessity of global administration and legislation in Korea has increased significantly as a result of the micro dust issue, the circumstances of which required cooperative response from nearby nations. However, understanding the administration of each nation and the procedure of legislation, based on the traditional perspective, is limited and the advent of a new system is therefore required. While these series of discourses cannot be considered to be completely new, they are still not being actively studied in the perspective of legislation. The current legislative situation views administrations exercising legislative power and public agencies participating in such procedures as exceptional. These are the factors that restrict the discourse of public agencies participating in legislation or exercising legislative power from being a leading issue.

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[3] There have already been various studies regarding this issue such as, but not limited to: Chang-Wee Lee, "A Study on the Concept and Function of the International Administrative Law" (2002) 31(2) Public Law 401; Sunhyuk Kim, "International Administration and Supranational Governance" (2004) 38 Korean Public Administration Review 87; Byung-Woon Lyou, "The Global Administrative Law" (2006) Administrative Law Journal 231; Dong-Soo Lee, "Globalization of Administrative Law" (2006) 33 Public Land Law Review 101; Dae-in Kim, "Global Administrative Law and International Organizations - Focusing on the World Bank's Sanction System" (2016) 45 Administrative Law Journal Korea Administrative Law Theory Practice Association 1.

[4] As globalization is now influencing the field of administrative law, which is the most conservative field, some expected that public law and private law will be integrated, while others do not. For more on this, refer to Chul-Yong Kim, Administrative Law (Goshigyesa, 2020) 49.

[5] The perspective of the discourse might differ because the administrative actions based on legislation of other nations without democratic legitimacy can also influence, but it can also be extended to discourse on the necessity of enacting administrative law that can have international effects. For more on transnational administrative action, refer to Jung-kwon Kim, "Transnationales Verwaltungshandeln aufgrund Internationalisierung der Verwaltung" (2017) 66 Lawyers Association Journal 193–224.

The legislation of global norms is commonly done through the process of domestic governments ratifying and adopting norms and resolutions or assessments made by international organizations that exert international influence such as the WHO (World Health Organization), the WTO (World Trade Organization), the ISO (International Organization for Standardization), and the IMO (International Maritime Organization). However, the extent to which a government participates during the procedure, whether participation is official or not, and the matter of which entity (state institution, public agency, etc.) participates in legislation can vary in every aspect. While veto can be exercised during the adaptation of international law, it is also practically applied to domestic law and functions as administrative law in some cases.

An important case in the perspective of domestic legislation and administrative law is that where an international standard is directly applied in domestic law as well. Still, there are limited discourses regarding whether it is appropriate to view this as another method of legislation. Prior to any discussion on international administrative law, if domestic institutions – whether they alternate with the government or work independently – substantially affect domestic legislations which comes into common use, the need of specifically debating under the general legislative perspective is significant. In particular, as the legislative power is given only to congress and administration in the Republic of Korea, if the context (conditions, environment, circumstances) were to allow public agencies to pass domestic legislation, immense change would be expected not only in the legislative system, but also in its practical execution. From this point of view, research on the roles of public agencies regarding domestic legislation is expected to hold significance in the discussions on both legislation and its execution.

This paper will examine how public agencies participate and exert their influence in the enactment of global norms, and how to designate the status of such norms if they are adapted in domestic law, and further how to maintain their procedural justification during the process of adaptation based on Korea's law system. It aims to promote methods of securing tangible justification for global norms that are currently being adapted in Korea, and to further lay institutional foundations for active participation of public agencies and effective process of legislative adaptation of global norms. While the related domains are broad, this paper will focus on the legislation of technical norms, which has historically been closely related to international organizations and associations. This is because the majority of the fields related to global norms in Korea are in technology, and the demand in such areas is constant. This paper will discuss this with a starting point in three categories based on the Korean law system. First, norms for maritime safety. Second, norms for ship safety. Third, norms for nuclear energy safety. These three areas are representative in that they can be included in the global domain but are not mainstream at the domestic level due to the distinctive expertise required in each respective category, and the fact that they normally follow international treaties. While they are rapidly being considered the main subjects of regulatory reformation in Korea, their different institutional statuses in do-

mestic legislation and in the global domain respectively makes this issue worth further discussion. Thus, this paper aims to develop the current discourse about the changing environment of legislation such as, but not limited to, retaining the justification of legislative power, the possibilities of a range of entities participating in legislation, and the procedures or requirements to exercise legislative power.

The below will focus on general issues regarding constitutional law and the enactment procedure under the Korean legislation system, but will specifically deal with legislation of technical norms in Korea based on the fact that technical norms constitute the field in which it is appropriate to examine the participation of public agencies in legislation of global norms (II). The following section will classify representative norms that can be related to global norms into three categories and inspect the process of legislation and the roles that public agencies can execute (III). Lastly, it will consider the directions of future development in roles and relations of international organizations and domestic public agencies in terms of legislating global norms (IV).

7.2 The status and the enactment procedure of technical norms in the Korean legislation system

7.2.1 Interpretation of the articles of the Constitution of the Republic of Korea regarding who has legislative power

Article 40 from the Constitution of the Republic of Korea (hereinafter referred to as the Constitution) states that "the legislative power shall be vested in the National Assembly" and thereby clarifies that this is the entity with legislative power. While the National Assembly is the center of legislative organization, it is not a monopolistic or exclusive legislative organization.[6] The Constitution stipulates in Articles 75[7], 95[8], etc. that the President, the Prime Minister, the Minister of the Executive Branch, the Supreme Court, the Constitutional Court and the National Election Commission are the entities with legislative power. The Constitution also restricts the form of legislation that each entity can enact; these are acts, presidential decrees, ordinances of the Prime Minister, ordinances of the Executive Ministry, and internal regulations of constitutional institutions. This can be interpreted to mean that the president cannot issue a presidential decree unless the national assembly enacts an act because there is no act to execute and no specific delegation (Article 75). While this is interpreted to mean that the Prime Minister and the Minister of the Executive Ministries can issue ordinances regarding mat-

[6] Su-woong Han, Constitutional Law (PAKYONGSA 2015) 1107.

[7] Constitution of Republic of Korea Article 75: The President may issue presidential decrees concerning matters delegated to him/her by an act, with the scope specifically defined and also matters necessary to enforce acts.

[8] Constitution of Republic of Korea Article 95: The Prime Minister or the head of an Executive Ministry may, under the powers delegated by an Act or Presidential Decree, or ex officio, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

ters that are within their jurisdiction without delegation or act (Article 95), such ordinances should be based on acts made by the Assembly if they are related to citizens' rights and obligations. Thus Articles 75 and 95 in the Constitution are in place to prevent the National Assembly from generally delegating its legislative power to the government. Moreover, while the President, Prime Minister, and the Minister of each Executive Ministry do have administrative legislative power according to the Constitution, the mainstream view is that their range is limited to authority subsidiary to the National Assembly's legislative power. Although the justification for entities other than the National Assembly exerting legislative power is explicitly stated in Articles 75 and 95, some[9] argue that their legitimacy should also consider Article 1(2) "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people" and Article 40 "the legislative power shall be vested in the national assembly" as supporting the mainstream.

Since the Constitution defines the legislative power of constitutional institution, technical norms are enacted by the institutions that the Constitution defines. Technical norms, here seen as representatives of global norms, take the form delegated through acts, which follows the form of administrative rule, as prescribed by the Constitution. However, the National Assembly has not enacted the details but only described the outline regarding this legislative system for technical norms and other specialized fields. The administration is responsible for the contents of the legislation. This has caused much criticism. This paper, raising the question of whether public agencies can enact legislation of global norms, can be expected to raise discussions more radical than the criticisms of the past. This is because it not only deals with administrative agencies with legislative power, but also the justification of experts in such fields in practice holding the power. This can also be further developed into a discussion on the functions of legislature that the Constitution defines.

The Constitution stipulates that both the range of a legislation entity and the form of legislation must be qualified for legislation to be legitimate. This is why public agencies cannot have legislative power, nor is there any form of legislation that the public agencies can enact under the Constitution.

Hence, although public agencies may in practice play a cooperative role at the stage of enacting a global norm, they cannot have any official legislative power. Thus, public agencies participate and provide opinions in the process of creating legislation drafts, which is done by the legislator of administrative legislation. However, in practice, when the regulations that are being legislated are technical and are connected to global norms, administrations with less specialized com-

[9] Although the president elected through a direct election system can also be democratically justified under the Constitution, administrative legislative power should be understood as an additional right for the president, as the Constitution mainly delegates administrative power to the president (Article 66), but also delegates legislative power for emergency legislation (Articles 76 and 77) and grants treaty-making powers (Article 73). For more on this, refer to Seon Teak Kim, "How to Control the Administrative Legislation" (2019) 28 European Constitution 6–8.

petence rely on public agencies more, with the agencies taking the lead in establishing standards. Still, legislatively speaking, public agencies only have the role as a consultant or cooperative partner during enactment of global norms in the Republic of Korea.

7.2.2 The concept and legislative features of technical norms as representative examples of global norms

As mentioned previously, technical norms are the main field in Korea that are highly related to global norms. However, the concept of technical norms is not the mainstream (Kernbereich) in the traditional legislation system. There are no exact definitions of or practical discussions on technical norms. It is also not clear whether technical legislation should be viewed as being limited to technology or more broadly, encompassing every enactment related to technology. Most importantly, determining the range of technical norms based on their content is subjective. It can create confusion regarding the traditional concepts of enactment if we expand the range to global enactment as well. On the other hand, if we call norms technical when the content is merely related, it might become hard to differentiate the subject of norms in the technical and the general field.[10] Therefore, this paper will use the terminology of "technical norms," rather than "technical legislation," and apply a narrow concept – defining these as norms with contents related to technology.

The range and types of technical norms vary. The most representative examples are technical standards (Technische Norm) and technical regulations (Regeln der Technik), which exist in various areas. While there is only one technical standard due to its purpose of guaranteeing unity of requirements,[11] guidelines and rules about certain products or systems, i.e., technical regulations, are different. Technical regulations are defined in Article 2 (8) in the Framework Act on National Standards as "standards compulsorily applicable to products, services, and processes (hereinafter referred to as 'products, etc.') in order to ensure the protection of health and safety of human bodies, environmental conservation, the prevention of consumer fraud, etc." The main focus of technical regulations is the safety – not the quality – of products (including foodstuffs and services),

[10] An examination that criticizes how Korea does not have systemized management for enactment of technical norms and suggesting reformation of legislation as a method of promoting regulatory reform can be found in Oksun Baek, "A Study on the Conceptualization and Control of Technical Legislation in the Age of Science and Technology" (2019) 20(3) *Public Law Journal* Korean Comparative Public Law Association.

[11] The Korean Agency of Technology and Standards and Korean Standards & Certification define a standard as "a document that is permitted by the official organization and decided by consent that includes rules, guidelines, or characteristics about actions that aim to reach their ideal in given circumstances for the purpose of identical and repetitive usage." (<https://standard.go.kr/KSCI/dictionary/getDictionaryView.do> accessed 29 July 2019). The European Committee for Electrotechnical Standardization (CEN) uses the following definition: "A standard is a technical document designed to be used as a rule, guideline or definition. It is a consensus-built, repeatable way of doing something." (<www.cen.eu/work/ENdev/whatisEN/Pages/default.aspx> accessed 25 August 2019).

plants, installations and constructions of all kinds.[12] The same definition is used in other nations as well.[13] Whether or not a technical regulation is singular can be determined when it accomplishes its goal, which is to make the most from controlling, based on its content. While a technical regulation can share contents with the standard when it cites a technical standard,[14] they are still differentiated by their purposes and whether or not they have legal binding force. Thus, while the standard – which does not have direct legal binding force – can be enacted by national institutions or organizations, the technical regulation can only be enacted by the nation itself, just like any other legal acts. Standards can also have tangible influence internationally as their purpose is unity and universality, but technical regulations have the features of domestic law norms, and are indirectly matched internationally to vitalize trade.

Nonetheless, technical regulations influence citizens' rights and obligations, as they are mandatory and are being adapted so that they can be used in the global area as well. A standard cannot become legislation unless there is a process that grants it legal effect. Still, a standard can be used as a norm and cases where standards are used to enact technical regulations are becoming more common.

7.2.3 Domestic law forms of technical norms and their enactment procedure

The legal forms of technical norms vary. Our Constitution stipulates that laws can be enacted in the form of Acts, Presidential Decrees, Ordinances of the Prime Minister, and Ordinances of the Executive Ministries. This is normally called the legal order, with norms that affect citizens' right and duty. However, sophisticated and professional fields like technical norms have a structure that is difficult to be enact in the legal order. To overcome this, it has been common to borrow the format of administrative rule, with content that includes technical information delegated through laws. While this can be directly stipulated in acts or legal orders, the majority of norms take the form of administrative rule (Ver-

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[12] Alex Inklaar, TECHNICAL REGULATIONS - Recommendations for their elaboration and enforcement (Physikalisch Technische Bundesanstalt Braunschweig und Berlin, 2009) 8.

[13] Technical regulations are standards for products and services, covering technical specifications, dimensions, packaging, quality levels, conformity assessment processes, standards for services, and other requirements for products or services. Directive (EU) 2015/1535 encompasses technical specifications, other requirements, rules of services, the prohibition of the manufacture, import, sale, use of products or the prohibition of the provision or use of services or the establishment of service providers. Further, includes regulations prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider <http://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/what-is-a-technical-regulation> accessed 26 July 2019. The National Center for Standards and Certification (NIS) website includes similar provisions for Korea. <www.standard.go.kr/KSCI/technologyIntro/technologyInfo.do?menuId=944&topMenuId=524&upperMenuId=525> accessed 27 July 2019.

[14] A new approach to technical harmonization was established during the preparation of unified market within European Union. For more information, see the following the link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l21001a> accessed 30 October 2020.

waltungsvorschrift) in which a norm is enacted through delegation of acts and legal orders.

There has been controversy regarding whether to also recognize administrative rules as regulations because they "go beyond the form of regulations stipulated in the constitution." This is because the enactment of administrative rules[15] is faster than that of general legislation, and the examination is also generally done within the executive branch.[16] The Constitutional Court and the Supreme Court recognize as regulations laws that have been enacted after legal delegation in specialized fields.[17] The reason that the courts accept these forms of administrative rules (normally announcements) is because they at least satisfy the requirements of the Constitution. Since the legislative entity is clear when a minister of a central administration organization with delegated administrative legislative power perform enactment, this seems to be permitted. Similar cases can be found in Korea. There is a Constitutional Court precedent of recognizing the effect of an announcement concretely enacted by the Financial Supervisory Commission after legal delegation. Although the Financial Supervisory Commission is a government organization, it is not an entity with legislative power under the Constitution. When looking at judicial precedents, while the majority conceded the announcement's legal effect, a minority was opposed. This minority claimed that the announcement was not in accordance with the form that the Constitution stipulated, and thus was a violation thereof.

However, in Korea, although these forms of administrative rules are tangibly applied in legislation, there are criticisms that this is not stipulated in the Constitution, and that the National Assembly has no control over this. For that reason, an amendment of the National Assembly Law is currently tabled, which would enable the National Assembly to be involved in administrative rules made by the administration. Still, considering that most administrative rules take the form of legislation, and there is a possibility of granting legislative power to public agencies, administrative rules seem like to be the most effective method for enacting technical norms.

The possibility for public agencies to legislate norms is constitutionally blocked as the Korean Constitution does not recognize public agencies as legislative enti-

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[15] The most common form of technical norm, the presidential decree, is announced after pre-announcement of legislation, screening of regulation, evaluation by the legislative office, review from the cabinet meeting, and the president's approval. Ordinances of ministries follow the identical procedure as the presidential decree in principle, but use a summary procedure which is announced after evaluation by the legislative office. Ministry of Government Legislation website <www.moleg.go.kr/lawinfo/governmentLegislation/process/processSchedule?sId=3> accessed 29 July 2019.

[16] However, technical norms which are enacted in a form of administrative rule without legal character are not a form of legislation as administrative rule itself is only valid internally within administrative agencies and therefore is decided autonomously. Still, administrative rules that are enacted after delegation by the legal order are recognized legally as an extension of said legal order. There were similar issues with Germany's administrative rule in relation to specifying norms (*normkonkretisierende Verwaltungsvorschrift*), regarding how to view the form and legal effect of environmental legislation and a technology safety act.

[17] Constitutional Court 2004. 10. 28. 99헌바 91.

ties. Still, this can be conceded, in an extremely narrow range, if administrative organizations have legal delegation of legislative power. Considering that the precedents accept the legal effect of administrative rules enacted after legal delegation, there is scope for public agencies to be permitted to enact, if this power is legally delegated to them. Still, constitutional discourse is more required for granting legislative power to public agencies, as the current status quo is an exception. And of course numerous disputes are expected during the process of allowing this within the Constitution.

Meanwhile, if the legal effect of a technical norm which is enacted as a form of administrative rule can be recognized, its enactment procedure and the enacting entity should be designated under the general legislation procedure. Technical norms with the form of administrative rule that are enacted by the minister of an executive ministry in accordance with the delegation of legal order do not encounter any problems as regards the exercise of legislative power. However, they can have the problem of not being the subject of prior examination by a legislative officer or pre-announcement of legislation, which are required in other legislation procedures under the Administrative Procedures Act.[18] Although this is not directly related to the subject of this paper, this calls for reform, as technical norms do not satisfy the requirements to be recognized as legislation from the perspective of domestic law.[19]

7.3 Divisions of the roles of public agencies in the legislative process for technical norms

There is a need to examine representative technical norms that require global unity. In Korea, the entity and form of legislation is strictly restricted, and thus non-legislative entities cannot exert any influence, regardless of if global unity is at hand. Still cases that describe the roles of public agencies should be discussed in order to determine the roles in domestic legislation of public agencies participating in a global domain.

The following sections will describe three representative fields to understand the reality of the role of public agencies within the Korean legislative system. The first case is enactment of various technical norms via the International Maritime Organization (IMO) and the Maritime Safety Act. This is a typical field where international standards are applied in domestic law, and can be expanded to illustrate the influence of international laws in the domestic law of each re-

[18] There have been efforts made in Korea to legislate the control of the National Assembly regarding administrative enactment. A few amendments of the National Assembly Law are currently being examined by the National Assembly, but are not yet being implemented. Implications can be seen in Germany, in which the National Assembly directly modifies or demands such amendments regarding administrative legislation. For reference, Sun Ki HONG, "Kontrollmöglichkeiten des Parlaments vor Erlass der Rechtsverordnung" (2015) 18 *European Constitution* 95–125.

[19] Further information can be found in Oksun Baek, "A Study on the Conceptualization and Control of Technical Legislation in the Age of Science and Technology" (2019) 20(3) Public Law Journal Korean Comparative Public Law Association.

spective signatory nation. The second case is about national standards, which are significant from the perspective of global unity, and in that the enactment is not restricted to legislative entities. National standards are unique in that they are closely related to private norms. The third case deals with nuclear energy norms, which a majority of all nations try to regulate, though the substantive contents of their regulations are decided entirely by experts.

7.3.1 The traditional role of public agencies in the relations between international law and domestic law

The influence of the IMO on domestic law

There have been various discourses to define the relationship between norms enacted by international organizations and domestic law. The below will examine the domestic application of maritime safety regulations by the IMO. The IMO is the most representative international organization which affects the domestic Maritime Safety Act. This is a UN-affiliated organization which deals with international issues related to maritime transport such as ship design, construction, equipment, labour force, etc.[20] It sets up regulative frameworks regarding the shipping industry which can be effectively and universally adopted. Its role of setting global standards is significant, as shipping is an international industry that can be effectively operated only if regulations are universally adopted. Its organization includes the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC), and the legal committee.[21]

IMO enacts regulations in various areas; as regards safety and security, these include the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, the International Convention on load lines, the International Regulations for Preventing Collisions at Sea, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The members of IMO and each treaty adopt and enforce the regulations within domestic law. Although Article 6 in the Constitution clarifies that "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea," it has its effect as domestic public law because it amends the Maritime Safety Act in the adoption process. Considering the stability and legitimacy of the domestic legislative system, enacting this as part of domestic law is viewed as appropriate.

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[20] The name used at the establishment in 1948 was the Inter-Governmental Maritime Consultative Organization (IMCO), which was changed to the current name in 1982.

[21] Further information regarding the IMO can be found from the IMO website < www.imo.org/en/About/Pages/Default.aspx> accessed 29 August 2019.

Distinct characteristics of laws for maritime safety and their enactment

The Maritime Safety Act is enacted and enforced for the safety of ships. It aims to "protect citizens' life and property by stipulating subjects required for safety and to maintain ship's airworthiness." It accordingly sets technical standards for safety-related elements such as "ship inspection," "small craft or ship stores," "model recognition for containers," "compliance with the standard," and "measures for safety." It is also introduced by reflecting domestic uniqueness of administrative law.

But the process of introducing or amending the Maritime Safety Act is quite different from that for general domestic legislation. By looking at the reason for legislation at the time of amending the Maritime Safety Act, we can know that amendments were made in order to match international treaties.[22]

In order to accommodate the revision of SOLAS in 1991, the Act stipulated the range of ships that are required to have radio station equipment and enforce those ships to have such equipment.

The same can be seen for the introduction of a renewal system of model recognitions of ship stores and the introduction of an approval system of gross weight of containers made through international treaties and later in domestic law as well. Thus, the ship safety standard was strengthened in 2017.

Thus, the reason behind legislation is often easy to identify, and the examination process also respects the matters decided by the IMO, unlike in the general legislative process. Hence, amendments or legislations made to follow international trends differ from other general domestic legislation in that redundant examination is excluded.

Ways for public agencies to participate in the enactment of the Maritime Safety Act

As a UN-affiliated international organization, IMO creates norms with delegates from each member nation participating in each enactment process. This is not only seen in IMO, but in many international treaties and agreements. Public agencies normally participate by having representatives among the delegates of each respective member nation. The public agency delegates will have expertise of the relevant matters, and their roles may take various forms. However, in this case, the role of the public agencies is usually defined and limited to that which is requested by the head of the government delegation. Thus, the role given to the public agencies would be typical of a technical consultant, i.e., giving advice.

The Korean Ministry of Oceans and Fisheries currently operates a website to provide information about civilian experts on the IMO and to enable information interchange between experts.[23] It holds conferences in order to support the

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[22] See the Ministry of Government Legislation website www.moleg.go.kr/lawinfo/governmentLegislation/process/processSchedule?sId=3 accessed 29 August 2019.

[23] IMO KOREA website <www.imokorea.org/> accessed 29 August 2019.

activities of experts and help them share opinions, form groups of experts to strengthen international maritime activity, and construct databases for documents related to IMO conferences. Thus, it has built a maritime safety network based of experts in this field, and created a system in which exchanging and sharing information about IMO activities and reports is possible. Public agencies participate in this area by contributing with professional opinion and recommendations for determining the nation's stance in maritime matters. It also activates the participation of civilian experts in order to properly react to IMO conferences.

7.3.2 Enactment of standards from ISO, a non-governmental organization, and the role of public agencies

The relation between international and domestic standards based on function

Standards[24] are said to serve the function of ensuring compatibility, guaranteeing quality, providing information, integrating societies, fulfilling social responsibilities, and creating the means for technical reformation.[25] There are some basic principles for the enactment of standards. Consensus is needed among stakeholders and transparency should be guaranteed in the process of enactment. Independence from pressure of special interest groups, justification to secure fairness, effectiveness, openness so that every stakeholder can participate, and connectivity with the market, in which the value of the market should match the economic feasibility, are also considered to be such basic features of standard enactment.[26]

These standards are one type of representatives of "global norms" that require unity when considering their functional aspects, as there is no big difference between international and domestic standards. However, they have often been classified into international standards,[27] regional standards,[28] national standards, and industry standards[29] based on their subject and scope of application. This is gradually changing, with standards from each area are securing unity.

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[24] In this section, "standards" refers to "technical standards."

[25] Korea Standards Association (KSA) website <www.ksa.or.kr/ksa_kr/839/subview.do> accessed 29 August 2019.

[26] KSA website <www.ksa.or.kr/ksa_kr/839/subview.do> accessed 29 August 2019.

[27] International standards are what the ISO, the IEC (International Electro-technical Commission), the ITU (International Telecommunication Union), etc., enact and the member nations apply.

[28] Standards that are enacted by the European Committee for Standardization (CEN) and applied in Europe are classified as regional standards.

[29] These are standards established and used by associations of industry, organizations, academic societies, etc. that apply to the companies and organizations that have joined or approved the association. Examples include standards drawn up by the U.S. ASTM (National Materials Testing Association), the Institute of Electrical and Electronics Engineers (IEEE), and others.

The role of ISO and its relation with domestic standards

The Republic of Korea implements standardizations and technical regulations based on ISO standards. The ISO is an independent, non-governmental international organization which was established to promote international exchange of goods and services, and to promote international standardization through intellectual cooperation in the fields of science, technology, and economy.[30] The Republic of Korea is a member of the ISO, and the Korean Agency for Technology and Standards (KATS), an agency affiliated with the Ministry of Trade, Industry and Energy, serves as a member body.[31]

The ISO develops, publishes, and disseminates international standards in order to promote global unity in activities related to the standards. It arranges exchange of information on work done by technology committees. It also cooperates in standardization studies with other international organizations such as the IEC and the CEN.

The ISO international standards are actively applied in the enactment of domestic technical standards, sometimes not only as a form of voluntary standard but rather as a criterion for regulation. Considering the original function of a standard, it is often appropriate for it to take the form of "voluntary standard", which is applied voluntarily and is non-binding.[32] However, Korean legislation functions such that the contents of voluntary standards are fixed as legal standards or are referred to or enshrined in legislation. Because technical standards usually take this form, they are often actually closely related to legislation.

Ways for public agencies to participate in the enactment of international standards

When considering cases where a technical standard can be applied as a norm with legislative effect, the enactment of the standard should have democratic and procedural legitimacy. Furthermore, if an international standard can function as legislation in domestic law, securing justification during enactment of the stand-

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[30] As stated in the ISO Statute.

[31] Members of the ISO are classified as full members (member bodies), correspondent members, and subscriber members. Only one organization per nation, representing the national standardization institution, can be joined as a full member, and it can only join when at least 14 countries agree based on the procedure regulations of the ISO. If this fails, the organization can raise an objection to the ISO, and can then join if more than 3/4 of the member nations agree. Full members can influence the development of and strategies behind the ISO standards by participating and voting at ISO technology and policy conferences. Correspondent members can participate in ISO technology and policy conferences as observers, which is the biggest difference as compared with full members (https://www.iso.org/members.html).

Currently, 164 national standard bodies are members (www.iso.org/about-us.html, accessed 29 August 2019). The Republic of Korea joined the ISO in 1963 as a member body with the Bureau of Standards of the Ministry of Trade and Industry representing the nation.

Voluntary standards are common and include Korea Industrial Standards, ISO Standards, and IEC Standards. Compulsory standards, on the other hand, are binding and defined in law and technical regulations.

[32] Voluntary standards are common and include Korea Industrial Standards, ISO Standards, and IEC Standards. Compulsory standards, on the other hand, are binding and defined in law and technical regulations.

ard in the international domain should also be required. Thus, it is necessary to examine the steps of how the ISO enacts standards.

The enactment of an ISO standard occurs in six stages. In the standard development stage, the opinions of experts and various stakeholders such as industrial associations and NGOs are taken into account. The standard will be enacted based on their agreement. To briefly summarize the procedure, a suggestion is made in the preliminary stage about clauses that should be amended or enacted. A Working Draft is written in the preparatory stage, with the new clauses made by the committee. Next, they examine the opinions of experts and governments, and related opinions, for instance from national technical associations, in regards to the draft. Delegates at international conferences report their stance at this stage. Approval is based on the principle of agreement, and the committee stage end once the draft made by the committee has been approved for the next stage. During the following inquiry stage, the draft goes through another committee stage for a certain period of time. This is followed by a voting procedure for the clauses, in some cases after further debate. The amendment or enactment passes when at least two thirds of the primary members of the technical committee or subcommittee support it, and less than a quarter of the total number of votes are against it. The Final Draft International Standard (FDIS) is distributed to member nations, which can vote during the approval stage that lasts for 8 weeks. Member nations can vote for or against the amendment or enactment, or withdraw from the process. When withdrawing, they should specify a technical reason for this. The FDIS is approved on the same conditions as the inquiry stage. If approved, the standard is published and disseminated as an international standard in the publication stage.[33]

As the ISO allows only one agency per member state, the KATS participates in this procedure as the representative of the Republic of Korea. Therefore, public agencies cannot be expected to play an official role. When the ISO examines the joining procedure, they check whether any other national organization is already registered in the ISO and whether that organization is most representative standardization institution in that nation.[34] However, the ISO does not require the member to be a governmental organization, which means that public agencies could theoretically become members of the ISO. Still, it would be challenging in Korea for a public agency to work as a member, as the standardization institution also plays the role of setting criteria for regulation. On the other hand, public agencies can participate in every opinion that the Korean government submits

[33] Korean Agency for Technology and Standards website <www.kats.go.kr/content.do?cmsid=371> accessed 29 August 2019.

[34] Below is the paper which claims that the improvement of standardization system is necessary because the current standardization policy (one member from one nation) restricts new stakeholders like public agencies from participating, even though the standards field is now being incorporated into the public field along with standards and technical regulations, as can be seen from the example of European Union. Jin Rang Lee, "A Study on the Emergence of New Stakeholders in the European Standardization Process: a Political Dilemma between Supranationalism and National Delegation Principle" (2011) 19(2) Social Science Studies 204–234.

during every stage in enactment or amendment of an ISO standard. Since civilian experts and standards associations also participate, the participation of public agencies can be considered substantial. If public agencies are defined as a narrow concept which excludes governmental institutions, it is hard for public agencies to internationally participate in the enactment or amendment of standards. Even if they do, their role should be limited to that of giving advice.

7.3.3 Role of public agencies in the enactment of technical criteria for the basis of regulation of nuclear power

Organizations related with nuclear energy regulation and legal basis

As its regulatory authority for nuclear energy, the Republic of Korea has established a Nuclear Safety and Security Commission (NSSC). The NSSC was established under the Act on the Establishment and Operation of the Nuclear Safety and Security Commission after the Fukushima incident in 2011, with the goal to make society safer. The NSSC is a committee affiliated with the Prime Minister and has the status of a central administrative agency according to Article 3 of Act on the Establishment and Operation of the Nuclear Safety and Security Commission. The NSSC collaborates with the Korea Institute of Nuclear Safety (KINS), the Korea Institute of Nuclear Nonproliferation and Control and the Korea Foundation of Nuclear Safety in general work related to the nuclear energy safety. The other organizations are non-governmental, and work in various fields related to nuclear energy safety.

Korea's legislation for nuclear energy safety consists of the Nuclear Safety Act, an enforcement decree, an enforcement rule, NSSC's rule and NSSC's administrative rule, as shown in the table below. The Nuclear Safety Act serves as a legal basis for NSSC safety regulation activities, placing it in charge of permitting construction of nuclear energy facilities and ensuring establishment of safety plans. The Enforcement Decree of the Nuclear Safety Act regulates administrative matters that are required in enforcing the law. The Enforcement Rule of the Nuclear Safety Act regulates administrative procedures, such as application forms, in detail. The NSSC Rule regulates important technical criteria required in enforcing the law and the Enforcement Rule, and NSSC's Administrative Rule regulates the forms for administrative procedures and detailed criteria for enforcing the law and the Enforcement Rule.

Requirement	Title	Content	Legal effect
Right, duty	Nuclear Safety Act [Act]	Basic matters on nuclear safety, legal basis of nuclear safety regulation	Legal effects recognized
System, procedure	Enforcement Decree of the Nuclear Safety Act [Presidential Decree]	Content regulations on administration required for the enforcement of the Nuclear Safety Act	
	Enforcement Ordinance of the Nuclear Safety Act [Ordinance of the Prime Minister]	Regulations on licensing procedures, application methods and administrative procedures necessary for the implementation of the Nuclear Safety Act and the Enforcement Decree	
Technical regulation	Rules on the technical standards of nuclear reactor facilities, etc. Rules on technical standards such as radiation safety management [Nuclear Safety Committee Rules]	Defines matters concerning key technical standards required for the implementation of the principles of the Nuclear Safety Act and the Enforcement Decree	
	NSSC Administrative Rule	Regulations including detailed technical standards and administrative procedures on specific topics required for the implementation of the Nuclear Safety Act, the Enforcement Decree, the Enforcement Regulations and the Commission Rules	

Requirement	Title	Content	Legal effect
Professional institutions' technical standards	Criteria for regulation	Descriptions of technical baseline requirements	Formally not statutes, but affect statute enforcement
	Guidelines for regulation	Descriptions of acceptable methods, conditions, specifications, etc., to meet the requirements of technical standards	
	Examination and inspection guidelines and technical guidelines	Guidelines describing methods and procedures for each regulatory task, in detail, based on regulatory requirements	
Industrial technology standards	Industrial technology standards (American Society of Mechanical Engineers, Institute of Electrical and Electronics Engineers, American Concrete Institute, Korea Electric Power Industry Code, etc.)	Specify details of materials, designs, tests and inspections of equipment and structures	

Source: Modified from the content on the KINS website.35

The relation between the IAEA and the domestic nuclear energy safety norm

The NSSC as a governmental organization is closely related to foreign safety regulation institutions.[36] The International Atomic Energy Agency (IAEA) as an international nuclear energy agency continually publishing documents with safety criteria. Previously, each committee under the IAEA wrote safety documents, but because there was overlap of the contents between documents, a Commission for Safety Standards (CSS) was established in August 2000, which now directs all other committees.[37] Every development stage of amendments to safety requirements is examined by member nations and consulting committees for the purpose of

[35] Korean Agency for Technology and standards website <www.kats.go.kr/content.do?cmsid=371> accessed 29 August 2019.

[36] In addition to the IAEA and the Nuclear Energy Agency (NEA), a specialized organization for the OECD, each nation has a nuclear regulatory body. Examples include the Nuclear Regulatory Commission (NRC) under the president of the United States, the Canadian Nuclear Safety Commission (CNSC), which is the the agency of the Prime Minister's Office of Canada, the Nuclear Regulation Authority (Japan), the independent agency of France, the Nuclear Safety Authority, Autorité de Sûreté Nucléaire, Finland's Radiation & Nuclear Safety Authority (STUK), Sweden's Radiation Safety Authority (SSM), and Germany's Bundesministerium fur Umwelt, Naturschutz und Nuclear Industrial Forum (BMU).

[37] These are the Nuclear Safety Standards Commission (NUSSC), the Radiation Safety Standards Committee (RASSC), the Transportation Safety Standards Committee (TRANSSC), and the Radioactive Waste Safety Standards Committee (WASSC). See Sun oh Yoo, "Current Status and Review of Development of IAEA Safety Standards" (2002) Korean Nuclear Society 1–2.

consistency and to gather opinions. Later, the drafts pass through each committee and the CSS. Safety fundamentals and safety requirements are approved by the board of directors of the IAEA, and published after the approval of Director General of the IAEA. Since the IAEA is a central intergovernmental forum for promoting technical cooperation in the field of nuclear energy, the norms do not have legal binding force.[38] They are recognized as legal acts only when the safety requirements enacted by the IAEA are applied in domestic enforcement rules or administrative rules.

The role of the KINS in nuclear energy safety

The KINS is a professional organization for nuclear energy safety and was established through the Act on the Korea Institute of Nuclear Safety. The KINS is different from a governmental organization as it was established by law (a special juristic person), and has various roles including, but not limited to, supporting technology development, managing information, and providing education. A majority of the organization's members are experts who are responsible for creating the technical standards included in the Nuclear Safety Act, the Enforcement Decree and Ordinance of that act, the Nuclear Safety Commission Rules and the Administrative Rules. They also develop and apply detailed criteria and guidelines that can be used in regulations. The KINS participates as a member of the national team in the NSSC when implementing standard documents from CSS, and presents opinions in the technical area. It also participates in conferences for developing the criteria of the American Society of Mechanical Engineers and the ISSE, which have the leading industry standards in the field of nuclear energy, and some experts from KINS are members of expert committees. They also work on various areas such as participating in regulatory information conferences hosted by the Nuclear Regulatory Commission (NRC).

7.4 Conclusion

Looking at the roles of public agencies in each case, it can be seen that they normally act as consultants and an expansion of their roles would not have any significant meaning.

However, in the case of technical standards, there are aspects in which the civilian area is being expanded to the public and the role of public agencies could then also be expanded.[39] As article 127 of the Constitution stipulates, the state establishes the national standard system and it is desirable for one institution to

[38] IAEA website (www.iaea.org/about/overview, accessed 29 August 2019).

[39] Initially, standards derived from private businesses and associations which took the initiative to consider the compatibility of products. Technical standards are global requirements and are usually perceived as effective and objective standards and implemented by large-scale and public associations. In the case where a private business makes their business standard the national technical standard and aims to make it the international standard, this standard may receive criticism from other businesses or associations.

be in charge of enactment, as securing unity of standards both internationally and domestically is of fundamental importance.

In the case of Korea, it would be most appropriate for the government to intervene in national standards because the technical standards and legislative regulation standards are either identical or partly overlapping. This is an issue of efficiency and social trust (reliability) rather than legal justification (legislative legitimacy). While (private) group standards for development of the industry may be an exception, the role of public agencies will not exceed the role of consulting in the enactment process, because Korea recognizes standard-related organizations and national institutions when they introduce national standards.

On the other hand, a fundamental outline of nuclear energy should be enshrined in a legal act, so it becomes a mandatory regulation. However, if the act uses the concept of uncertainty and delegates the power of making detailed safety regulations to administrative rule, it becomes difficult for the government to enact, even with legislative power. Nuclear energy is a field in which the expansion of experts could be considered as standards for nuclear energy can be partially adopted when needed. Nevertheless, the standards for nuclear energy technology should be updated consistently, just like technical norms, and the consistent participation of public agencies with expertise should be emphasized at that stage.

7.4.1 Roles and direction of further development of public agencies in the legislation of technical norms

Phenomenon of legislative cooperation of public agencies and the possibility of expanding legislative power

As previously examined, one way for public agencies to participate in the legislative process is through cooperation. It is common from the legislative perspective for public agencies and private citizens to participate as experts in legislative processes or to express their opinions in public hearings. Recently, however, the number of cases in which public agencies or private citizens are leading the enactment has risen and there are various circumstances in which cooperation with public agencies is broadly required. There are views which argue that it is possible for public agencies and private citizens to lead enactment based on a privatization discourse and as an extension of Guarantee administration (Gewährleistungsverwaltung). Thus, public agencies or private citizens can cooperate not only in recommending but also in practically establishing means and criteria when exercising their role.[40]

[40] Jae-Yoon Park, "A Study on the private norm-making in the Administrative Regulation" (2016) 44 *Administrative Law Journal* 5.

Is it then possible to delegate or expand legislative power to public agencies?[41] If evidence for the delegation of legislative power can be provided by the law, is this enough to justify legislation enacted by public agencies? There is a question as to if legal issued arises regarding public agencies taking charge of legislation (in full or in part), either formally or substantially.

Is it possible for a public agency to enact a norm if it is not mentioned as a legislative entity in the Constitution? Can then this norm be recognized as having a legal effect? Is this allowed under the Constitution? There should be more debate about this issue. There is precedent from the Constitutional Court, which judged that an administrative rule made by Financial Supervisory Commission was not in violation of Article 75 of the Constitution even though the Financial Supervisory Commission does not have legislative power. Yet minority views argue that "It violates the constitution because it arbitrarily creates a new form of law."[42] There might be views like the minority opinion which judge that delegation of legislative power should not be allowed. However, entities can enact norms through delegation even if they are not the legislative entity stipulated by the Constitution, when this is inevitable in a professional field.

It seems that it is not impossible to grant legislative power to public agencies committed to fulfilling the government's role as an extension of their work. Of course, this should have support in the law. Further, the range of their legislative power should be minimized and limited to their work only, except as regards the duties and rights stipulated in the law.[43] Discussions on this have never been held in Korea. But considering the reality of global technical norms, we have to take account of Germany's strong view which claims that granting authority to a person entrusted with public affairs is not a problem of justification, but more

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[41] The answer to this question can change depending on if enactment means enactment of an act (*Gesetzgebung*) or law-making (*Rechtssetzung*). In the case of enactment of an act, the legislative power should fundamentally be given to a national assembly, and for the latter this discourse can be done because it includes all forms of norms. This discourse can be expanded regarding whether or not private norms are allowed.

[42] Constitutional Court of Korea 2004. 10. 28. 99헌바91.

[43] For example, there are some cases where not only public agencies substantially legislate, but where private organizations formally decide on the contents of Korean legislation reality. Under the Promotion of the Motion Pictures and Video Products Act, the Korea Media Rating Board is to rate movies and videos, and regulate based on their ratings. Although the act allows the Korea Media Rating Board to independently decide rules, the legal status of the board is unclear. Is it also unclear if it is an extension of the administration or if it violates the rights of film-related persons. Since this board, composed of civilians, is established by law and norms it enacts have legal effect, Article 85 stipulates that the Korea Media Rating Board shall give an advance notice of any bill of rules or their amendment or repeal through the Official Gazette, etc. for a fixed period of not less than 20 days and shall, if the bill has been passed, announce it officially by publishing it through the Official Gazette, etc.

Article 85 (Establishment, Amendment and Repeal of Rules of the Korea Media Rating Board).

(1) In case the rules of the Korea Media Rating Board are to be established, amended or repealed, the Korea Media Rating Board shall give an advance notice of the bill of rules or their amendment or repeal through the Official Gazette, etc. for a fixed period of not less than 20 days and shall, if the bill has been passed, announce it officially by publishing it through the Official Gazette, etc.

(2) In case standards for classification are to be established or amended pursuant to Article 50 (6), the Korea Media Rating Board shall hear opinions voiced by juvenile organizations, nonprofit private organizations, and academic or industrial circles.

an problem of controlling, in line with the Anglo-American view.[44] Then there is no reason to deny the legislative authority of public agencies fulfilling their public work. However, fulfilling requirements regarding the procedure and organization of the range of legislation is still necessary. Thus, it may be possible to expand legislative power to public agencies without amendments to the Constitution. This leads to the issue of on what grounds and to what degree the legislation will proceed. It is important to have a proper avenue of control while granting a public agency autonomy within the range and purpose of their legislation for either administrative legislation or legislation via civilians. Therefore, the National Assembly could consider focusing on establishing a basic framework and procedural controls in law from a cooperative point of view, or withholding consent based on law, as in Germany.[45]

Preliminary considerations for active legislative participation of public agencies

The role of public agencies is inevitably significant in regard to enactment of global norms. Even considering the tangible role that public agencies play, it is still difficult to broadly grant legislative power to public agencies considering the current Korean law system. However, the current status quo in which adaptions are made only after formal examination does not make significant sense either.[46]

In this sense, it is important to ensure democratic legitimacy when legislation is enacted by entities other than those exercising existing legislative powers, such as international organizations or private companies. Identical examination cannot be performed in the process of adapting global norms into domestic law as is done with other legislation. Thus, the only way forward is through securing procedural and organizational justification during the enactment of global norms.[47] As organizations, public agencies that participate in enactment of global norms should pursue public wealth and should be objective.[48] Also, whether or not en-

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[44] Florian Becker, "Kooperative und konsensuale Strukturen in der Norm Setzung" (2005) S.388ff; Catherine M Donnelly, "Delegation of governmental power to private parties" (2007) 6, 67.

[45] Park, Jae-Yoon, "The Role of Legislation in the Governance age - from the perspective of Administrative Law" (2016) 45(2) Public Law, Korean Public Law Association, 200.

[46] There is a concern that it might be meaningless due to an anchoring effect (*Ankereffekt*) if we unconsciously follow our decisions based on existing standards. Problems in which outsourcing legislation to civilians would also arise in this way. An examination of the problem in public law regarding legislation outsourcing in Germany can be found in Michael Kloepfer (Hrsg.) *Gesetzgebungsoutsourcing: Gesetzgebung durch Rechtsanwälte?* (2011); Jung-kwon Kim, "Public Issues in Legislation Outsourcing" (2016) 10 *Journal of Legislative Evaluation* KLRI.

[47] One of perspective that views promoting legislative participation of public agencies as securing procedural justification can be found in Steffen Augsberg, *Rechtsetzung zwischen Staat und Gesellschaft* (2003) S 343.
It can also be explained that various legal method, such as examination procedures, exist in administrative law when international organizations make decisions that directly influence the public in the perspective of global administrative law. (Dae-in Kim (n 3) 6).

[48] Unlike public agencies, private citizens can exist take part in the legislative process (*Gesetzgebungsvertrag*). Discourse regarding this possibility can be found in Florian Becker (n 37); Florian Becker, Kooperation von Staat und Gesellschaft: Verfassungsrechtliche Rahmenbedingungen für vertragliche Vereinbarungen im Gesetzgebungsverfahren, Forschungsbericht (2004) <www.mpg.de/838128/%20forschungsSchwerpunkt?c=%20166386&force%20_lang=de> accessed 1 September 2019.

actment is shaped by experts matters. Transparency of the enactment should be guaranteed, along with active participation of stakeholders.

Furthermore, an issue related to delegating legislative power to public agencies in the first step also arises. A significant risk arises if we delegate public agencies broad legislative power in the current status quo. Yet under the perspective of practical legislation affairs, the question can be raised regarding whether it is necessary to expand the same content once again by going through a procedural process. In the case of standard or nuclear technology regulation, it undergoes enactment by a legislator with democratic legitimacy when being adopted as an international regulation.[49] Further processes would not only bring inefficiency in administrative legislation, but also delay adaptation of the corresponding technical norms. One of the main purposes of technical norms is that they can be applied immediately when needed in the professional area. This is why there are limitations making it impossible to fully utilize the function of technical norms when there is gap between the official entity and the practical entity in the enactment of technical norms.

Thus, ways for professional public agencies to directly enact norms regarding professional areas should also be considered. This is a way for the legislator to delegate its right to professional public agencies to specify the enactment, just as the legislator delegates its right to the government. Still, public agencies should not be secured through law, but should rather obey the principle that the Constitution stipulates a legislator. Important areas that should be legislated through legal acts cannot be delegated under the principle of parliamentary approval (Parlamentsvorbehalt). Also, broad delegation of legislative power should be banned, and should be strictly controlled and limited to the range of a public agency's professional area, so that it does not abuse its power. There should be at least a minimum amount of supervision as to whether the delegated public agency performs proper examination and follows proper procedure when exercising its right. For example, it should specify the reason for its legislation and the process and examination it performed. Ways of preparing legislation and determination procedures regarding the final drafts of public agencies should also be considered. Thus, it would be possible for public agencies to independently and actively participate in enactment of norms within the range of their legal powers.

Measures to reform legislation system in order to expand the new role of public agencies regarding global technical norms

As well as public agencies working in the global domain, professional institutions that participate in enacting domestic technical norms like nuclear standards also have a substantive influence in legislation. Nevertheless, there are various obstacles in reality to directly granting legislative power to public agencies and profes-

[49] While both the NSSC and the KINS participate in the enactment of technical norms in the field of nuclear energy safety, the KINS is the organization which writes the technical criteria. Such technical criteria cannot be applied in regulations unless the NSSC recognizes them as norms.

sional institutions because legislation needs democratic legitimacy. Such obstacles will be difficult to overcome, even if one applies the view that "if a regulated party participates in the formulation of norms, such participation can function as the justification for the enactment of norms or the legitimacy of the enactment of private norms." The obstacles not expected to be sufficient grounds to change the framework of traditional legislative powers. While this might naturally change along with the social and cultural environment, public agencies and professional institutions are already in our current status quo intervening in substantive legislation.

To bridge the gap between the theory and the working field of legislation, we have to consider dividing technical norms into a "legislative part" and a "professional/technical part," and further expanding the role of public agencies as regards the "professional/technical part." While entities with legislative power have authority as regards both parts of technical norms, their legislative power is, technically, extremely nominal for the "professional/technical part." This not only acts as an obstacle in securing legislative justification, but also hinders updating with the latest content and new technical characteristics. Division of technical norms from the original legislation can have a strong impact in Korea, as regulatory sandbox legislation began to be expanded from 2018 and the "Priority approval, ex-post regulation principle" was clarified. For example, in Japan, a gradual change was made from the year 2000, going from their original way of specifically deciding the form of technical norms to abstractly decide on the standard of services and goods (i.e., deciding the required minimum of the performance standards).[50] They also reformed by only deciding on requirements for each respective good and service, and excluding any other specific technical standard from the form of acts.[51] Thus, their legislation system allows professional institutions to decide professional and detailed technical contents of technical norms, and to recognize this effect in the original legal acts. This not only accomplishes the purpose of regulation, but also contributes to making more rational and better regulation because the citizen can selectively choose the regulation standard. These changes will enable for professional institutions and public agencies to rightfully play their roles in enacting technical norms. It is also expected to take better account of the technically distinct characteristics of technical norms. Still, such changes should be preceded by the securing of justification through a rightful and democratic procedure.

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[50] After the announcement of guideline by Regulatory Reform Committee for Administration Reformation in 1999, Japan has been reforming their regulation legislation of gas safety, product safety, etc. to decide on a required minimum of the performance standard (性能規定化). For more information, see 総務庁, 規制行政に関する調査結果に基づく勧告―基準・規格及び検査・検定―, 平成12年３月<www.soumu.go.jp/main_sosiki/hyouka/kisei431-01.htm, accessed 30 October 2020); Japan's Ministry of Economy, Trade and Industry website: www.meti.go.jp/policy/consumer/seian/denan/topics.html, accessed 30 October 2020.

[51] Korea has also reformed similarly for gas safety standards in 2007.

7.4.2 Conclusions and Suggestions for Research

There are various cases where global norms are enacted through the participation of public agencies, and thus it is inevitable for public agencies to lead the process. Professionalism in legislation and proper timing of amendments can be guaranteed by strengthening the role of public agencies, which then act practically as an alternative to the legislator. However, there is a possibility of collision regarding which entity gets the existing legislative power, and it is expected that doubts will increase regarding whether legislation enacted in this way can also have justification. This is because negative perceptions of and distrust toward international organizations are increasing as a result of the change of the role and status of leading organizations in the domain of global norms.[52] The image of the international organization has changed from that of an entity that embodies the ideal of legislative reason, which in fact impacts on this matter.

The most effective solution to these issues would be to implement an international standard to prevent or restrict legislation by individual nations. However, as it is difficult to create a universal system that embeds all nations as one, continual discussion is necessary and expected. While it is definitely to be seen as a difficult feat, it is not at all impossible. Future changes globally may create the potential for discussions by area or even geographical location. In order for achieve this, each individual nation must address problems that arise in domestic law and aim to find solutions.

This paper has examined the status of public agencies which affect either global or domestic legislation within the Korean legislation system in order to determine the role of public agencies participating in legislation in the global domain. It has specifically focused on technical norms including professional contents which require higher global unity. Unless there is a legal guideline (like the establishment of a norm in the global domain), the role of public agencies in the enactment of a global norm can never exceed that of an advisory body considering the Korean constitutional system. It is not always inappropriate for public agencies to be included as advisory bodies. However, participating as an advisory body and observing the legislation differs from participating as a legislative entity. It is hard to find arguments regarding this in the current status quo. There should be an enhancement of the legislation system for the purpose of strengthening the role of public agencies when there is an increasing need to emphasize citizens' legislative cooperation as well. In order to pursue harmony of existing legislation and democratic legitimacy, there should be greater discourse about procedural ways to grant legislative rights and to control those rights.

[52] Dae-in Kim (n 3) 6).

8. Public Agencies in International Cooperation under National Legal Frameworks

Legitimacy and Accountability in Internationalised Nordic Public Law

*Henrik Wenander**

8.1 Introduction

The last few decades have witnessed a fundamental change in the administrative law structures of many states. Through the phenomena labelled globalisation, internationalisation and Europeanisation, the national public bodies have seen partially new legal frameworks for administrative activities, judicial review of decisions and accountability regimes. This is very clear in regard to administrative agencies of different kinds. Whereas a civil servant in an expert agency would perhaps fifty years ago still have been presumed to work almost entirely at the national level, with only occasional international contacts, today's picture is entirely different. In many national administrative agencies, the everyday activities now involve working in international networks of different kinds. This development creates interesting tensions between the well-established constitutional structures and the internationalised role of public agencies. This article examines some aspects of these forms of international administrative cooperation in the perspective of the Nordic legal systems of Denmark, Finland, Iceland, Norway and Sweden.[1]

The main question for this article is how the international and European activities of national public agencies change the national agencies' constitutional roles in their domestic systems for distribution of powers in relation to the core elements of legitimacy and accountability. This question gives rise to related sub-questions on the effects of international and European cooperation on the constitutional mechanisms of administrative steering, rule-making and transpar-

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[1] Concerning terminology and the use of the term 'Scandinavian' (which strictly speaking includes only Denmark, Norway and Sweden, but in international discourse is also used as synonym to 'Nordic'), see Ulf Bernitz, 'What is Scandinavian Law?' (2007) 50 *Sc.St.L.* 14, 15 f.

ency under the Nordic models, which will be explored in the following. The scope of the article does not allow for detailed discussions on concrete solutions to the problems identified. The method for the study is to identify central aspects of the legal framework for the activities of the administrative agencies and how these relate to the central interests of democracy, the rule of law and accountability.

The Nordic legal systems constitute a group of similar legal systems based on a common set of values, which sometimes makes comparative lawyers consider them a special 'legal family' that does not seamlessly fit into the framework of the continental European legal systems of French or German law.[2] Among the particular features of the Nordic systems, comparative studies often highlight a form of pragmatism that differs from continental (and thus European Union) detailed, 'legalistic', thinking, a far lesser degree of systematisation of law and a far-reaching trust in and respect for the democratically legitimised parliaments.[3] The latter is expressed through a focus on written legislation and the usage of legislative materials to establish the 'will of the legislator' in legal interpretation.[4] In other words, in the contemporary Nordic constitutional systems, the legitimacy of law rests on democracy. A further common feature of the Nordic legal systems is the great weight attached to transparency, especially concerning access to public documents.[5] The possibility of getting insight into public documents is, in practice, an important factor for administrative accountability (see below section 8.6).

International surveys have repeatedly ranked the five Nordic states among the most successful ones in the world when it comes to democracy, the rule of law and the protection of fundamental rights, as well as the effective administrative policies for economic stability, environmental protection and social welfare.[6] Although the states harbour similar societies and are largely based on the same legal culture regarding the view on democracy, fundamental rights etc., their constitutional and administrative structures differ. This provides good opportunities for interesting observations on how similar systems deal with common challenges in different ways.[7] This article examines the role of national public administrative authorities both under EU law – including the cooperation structures involving

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[2] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn OUP 1998) 273; Michael Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76.

[3] Helle Krunke and Björg Thorarensen, 'Introduction', in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 7 f.

[4] Jaakko Husa, 'Constitutional Mentality' in Pia Letto-Vanamo, Ditlev Tamm and Bent-Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 58.

[5] Markku Suksi, 'Markers of Nordic Constitutional Identity', (2014) 36 Retfaerd 66, 88; Oluf Jørgensen, Access to Information in the Nordic Countries: A Comparison of the Laws of Sweden, Finland, Denmark, Norway and Iceland and International Rules (Steven Harris tr, Nordicom 2014) 10 <www.nordicom.gu.se/sv/publikationer/access-information-nordic-countries> accessed 6 October 2021.

[6] Frank Martela, Bent Greve, Bo Rothstein, and Juho Saari 'The Nordic Exceptionalism: What Explains Why the Nordic Countries are Constantly Among the Happiest in the World', in John F. Helliwell, Richard Layard, Jeffrey D. Sachs, and Jan-Emmanuel De Neve (eds), *World Happiness Report 2020* (Sustainable Development Solutions Network 2020) 130 <worldhappiness.report/ed/2020/ accessed 6 October 2021.

[7] Ran Hirschl, 'The Nordic Counternarrative' [2011] ICON 449.

the EEA states of Norway and Iceland – and under other forms of administrative international cooperation. Special attention is given to the well-established structures for cooperation within the framework of the Nordic Council, the Nordic Council of Ministers and associated bodies. As this article focuses on the national administrative agencies, the development of supranational administrative structures such as EU agencies is not examined, beyond mentioning that they may be important as collaboration partners for the national authorities in their international activities.

8.2 The International Activities of National Administrative Authorities

As stated in the preceding section, national administrative authorities have experienced increased international activities over the last decades. These changes may be seen as parts of the general developments of Europeanisation, internationalisation or globalisation. Those are terms at a high level of abstraction, often disputed, and will not be examined further here. Instead, this section aims at highlighting some central features of the activities performed by national administrative authorities in the international field. The agencies operate in what has been called a European or even a Global Administrative Space, indicating an area where national and international bodies engage in administrative matters to implement and deepen cross-border cooperation.[8] Of course, the work of administrative authorities in the Global or European Administrative Space includes a wide range of very different activities. It is not possible to list exhaustively all forms of administrative action in the international field here, and several kinds of classifications seem to be possible.[9]

However, important types of activities, which overlap to a certain extent, include:

1) exchanging experiences and best practices in the relevant field of expertise,
2) participating in formal and informal international bodies as representatives of the state or as sectorial experts (e.g., in comitology and working groups of the EU legislative and implementing process),
3) solving cross-boundary problems arising in the field of expertise,
4) exchanging information and
5) drafting or even adopting formal decisions and rules.

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[8] Herwig C. H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 907 f.; Benedict Kingsbury and others, 'Global Governance as Administration – National and Transnational Approaches to Global Administrative Law' (2005) 68 *LCP* 1, 3.

[9] Paul Craig, 'Shared Administration and Networks – Global and EU Perspectives' in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds), *Values in Global Administrative Law* (Hart 2011) 102 f.; Hofmann, Rowe and Türk (n 8) 307 ff.; Henrik Wenander, 'A Toolbox for Administrative Law Cooperation beyond the State' in Anna-Sara Lind and Jane Reichel, *Administrative Law beyond the State - Nordic Perspectives* (Nijhoff and Liber 2013) 57 ff.

Concerning more formal decision-making, national administrative authorities in many fields of law take part in what have been called structures for composite (also called 'mixed' or 'integrated') decision-making, where national authorities from different countries and international institutions (in the EU, often the Commission or EU Agencies) participate at various stages of handling a matter. These procedures may concern decisions in individual cases. More general cooperation structures can also be found outside of the EU, for example in international mechanisms for food safety standards linked to the Food and Agriculture Organization of the United Nations (FAO).[10]

In EU and EEA law, the deep-going cooperation has meant that nation-state-oriented, older doctrines barring administrative authorities from direct international contacts have had to be abandoned. Instead, the principle of sincere cooperation now requires national administrative authorities to be able to contact each other directly, without using the national Ministries for Foreign Affairs as intermediaries.[11] Under the far-reaching regional cooperation structures between the Nordic countries, a corresponding principle allowing for direct contacts has applied for a considerable length of time.[12]

Linked to the possibility and duty of direct international contacts is the need for mutual trust between the national administrative authorities and civil servants involved. This would seem to be both a practical prerequisite for cooperation and a legally entrenched principle of EU/EEA law.[13] In EU administrative law, all involved national authorities – independent or not – need to act as parts of the same European administrative system, not unlike their duties under national administrative law. Temple Lang has vividly pictured this duty as a requirement of national authorities to behave like 'a flock of birds or a shoal of fish' with a common direction.[14] In much the same fashion as the EU, the Nordic legal and admin-

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[10] Armin von Bogdandy and Philipp Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9 *German Law Journal* 2013, 2018 ff. <germanlawjournal.com/volume-09-no-11> accessed 6 October 2021; Eberhard Schmidt-Aßmann, 'Introduction: European Composite Administration: Data Exchange, Decision-Making and Control' in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011); Wenander (n 9) 57 ff.

[11] Consolidated version of the Treaty on European Union [2016] OJ C202/1 (TEU), art 4(3); Consolidated version of the Agreement on the European Economic Area (7.2.2019) <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01994A0103(01)-20190207&from=EN> accessed 6 October 2021 (EEA Agreement), art 3; Paolo Mengozzi, *European Community Law from the Treaty of Rome to the Treaty of Amsterdam* (Patrick Del Duca tr, 2nd edn, Kluwer 1999) 88; Henrik Wenander, 'Recognition of Foreign Administrative Decisions', (2011) 71 *ZaöRV* 755, 769.

[12] Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden, Helsinki 23 March 1962, with later amendments <norden.diva-portal.org/smash/get/diva2:1229026/FULLTEXT01.pdf> accessed 6 October 2021, art 42; Henrik Wenander, *Fri rörlighet i Norden. Nordiska gränshinder i rättslig belysning* (Juristförlaget i Lund 2014) 34 f.

[13] Xavier Groussot, Gunnar Thor Petursson and Henrik Wenander, 'Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other' (2016) 1 *European Papers* 865, 867 ff.

[14] John Temple Lang, 'General Report' in International Federation of European Law (FIDE), XIX F.I.D.E. Congress: Helsinki 1–3 June 2000. 1. The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty (FIDE 2000) 383.

istrative cooperation in various sectors is based on a high degree of mutual trust, which is helped by the cultural and societal similarities between the countries.[15]

Concerning the organisation and procedures of the authorities, the default rule is that the activities of administrative agencies, including their international dimension, are governed by national constitutional and administrative structures. In EU and EEA law, this is known as the principle of procedural and institutional autonomy. However, it is well-known that this autonomy may very well be limited by either EU legislation or general principles of EU administrative law, including the principles of equivalence and effectivity.[16] Also, other forms of international administrative cooperation would seem to – tacitly – rest on the idea that the activities as a rule are carried out within the national constitutional and administrative legal framework.[17] One important aspect of this, concerning international administrative cooperation in the EU, is that national administrative authorities are obliged to be active in ensuring that decisions of relevance to foreign authorities are correct and based on sufficient information.[18]

Furthermore, concerning the institutional arrangements, EU law requires national administrative authorities to be independent of political steering in a number of fields. This is the case for example in the field of data protection, as well as for various market surveillance regimes.[19] These national bodies with supervisory tasks are sometimes referred to as independent regulatory agencies, and are supposed to interact in European regulatory networks. In Cassese's words, they thus form 'a European concert of regulators'.[20]

It should also be pointed out that there might be expectations of independence in other situations. It has been argued that persons taking part in international administrative cooperation as experts need to be independent of political bodies. At the same time, it is difficult to both make a distinction between expertise and policy and protect experts from informal pressure. Here, the procedures for appointing experts are of importance.[21] Under EU law, certain Regulations require

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[15] Wenander (n 11) 783.

[16] On procedural and institutional autonomy in EU law, see Hofmann, Rowe and Türk (n 8) 12 f.; on EEA law, see John Temple Lang, 'The Principle of Sincere Cooperation in EEA Law' in Carl Baudenbacher (ed) *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 79.

[17] Wenander (n 9) 66.

[18] John Temple Lang, 'Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty', (2003-2004) 27 *Fordham Int'l LJ* 1904, 1938; on social security coordination, Case C-202/97 *Fitzwilliam* EU:C:2000:75, [2000] ECR I-883, paras 51 ff.; Henrik Wenander, 'A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) 883/2004' (2013) 6 *REALaw* 39, 62.

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 52; see further Hormann, Rowe and Türk (n 8) 261 f.

[20] Eduardo Chiti, 'Towards a Model of Independent Exercise of Community Functions?' in Roberto Caranta, Mads Andenas and Duncan Fairgrieve (eds), *Independent Administrative Authorities* (British Institute of International and Comparative Law 2004) 210 ff. quoting Cassese's expression *'concerto regolamentare europeo'*.

[21] von Bogdandy and Dann (n 10) 1024 f.

that representatives of national authorities in EU organs act independently.[22] This poses challenges to the roles of national representatives as agents of the ministry or the Government under the Nordic constitutional traditions.

In connection to this independence, it should also be mentioned that EU law requires national administrative authorities, both within the organisation of the state and within local government, to apply EU law in the same way as courts. This requires administrative authorities to set national legislation aside if this is necessary under the EU doctrines of supremacy and direct effect ('administrative direct effect').[23] In practice, this duty would seem to be especially relevant for independent administrative authorities.

8.3 Nordic Models of Public Administration

Owing to the historical development of the legal systems, two main types of constitutional organisation of the public sector can be identified within the Nordic region. These two types are commonly referred to the East-Nordic and West-Nordic models and reflect the historic dominance of Denmark (which historically included Iceland and Norway) and Sweden (which historically included Finland). The legacies of these two systems are still visible in the public law of the five countries.[24] They are also important for the effects of globalisation etc. on the constitutional position of the administrative agencies (see section 8). Below, the basic features of the models are summarised in relation to the workings of the administrative agencies and their relations to ministers.

8.3.1 The West-Nordic Model

The West-Nordic administrative model of Denmark, Iceland and Norway represents what has been labelled a "normal European model" based on ministerial rule, although the strength of this concept varies between the countries.[25] Under this model, the legitimacy of administrative action follows from the democrati-

[22] E.g., Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12, art 42; Christoffer Conrad Eriksen and Halvard Haukeland Fredriksen, *Norges europeiske forvaltningsrett. EØS-avtalens krav til norske forvaltningsorganers organisering og saksbehandling* (Universitetsforlaget 2019) 200 f.

[23] Case 103/88 Costanzo EU:C:1989:256, [1989] ECR 1839; Maartje Verhoeven, The Costanzo Obligation. The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law (Intersentia 2011); Sasha Prechal, 'Does Direct Effect Still Matter?' (2000) 37 CMLRev 1047, 1049.

[24] Olli Mäenpää and Niels Fenger, 'Public Administration and Good Governance' in Pia Letto-Vanamo, Ditlev Tamm and Bent-Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 165.

[25] Eivind Smith, 'Likheter og skillelinjer i nordisk forvaltningsrett [koreferent]' in Kavita Bäck Mircahndani and Kristina Ståhl (eds), *Förhandlingarna vid det 39:e nordiska juristmötet i Stockholm* (De Nordiske Juristmøder 2012) 624. <nordiskjurist.org/meetings/likheter-och-skillnader-i-nordisk-forvaltningsratt> accessed 12 February 2021; Shirin Ahlbäck Öberg and Helena Wockelberg, 'Nordic Administrative Heritages and Contemporary Institutional Design' in Carsten Greve, Per Lægreid and Lise H. Rykkja (eds), *Nordic Administrative Reforms: Lessons for Public Management* (Palgrave Mcmillan 2016) 63.

cally legitimised ministerial rule. The constitutions, although not identical, are all based on a fairly clear three-partite separation of powers, with the Head of State – that is the Monarch of Denmark or Norway or the President of Iceland – as the nominal leader of the Executive branch. However, the executive power is in practice held by the ministers appointed by the Head of State and tolerated by the Parliament.[26] The ministers act as heads of their respective ministries and are individually responsible for deciding on matters falling under the competence of their ministry. This also includes the business of the administrative agencies, which are largely organised within the hierarchical structures of the ministries.[27] Due to the sheer number of matters to attend to, the ministers, as in other similar systems, usually delegate decision-making competence to the administrative agencies within the ministry. Nevertheless, a minister is still accountable for decisions made within the ministry. However, criminal responsibility would seem to be limited to situations where the minister has had a real possibility to consider the decisions being made. Criminal charges are, in all three countries, heard by special Courts of Impeachment. Such courts have in modern times found ministers guilty of misuse of office in Denmark (in 1995) and Iceland (in 2012).[28] The three West-Nordic legal systems further make use of special investigation commissions, appointed by either the Parliament or the Government.[29] Individual administrative decisions may be challenged before administrative appeal bodies and the courts.[30]

In addition to these agencies within the ministerial structures of Denmark, Iceland and Norway, there are also administrative bodies more loosely attached to the ministries, thus having a more independent position. In part, the establishment of such bodies is a result of requirements under EU law. In this category, one finds the National Banks, as well as certain administrative organs relating to competition and market surveillance (see the preceding section). It may be noted that Norway and Iceland, even as non-EU states, have similar obligations as Denmark in these respects, as a result of the EEA Treaty. Certain other public bodies established by acts of law also fall outside of the ministerial hierarchy, meaning that the ministers cannot formally govern the activities in the same way as with the agencies within the ministerial structures.[31]

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[26] In Denmark, the *Folketing*, in Norway, the *Storting* and in Iceland, the *Alþingi*; Constitution of Denmark 1953 (*Danmarks Riges Grundlov*), arts 3 and 12–14; Constitution of the Kingdom of Norway 1814 (*Kongeriket Norges Grunnlov*), arts 3 and 12; Constitution of Iceland 1944 (*Stjórnarskrá lýðveldisins Íslands*, 1944 nr 33), arts 2 and 13; Thomas Bull, 'Institutions and Division of Powers' in Helle Krunke and Björg Thorarensen (eds), The Nordic Constitutions: A Comparative and Contextual Study (Hart 2018) 45 ff.

[27] Bull (n 26) 59.

[28] Constitution of Denmark 1953, arts 16, 59 and 60; Constitution of Iceland 1944, art 14; Constitution of Norway 1814, art 86; Björg Thorarensen, 'Mechanisms for Parliamentary Control of the Executive' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study* (Hart 2018) 93 ff.

[29] Thorarensen (n 28) 86 ff.

[30] Mäenpää and Fenger (n 24) 175.

[31] Mads Andenas, 'Independent Administrative Authorities in Comparative Law: Scandinavian Models' in Roberto Caranta, Mads Andenas and Duncan Fairgrieve (eds), *Independent Administrative Authorities* (British Institute of International and Comparative Law 2004) 258 ff.

Local government in the municipalities or regions should be mentioned as a special subgroup of independent public authorities in the West-Nordic countries. These organs, led by directly elected political bodies, whose decisions are carried out by local authorities, have an important role in implementing national legislation at the local level. They are also awarded a certain scope of discretion within the framework provided by national legislation. Although the local governments take an independent position in the constitutional structure in all the Nordic countries, comparative research has shown that the scope for political control of local government is much broader in Denmark and Norway than in the East-Nordic countries (see below).[32]

8.3.2 The East-Nordic Model

Swedish law and Finnish law follow another pattern, departing from what can be seen as a European 'normal model'. As a result of historical developments, in part going back to the administrative reforms of the early 17th century, the Swedish and Finnish administrative agencies are organised more independently from the governmental ministries. The constitutions are based on an organisation where the governments, accountable to the parliaments, head the administrative organisations. In Sweden, the Government always makes decisions as a collective, whereas in Finland, this is the case only for more important decisions. In both countries, administrative authorities are organised under the government and the relevant ministry, but outside the ministry hierarchy, as separate entities within the state. They enjoy a high degree of autonomy within the scope for discretion under the applicable legislation, although the Swedish administrative model awards a more independent position to the administrative authorities than does Finnish law and practice.[33] In comparison to the West-Nordic countries, the legitimacy of the actions of the administrative authorities in Finland and Sweden is not as directly linked to the steering by the democratically legitimate Government, rather being connected to the independent application of (democratically adopted) legislation.[34]

Concerning Sweden, the Instrument of Government (the central fundamental law) explicitly prohibits the Government and Parliament from being involved in individual decisions related to the exercise of public power vis-à-vis an individual or a local authority, or the application of an act of law. However, in situations not relating to individual decisions, the Government – and the responsible minister – may formally or informally direct the work of the authorities within the scope of the applicable legislation.[35] The limits for ministerial interference in controversial

[32] Eija Mäkinen, 'Controlling Nordic Municipalities' (2017) 23 *EPL* 123, 123 and 142 ff. Mäkinen's study did not include Iceland.

[33] Instrument of Government 1974 (*Regeringsformen*), ch 12 art 1; Constitution of Finland 1999 (*Suomen perustuslaki/Finlands grundlag*), art 119.

[34] Mäenpää and Fenger (n 24) 164.

[35] Instrument of Government 1974, ch 12 art 2; Joakim Nergelius, *Constitutional Law in Sweden* (2nd edn Wolters Kluwer 2015) 84 ff.

political matters is a recurring topic of discussion in Swedish political and constitutional discourse.[36] Another aspect of this constitutional arrangement is that it has been deemed to fulfil EU law requirements of independence, since all Swedish authorities are organised independently.[37] In this way, Swedish administrative authorities would seem to be organised in a way that suits European cooperation very well.[38] It could, however, be discussed whether this independence is actually always sufficient, given the scope for formal and informal influence under the constitutional provisions. Here, the Swedish pragmatism could be in conflict with the EU legalistic thinking.

The independent organisation of the Swedish administrative authorities may play out in unexpected ways in relation to EU law and its doctrine of 'administrative direct effect' (see section 8.2). For example, the Swedish Tax Authority (Skatteverket) has issued guidelines on setting aside Swedish parliamentary legislation as being contrary to EU law.[39] In the same vein, Swedish municipalities have occasionally refused to apply legislation with reference to the precedence of EU law. This has resulted in criticism from the Parliamentary Ombudsman.[40]

In Finland, the limits for governmental interference in administrative matters are not regulated in the constitution. Still, legal scholarship describes the situation as being very similar to that under Swedish law.[41] Perhaps as a consequence of the silence of the written constitution, the scope for ministerial intervention has not been a matter of controversy in Finnish politics and law to the same extent as in Sweden.[42] When EU law requires the establishment of independent supervisory authorities or similar (see section 8.2), or when this is otherwise deemed necessary, the relevant sectorial legislative acts in many instances explicitly state that the regulatory agencies shall act independently.[43]

In both countries, accountability is divided between the political and the administrative level, in principle meaning that a civil servant is criminally liable when acting within the sphere that is protected from political interference. Decisions in individual administrative matters may be appealed through the administrative court system.[44] The ministers are legally accountable for their decisions and may

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[36] Thomas Bull, 'Sweden: Administrative Independence and European Integration' (2008) 14 *EPL* 285, 288 ff.

[37] SOU (Statens offentliga utredningar, Swedish Government Official Reports Series) 2016:65 *Ett samlat ansvar för tillsyn över den personliga integriteten* 144 ff.

[38] Bull (n 36) 291.

[39] Bull (n 36) 295 f.

[40] Henrik Wenander, *De svenska kommunerna i EU:s konstitutionella system* (Swedish Institute of European Policy Studies 2019, Report 2019:1) 29 f. (47 for summary in English) <www.sieps.se/publikationer/2019/de-svenska-kommunerna-i-eus-konstitutionella-system> accessed 6 October 2021.

[41] Mäenpää and Fenger (n 24) 164.

[42] Henrik Wenander, 'Den statliga förvaltningens konstitutionella ställning i Sverige och Finland – pragmatism och principer' [2019] *JFT* 103, 136.

[43] See, e.g., the Data Protection Act 2018 (*Tietosuojalaki/ dataskyddslagen*, 2018/1050), s 8: 'The Data Protection Ombudsman is autonomous and independent in his or her activities' (quoted from the unofficial translation available at <www.finlex.fi/sv/laki/kaannokset/2018/en20181050.pdf> accessed 6 October 2021).

[44] Mäenpää and Fenger (n 24) 174 f.

be prosecuted before a Court of Impeachment (Finland) or through the regular system of the general courts (Sweden). Whereas there is a rather recent example of this procedure in Finland, Swedish law has not experienced such a trial since the 19th century. In Sweden, as an intermediate step to prosecution, the Committee on the Constitution (Konstitutionsutskottet) may, on the initiative of a member of the Riksdag, assess the legality of the actions of a minister and can issue public criticism.[45]

In Sweden and Finland, local government is a central actor for implementing national policy, as well as acting within its legal scope for self-government. As stated above, Finnish law and Swedish law award an even more independent position to the municipalities and regions than the West-Nordic systems do.[46] In Sweden, this has occasionally created delicate situations concerning international relations, such as when Swedish municipalities (or companies controlled by municipalities) considered letting strategically important harbours to companies linked to the Russian state. At least in theory, similar situations could arise within the framework of international administrative cooperation.[47]

8.4 The Nordic Models and the International Activities of Administrative Authorities

The partially different constitutional models of public administration of the Nordic legal systems have been described above. This section outlines some general consequences of this framework for administrative international cooperation. The more specific questions relating to administrative rule-making and transparency are addressed in the following sections (8.5 and 8.6).

In the West-Nordic systems, the administrative authorities act under the direct leadership of the responsible ministers. Legally speaking, the actions of the administrative authorities at the international level therefore constitute actions by their respective ministries. As mentioned, this reflects what could be seen as a normal model in Europe, and therefore seems not to have given rise to discussions on the model as such in international administrative cooperation. The direct political leadership of the administrative authorities may, depending on the political circumstances, direct the decision-making so that the authorities comply with international agreements. One example of this concerns a situation in which the Commission criticised the Danish legislation on family benefits for migrant workers as being discriminatory and not complying with the treaty provisions on free movement. However, there was not a majority for amending the law in the Folketing (the Danish Parliament). Subsequently, the competent ministry instructed the competent administrative authority to set aside parts of the act of law in order to

[45] Instrument of Government 1974, ch 13 art 1; Bull (n 26) 56 f.

[46] Mäkinen (n 32) 143.

[47] Henrik Wenander, 'Underordning och självstyrelse. De svenska kommunernas konstitutionella roll i det europeiska flernivåsystemet' (2018) 120 (5) *Statsvetenskaplig tidskrift* (special issue) 43, 50.

comply with – the politically controversial – EU provisions on free movement.[48] This possibility of governing the actions of the administrative authorities within the scope of EU law may of course also be used to limit the impact of EU law for political reasons.[49]

As mentioned (section 8.3.1), the West-Nordic legal systems provide possibilities for establishing administrative authorities outside the ministerial structures. In some instances, such bodies have been established owing to requirements under EU law on independent ('regulatory') agencies of various kinds. In this way, Denmark, Iceland and Norway provide a special status for certain authorities, e.g., in the field of data protection.[50]

In Swedish law, the prohibition on governmental interference with administrative decision-making has not been seen as limiting the scope for instructions to civil servants engaging in EU comitology, working groups and similar. The reason has been that such activities do not constitute decision-making in individual cases, which is covered by the wording of the constitutional text. Neither do such activities fall under the collective decision-making of the Government required by the constitution. Therefore, ministers may direct the actions of the ministry representatives in their contacts in the European Administrative Space.[51] Similarly, a governmental ordinance makes clear that the authorities shall assist the Government in EU and other international cooperation and keep the Government informed of developments of importance for the cooperation.[52] This piece of legislation is a clear indication of a change in the constitutional position of administrative authorities.

In other words, if the legal provisions work as intended, the ministers have good legal possibilities of staying informed and steering the activities of the civil servants representing Sweden in the EU. Studies in political science have shown that this scope for steering is actually used to a large degree, so that there is very little risk that Swedish representatives in the European Administrative Space take a different direction than the one intended at the political level.[53]

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[48] Catherine Jacqueson, 'From Negligence to Resistance: Danish Welfare in the Light of Free-movement Law' [2016] EJSS 183, 201 f.; Skatteministeriets skrivelse [Letter from the Ministry of Taxation] No. 9353 of 9 July 2013 <www.retsinformation.dk/Forms/R0710.aspx?id=153355> accessed 6 October 2021.

[49] Bull (n 36) 292.

[50] In Denmark, the Data Protection Act 2018 (Lov om supplerende bestemmelser til forordning om beskyttelse af fysiske personer i forbindelse med behandling af personoplysninger og om fri udveksling af sådanne oplysninger [databeskyttelsesloven] 2018 nr 502), s 27 ('The Data Protection Agency shall carry out its functions with complete independence'); in Iceland, the Data Protection Act 2018 (Lög um persónuvernd og meðferð persónuupplýsinga, 2018 nr 90), s 36; in Norway, the Personal Data Act 2018 (Lov om behandling av personopplysninger [personopplysningsloven] 2018 nr 38), s 20 ('The Data Protection Agency may not be instructed on the handling of individual matters or on other questions on the activities involving sectoral expertise. The King and Ministry may not reconsider the Agency's decisions').

[51] Jane Reichel, Ansvarsutkrävande – svensk förvaltning i EU (Jure 2011) 75.

[52] Government Agencies' Ordinance 2007 (*Myndighetsförordning*, 2007:515), s 7.

[53] Bengt Jacobsson, 'Governing by Microsteering' in Bengt Jacobsson, Jon Pierre and Göran Sundström (Eds), *Governing the Embedded State: The Organizational Dimension of Governance* (OUP 2015) 85.

In spite of the possibilities of steering the activities of the authorities at the European level, the international activities of administrative authorities have, for both Sweden and Finland, been described as a part of a development weakening the constitutional structures for accountability. One important reason for this is the room for the independent agencies to make assessments of the requirements of EU law that differ from those of the Government.[54] In order to strengthen the democratic control of the international administrative activities of national authorities, Swedish legal scholarship has suggested increasing the involvement of the national parliament in the composite structures to enhance the democratic legitimacy in decision-making.[55] Although such calls for democratic legitimation of international administrative cooperation seem reasonable from a theoretical perspective, it may be a considerable challenge to actually design legal and political mechanisms for parliaments to get involved in the often very technical and detailed fields of cooperation between national agencies.

A special aspect of the administrative independence is the role of national experts in EU administrative cooperation. As has been touched upon above (section 8.2), the role of an expert would typically require a high degree of factual independence and integrity. At the same time, the procedures for appointment, as well as other factors, could provide possibilities for informal influence. Studies in political science in the Nordic countries indicate that it is not always clear to the civil servants participating in EU administrative cooperation bodies if their role is to represent the member state or to provide expertise. It has furthermore been observed that the differences between the diverse national constitutional systems of public administration influence the attitudes of civil servants in EU cooperation. This line of research has also identified differences between the three Nordic EU states and the two states taking part only in the more limited EEA cooperation.[56]

Concerning accountability, the major administrative controversies occurring at the ministerial level in the five Nordic countries in the last decades have for the most part had little or no relation to EU/EEA law or other international administrative cooperation. Accordingly, the courts of impeachment and the Special Investigation Committees in these countries have rarely discussed administrative activities at the European or global level. However, there is one example: the inquiry relating to the failures of major banks in Iceland in 2008. The Special Investigation Commission concluded that Icelandic authorities had failed to assess the legal and factual situation, which would have been necessary both to make requisite decisions and to interact with foreign governments in accordance with

[54] Mäenpää and Fenger (n 41) 167.

[55] Anna-Sara Lind and Jane Reichel, 'Den svenska förvaltningsmodellen som en del av en integrerad europeisk förvaltning – en fallstudie om dataskyddsförvaltning' [2014] *FT* 504, 522 ff.

[56] Jarle Trondal and Frode Veggeland, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in EU Committees' (2003) 10 *Journal of European Public Policy* 59, 73; Helena Wockelberg, 'Political Servants or Independent Experts? A Comparative Study of Bureaucratic Role Perceptions and the Implementation of EU Law in Denmark and in Sweden' (2014) 36 *Journal of European Integration* 731, 744 ff.

the obligations under EEA law.[57] This conclusion reflects the general duty under EU and EEA law for national administrative authorities to ensure that decisions of relevance to foreign authorities are correct and based on sufficient information (see section 8.2).

The Nordic countries can be seen as pioneers of administrative cooperation, given the close Nordic cooperation that developed from the beginning of the 20th century and flourished especially after World War II and through to the 1970s. A formalised institutional structure under public international law, with the Nordic Council (with parliamentary representatives), the Nordic Council of Ministers (with governmental ministers) and attached groups of civil servants, made possible rather extensive cooperation in several fields of public law.[58] EU and EEA membership has undoubtedly limited the scope for this legal cooperation, and it is likely that parts of the legal framework are not compatible with EU law in substance.[59] Still, the administrative structures for direct and efficient cross-boundary cooperation are in all likelihood a valuable feature. In spite of the legal uncertainties, Nordic formal and informal administrative cooperation is therefore still important in several fields, not least concerning simplifying cross-border mobility at the local level.[60]

8.5 Administrative Rule-Making at Home and Abroad

One important aspect of the constitutional role of public administration is the scope for administrative authorities to engage in formal rule-making both domestically and at the international level. Already in a purely domestic setting, the delegation of legislative competence to un-elected officials may be controversial in terms of democratic legitimacy. In this section, some general observations are made on the rule-making role of administrative authorities in relation to their engagement in the Global or European Administrative Space. The East-West divide is visible in this field too and may therefore be used as a framework for description.

Concerning the West-Nordic legal systems, with their Executive branch including both the ministerial level and the authorities, the conceptual difference between rule-making by a minister or by a lower authority would seem to be mostly a matter of internal organisation of the ministry structure. As touched upon above, a minister in Denmark, Iceland or Norway is politically and legally accountable for

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[57] Report of the Special Investigation Commission (SIC) (English summary) Chapter 21 Causes of the Collapse of the Icelandic Banks - Responsibility, Mistakes and Negligence (2010) 84 <www.rna.is/media/skjol/RNAvefurKafli21Enska.pdf> accessed 6 October 2021.

[58] Pia Letto-Vanamo and Ditlev Tamm, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic Cooperation. A European Region in Transition* (Routledge 2016) 102 ff.

[59] Päivi Leino Sandberg and Liisa Leppävirta, 'Does Staying Together Mean Playing Together? The Influence of EU Law on Co-Operation Between EU and Non-EU States: The Nordic Example' (2018) 43 *ELRev* 295.

[60] Iain Cameron, 'Nordic Cooperation' in *Max Planck Encyclopedia of Public International Law [MPEPIL]*, para 26 <opil.ouplaw.com/home/epil> accessed 12 February 2021; Wenander (n 12) 127 ff.

all decisions made within their ministry's sphere.[61] However, given the tri-partite division of powers present in both Danish, Icelandic and Norwegian law, delegating far-reaching legislative competences to the Executive branch could disturb the constitutional division of powers.[62] It is not possible to track such effects of European and global administrative cooperation in greater detail here, but the problem would seem to deserve more attention in legal scholarship.

Concerning the East-Nordic legal systems, Finnish constitutional law takes a very cautious position as regards the delegation of norm-making power to the authorities below the governmental level. According to the Constitution of Finland, such delegation may only take place if there is a special reason for this, and if the significance of the rules does not require regulation in the form of a parliamentary act of law or a governmental decree. Further, the scope for the delegation of rule-making power must be precisely defined in the relevant acts.[63] The travaux préparatorires to the constitutional provision underline that the wording of the provision implies that delegation to administrative authorities should be seen as exceptional.[64] Therefore, the scope for delegation to administrative authorities is very narrow under Finnish constitutional law.

In contrast, Swedish constitutional law allows for a far-reaching delegation of powers from the Riksdag to the Government and further to administrative authorities.[65] As a guiding principle, the travaux préparatoires to the constitutional provisions state that delegation of rule-making power should be limited, so that matters of more important character are decided by the Riksdag.[66] There are, however, no legal recourses if the Riksdag should over-use its scope for delegation under the constitutional framework. In Swedish discourse, legal scholarship has ever since the early 1980s criticised the democratic deficits stemming from the lack of political accountability on the part of the independent administrative authorities and the rule burden associated with the uncontrolled, expanding body of low-level rules.[67] Furthermore, Swedish legal scholarship, using the example of the Swedish Financial Supervisory Authority, has pointed out the risks of concen-

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[61] For Denmark, see Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk statsret* (DJØF 2012) 62; for Norway, see Eivind Smith, *Konstitusjonelt demokrati* (3rd edn Fagbokforlaget 2015) 256.

[62] Cf. concerning Danish law, Henrik Palmer Olsen, Maktfordeling. En analyse af magtfordelingslæren med særligt henblik på den lovgivende magt (DJØF 2005) 468 ff.

[63] Constitution of Finland 1999, art 80; Outi Suviranta, 'The Rule-Making Powers of Independent Administrative Agencies in Finland' in Erkki J. Hollo (ed), *Finnish Legal System and Recent Development* (Edita 2006) 202 f.

[64] RP (Regeringens proposition till riksdagen, Government Bill) 1/1998 rd *med förslag till ny Regeringsform för Finland* 134.

[65] Instrument of Government 1974, ch 8 arts 3, 7, 10 and 11; Nergelius (n 35) 27 ff.

[66] Prop. (Proposition, Government Bill) 1973:90 med förslag till ny regeringsform och ny riksdagsordning m. m. 205 ff.

[67] Håkan Hydén, Ram eller lag? Om ramlagstiftning och samhällsorganisation (1984), published as Governmental report Ds C 1984:12; Fredrik Sterzel, Författning i utveckling. Tjugo studier kring Sveriges författning (Iustus 2009) 261.

trating power to a single authority, being responsible for both adopting detailed delegated rules, supervising market actors and deciding on sanctions.[68]

In the European and international structures for administrative cooperation, the national administrative authorities are largely entrusted – by the national Parliament or Government – with the implementation of the rules adopted at the international level. Naturally, the specialised agencies at the national level may often have been involved in the drafting of these rules. It would therefore seem reasonable that delegation of norm-making power to the administrative level is often used for technical matters, such as details in implementing directives or annexes to other EU legislation.[69] However, this means that the specialised administrative authority is often responsible for both drafting (or even adopting) the national rules and enforcing these rules at the national level. This also applies to rules stemming from global cooperation regimes, for example concerning international aviation.[70] The criticism against the deficits in accountability and separation of powers in administrative rule-making gains another dimension here, connected to the alleged democratic deficit of the EU.

8.6 Transparency

As stated at the outset (section 8), transparency is a central value in the public law of all the Nordic countries. This is particularly the case in Swedish law. Since the perceptions of the balancing between transparency and confidentiality may be very different in other parts of the world, and even in Europe, the participation in international and European administrative cooperation may constitute a challenge.

The historical roots of the transparency principle can be found in the liberal era of Swedish constitutional history ('The Age of Liberty') in the mid-18th century and are linked to the protection of the freedom of the press through the 1766 Freedom of the Press Act.[71] This heritage indicates the origin of the idea of transparency as a means to make possible public scrutiny of administrative action and, indirectly, to hold officials accountable. Today, the tenets of transparency concerning access to public documents in Sweden are regulated in considerable detail at the constitutional level in the Freedom of the Press Act, with specific rules on exceptions from the principle in a special act of law. The latter contains

[68] Wiweka Warnling-Nerep, 'Finansinspektionens tillsyn i perspektiv av legalitet och legitimitet' [2009] *FT* 389, 392.

[69] Concerning Finland, see Suviranta (n 63) 207 f.

[70] Suviranta (n 63) 207 f.

[71] Johan Hirschfeldt, 'Free Access to Public Documents – a Heritage from 1766' in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Transparency in the Future - Swedish Openness 250 Years* (Ragulka 2017).

a large number of exceptions to the principle of transparency.[72] It may be noted that, unlike in certain other European systems, the concept of originator control is not a traditional feature of the Swedish system of transparency. The authority holding a requested document has to assess the question of confidentiality in accordance with the legislation, an assessment which does not involve the entity originally issuing the document.[73]

Finland – which was a part of Sweden when the 1766 Freedom of the Press Act was adopted – shares this historical heritage and protects the basic idea of transparency briefly in its constitution, with specific provisions in a separate act of law.[74] Norwegian law has more recently followed suit, and now has the same structure.[75] The provisions in Danish and Icelandic law are, contrastingly, found only at the level of ordinary legislation.[76] These differences in part follow the East-West pattern. Still, it is clear that all five Nordic legal systems attach great importance to the idea of transparency for public documents.[77]

In all five countries, there are mechanisms for challenging decisions to refuse access to documents before a court.[78] In the West-Nordic countries, there are also special administrative bodies hearing such cases.[79] It should further be noted that Swedish law provides that decisions by a minister to refuse access to documents shall be challenged before the Government (which makes a decision as a collective), here acting in its capacity as the supreme administrative body of the Realm.[80] The Government's decision may not be scrutinised by a court. This arrangement is a remnant of the tradition of appeal within the administrative system, which generally gave way to appeal through administrative courts during the 20th century, in part owing to Europeanisation.[81]

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[72] Freedom of the Press Act 1949 (*Tryckfrihetsförordning*). Together with the Act of Succession 1810 (*Successionsordning*), the already mentioned Instrument of Government 1974 and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*), the Act forms the Swedish constitution. The status as a fundamental law means that it is more difficult to amend than ordinary acts of law, see further the Instrument of Government 1974, ch 8 art 14; Public Access to Information and Secrecy Act 2009 (*Offentlighets- och sekretesslag*, 2009:400).

[73] Freedom of the Press Act 1949, ch 2 art 17; Public Access to Information and Secrecy Act 2009, ch 6.

[74] Constitution of Finland 1999, art 12; Act on Access to Information 1999 (Laki viranomaisten toiminnan julkisuudesta/Lag om offentlighet i myndigheternas verksamhet, 621/1999).

[75] Constitution of Norway, art 100; Freedom of Information Act 2006 (*Lov om rett til innsyn i dokument i offentleg verksemd,[offentleglova]* 2006 nr 16).

[76] In Denmark, the Access to Documents Act 2013 (*Lov om offentlighed i forvaltningen [offentlighedslov]* 2013 nr 606); in Iceland, the Freedom of Information Law 2012 (*Upplýsingalög*, 2012 nr 140).

[77] Jørgensen (n 5) 10; Ragna Aarli, 'Public Access to Digital Documents' in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Transparency in the Future - Swedish Openness 250 Years* (Ragulka 2017) 320 ff.

[78] Mäenpää and Fenger (n 19) 173.

[79] Oluf Jørgensen, 'Significant Differences between the Nordic Laws on Public Access to Documents' in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Transparency in the Future - Swedish Openness 250 Years* (Ragulka 2017) 197.

[80] Freedom of the Press Act, ch 2 art 19.

[81] Henrik Wenander, 'Geschichte der Verwaltungsgerichtsbarkeit in Schweden' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit* (Springer 2019) 1180 ff.

In international administrative cooperation, also within the EU, the principle of transparency could be at odds with the traditions of diplomatic secrecy and restrictive views in other legal systems.[82] At the time of the discussions on EU accession for Sweden and Finland (and, initially, Norway) in the 1990s, the protection of the principle of transparency was a central issue of concern. In the Accession Treaty, the three states made declarations stating the importance of the principle.[83] In Sweden, the constitutional provision of the Instrument of Government was subsequently amended and now states that the transfer of sovereignty to the EU may not affect the principles or the form of government. Although not entirely clear, the wording is thought to protect the principle of transparency for public documents, among other central features of Swedish constitutional law.[84]

Furthermore, the Nordic governments, especially those of Finland and Sweden, have been active in promoting the advantages of transparency at the EU level. The adoption of the Transparency Regulation took place after political pressure from Sweden and Finland.[85] The Swedish Government has continuously aimed at promoting transparency during negotiations on EU legislation, in part as a means to keep the domestic and constitutionally protected transparency principle intact.[86]

Sometimes, however, international administrative cooperation in the European or Global Administrative Space requires confidentiality for certain information exchanged within the cooperation structures. When such a duty follows from an EU regulation, this legal act would be directly applicable in the EU Member states of Denmark, Finland and Sweden.

This situation would be unproblematic at a legal-technical level, although a wide use of provisions on confidentiality in regulations would limit transparency in practice (see below on the erosion of transparency). When such provisions are found in directives, international agreements and, in the cases of Iceland and Norway, regulations covered by the EEA Agreement, the existing national legislation on secrecy needs to be amended.[87]

Denmark, Finland, Iceland and Norway have traditionally opted for using general provisions on confidentiality for documents obtained in international and European administrative cooperation. These provisions refer in slightly differing

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[82] Inger Österdahl, 'Transparency versus secrecy in an international context: a Swedish dilemma' in Anna-Sara Lind, Jane Reichel and Inger Österdahl (eds), *Freedom of Speech, Internet, Privacy and Democracy* (Liber 2015) 74 ff.

[83] Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union – Joint Declarations [1994] OJ C241/395–397.

[84] Nergelius (n 35) 57 ff.; Österdahl (n 82) 74 f.

[85] Ian Harden, 'The Revision of Regulation 1049/2001 on Public Access to Documents' (2009) 15 *EPL* 239, 239 f.; Maarten Zbigniew Hillebrandt, Deirdre Curtin and Albert Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' (2014) 20 *ELJ* 1, 11 f.

[86] Österdahl (n 82) 92 f.

[87] Consolidated version of the Treaty on the Functioning of the European Union, [2016] OJ C202/13 (TFEU), art 288; EEA Agreement, art 7; Dag Wernø Holter, 'Legislative Homogeneity' in Carl Baudenbacher (ed) *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 14.

ways to the general interests of international relations, or more specifically to international cooperation in the relevant field.[88]

In contrast, the Swedish policy in the field for a long time aimed at retaining the structure of the traditional transparency principle and allowing for as much transparency as possible also in international administrative information exchange. This was to be achieved, as before EU membership, by implementing international obligations on confidentiality by limited and detailed rules in various fields, which should be interpreted so as to promote as much transparency as possible.[89] However, this turned out to be difficult in practice.

The challenges for Sweden in this context were highlighted in three cases from the Swedish Supreme Administrative Court (then Regeringsrätten, now Högsta förvaltningsdomstolen) from the late 1990s and early 2000s concerning documents on genetically modified organisms (GMOs). In short, the cases concerned situations where persons (in all likelihood linked to environmental organisations) had requested documents received by the Swedish Board of Agriculture (Statens Jordbruksverk) within the framework of composite procedures for permitting GMOs. The cases illustrate various aspects of the tension between expectations from foreign authorities and private actors basing on the idea of originator control (alien to the system of transparency in Swedish law), confidentiality rules under EU law, the effects of foreign authorities' positions on confidentiality and the interpretation of Swedish provisions on exceptions to transparency.[90] Without going into the details of the cases, it can here be remarked that they had the potential of creating constitutional complications, given that the protection of the principle of transparency could be seen as a precondition for the Swedish transfer of sovereignty to the EU.

Against the backdrop of the perceived problems with the Swedish position, Swedish legislation was modified in the 2010s. The relevant act now includes a more general provision on confidentiality in situations where access to documents received within the framework of international cooperation could complicate Sweden's participation.[91] Thus, Swedish law is now similar to that in the other Nordic legal systems.[92] Legal scholarship has concluded that this type of provision entails an indirect form of originator control and a defeat for the traditional Swedish position on transparency.[93]

It should, however, be borne in mind that the provisions in the Nordic acts of access to information still require the authority holding the documents to provide

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[88] In Denmark, Access to Documents Act 2013, s 32 (1); in Finland, Act on Access to Information 1999, s 24 (2); in Iceland, Freedom of Information Law 2012, s 10(2); in Norway, Freedom of Information Act 2006, s 20; Jørgensen (n 79) 189; Österdahl (n 82) 90 ff.

[89] Österdahl (n 82) 94 f.

[90] Cases RÅ (*Regeringsrättens Årsbok*, The Yearbook of the Supreme Administrative Court) 2000 ref. 22; RÅ 2005 ref. 87; RÅ 2007 ref. 45.

[91] Public Access to Information and Secrecy Act 2009, ch 15 s 1 a.

[92] Jørgensen (n 79) 189.

[93] Österdahl (n 82) 96.

sufficiently clear reasons for confidentiality linked to real and actual interests of maintaining international cooperation. The development towards greater transparency in international and European cooperation in general may mean that foreign authorities gradually accept a greater degree of openness.[94]

Taking a formal view, the implementation of EU law or international agreements on secrecy is unproblematic in the sense that the national legislators have legitimised the exception from the principle of transparency in accordance with the procedures laid down in constitutional law. In a more principled perspective, however, broad limitations of access to public documents for reasons of international administrative cooperation may imply an erosion of the traditional principle of transparency.[95] At the same time, it could be argued that this is a price that will have to be paid, at least to some extent, for participating in international cooperation.

Furthermore, EU Regulation (EC) 1049/2001 is applicable in the three Nordic EU states.[96] In the EFTA States of Norway and Iceland, similar rules are laid down in a Decision by the EFTA Surveillance Authority (ESA).[97] Although the Regulation primarily deals with transparency matters in the EU institutions, it includes a provision relating to access to documents in the national administrative authorities participating in EU cooperation, for instance in composite decision-making procedures. Article 5 of the Regulation provides that if a member state receives a request for a document originating from an EU institution, the member state shall consult with the institution 'in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation'. The article also provides that the 'Member State may instead refer the question to the institution'.[98] The EU General Court has characterised the provision as a 'coordination mechanism between EU institutions and Member States'.[99] Although it is still up to the national authority to make the final decision under its own legislation, this duty clearly indicates that the authority constitutes a part of a common European administrative system, where the principle of sincere cooperation applies.[100] The Commission has argued that '[i]n practice, the Member State will endeavour to reconcile the provisions in the Regulation with its own legislation'.[101]

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[94] Cf., in Danish law, Jon Andersen, *Offentlighed i forvaltningen* (DJØF 2013) 282 ff.

[95] Österdahl (n 82) 97.

[96] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[97] ESA Decision 300/12/COL of 5 September 2012 to adopt revised Rules on public access to documents, and repealing Decision 407/08/COL, art 5, available at <www.eftasurv.int> accessed 12 February2021.

[98] Cf. ESA Decision 300/12/COL, art 5: 'Upon request, the Authority [the ESA] shall indicate whether it considers that disclosure of an Authority document in the possession of an EFTA State would undermine such interests as protected in Article 4.'

[99] Case T-264/15 *Gameart sp. z o.o. v European Commission* EU:T:2017:290, paras 34 and 35.

[100] Harden (n 85) 243; Case C-64/05 P, *Sweden (IFAW) v Commission* EU:C:2007:802, [2007] ECR I-11389, para 70.

[101] Commission, Report on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents COM(2004) 45 final, s 3.8.

If this is correct, this constitutes a substantial change in the constitutional role of administrative authorities, at least in Sweden, with its strong focus on transparency as a core value in public law.

8.7 Conclusions

As is clear from the preceding, the administrative agencies of the Nordic states are in a number of ways integrated in international cooperation. It is clear that this development is particularly visible in the cooperation within the EU and the EEA. The main question for the article was how this integrated cooperation has changed the national agencies' constitutional roles in their respective domestic systems for distribution of powers.

As regards the general systems for steering administrative agencies, that is the 'East- and West-Nordic models' (Section 8.3), it can be concluded that the latter model – in Denmark, Iceland and Norway – represents a 'mainstream' European model, which seemingly is not much affected by the Europeanisation or internationalisation of its activities (Section 8.3.1). Contrastingly, the Swedish, and to some extent Finnish, 'East-Nordic' model could in theory create challenges for governmental steering. As has been concluded, however, the established interpretation of the constitutional limits for steering has not limited governmental control over international administrative cooperation, nor has it been a problem in practice (Section 8.3.2).

In regard to administrative rule-making, European and other international administrative cooperation can be said to reinforce the problems associated with delegating norm-making power to administrative bodies that are not democratically legitimised, neither in their respective domestic constitutional systems, nor under EU law. It should be noted here that EU law itself has historically often been criticised for a democratic deficit. Furthermore, the norm-making power of agencies in the European or Global Administrative Space may have as a consequence that one and the same public body is not only the sole holder of technical expertise, but also both makes the rules, engages in supervision in international composite structures and decides on sanctions. Although this is not a problem only at the international level, the international dimension reinforces the problems connected to administrative bodies adapting binding rules already in a purely national context. The administrative rule-making in the Global or European Administrative Space may therefore disturb the constitutional distribution of powers between institutions. As noted in Finnish legal discourse, the national institutional structures are directly linked to well-established, and sometimes very old, systems for accountability at the national level. This is a constitutional problem that should be taken seriously.

Concerning transparency, it would seem that Nordic participation in international administrative cooperation has two sides. On the one hand, the Nordic states, especially Sweden, will have to adapt to foreign views on transparency and accept a possible erosion of the transparency principle. The idea behind Article 5

of Regulation (EC) No 1049/2001 (and the corresponding ESA Decision) would seem to be particularly at odds with at least the Swedish traditions and constitutional rules. This does not relate only to the matter of transparency as such, but also to the constitutionally entrenched requirement that administrative authorities make legal assessments in more important matters independently, without interference from other public bodies. On the other hand, Nordic participation may give a certain scope for changing attitudes, though this possibility should of course not be overstated. Generally speaking, the possible limitations on transparency may also limit the possibility to hold public officials accountable through the monitoring by a free media sector, which was the original idea behind the principle of transparency.

To summarise, in all fields studied here, the participation by Nordic administrative agencies in the Global or European Administrative Space raises questions on how to maintain – or indeed develop – the structures for legitimacy and accountability. This is especially the case for the East-Nordic systems of Sweden and Finland, with their constitutional traditions that in part deviate from what could be seen as a standard European model. However, it should be mentioned that the matters discussed here are not to be regarded as separate problems in contemporary administrative law. Rather, the participation of national administrative agencies in European or other international administrative cooperation sheds light on problems that already exist in the purely domestic settings. Thus, the lack of democratic legitimacy in administrative rule-making, for example, needs to be discussed in both the national and the international setting simultaneously. This is especially important in relation to EU law, since the institutional structures are, to a seemingly ever-increasing degree, interlinked by the use of composite decision-making structures.

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