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Context

The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship

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A. Introduction

One does not approach a challenge with a backward view. Rather, we take on challenges by looking forward. In scholarship, taking a forward view is known as *research*. Law schools define themselves by their research. Scholarly work is what garners prestige from without and solidarity from within. Without a doubt, teaching itself also ranks highly, but excellent teaching begins with proper research. The connection between research and teaching is indispensable. Teaching flourishes where students are gradually introduced to the processes of research, giving them a feeling for the excitement of scholarly work. This forms the nexus between the older and younger generations of academics, continually opening and reopening their perspectives to innovation and the undiscovered. *Semper apertus* reads the seal of the University of Heidelberg from 1386.

Research requires much stamina. The systematic search for new insights and ideas proceeds according to rules different from those governing politics and economy. It succeeds only where researchers forgo actionism. Research with stamina, of course, does not mean longwinded research. Mere reproduction of what is already known and established is not research. One also cannot rationalize research by simple reference to the law's peculiar stabilizing function. Phenomena draw and merit scholarly attention precisely because of their novelty or unusualness. We may find them agreeable, or, owing to the threat they represent to the familiar, traditional framework, they may seem disagreeable. But administrative law scholarship has the task—the responsibility!—to recognize anything and everything that exists

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within the realm of administrative reality, to scrutinize it systematically, and to locate it within the context of previous knowledge and insight.

One such research topic is the internationalization of administrative relations, which is taking place within the tension between the traditional and the novel: not a standard topic, if also not completely new. Since the mid-19th century, legal issues arising out of international administrative treaties and international administrative unions have been dealt with in a broad, international discourse. Contemporary literature clearly recognized that international law and administrative law were converging and needed to be placed on a new foundation—international law as the law of state cooperation, and administrative law as a body of law reaching above and beyond the traditional notion of sovereignty. Georg Jellinek fittingly captured both the aspect of an increase in legal structuring and the aspect of an alteration of the prior understanding: 'That definition of the term *sovereignty*, which characterizes state power as inherently absolutely limitless, cannot be reconciled with the historical reality of states bound by a system of administrative treaties.'[1] By 1882, he had already formulated it positively in his treatise on the relationships of states: in the large administrative associations, states show 'that, in their reciprocal relations, they are not only powers, that is, not only physically acting forces, but also orders.'[2]

Many of these insights were shaken by the Second World War with some forced into the background, while post-1945 German public law—understandably, but exaggeratedly—concentrated on domestic issues.[3] Recently, however, one can observe a resurgence in scholarly interest in the internationalization of administrative law.[4] This provides us with our starting point.

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[1] GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 740 (3rd ed., 1913).

[2] GEORG JELLINEK, DIE LEHRE VON DEN STAATENVERBINDUNGEN 111 (1882).

[3] Konrad Hesse, *Einleitende Bemerkungen zum Kolloquium*, *in* DIE WELT DES VERFASSUNGSSTAATES 11 (Martin Morlok ed., 2001); Rainer Wahl, *Die zweite Phase des Öffentlichen Rechts in Deutschland: Die Europäisierung des Öffentlichen Rechts,* 38 DER STAAT 495 (1999).

[4] CHRISTIAN TIETJE, INTERNATIONALISIERTES VERWALTUNGSHANDELN (2001); CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG (2005); CHRISTOPH OHLER, DIE KOLLISIONSORDNUNG DES ALLGEMEINEN VERWALTUNGSRECHTS (2005); FRANZ C. MAYER, DIE INTERNATIONALISIERUNG DES VERWALTUNGSRECHTS (2005); Matthias Ruffert, *Rechtsquellen und Rechtsschichten des Verwaltungsrechts*, *in* 1 GRUNDLAGEN DES VERWALTUNGSRECHTS 149 *et seq.* (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006). For earlier works, *see* Hans-Heinrich Trute, *Die Wissenschaft vom Verwaltungsrecht,* DIE VERWALTUNG, Beiheft 2, 9, 21 *et seq.* (1999); Jan Ziekow, *Die Funktion des Allgemeinen Verwaltungsrechts bei der Modernisierung und Internationalisierung des Staates, in* INTERNATIONALISIERUNG VON STAAT UND VERFASSUNG IM SPIEGEL DES DEUTSCHEN UND JAPANISCHEN STAATS- UND VERWALTUNGSRECHTS 187 (Rainer Pitschas & Shigeo Kisa eds., 2002).

As I understand it, the internationalization of administrative activity means processes of an administrative nature extending beyond national administrative borders, either because they have evolved beyond such borders or because they were, from the outset, conceived without consideration of such borders. Diminished territoriality is their hallmark. If however the principle of territoriality can be counted among the 'classic' premises of administrative law,[5] then internationalization represents a substantial challenge.

My thoughts here are developed in three steps. Part II describes internationalized administrative relations. In light of this survey, part III addresses the specific challenges confronting administrative law scholarship. Part IV undertakes, in the form of a research agenda, to draft a blueprint for a law on international administrative relations. Part V concludes the discussion with a plea for a redefinition of international administrative law. Before proceeding with examples, two limitations on the scope of the present discussion should be kept in mind:

> The *Europeanization* of administration and administrative law[6] is not dealt with, although it can certainly be viewed as a particular form of internationalization. It is set aside nonetheless because of the particular circumstances of supranational lawmaking (most prominently, those of EC law) have allowed it to develop its own independent legal configuration and is, therefore, significantly distinct from what one might call 'normal' internationalization.
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> I also avoid an association with the concept of *global administrative law*, although it is currently the subject of a rich, scholarly discussion, especially in the USA[7] and Italy,[8] but also elsewhere.[9] A

[5] OTTO MAYER, II DEUTSCHES VEWALTUNGSRECHT 454 (1st ed., 1896).

[6] STEFAN KADELBACH, ALLGEMEINES VERWALTUNGSRECHT UNTER EUROPÄISCHEM EINFLUß (1999); DER EUROPÄISCHE VERWALTUNGSVERBUND (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold eds., 2005); Jürgen Schwarze, EUROPÄISCHES VERWALTUNGSRECHT CXII (2nd ed., 2005).

[7] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law,* 68 LAW & CONTEMPORARY PROBLEMS 15 (2005), available at: http://www.law.duke.edu/journals/cite.php?68+Law+&+Contemp.+Probs.+15+(summerautumn+2005)#H1N2.

[8] Conferences on Global Administrative Law in Viterbo, 10-11 June 2005 and 9-10 June 2006.

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> portion of the phenomena handled in those debates will indeed be addressed here. However, the (over)extension into the global sphere shifts the focus too quickly away from the (relatively speaking) more readily comprehensible factual constellations; therewith, certain experiences and potential solutions remain unutilized, although they are certainly already available in the practice-related material of comprehensible, relatively small-scale situations of administrative cooperation, both bilaterally and between adjacent countries.

B. The Functions of Administrative Law

A law on international administrative relations should thus also be framed in terms of the same dual function which shapes domestic administrative law:[10] it must protect the individual's rights against the administration, and it must make legal procedures and instruments available to the administration, so that it can effectively carry out its tasks. Administrative law scholarship has the peculiar responsibility to defend this dual function against fluctuations in lawmaking and in adjudication, for only academia maintains the distance necessary to an overview of developments in the longer term.

Today, such fluctuation also includes the fact that the discourses on administrative law begun on the national level grow far beyond these borders. Fortunately, more has occurred on this point in the last two decades than is generally recognized—initially in comparative administrative law but, more recently, increasingly in collaboration on substantially similar problems.[11]

I. The Law's Formative Force

An inquiry into the functions of administrative law scholarship is simultaneously an inquiry into the effectiveness of the law:

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[9] JEAN-BERNARD AUBY, LA GLOBALISATION, LE DROIT ET L'ÉTAT (2003); MATTHIAS RUFFERT, DIE GLOBALISIERUNG ALS HERAUSFORDERUNG AN DAS ÖFFENTLICHE RECHT (2004).

[10] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 16 *et seq.* (2nd ed., 2004); ZIEKOW (note 4), at 201 *et seq.*

[11] For example, in the European Group of Public Law, its annual conferences, and the European Review of Public Law that it publishes, available at: http://www.eplc.gr.

> Because many occurrences take place in much greater dimensions and with much stronger developmental dynamics than the law, do they not thus fall outside the law's sphere of influence? The prototypical example is electronic communications technology, which can hardly be approached with a single state's regulatory scheme.
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> Have not many actors, already for quite a long time, preferred softer means of settlement and compromise instead of waiting for hard legal solutions? Examples include various systems of negotiation, settlement, and plea bargaining, each with its own, situational codes of conduct.

Is not law itself generally on the retreat, being pressed back to the fringes by stronger policy goals? Objections such as this are untenable.

Of course, most of these objections are not specifically caused by internationalization. They can equally be directed against national administrative law and have been dealt with at length, particularly in the discussion of administrative legal reform.[12] At no time was it seriously in doubt, whether the law could, or would, continue to have effective influence in its pivotal role as a central standard for the social order. The law is not simply swept helplessly along in an uncontrollable current of 'de-formalization'. Doomsday scenarios are hardly helpful. Societal processes are, and always have been, a mixture of formal and informal elements. There never was a golden age of immaculately legal administration. Formal elements provide the requisite stability; informal practices maintain the necessary reserves of flexibility. Striking the proper balance between the two is the actual task. And it is a continuous task.[13]

This task demands, however, that administrative law scholarship abandon a restrictive definition of the term *law*, that is, abandon a definition that encompasses only the *traditional* legal instruments and only the *substantive* statutory law that determines, or programs, administrative activity. In reality, the influence of law

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[12] *See* I-X SCHRIFTEN ZUR REFORM DES VERWALTUNGSRECHTS (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1993-2004); Andreas Voßkuhle, *Die Reform des Verwaltungsrechts als Projekt der Wissenschaft*, 32 DIE VERWALTUNG 545 (1999).

[13] Friedrich Schoch, *Entformalisierung staatlichen Handelns, in* III HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 131 *et seq.* (Josef Isensee & Paul Kirchhof eds., 2005).

flows also from procedural law and from the law on institutional structures.[14] The law's governance function does not break down at the border between public and private law; rather, the law's potential to govern embraces both the mode of reasoning based on legal principles and a cautious extension to include those standard works which do not (yet) count among the canonized sources of law.

Admittedly, there are greater challenges to the law within the system of internationalized administrative action than within the national sphere. Often, even a basic, common legal framework is lacking. Individual, national parliaments have, at best, only limited influence.[15] And the confusing structure of administrative cooperation also does its part to hamper the determination of accountability.

On the other hand, it is precisely international law that is experienced with legal instruments of widely varying degrees of 'hardness' and intensity. International law also exhibits greater openness in questions of sources of law—as is evident from article 38 of the ICJ Statute.[16] Law in international relations is by no means necessarily in decline, as is very apparent from recent developments. Dispute settlement in the WTO is seen as a manifestation of increasing juridification.[17] The self-imposed practice among expert panels of setting strict procedural rules shows that the law's legitimizing function is not disposable. Admittedly, the administrative cooperation underlying internationalization was itself only able to develop in a political climate with due respect for the rule of law; nonetheless, the assertion that internationalized administrative relations are indeed amenable to legal systematization remains a very tenable scholarly position.

II. The Meaning of "Open Statehood"

But inquiry into the functions of administrative law scholarship is also inquiry into the state's role in the systematization of internationalized administrative relations.

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[14] For more detail, *see* GUNNAR FOLKE SCHUPPERT, VERWALTUNGSWISSENSCHAFT 461 *et seq.* (2000); Claudio Franzius, *Modalitäten und Wirkungsfaktoren der Steuerung durch Recht, in* GRUNDLAGEN DES VERWALTUNGSRECHTS 42 *et seq.* (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006).

[15] Kingsbury, Krisch & Stewart (note 7), at 34 *et seq.*; Ruffert (note 9), at 61-62.

[16] *See* Christian Tietje, *Recht ohne Rechtsquellen?*, 24 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 27, 30 *et seq.* (2003); Tietje (note 4), at 255 *et seq.*

[17] GÖTZ J. GÖTTSCHE, DIE ANWENDUNG VON RECHTSPRINZIPIEN IN DER SPRUCHPRAXIS DER WTO-RECHTSMITTELINSTANZ 88 *et seq.* (2005); Meinhard Hilf, *Das Streitbeilegungssystem der WTO, in* WTO-RECHT 507 *et seq.* (Meinhard Hilf & Stefan Oeter eds., 2005); John Jackson, *Effektivität und Wirksamkeit des Streitbeilegungsverfahrens der WTO, in* VERRECHTLICHUNG–BAUSTEIN FÜR GLOBAL GOVERNANCE? 99 *et seq.* (Bernhard Zangl & Michael Zürn eds., 2004).

Administrative law owes its traditional form to its close relationship to the nation-state and the associated institutions of constitutional law (separation of powers, legality, judicial review).[18] With this internationalization, can we now anticipate *Amministrazioni senza Stato*—as the title of a thoughtful Italian study speculates?[19]

Viewed from a purely global perspective, such a prognosis is not unfounded: other actors (international organizations such as the World Bank, mixed expert bodies such as the Codex Alimentarius Commission, and NGOs) play important roles in the processes of administrative decision-making.[20] For instance, the so-called secondary lawmaking of international organizations, an intermediate form of law that is important particularly for administrative execution, does indeed diminish the influence of the individual state.[21]

However, taking the myriad manifestations of internationalized administrative action into an overall view, the scene looks far less dramatic: in police law, tax law, and social welfare law, states and state institutions still determine the situation—international entanglements notwithstanding—and oversee the influence from processes of internationalization. Good examples of this include the detailed regulation of the 1990 Schengen Convention or treaties on double taxation.

In worldwide international intercourse, as well, states ultimately continue to be the most important formative forces.[22] Here, one must be careful not to be dazzled by the spectacular activities of international NGOs or multinational corporations. It is state governments that conclude treaties.[23] It is primarily states' courts that develop customary international law. It is states' executive instruments that are called on to implement treaties. 'Whichever way one looks at it, the legitimacy of political

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[18] SABINO CASSESE, GLOBAL ADMINISTRATIVE LAW: AN INTRODUCTION 36 *et seq.* (2005), available at: http://globusetlocus.org/it_data/fil/s_cassese__global_administrative_law.pdf; Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law,* 9 EUROPEAN PUBLIC LAW 563, 565-566 (2003).

[19] STEFANO BATTINI, AMMINISTRAZIONI SENZA STATO: PROFILI DI DIRITTO AMMINISTRATIVO INTERNAZIONALE (2003).

[20] GUNNAR FOLKE SCHUPPERT, STAATSWISSENSCHAFT 869 *et seq.* (2003).

[21] JURIJ D. ASTON, SEKUNDÄRGESETZGEBUNG INTERNATIONALER ORGANISATIONEN ZWISCHEN MITGLIEDSTAATLICHER SOUVERÄNITÄT UND GEMEINSCHAFTSDISZIPLIN 195 (2005).

[22] VOLKER RÖBEN, AUßENVERFASSUNGSRECHT (Habilitationsschrift) 33-38 (2005); TRANSFORMATION DES STAATES (Stephan Leibfried & Michael Zürn eds., 2006).

[23] Anthony Aust, *Domestic Consequences of Non-Treaty Law-Making, in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, 487, 495 (Rüdiger Wolfrum & Volker Röben eds., 2005).

activity and legal standardization on the international level still relies on the legitimizing structures and processes of nation-states.'[24]

In the present context, reconnecting to national constitutional orders is similarly necessary. It is in line with the insight that, internally, the state is the only reliable point of crystallization for civic identity and the only bearer of comprehensive responsibility with respect to the citizenry.[25] States alone are therefore able to counterbalance the strong segmentation of politics on the international level.[26]

Here, too, of course, modern challenges will not be overcome by a concept of statehood, which seeks to maximize insulation from the outside and which, in any case, interprets internationalization above all as a threat. Instead, it will be necessary to take a *concept of open statehood* seriously, as the German Basic Law has done, in articles 23-25 and 59, from its inception by elevating the concept as a normative ideal.[27] The Federal Constitutional Court today fittingly emphasizes that international law 'endeavours to form the foundation of legitimacy for every state order'.[28]

In light of this sort of constitutional decision, the internationalization of legal and administrative relations is not a distressing side-effect that must be limited with as many 'reservations' as possible. Rather, such internationalization should be considered normality for a constitutional state—of course, not without risks and difficulties, which at any rate complicate governmental action in the domestic sphere as well—and should not be viewed as a radical development intruding into and usurping the state's domain.

Understood as normality, internationalization would involve our incorporating its various forms of cooperation into that part of administrative law which we

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[24] Fritz Scharpf, *Legitimationskonzepte jenseits des Nationalstaats, in* EUROPAWISSENSCHAFT 705, 736 (Gunnar Folke Schuppert, Ingolf Pernice & Ulrich Haltern eds., 2005).

[25] Rainer Wahl, *Internationalisierung des Staates, in* FESTSCHRIFT FÜR ALEXANDER HOLLERBACH 193, 220-221 (Joachim Bohnert, Christof Gramm, Urs Kindhäuser, Joachim Lege, Alfred Rinken & Gerhard Robbers eds., 2001).

[26] *See* Armin von Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahm*e, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 853 (2003).

[27] Röben (note 22), at 528-530.

[28] Bundesverfassungsgericht (BVerfG–Federal Constitutional Court), 2 BvR 955/00, 1038/01, (2004) (original quotation: "… Grundlage der Legitimität jeder staatlichen Ordnung sein will."). *See also* 2 BvR 2259/04, (2005) (discussing the consequences and attention to the structures, content, and legal viewpoints of other states, for example, in legal assistance).

consider worth preserving. Doing so would facilitate a better legal comprehension of especially the interface of horizontal and vertical modes of administrative cooperation.

III. Basic Elements: Treaty and Statute

If states are indeed still the most important forces in international politics, then there are good reasons to continue entrusting much to the two main forms of legal structuring: the international treaty and the parliamentary statute. And there are also good reasons to take these two forms as the core building materials for a law on international administrative relations.

1. Treaties

The international treaty constitutes both the foundation and the framework for international administrative relations: treaties concretize obligations to cooperate, install regimes for secondary lawmaking and legal review, and create international organizations as new actors. Treaties are also the means required to raise protective standards above a minimum level of protection under customary international law. Where intensive forms of cooperation have developed without a treaty as basis but with effects reaching into the national sphere, states have the task to 're-file' these forms under treaty law.

The theoretical tenets of the international treaty have found a sufficiently clear doctrinal gestalt in the Vienna Convention on the Law of Treaties.[29] At the same time, they are flexible enough to process the demands of novel developments. The possibility of simplified, continued development and concretization of treaties exists, not least in the potentialities of secondary lawmaking.[30] For its part, states' task here is to act as a decelerator, whenever they have the impression that such administrative activity threatens to run off the rails of individual state authority. And, for its part, academia's task is to craft an *ultra vires* standard to gauge this connection between states and international administration.

Specifically characteristic of international administrative relations are 'regulatory cascades': treaties set up only the framework. Development of the specific content is reserved for further forms of negotiation and decision-making. The primary form comprises administrative agreements which can be concluded as governmental or ministerial agreements or, with the proper authorization, even as implementation

[29] GEORG DAHM, JOST DELBRÜCK & RÜDIGER WOLFRUM, I.3 VÖLKERRECHT 511-763 (2nd ed., 2002).

[30] *See* the contributions to Wolfrum & Röben (note 23).

agreements by subordinate governmental departments.[31] Considering this canon of modes, recourse to memoranda of understanding should be limited to truly open situations in which the parties concerned reasonably wish to avoid binding themselves legally. For execution of administrative acts, such situations would presumably remain exceptional. Additionally, the practice of publishing agreements still has much room for improvement.

2. Statutes

Legislation is the second structuring factor. First of all, however, in parliamentary praxis, more attention must be paid to international administrative action. Pains must be taken to make the international dimension present in individual sectoral laws, and a requirement of parliamentary ratification of international treaties fails to achieve this sufficiently. It is necessary not only to create legal bases for the arsenal of international administrative acts, but also to connect them to those existent legal bases that regularly implicate internal administrative action. There are already examples of this: the tax code and the social security code contain a significant number of provisions on the transfer of data to foreign institutions. Police law governs the deployment of German police officers abroad as well as the authority of foreign officers in German territory. These, however, are relatively rare provisions. The law of administrative procedure, in some ways the most important representative of general administrative law in Germany, has completely factored out the international dimension, even though its inclusion, for instance, in official administrative assistance, would have seemed only logical.

Yet the legislature has recently recognized the meaningfulness of the issue. The new Telecommunications Act, for example, explicitly emphasizes the responsibilities of regulatory agencies with respect to international telecommunications policy, especially their cooperation with international organizations, and specifies that the agencies act in this respect on behalf of the Federal Ministry of Economics (§140). Thus, it goes well beyond the old regulation of cooperative execution (§83 of the Telecommunications Act of 1996); indeed, it has implications for the gubernative powers that have previously been exercised only informally in transnational networks of agencies. At any rate, this is a clear attribution of domestic accountability. The legislature draws on the governance capabilities inherent in its power to adjust the state's structure; thereby, it connects the international administrative network back to the national constitutional order.

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[31] *See* Art. 19 of the Abkommen zwischen der Bundesrepublik Deutschland und Japan, Bundesgesetzblatt (BGBl.) part II (1999), at 876; Art. 5 of the Vereinbarung zur Durchführung des Abkommens, BGBl. part II (1999), at 896.

IV. "Giving Teeth" to the Legal Order

Treaty and statute 'give teeth' to the international legal order and to national legal orders.[32] A statute domestically mandates an application of the law, which then underlies those legal standards by which administrative agencies are bound under article 20(3) of the German Basic Law. Conversely, a treaty opens up the possibility of bringing cross-border administrative cooperation into the statutory systematics, thereby permitting the resolution of incidental issues, such as questions of choice of law or of liability.

From *both* approaches, starting from the treaty or the statute, the international and national legal orders are converging,[33] without however consolidating into a homogenous unit. Differences (for instance, in the interpretive methods) and tensions persist. The law on international administrative relations knows no hierarchy of sources of law. This would presume a unified political system, which is more doubtful at the international level than the European level.

Tensions between the legal orders can be mitigated by interpretation in accordance with international law and other rules of deference. But the tensions cannot be completely alleviated. The points of tension are well-known from the Federal Constitutional Court's handling of EC law and the ECHR.[34] The tension is however no German *Sonderweg* but has parallels with other legal orders. Even the abovementioned judgment of the Court of First Instance on 'terrorist monies' is a reaction to the tensions between legal levels, that is, between the international and the European protection of fundamental rights.

Tensions will continue to increase as the administrative activities of international bodies intensify and begin to lead to types and degrees of legal intervention that the international legal order is not yet equipped to deal with. The literature on international environmental law provides a case in point. Scholars rightfully point out that the level of compliance monitoring already achieved should have been flanked by a canon of indispensable procedural principles.[35] The above-cited

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[32] For a fundamentally similar approach, *see* Tietje (note 4), at 488, 640 (internationalized administrative activity within the system of national and international law as a functionally coherent unit).

[33] For a clear representation of this point, *see* DANIEL THÜRER, I KOSMOPOLITISCHES STAATSRECHT 75 (2005) (organizational systems engaging with each other).

[34] *See* Stefan Mückel, *Kooperation oder Konfrontation?: Das Verhältnis zwischen BVerfG und EGMR,* 44 DER STAAT 403 (2005).

[35] ULRICH BEYERLIN, UMWELTVÖLKERRECHT 496 (2000).

judgment of the Court of First Instance points in the same direction. It also identifies the two approaches to releasing the tensions:

> The first approach is 'bottom-up' and inquires whether strict adherence to international law is not precluded by the legal reservation of an *ordre public* that compels both a more definite disconnection from UN law and scrutiny using a European fundamental rights standard—an *ordre public* that derives from *within* the European legal tradition or that of the Member States. This has heretofore been the usual *decoupling* approach; it takes only the internal act of execution into account, asserting its entitlement to exceptional regulation and refraining from making any statement regarding the law of the higher level.
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> The Court, however, chose to follow another approach. It inquires whether the UN Security Council's resolutions meet the requirements of UN law and then proceeds to construe the reservation of an *ordre public* in international law, derived from the *jus cogens* of international law. This can be described as the *extending* approach; it is particularly interesting in that it does not limit itself to the internal legal order's demands on the internal act of execution, instead seeking to recognize fundamental protective standards that have already developed on the higher prescriptive level. It is an approach similar to the one advocated in one of the dissenting opinions in the judgment on the European arrest warrant.[36] Here, much admittedly remains unresolved, including especially the question of jurisdiction.[37]

[36] 2 BvR 2236/04, (2005) dissenting opinion of Judge Michael Gerhardt, at 339 *et seq*. For a similar approach to a judgment of the Court of First Instance, *see* Lothar Harings, *Die EG als Rechtsgemeinschaft (?) – EuG versagt Individualrechtsschutz,* 16 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 705 (2005).

[37] Christoph Möllers, Frankfurter Allgemeine Zeitung, 14 February 2006, at 39; regarding this question, *see also* Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte,* 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 41, 57 *et seq*. (2006).

Nonetheless, everything speaks for the use of both approaches in combination: fundamental standards based on the rule of law (fair trial rights, judicial protection) can today already be developed for activities on the international levels, as well. International organizations cannot demand anything of their members that they are not themselves willing to respect. The necessary *democratic* elements of decision-making are still to be secured primarily by way of a sufficient connection from the national executive actors in the international contexts back to the legitimating sources of their respective constitutions.[38]

C. A Blueprint for the Law on Internationalized Administrative Relations

The above statements have already raised a few specific points that will be addressed in the following discussion, which undertakes a listing of topics that need to be addressed in a systematic representation of a law on international administrative relations. As stated above, only the contours of the necessary crafting of the legal doctrine will be sketched here, in the form of a research program.[39]

The opportunity to draw up such programs and to implement them with other, especially younger scholars is perhaps one of the greatest advantages offered by a career as an academic researcher and instructor. In order to take full advantage of this opportunity, however, a certain research climate is required: a high degree of international exchange and a faculty that combines friendly collegiality and prudent distance. Much has already been self-evident for decades and need not now be fought for, requested, or otherwise attained.

As far as the system-building of a law on international relations is concerned, there is something to be said for an orientation along three doctrinal categories: form, procedure, and principle.[40] By centring the legal questions of internationalized administrative relations on forms, procedures, and principles, one proceeds from what is already well-settled; inquires into the larger context, into functional equivalents, gaps in protection, and necessary expansions into related areas; and enables comparison.

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[38] Möllers (note 4), at 358 *et seq.*; Thomas Puhl, *Entparlamentarisierung und Auslagerung staatlicher Entscheidungsverantwortung, in* III HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 3 *et seq.* (Josef Isensee & Paul Kirchhof eds., 2005). For a discussion in the context of the European Union, see the dissenting opinion of Judge Gertrude Lübbe-Wolff, 2 BvR 2236/04, (2005).

[39] *See* WOLFGANG SCHLUCHTER, HANDLUNG, ORDNUNG UND KULTUR 9-10 (2005) (discussing generally the requirements of a research program).

[40] On their significance in national administrative law, *see* Schmidt-Aßmann (note 10), at 297 *et seq.*

I. Administrative Law on Information

One issue, however, must be dealt with preliminarily: the issue of information and the trafficking of information in international administrative intercourse. It cuts across all three doctrinal categories, so to speak. Administrative cooperation in the international sphere is, above all else, the exchange of information. Here, even more than in national administrative law, it holds true: administrative law is first and foremost law on the administration of information! Its regulatory objects can be identified by asking four questions:

1. What information may be collected and exchanged at all?
2. Who has access to the information held by an administrative entity, and who is authorized to make a record of the information?
3. To what degree is the information open to the public, and how is the necessary confidentiality secured?
4. Who safeguards the quality of information, and who can be held liable for inaccuracy?

Nowadays, the protection of *personal* data is already relatively well secured. At any rate, guidelines for uniform rules are recognizable in social security agreements and double taxation treaties, and such guidelines provide points of reference for the negotiation of administrative agreements or for the development of cooperative practice. In contrast, the protection of business and trade secrets remains uncertain. Here, too, however, international standards need to be developed. This is true, for example, in the case of the transfer of corporate data for purposes of review by environmental law systems—especially when NGOs are involved in such systems.

One problem, the significance of which has hardly been recognized, is the handling of information that has *already* been collected. As a general rule, an agency is not *required* to evaluate information received. But is it *permitted* to do so in all cases? Every utilization of information can make its own unnoticed contribution to the establishment of practices that the given entity is neither authorized to practice itself nor even permitted to tolerate. In the processing of information, thus, scandalous investigative practices in another country, such as torture, cannot be ignored, and *a fortiori* an administrative institution may not, whether directly or indirectly, contribute to such practices itself. On the other hand, administrative law knows no absolute prohibition on the processing of information. In defense against serious threats, especially threats to life and health, information may be extracted

from the international administrative intercourse and utilized, even when its collection would be impermissible under domestic law.

II. Procedures and Principles

Forms, procedures, and principles provide the fundamental structure not exclusively for German administrative law, well-known for its systematic approach; rather, they are also evident in other administrative legal orders, including the European order.[41]

The legal procedure of international administrative relations is, today, still defined largely by the institutions of reciprocal administrative assistance[42] and mutual recognition.[43] The current view holds that both have to be based on an international treaty and that, as yet, there are no unwritten duties of administrative assistance or recognition. By now, though, there is a recognized duty to inform regarding dangers in bordering areas, based on the principle of good neighbourliness. It also seems that one cannot rule out the existence of a duty when the situation involves the enforcement of *jus cogens* in international law. Within each treaty-framework, the relations of administrative assistance have been intensifying. Still dominant, of course, is the division of spheres of responsibility that follows from the principle of sovereignty. However, clauses earmarking data for specific purposes are common in data protection law and leave no doubt that external effects must now be taken into consideration.

At this point, it becomes clear that a law on internationalized administrative relations will first have to orient itself toward *principles*, before individual regulations can be developed. Such principles can be derived inductively from national law and international treaties and deductively especially from human rights protections under international law. European administrative law has developed with a similar orientation toward principles.[44] Recently, the rulings of the WTO dispute settlement bodies have proven to be a source of principles as law, which not only has effects on domestic administrative law, but even seeks to bind international authorities: principles such as good faith, due process of law, equal

[41] *See* JÜRGEN SCHWARZE, EUROPÄISCHES VERWALTUNGSRECHT (2nd ed., 2005).

[42] *See* Rudolf Geiger, *Legal Assistance Between States in Administrative Matters, in* III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 186 (Rudolf Bernhardt ed., 1997).

[43] *See* SASCHA MICHAELS, ANERKENNUNGSPFLICHTEN IM WIRTSCHAFTSVERWALTUNGSRECHT DER EUROPÄISCHEN GEMEINSCHAFT UND DER BUNDESREPUBLIK DEUTSCHLAND 52 *et seq.* (2004).

[44] *See generally* Armin von Bogdandy, *Europäische Prinzipienlehre, in* EUROPÄISCHES VERFASSUNGSRECHT 149 (Armin von Bogdandy ed., 2003).

treatment, proportionality, and the protection of legitimate expectations of privacy have been increasingly recognized as spanning multiple levels.[45]

Included among these principles is the notion that interests implicated and those whose interests they are have a chance to be heard. This, though, raises complicated questions of *representation*. Some of the literature, here, assigns an important role to NGOs and promises that they will deliver a strengthening of democratic values.[46] One should, however, be cautious with overdrawn expectations. When viewed with proper caution for the decisional interdependence on the international levels, insights into the ordering of powers tend rather to speak against expectations of greater legitimacy flowing from a multiplicity of participatory possibilities.[47] It can conversely even confuse a clear view of responsibility, which is a basic prerequisite of democracy. Rather, recourse to national administrations often seems to be a more effective means of securing a basic level of accountability. Thus, what is actually needed is a conceptualization of delegation and review in the national constitutions—a conceptualization that is specifically tailored to international administrative relations.[48]

D. A Plea for a New International Administrative Law

A research area gains in consistency when it can be put succinctly, put in a nutshell, as it were. The law on internationalized administrative relations will yet need to be newly conceptualized, but it should henceforth be understood as the core of *international administrative law*!

However, this term has already been taken;[49] the prevalent usage of *international administrative law* refers to the public law on conflict of laws, developed in linguistic parallel to private international law, which is to say, it refers to national laws on the

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[45] della Cananea (note 18), at 573 *et seq.*; Göttsche (note 17), at 195 *et seq.*; Kingsbury, Krisch & Stewart (note 7), at 24.

[46] Kingsbury, Krisch & Stewart (note 7), at 22; STEFANO BATTINI, INTERNATIONAL ORGANIZATIONS AND PRIVATE SUBJECTS: A MOVE TOWARD A GLOBAL ADMINISTRATIVE LAW? 22 (2005), Institute for International Law and Justice, NYU School of Law, Working Paper 2005/3, available at: http://www.iilj.org/publications/documents/2005.3Battini.pdf; Zoe Pearson, *Non-Governmental Organisations and International Law: Mapping New Mechanisms for Governance,* 23 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 73 (2004).

[47] Ohler (note 4), at 329 *et seq.*

[48] *See also* Tietje (note 4), at 585 *et seq.*

[49] *See* Ohler (note 4), at 2 *et seq.*

applications of laws in fact constellations with a foreign link.[50] This parallelization was askew from the outset. What is more, it has been the cause of some contention.[51] The two fields pursue very different goals. Most notably, international administrative law, thus understood, does not deal with choice of law among various legal orders.

Administrative law scholarship should abandon the inaccurate parallel and radically reorder the formation of terminology. International administrative law is to be understood as the administrative law originating under *international law*. It involves processes of reshaping national law and reconstructing international law; these processes resemble Europeanization in their structures (but not in their mechanisms).

As a matter of clarification, it is worth noting that none of this changes the fact that *national* administrative law remains the main point of orientation for the practical administrative activity of most agencies. The laws on the applications of laws, or laws on conflict of laws, are to be systematized within the framework of *national* administrative law for administrative procedures with foreign implications; this is national law which is to be determined by, above all else, the national constitution.[52]

For the newly defined international administrative law, I would propose—in continuance of research on European administrative law[53]—three main functional circles: it is a body of law governing international administrative institutions, a body of law *determinative* of national administrative legal orders, and a body of law on *cooperative* handling of specific associative problems.

I. Law of International Administrative Institutions

As a body of law governing international administrative institutions, international administrative law takes account of the current development that international organizations increasingly carry out administrative activities with external effects.[54]

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[50] For references, *see* CHRISTIAN VON BAR & PETER MANKOWSKI, I INTERNATIONALES PRIVATRECHT 235, 236 (2nd ed., 2003); Ernst Steindorff, *Verwaltungsrecht, Internationales, in* III WÖRTERBUCH DES VÖLKERRECHTS 581 (Karl Strupp & Hans-Jürgen Schlochauer eds., 1962).

[51] Ludwig von Bar, *Internationales Verwaltungsrecht*, *in* II ENZYKLOPÄDIE DER RECHTSWISSENSCHAFT 278 *et seq.* (Josef Kohler ed., 1914). For an early critique, *see* Mayer (note 5), at 454.

[52] For a recent, groundbreaking work, *see* Ohler (note 4), at 112 *et seq.*

[53] Schmidt-Aßmann (note 10), at 384 *et seq.*

[54] *See* Kingsbury, Krisch & Stewart (note 7), at 20 *et seq.*

The above discussion has already shown that international organizations cannot do so without respecting fundamental principles of law, especially those protecting international human rights.

Beyond this, a higher degree of binding legal force must be ascribed to an array of practical rules of procedure, which international institutions have heretofore practiced only as internally binding standards. Gradually, such *practical* rules must be developed into legal rules.

II. Law Determinative of National Administrative Legal Orders

In its second function as a body of law determinative of national administrative legal orders, international administrative law rearranges those national orders by calling for alterations and expansions. One recent example is the Aarhus Convention, concluded under the auspices of ECOSOC. Without establishing particular cooperative relations among national executive branches, the Convention prescribes a reconstruction of national protections in environmental matters, thereby resulting in expansions of both internal administrative procedure and judicial administrative procedure.[55] A separate topic involves the effects that international law has on national laws on application of laws in cases with a foreign link.[56]

III. Law on Cooperative Handling of Multilevel Issues

Merging the two mentioned functions, international administrative law is thirdly a law on horizontal and vertical administrative cooperation and the specific multilevel issues related to such cooperation. It is not enough to perform the central regulatory tasks of administrative law, to protect individual rights, and to ensure administrative accountability, where this all is done separately at each distinct level. Association, in and of itself, creates its own legal problems when accountability becomes unclear and when individual decisions become dependent on specialized voting mechanisms.

International administrative law must find answers to these specifically multilevel challenges. There are certainly models in various fields, among them the interpretive understandings in treaties on double taxation and the comprehensive standards on data transfer found in social legislation as well as agent liability for

[55] Christian Walter, *Internationalisierung des Deutschen und Europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Aarhus-Konvention*, 40 EUROPARECHT 304 (2005).

[56] Ohler (note 4), at 129-130.

errors in police information systems and the notion of an *ordre public* in international law. Legal scholars will have the task of taking these components of positive-law material and constructing a systematized law on international administrative relations. A wide-open field of work in comparative law and legal doctrine lies ahead of us. Research takes a forward view: *semper apertus*!