Articles

The Global Administrative Order Through a German Lens: Perception and Influence of Legal Structures of Global Governance in Germany

By Philipp Dann and Marie v. Engelhardt***

Abstract

This article examines to what extent and how German administrative law and organisation have been changed by globalization, as well as the increasing reach and depth of global governance. A first chapter analyzes the legal discourse in Germany and finds that international (more than global) administrative law has become a major topic. It points to three different strands in German scholarship and highlights especially the proposal to conceptualize global governance as an exercise of international public authority. In a second step, the article examines three specific fields of law (environment, health and financial services) and analyzes how national administrative and legal structures have been influenced by globalization. In particular, it inquires what instruments of standard setting and forms of implementation have been used. Finally, the article acknowledges that globalization has had a tremendous effect on German administrative law, and describes seven instrumental and substantive modes of the effect of international rules on the German legal order.

A. Introduction

One of the most intense and innovative discussions in public law over the past years has often debated the question of how, and to what extent, globalization and the increasing reach and depth of global governance have changed international law. A central impulse for this discussion has been the Global Administrative Law Initiative based at the New York University (NYU) School of Law.[1] The present article reflects on this discussion in three

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ways: first, it aims to introduce German discourse in this area to a non-German audience, which has been varied and rich. Second, it will analyze how various fields of administrative law have been shaped by globalization and, finally, it will examine different legal mechanisms that contributed to this change.

B. The Notion of a Global Administrative Order

The notion of a *global* administrative order has not really caught on in Germany. However, discussion on international administrative law ("*Internationales Verwaltungsrecht")* has a long tradition in German administrative scholarship, and is both intense and varied.[2]

In the current discourse, three strands of the discussion on the notion of international administrative law can be distinguished:

- The first approach conceives international administrative law in a public law version of conflicts of law. It is mostly concerned with the question of how to deal with collisions of rules from different jurisdictions.[3] In this sense, international administrative law does not deal either with a vertical relationship between the state and international organizations or with international institutional law as such, but rather with the horizontal relationship between different national rules.
- A second focus of the debate is the question of how international law transforms national administrative law.[4] It is based on the observation that a plenitude of international treaties, organizations and regimes produce rules that also shape the content and contours of national administrative law. Although this dimension

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[1] Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 (2005).

[2] In this rich tradition, *see especially* CHRISTIAN TIETJE, INTERNATIONALISIERTES VERWALTUNGSHANDELN (Internationalized Administrative Action) 30 (2001), with references to Lorenz von Stein.

[3] CHRISTOPH OHLER, DIE KOLLISIONSORDNUNG DES ALLGEMEINEN VERWALTUNGSRECHTS: STRUKTUREN DES DEUTSCHEN INTERNATIONALEN VERWALTUNGSRECHTS (The Collision Order of General Administrative Law: Structures of German International Administrative Law) (2005).

[4] *See* CHRISTIAN TIETJE, *supra* note 2; MATTHIAS RUFFERT, DIE GLOBALISIERUNG ALS HERAUSFORDERUNG AN DAS ÖFFENTLICHE RECHT (Globalization as a Challenge for Public Law) (2004); Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen* (The Challenge Posed by the Internationalization of Administrative Relations to Administrative Law Scholarship), 45 DER STAAT 315 (2006); FRANZ C. MAYER, DIE INTERNATIONALISIERUNG DES VERWALTUNGRECHTS, MODI UND STRUKTUREN DER EINWIRKUNG AUF DAS NATIONALE RECHT IN ZEITEN DER EUROPÄISIERUNG UND GLOBALISIERUNG (The Internationalization of Administrative Law. Modi and Structures of Influence on National Law in Times of Europeanization and Globalization) (Manuscript) (2005).

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will feature in our answers to later questions, this approach does not contribute to the question of the notion of a global or international administrative order. The law in question is still national law, even though it maybe shaped by international or global law.

- Finally, the third strand of the discussion focuses on the law of international institutions. This approach too has a long tradition in German scholarship,[5] but has gained traction and urgency only recently, while being driven by a double impulse. For one, it is obvious that international actors today are not only bound by, but also make law, so that the question of how this law is to be understood and evaluated arises. At the same time (and this is the second impulse), there is the concern of the legitimacy of international institutions and their activities. Accountability, transparency and the "taming" of international institutions more generally seem to be an urgent task, not in the least for the discipline that is traditionally in charge of such questions (administrative law).[6] Here, a US-inspired discourse has spawned numerous German contributions.[7]

Eberhard Schmidt-Assmann has proposed to realize and analyze the close connections between the second and third strands. He understands international administrative law "as the administrative law originating under international law."[8] In continuation of his research on European composite administration, he proposes to distinguish "three main functional circles, [where international administrative law] 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."[9]

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[5] *See*, for example, IGNAZ SEIDL-HOHENVELDERN, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIESSLICH DER SUPRANATIONALEN GEMEINSCHAFTEN (The Law of International Organizations, Including of Supranational Communities) (1971).

[6] With this concern, *see especially* Armin von Bogdandy, *Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung* (Prolegomena to Principles of Internationalized and International Administration), *in* ALLGEMEINES VERWALTUNGSRECHT— ZUR TRAGFÄHIGKEIT EINES KONZEPTS (General Administrative Law – On the Solidity of a Concept) 687 (Hans-Heinrich Trute ed., 2008).

[7] INTERNATIONALES VERWALTUNGSRECHT: EINE ANALYSE ANHAND VON REFERENZGEBIETEN (International Administrative Law: An Analysis Based on Areas of Reference) (Christoph Möllers *et. al.* eds., 2007); Claus Dieter Classen, *Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft (*The Development of International Administrative Law As a Task for Legal Scholarship), VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 365 (2008); MATTHIAS RUFFERT & CHRISTIAN WALTER, INSTITUTIONALISIERTES VÖLKERRECHT, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN UND SEINE WICHTIGSTEN ANWENDUNGSFELDER (The Law of International Organizations and Its Most Important Fields of Application) (2009); THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010).

[8] Eberhard Schmidt-Assmann, *The Internationalization of Administrative Relations*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 7, at 943, 961.

[9] *Id.*

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In the present context, however, it still leaves the question of what the content and subjects of such an international administrative law can be. Which are the international administrative institutions and the laws that they are composed of? It is here that the idea of an international, or even global administrative order is most concrete. Hence, is the administration only through international organizations – or through other institutions as well?

In this respect, an approach formulated in a project at the Max Planck Institute (MPI) in Heidelberg might be helpful, and will therefore be explained here in more detail.[10] This approach starts out by contextualizing international administrative law thought within the discussion and concept of global governance. Global governance is understood as central to the visualization of a whole new realm of international cooperation and regulation that reaches beyond the traditional instruments of public law. However, even though it has a fundamental function, the concept of global governance, so it is argued, is not sufficient for the purpose of public law research, since it does not provide a critical and principled perspective for a *legal* and especially, for a public law inquiry. Public law deals with public authority. It is an ultimately unilateral set of rules that can curtail freedoms, and serves the dual function of constituting and, at the same time, of limiting unilateral i.e. public authority.[11] Yet the concept of global governance as such does not provide a guiding tool on what is considered public authority. Hence, the focus of public law inquiry should not be global governance, but rather the exercise of international public authority. Where such authority is exercised, the limiting function of public law (and lawyers) sets in. The content and contours of the international "administrative" aspect are based on the definition of an international public authority (IPA).

How is this authority defined? It might be helpful to cite a bit more extensively from the central article introducing the Heidelberg project on IPA. In it, authority is defined as

> [T]he legal capacity to *determine* others and to reduce their freedom,[12] i.e. to unilaterally shape their legal or factual situation.[13] An exercise is the realization of

[10] Armin von Bogdandy *et al.*, *Developing the Publicness of Public International Law*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 7, at 3.

[11] EBERHARD SCHMIDT-ASSMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE, GRUNDLAGEN UND AUFGABEN DER VERWALTUNGSRECHTLICHEN SYSTEMBILDUNG (General Administrative Law as An Idea of Order, Foundations and Tasks of System-building in Administrative Law) 16 (2004).

[12] This definition is meant to develop sufficient conceptual characterizations that cover the most important cases; we do not aim for a full definition. For details, *see* HANS-JOACHIM KOCH & HELMUT RÜSSMANN, JURISTISCHE BEGRÜNDUNGSLEHRE (Legal Reasoning) 75 (1982).

[13] Our concept of authority is thus, different from that of the New Haven School, which defines authority as "the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make

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> that capacity, in particular by the production of standard instruments such as decisions and regulations, but also by the dissemination of information, like rankings.[14] The determination may or may not be legally binding.[15] It is binding if an act *modifies the legal situation* of a different legal subject without its consent. A modification takes place if a subsequent action, which contravenes that act, is illegal.[16]

At the same time, the authors stress

> [T]hat the concept of authority needs to be conceived in a broader way than this rather traditional definition. The capacity to determine another legal subject can also occur through a non-binding act, which only *conditions* another legal subject. This is the case whenever that act builds up pressure for another legal subject to follow its impetus. Such exercise of public authority often occurs through the establishment of non-binding standards which are followed, *inter alia*, because the benefits of observing them outweighs the disadvantages of ignoring them (e.g. the OECD standards for avoiding double taxation),[17] or because they are equipped with implementing mechanisms imposing positive and negative sanctions (e.g. the FAO code of conduct for responsible fisheries).[18] Furthermore, legal subjects can also be conditioned by instruments without deontic operators (e.g. statistical data contained in PISA reports),[19] building up communicative

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which decision by what criteria and what procedures." *See* Myres McDougal & Harold Laswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AMERICAN JOURNAL OF INTERNATIONAL LAW 9 (1959).

[14] On standard instruments, *see* Matthias Goldmann, *Inside Relative Normativity*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 7, at 661.

[15] This concept of authority is similar to the concept of power developed by Barnett & Duvall, *Power in Global Governance*, *in* POWER IN GLOBAL GOVERNANCE 98 (Michael N. Barnett ed., 2007). The main difference between their concept of power and our concept of authority in this article is that the latter needs a legal basis. Narrower however, is the definition of authority as the power to enact law unilaterally, as proposed by CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG (Division of Powers) 81-93 (2005).

[16] *See* Armin von Bogdandy *et al*., *supra* note 10, at 3, 11.

[17] Ekkehart Reimer, *Transnationales Steuerrecht* (Transnational Tax Law), *in* INTERNATIONALES VERWALTUNGSRECHT: EINE ANALYSE ANHAND VON REFERENZGEBIETEN (International Administrative Law: An Analysis Based on Reference Sites) 181 (Christoph Möllers, Andreas Voßkuhle & Christian Walter, eds., 2007). Alternatively, *see* Christoph Möllers *et. al.* eds., *supra* note 7.

[18] Jürgen Friedrich, *Legal Challenges of Non-binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 7, at 511.

[19] *See* Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority Through National Policy Assessment. The OECD's PISA Policy as a Paradigm For a New International Standard Instrument*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW 241 (2008).

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> power which the addressee can only avoid at some cost, be it reputational, economic, or other."[20]

This still does not elaborate on the specific natures of the *public* and *international* within international public authority. Here, it is proposed to:

> [C]onsider as international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest.[21] The "publicness" of an exercise of authority, as well as its international character, therefore depends on its *legal basis*."

Again, the authors admit that this definition of publicness appears as rather formalistic and does not exhaust the meaning of publicness framed by the constitutionalist mindset of the Western tradition. Public institutions in a liberal democracy are expected to respect and promote fundamental values, such as public ethos, transparency or accessibility for citizens.[22] The article authors, therefore, stress that their own understanding of the concept of publicness

> [I]s deeply imbued by and intended to carry much of this tradition, which formulates issues that need to be addressed. Nevertheless, such expectations towards public institutions should not simply be transposed to international institutions, since the differences between domestic and international institutions remain fundamental. Therefore, we believe that the legal basis of authority provides the best criterion for qualifying it as *public* and drawing the line between public and private authority that we conceive as indispensable for legal research. Accordingly, an enterprise like Volkswagen which exercises contractual authority over employees in its Brazil subsidiary cannot be considered to exercise public authority because such an enterprise is constituted under private law and is not formally charged with performing public tasks.[23]

At the same, it has to be taken into account that one of the main revelations of the research on global governance is that institutions based on private law or hybrid

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[20] *See* Armin von Bogdandy *et al*., *supra* note 10, at 3, 12.

[21] Some put the task of discharging public duties at the heart of their approach, including Matthias Ruffert, *Perspektiven des Internationalen Verwaltungsrechts* (Perspectives of International Administrative Law), *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 395, 402. In this article, we prefer to build on the concept of public authority, but qualify it by referencing public interest as well.

[22] *See* Armin von Bogdandy *et al*., *supra* note 10, at 3, 13.

[23] *Id.* at 14.

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institutions which lack any relevant delegation of authority may carry out activities which are just as much of public interest as those based on delegations of authority. The MPI approach therefore proposes that

> [S]uch activity can be regarded as a functional equivalent to an activity on a public legal basis. To identify such functional equivalence, we suggest a topical catalogue of typical instances rather than a generic definition relying on the evasive concept of the "common good." A typical instance would be, for example, any governance activity which directly affects public goods, by which global infrastructures are managed, or which unfolds in a situation where the collision of fundamental interests of different social groups has to be dealt with. Thus, an institution like ICANN, though perhaps not necessarily exercising public authority in a strict sense, should be subject to the same legal requirements which are applicable to comparable exercises of public authority, for it manages a global infrastructure (i.e. Internet domain names). Assessing such governance activities by the legal standards applicable to functionally comparable exercises of international public authority has two main objectives. It shows that public affairs can be regulated in other, and sometimes more effective legal settings from which public institutions might even draw insights. At the same time, such reconstruction provides a framework for critique, as private forms of organization might have even more severe legitimacy deficits than public ones.[24]

In sum, any international activity that is to be considered as the exercise of international public authority according to the definition given is conceived as part of the international administrative order.

C. Global Cooperation and the Globalization of National Legal Orders

Against the background of these approaches to a global administrative order, and especially to international public authority, we will now examine how three specific fields of administrative law have been influenced by international public authority.

I. Environment

Global environmental administration makes an interesting case study for the globalization and Europeanization of the German legal order, given its administrative structure, decentralized standard setting aimed at national administration, and its frequent use of

[24] *Id.* at 15.

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informal instruments.[25] There are several ways in which international environmental law impacts German law.

First, administrative cooperation between national and international bodies plays a vital role in global environmental administration, due to the inherently transboundary and multi-sectoral nature of the subject matter at hand. In accordance with the principle of international cooperation and its concretization of various obligations of cooperation contained in national and international law, German government agencies maintain regular and active relations with international environmental organizations and agencies.[26] Indeed, many international environmental regimes build on an institutional structure of periodic conferences, expert meetings etc., which require the participation of national administrative bodies to concretize, develop and foster compliance with environmental regulation.[27]

Further, German environmental law often implements international standards through executive lawmaking, namely through legislation that provides the power to issue statutory instruments ("*Verordnungsermächtigung"*). These statutory instruments are applied to give effect to international treaty obligations, but also to decisions and non-binding recommendations of international organizations. For example, decisions and standards adopted in the framework of the OSPAR Convention on the Protection of the Marine Environment of the North-East Atlantic must be incorporated into national law by means of statutory instruments issued by the Federal Minister of the Environment.[28]

Other legal instruments contributing to the globalization of national environmental administration are contained in international treaties which establish environmental reporting requirements for government agencies,[29] or which set out that certain activities impacting the environment require an administrative decision ("*Genehmigungserfordernis"*).[30] In some cases, national legislation establishes that such

[25] *See* CHRISTIAN TIETJE, *supra* note 2, at 413.

[26] *Id.* at 413.

[27] On administrative cooperation and networks, see Wolfgang Durner, *Internationales Umweltverwaltungsrecht* (International Environmental Administrative Law) *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 146. Alternatively, *see* Christoph Möllers *et. al.* eds., *supra* note 7.

[28] *See* the Law on the Convention on the Protection of the Marine Environment of the North-East Atlantic art. 2, Aug. 23, 1994, 1994 O.J. (L104) 2; [Bundesgesetzblatt—BGBl.] II 1994,1 355.

[29] *See*, for example, the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area art. 19, Feb. 2, 1994, 1994 O.J. (L73).

[30] *See* The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), Sept. 22, 1992, 2354 U.N.T.S 67; 32 I.L.M. 1069 (1993). The OSPAR Convention establishes detailed provisions for the domestic procedure governing the grant of approvals for certain activities impacting on the environment.

administrative decisions take into account non-binding international environmental standards, thus obtaining normative force in national law.[31] Furthermore, international standards for the protection of the environment make their way into national legislation through the principle of international law-friendly interpretation of domestic law.[32]

An especially influential instrument of internationalization has been the 1998 Aarhus Convention, which Germany ratified on 15 January 2007.[33] Most of the international obligations contained in the Aarhus Convention had been transformed into European Community law by means of three European Communities Directives adopted between 2001 and 2003.[34] To comply with the directives, Germany then passed the national law on environmental information ("*Umweltinformationsgesetz")*, the law on public participation ("*Öffentlichkeitsbeteiligungsgesetz")* and the law on environmental legal remedies ("*Umweltrechtsbehelfsgesetz")* in 2005 and 2006.[35] In sum, the Aarhus Convention

[31] *See* CHRISTIAN TIETJE, *supra* note 2, at 421. *See* also, for example, the *Hohe-See-Einbringungsgesetz* (High Sea Dumping Act) art. 5, Aug. 25, 1998, BGBI. 1S, 2455, which establishes that the permit required for the dumping of excavated material and urns for burial at sea will be withheld if the threshold values of radioactivity are exceeded. These threshold values are set by the International Atomic Energy Agency (IAEA) and have been adopted by the contracting states to the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 13, 1972.

[32] *See,* for example, the Ramsar Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245, 11 I.L.M. 969 (1972). For an international law-friendly interpretation, see FRANZ C. MAYER, *supra* note 4, at 313.

[33] *See* the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, UN Doc. ECE/CEP/43, 38 I.L.M. 517 (1999). On the impact of the Aarhus Convention on National Environmental Law, Jun. 25, 1998, 2161 U.N.T.S. 447, *see* for example, Thomas von Danwitz, *Aarhus-Konvention. Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten* (Aarhus Convention. Environmental Information, Public Participation, Access to Justice), 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NZW) 3 (2004); Martin Scheyli, *Aarhus-Konvention über Informationszugang, Öffentlichkeitsbeteiligung und Rechtsschutz, in Umweltbelangen* (Aarhus Convention on Access to Information, Public Participation in Environmental and Legal Issues) 38 ARCHIV DES VÖLKERRECHTS 2 (2000); Petra Jeder, *Neue Entwicklungen im Umweltrecht vor dem Hintergrund der Aarhus-Konvention* (New Developments in International Environmental Law Against the Background of the Aarhus Convention), *in* JARHBUCH DES UMWELT-UND TECHNIKIRECHTS (Yearbook of Environmental Law and Technology) 145 (Reinhard Hendler *et. al*. eds., 2002).

[34] Directives 2003/4/EC on Public Access to Environmental Information 2003 O.J. (L41) 26; 2003/35/EC on Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment 2003 O.J. (L156) 17; and 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment 2001 O.J. (L197). Some international obligations contained in the European Convention [hereinafter "the Convention"] have not, however, been transformed into European Community [hereinafter "the EC"] law, and need to be implemented independently by Germany. *See* Wolfgang Durner, *Internationales Umweltverwaltungsrecht* (International Environmental Management Law), *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 121, 134.

[35] With regards to the implementation of Directive 2003/35/EC, it has been argued that German law does not go far enough, since the right to sue it provides is too restricted. *See* the request of a preliminary decision of the Higher Administrative Court of Münster to the Court of Justice of the European Union [hereinafter "CJEU"], Case No. C-115/09, Mar. 27, 2009.

establishes a truly multilayered normative regime, while the perception prevails that German law is being *Europeanized*, not internationalized. This perception overlooks to what an extent European standards are predetermined by international standards, in a process in which the latter are interposed between international and national law.[36]

With regards to the international governance of climate change, Germany has ratified the United Nations Framework Convention on Climate Change (UNFCC) on 9 December 1993, and the Kyoto Protocol on 31 May 2002.[37] Together, they constitute a legal regime for climate protection that is aimed at the interaction of international and national administration. At the international level, both the UNFCC and the Kyoto Protocol foresee a conference of state parties, which can modify or concretize existing obligations by means of consensus. The obligations thereby established are binding on the European Community,[38] and at the national level on the German executive in particular, through the enactment of statutory orders and other measures adapting the German law on emission control ("*Bundes-Immissionsschutzgesetzes")*.[39] In the case of the Kyoto Protocol, the European Community committed to a global emission target that was subsequently divided among its member states.

II. Health

The influence of global health governance on Germany's national legal order is complex and multilayered. It takes place through a wide range of formal and informal instruments, reaching from close administrative cooperation and the implementation of standards in national law to more oblique effects, such as in the field of standardization.

To start with, a wide range of government agencies concerned with public health – e.g. the Federal Office of Consumer Protection and Food Safety (*Bundesamt für Verbraucherschutz und Lebensmittelsicherheit*) and the Federal Institute for Risk Assessment (*Bundesinstitut für Risikobewertung*), maintain close working relations with International Organizations

[36] *See* Wolfgang Durner, *supra* note 34, at 121, 131-133.

[37] *See* the Law on the United Nations Framework Convention on Climate Change [hereinafter the "UNFCC"], Sept. 13, 1993, BGBl. II 1993, 1783; and the Law on the Kyoto Protocol to the United Nations Framework Convention [hereinafter the "Kyoto Protocol"], Apr. 27, 2002, BGBl II 2002, 966.

[38] The European Commission approved the UNFCC on 21 December 1993 and the Kyoto Protocol on 31 May 2002.

[39] *Bundes-Immissionsschutzgesetzes* (German Law on Emission Control), Sept. 26, 2002, BGBl. I 2002, 3830. *See* Christoph Bail et al., *Klimaschutz und Recht* (Climate Protection and Law), *in* HANDBUCH ZUM EUROPÄISCHEN UND DEUTSCHEN UMWELTRECHT: EINE SYSTEMATISCHE DARSTELLUNG DES EUROPÄISCHEN UMWELTRECHTS MIT SEINEN AUSWIRKUNGEN AUF DAS DEUTSCHE RECHT UND MIT RECHTSPOLITISCHEN PERSPEKTIVEN (Handbook on European and German Environmental Law: A Systematic Illustration of European Environmental Law with Ist Effects on German Law and Legal Political Perspectives) (Hans-Werner Rengeling ed., 1998).

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and bodies, for example with the World Health Organization (WHO), the Food and Agriculture Organization (FAO), or the Codex Alimentarius Commission (CAC).[40] Administrative cooperation is indeed a basic feature of global health administration: it reaches from regular participation of national bodies in numerous WHO committees, to explicit obligations of coordination and information exchange between national and international bodies, as contained in the Statute of the World Organization for Animal Health.[41]

Apart from administrative cooperation, the impact of global health administration on health governance in Germany can be traced to the incorporation of substantive standards into national law.

For one, legislation that provides the power to issue statutory instruments ("*Verordnungsermächtigung"*) plays an important role in the implementation of international regulations on public health, especially where subject matters are characterized by dynamic evolution and scientific developments.[42] For instance, a national law from 1971 provides the health minister with the power to enact statutory instruments required to implement international health regulations (IHR) of the WHO.[43] Another law grants the health minister authority to change the list of non-prescription, prescription and illegal narcotics in accordance with corresponding amendments to the Annexes of the Single Convention on Narcotic Drugs.[44] As a result, international legal obligations in the context of the respective treaty regime can be created or modified without formal ratification.

Further, German law contains numerous references to binding and non-binding instruments of global health administration. For example, the German drug law refers to the WHO list of International Nonproprietary Names (INN), and foresees the use of these designations to facilitate the identification of pharmaceutical substances or ingredients. By means of reference, the non-binding INNs become binding in the national legal order.[45]

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[40] *See* CHRISTIAN TIETJE, *supra* note 2, at 326. Germany has ratified the statute of the World Health Organization on 29 May 1951.

[41] *See* Article 2 of the Statute of the World Organization for Animal Health.

[42] The legal basis for the German *Verordnungsermächtigung* is article 80, para 1 of the GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

[43] *See Gesetz zu den Internationalen Gesundheitsvorschriften* (Law on International Health Regulations), Jul. 1, 1971, BGBl. II 1971, 865. *See also* CHRISTIAN TIETJE, *supra* note 2, at 33.

[44] *See* Art. 1, para 4 of the *Betäubungsmittelgesetz* (National Law on Narcotics), Jul. 28, 1981, BGBl. I S. 1981, 681, 1187.

[45] *See* CHRISTIAN TIETJE, *supra* note 2, at 33, and art. 10, para 6 of the *Arzneimittelgesetz* (National Drug Law), 16 May 1961, BGBl. I S. 1961, 533. Other references point to codes of conduct adopted by international organizations, for example the Model Guidelines for the International Provision of Controlled Medicines for

Yet the normative impact of global health regulations on the national legal space is often more oblique than the above-mentioned instruments suggest, and there is frequently no concrete national legislation that intends the international standard to become directly effective in national law.

For instance, a large part of standard setting by international organizations in the realm of public health is aimed at harmonization through standardization, for which the Codex Alimentarius offers a pertinent case study. The German Food Code (*Deutsches Lebensmittelbuch*) contains a set of guidelines on the origin, consistency and other characteristics of food that are drafted by a national commission in consideration of the Codex Alimentarius.[46] Standards of the latter that have been adopted by the German government are legally binding and leave no scope for judgment evaluation to the national commission. Even findings of the CAC that have not been formally adopted, however, cannot be ignored by the national commission in light of its technical mandate to determine the prevailing standards on food.[47]Also, the standards of the CAC are referred to in the World Trade Organization's (WTO) Agreement on Technical Barriers to Trade (TBT) and in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). As a WTO member state, Germany's administrative bodies – including the German Food Code Commission – are legally bound to comply with the Codex Alimentarius. In addition, this obligation follows from European Community law, and thus has supremacy over national law. As a result, the *prima facie* non-binding standardization efforts of the CAC have an extensive, indirect normative effect on German health administration.[48] Further, the authority and influence of the CAC goes beyond what can be grasped by simply looking at the formal incorporation of its standards into national law.[49]

In the case of the swine flu, Germany did not take concrete measures when the WHO announced on 11 June 2009 that the pandemic alert for H1N1 was raised to 6, since its national plan on pandemics was already in place.[50] However, close cooperation with WHO

Emergency Medical Care, WHO/PSA/96.17 (1996), which must be observed according to art. 15, para. 3 of the *Betäubungsmittel-Außenhandelsverordnung* (German Law on External Trade with Narcotics) BGBl. I 1981, 1420, to facilitate the export of narcotics to disaster areas.

[46] *See* art. 33, para. 2 of the *Lebensmittel- und Futtermittel-Gesetzbuch* (German Food and Animal Food Code), Jul. 24, 2009, BGBl. I S. 2009, 2205.

[47] *See* CHRISTIAN TIETJE, *supra* note 2, at 339.

[48] *Id.* at 342.

[49] Ravi Afonso Pereira, *Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission, in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 7, at 541.

[50] Press release, *Bundesministerium für Gesundheit* (Federal Ministry of Health) 55 (Jun. 11, 2009). On the challenges of pandemics to the national legal order, *see* Michael Kloepfer & Sandra Deye, *Pandemien als*

continued throughout, with the Robert Koch Institute (the central federal institution responsible for disease control and prevention) and the Paul Ehrlich Institute (the Federal Agency for Sera and Vaccines) maintaining regular contact with the Organization and the Federal Ministry of the Interior acting as National IHR Focal Point.[51]

III. Financial Sector

Germany has been supportive of the Basel Accords and has taken early action to transpose the global financial standards of Basel II into national law. Following an agreement between the members of the Basel Committee setting out a timeframe for implementation, the European Union (EU) adopted two directives to adapt to Basel II in 2006 – the Banking and the Capital Adequacy Directives.[52] Germany adopted a national law in November 2006 that brings German banking law in line with the changes brought on by European directives and the Basel II accords. The new law grants the Federal Minister of Finance the power to issue statutory instruments to implement the European directives.[53] The Federal Minister has acted accordingly and issued three statutory instruments containing more detailed risk and capital management requirements for banks.[54]

The fact that the non-binding standards of Basel II have thus obtained normative force in the domestic legal system by means of European and national legislation, is regarded as problematic from a democratic legitimacy point of view.[55] The global financial standards

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Herausforderung für die Rechtsordnung (Pandemics as a Challenge For the Legal Order), DEUTSCHES VERWALTUNGSBLATT 1208 (2009). On the debate about the costs accrued through the swine flu vaccination, *see* Cathrin Correll, *Wer trägt die Kosten für die Schutzimpfung gegen "Schweinegrippe*"? (Who Bears the Costs of the Swine Flu Vaccination?), 62 NEUE JURISTISCHE WOCHENSCHRIFT 3069 (2009).

[51] *See* Art. 4, lit. 1 of the International Health Regulations, Jul. 25, 1969, 21 U.S.T. 3003; T.I.A.S. 7026; 764 U.N.T.S. 3; *see also* art. 12 of the *Infektionsschutzgesetz* (German Law on the Prevention and Combat of Infections), Jul. 20, 2000, BGBI. I S. 2000, 1045, which establishes an obligation on the Robert Koch Institute to notify the World Health Organization and the European Community Network for the Epidemiological Surveillance and Control of Communicable Diseases in the EC.

[52] Directive 2006/48/EC Relating to the Taking Up and Pursuit of the Business of Credit Institutions 2006 O.J. (L177) 1; and 2006/49/EC on the Capital Adequacy of Investment Firms and Credit Institutions 2006 O.J. (L177) 201.

[53] *See* the *Gesetz zur Umsetzung der neu gefassten Bankenrichtlinie und der neu gefassten Kapitaladäquanzrichtlinie* (Act Implementing the Recast Banking Directive and the Recast Capital Adequacy Directive), Nov. 17, 2006, BGBl. I S. 2006, 2606.

[54] *See* the three statutory instruments of December 14, 2006: the *Solvabilitätsverordnung* (Solvency Regulation), Dec. 14, 2006, BGBI. 1S. 2006, 2926, the *Groß- und Millionenkreditverordnung* (Credit Regulation) Dec. 14, 2006, BGBl. I 2006, 3065, and the *Liquiditätsverordnung* (Liquidity Regulation), Dec. 14, 2006, BGBI, I S. 2006, 3117.

[55] *See for example*, Christoph Möllers, *Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung* (Transnational Cooperation of Agencies. Constitutional

set out in the Accords are adopted by the Basel Committee, which is composed of representatives of national central banks and supervisory authorities, which in Germany, is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht)*[hereinafter the "BAFin"]. The BAFin has the explicit mandate to engage in international administrative cooperation, and since the Basel Committee does not set binding international law, the BAFin do not require an explicit legal authorization to engage in standard setting.[56] While a formal authorization exists, however, the fact that the non-binding Basel Accords are being transposed into national law results in a situation where the realization of public interests rests in the hands of a non-representative group of administrative agents. Further, since the implementation of the Basel Accords constitutes an act of parliamentary self-commitment, it raises complicated questions as to the constitutional limits of the content, as well as of the implementation of the standards transposed.[57]

D. Globalized or Re-Nationalized?

There is no simple answer to the question of whether global problems have made Germany and its law more globalized. Instead, one would have to distinguish between different fields of law to give a precise answer. Although a general trend pointing to more international regulation with effects on national law seems most obvious (as the examples in the section above suggest), there are also exceptions. Two of these are especially interesting:

- For the field of migration law, Jürgen Bast has convincingly demonstrated that the dynamic here is less one of internationalization, and more one of de-internationalization through Europeanization.[58] EU law regularly absorbs or superimposes the existing, though not numerous international norms with those of its own. Put more generally, Bast underlines the need to keep in mind the three-level structure that exists within the EU, i.e. the national, European and international levels, when thinking of the process of internationalization. EU

and Public International Law Problems of Transnational Administrative Standard Setting), 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 351 (2005).

[56] Art. 4, para. 2 of the *Finanzdienstleistungsaufsichtsgesetz* [FinDAG—Law on Financial Supervisory Authority], Apr. 22, 2002, BGBl. I S. 2002, 1310, setting out the statute of the German supervisory authority on financial services.

[57] *See* Christoph Ohler, *Internationale Regulierung im Bereich der Finanzmarktaufsicht* (International Regulation in the Area of Financial Supervisory Authority), *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 274 .

[58] Jürgen Bast, *Internationalisierung und De-Internationalisierung der Migrationsverwaltung* (Internationalization and De-Internationalization of the Administration of Migration, *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 279, and especially 307-312.

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Member states are part of a highly legalized federal structure that has specific competences to act internationally, along with instruments to shape the internal EU order.

- Another interesting field with contrasting features is that of the law of development cooperation. Here, there certainly exists a high density of international norms and organization. However, the interplay between the levels is characterized by a heterachy. The competences of different actors are parallel, put especially clearly in Art. 209 II 2 of the Treaty on the Functioning of the European Union (TFEU).[59] This has the effect that states such as Germany remain highly independent in the way that they organize their transfer of development aid.

Although it is therefore advisable to take a close look at each case, the general trend is clear. The instances of international impulses or inputs (in non-legal terms), are numerous and obvious. To summarize the ways in which German law has reacted to such impulses, it might be helpful to distinguish between the modes by which such impulses take effect. Franz Mayer has distinguished and analyzed seven instrumental and two substantial modes of the impacts of international rules on German law.[60] In terms of instrumental modes he makes the following distinctions, which are outlined below.[61]

I. *Changes in the Constitution*

International developments can prompt legislative changes on the constitutional level, even though this is rare in the German context. It has happened most prominently in the case of international pressure on German asylum law, and the ensuing changes in Article 16a of the *Grundgesetz* (the Basic Law for the Federal Republic of Germany— GG), even though the pressure here was more political than legal.

II. Implementation of International Obligations Through Laws or Executive Orders ("Umsetzung")

This is the most important and classic way to transpose international rules into national law. This can take place through lawmaking ("*Parlamentsgesetz"*), but also through executive legislation ("*Verordnung oder Verwaltungsvorschriften"*). Article 59 of the GG is

[59] Philipp Dann, *Grundfragen eines Entwicklungsverwaltungsrechts* (Basic Questions of a Developing Administrative Law), *in* INTERNATIONALES VERWALTUNGSRECHT, *supra* note 17, at 7, and especially 43-44.

[60] *See* FRANZ C. MAYER, *supra* note 4.

[61] The two substantial modi of influence are human rights law and economic liberalization.

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the central norm that governs this process. Such implementation is considered the instrument most sensitive to the specialties of the national legal order.

III. Direct Effect

Of less, but perhaps growing importance are the direct effects of international norms that are fundamental to European law and their influence on national legal orders. The discussion on the direct effect of WTO law has highlighted the problems and pitfalls of this instrument.

IV. References ("Verweise")

Of special importance are also the dynamic as well as static references to international norms in national laws.[62] Given the fact that such references are part of the national (here, German) law, they can easily be identified, and are thus a transparent instrument to implement international rules at first sight. However, especially dynamic references lose this benefit, since they refer to changing international rules, and hence cloud the current state of the law. In terms of transparency and democracy, dynamic references are problematic.

V. Compliant or International Law-Friendly Interpretations ("Völkerrechtsfreundliche Auslegung")

Another relevant mode of internationalization of the German legal order and an important technique in multi-level legal orders is the international law-friendly interpretation of norms, or the interpretation to comply with international law. According to this technique, any German law should be construed as far as possible in conformity with international law, parallel to the established method of interpretation to comply with EU law ("*europarechtskonforme Auslegung")*. This mode concerns any norm in national law, since any norm must be in conformity with the international law obligations of Germany.[63] This mode of international law-friendly interpretation is nevertheless, softer than direct effect or reference, since it is always based on a national norm as the starting point. Its effect then is, to a large extent, dependent on the openness of the national norm. Vague general norms ("*Generalklauseln"*) offer more leeway for interpretation. Also, the mode of

[62] *See especially* CHRISTIAN TIETJE, *supra* note 2, at 599-620.

[63] *See* the *Bundesverfassungsgericht* [BverfG-Federal Constititutional Court], 75 BverfGE 1, 18; also, *see generally* Albert Bleckmann, *Der Grundsatz der Völkerrechtsfreundlichkeit der deutschen Rechtsordnung* (The Principle of International Law-Friendly Interpretation in the German Legal Order), DIE ÖFFENTLICHE VERWALTUNG 137 (1996).

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international law-friendly analysis becomes relevant only in the application of law, and is hence of special importance for courts or administrative agencies that apply the law. Law making in itself is therefore not so much concerned.

VI. Comparison ("Rechtsvergleichung")

An indirect mode of internationalization can be found in the method of comparison. By placing national norms in the context of other national or international ones, alternatives become apparent and the pressure to adopt more fitting legal solutions, or at least to justify traditional national solutions rises. Comparative perspectives on law, including public law, have become more important to the German legal order, even though they are not legally required, as is demonstrated, for example in EU law (Article 340 II of the TFEU) or in some national legal orders (e.g. Article 39(I)(c) of the South African Constitution). Comparison is a relevant mode for both lawmakers and adjudicators.

VII. Coordination through informal standards

A well-known technique of the German federal system as well as the European legal order, internationalization in the sense of a convergence of national legal orders in accordance with trans- or international standards also takes the form of coordination through informally agreed standards. This is mostly a horizontal method, i.e. one that is used between national states (e.g. Basel Committee, G8/20) and one that is highly effective. It is problematic, however, in at least two ways: First, in a democratic perspective, since informal standards are regularly negotiated between governments with parliaments being included often only (if at all) at the end of the process. And secondly, such coordination through standards is a problem for the clarity of law, since standards are not only seldom transformed into binding rules.

E. A New Administrative Law?

It is certainly correct to assume that German national sovereignty has been affected by the process of globalization. The German legal order is no longer (if it ever was) a "self-contained regime." From its inception, it has been open to influences by public international law (as laid down in Article 25 of the GG). In this sense the developments of the past years, especially the rise of global governance and increased global regulation can only be regarded as a gradual change, and not as an entirely new phenomenon. Thus, they deepen the interwoven and interlinked structure of legal orders.

Quite obviously then, this poses questions from a democratic standpoint. Public authority and lawmaking beyond the nation-state lack the democratic basis that has come to be

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expected for liberal democracies.[64] As per our understanding, it would be misleading, all the same, to use these doubts as arguments against the open interaction with international law, and especially in the field of international administrative law. Rather, this is the task of legal academia to formulate doubts, mark deficits and think about solutions. The recent debate on international administrative law ("*Internationales Verwaltungsrecht"*), global administrative law and on public law approaches are hence the signs of an important ongoing discussion.

[64] Regarding these issues, *see* Rainer Wahl, *Der einzelne in der Welt jenseits des Staates* (The Individual in the World Beyond the State), *in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG (Constitutional State, Europeanization, Internationalization) 53 (Rainer Wahl ed., 2003).

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