

Administrative self-regulation  
("innenrecht") and global administrative law

Auto-regulação administrativa  
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## ADMINISTRATIVE SELF-REGULATION (“INNENRECHT”) AND GLOBAL ADMINISTRATIVE LAW

## AUTO-REGULAÇÃO ADMINISTRATIVA (“DIREITO INTERNO”) E DIREITO ADMINISTRATIVO GLOBAL

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**Abstract:** A new category of “law” is developing, Global Administrative Law (GAL). The goal of this new strand of literature is to capture and embed the discourse about global governance and bring it into the legal realm. One controversially debated question is whether all of these new phenomena categorised as global governance can be called proper law. This paper uses the concept of law developed by Benedict Kingsbury as well as the German administrative law concept to shed some light on the question of validity and weight. Kingsbury distinguishes between these two categories. In contrast, German administrative law distinguishes between internal law (only “law” in exceptional cases but weight attached) and external law (law in the proper sense). A comparison between Kingsbury’s concept of law for GAL and the German approach can therefore enhance our understanding of law in the global space.

**Abstract:** Uma nova categoria de “direito” está a desenvolver-se: o Direito Administrativo Global (GAL). O objetivo desta nova categoria passa por captar e incorporar o discurso sobre a governança global e trazê-lo para o campo normativo. Uma questão controversa que tem sido debatida consiste em saber se todos esses novos fenómenos categorizados como governança global podem ser considerados verdadeiramente como direito. O presente artigo recorre ao conceito de direito desenvolvido por Benedict Kingsbury e, bem assim, ao conceito alemão de direito administrativo para procurar lançar alguma luz sobre a questão da validade e peso. Kingsbury distingue entre estas duas categorias. Em contrapartida, o Direito Administrativo alemão distingue entre direito interno (apenas “direito” em casos excepcionais) e direito externo (direito em sentido próprio). Uma comparação entre o conceito de direito de Kingsbury para o GAL e a abordagem alemã pode, portanto, melhorar a nossa compreensão do direito no espaço global.

**Keywords:** Global Administrative Law, concept of law, Verwaltungsvorschrift-

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ten, Innenrecht, waste management

**Palavras-chave:** Direito Administrativo Global, conceito de direito, directrizes administrativas, direito interno, gestão de resíduos

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## 1. Introduction

The separation of power doctrine, the three branches of government, legislative, judicative and administrative branch, well-known in political theory and reality in nation states today, has been nearly absent at the international level for almost one century. After Lorenz von Stein's early introduction of international administrative law in the second half of the 19<sup>th</sup> century,<sup>2</sup> the global administration has been more or less neglected. International administrative law has lived and operated in the shadow and has not played a significant role in international law scholarship. In the beginning of the 20<sup>th</sup> century, the administration was reintroduced by the Global Administrative Law (GAL) project, stating that "[e]merging patterns of global governance are being shaped by a little-noticed but important body of global administrative law".<sup>3</sup> Terms were coined like the powerful "administrative hinterland" of the WTO.<sup>4</sup> All this brought global public administration again back to scholarly attention.

That we can detect a phenomenon called global governance is not really disputed any longer. However, the question is whether this global administration is governed by law. Kingsbury/Krisch and Stewart define GAL as the law that "covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative structures, on principles of reasoned decisionmaking, and on mechanism of review"<sup>5</sup>. The key theme, in their understanding of GAL, is securing accountability. This very restrictive and controlling perspective of GAL might be due to a narrow understanding of administrative law in general. It resembles a perspective also common in national administrative law scholarship. Here, national administrative law is created as a sphere of law concerned with the relationship between the citizens versus the state. This picture might have held true during a time where administration was merely in charge of law and order and did not perform all the governance tasks we usually associate with administrative tasks, at least in modern welfare states, today, like social benefits, planning tasks for infrastructure and so forth.<sup>6</sup> Nowadays, it is less them vs. us. The administration is much more interlinked with and part of the society today.

This new role of the administration in the 20th century has created a necessity of more and more administrative action. Some of this administrative action appears

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2. LORENZ VON STEIN, Einige Bemerkungen über das internationale Verwaltungsrecht, *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, 6, 1882, 395.

3. BENEDICT KINGSBURY, NICO KRISCH, and RICHARD B. STEWART, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, 68, 2005, pp. 15-60.

4. ANDREW LANG and JOANNE SCOTT, The Hidden World of WTO Governance, *European Journal of International Law*, 20, 3, 2009, pp. 575-614.

5. KINGSBURY/KRISCH, and STEWART, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, 68, 2005, pp. 15-60.

6. KLAUS LANGE, Innenrecht und Außenrecht, in: Hoffmann-Riem/Schmidt-Aßmann/Schuppert, *Reform des Allgemeinen Verwaltungsrechts Grundfragen*, Baden-Baden, 1993, pp. 307-331.

in the form of quasi-legislation, administrative provisions or guidelines. Even so an overall comparison of public law in all jurisdiction is still missing; some kind of quasi-legislation is known and used in many jurisdictions.<sup>7</sup> Generally, this kind of administrative action is not binding and only regarded as “Innenrecht” (internal or organisational law), instead, other kinds of administrative action are binding upon third parties and are regarded as “Außenrecht” (external law). The focus of GAL on the “accountability deficit” highlights the external law part, but neglects the internal or organisational law part. However, the concept of law for GAL as presented by Kingsbury hints towards internal law through highlighting that for GAL not only validity is important but also weight. The paper will show that administrative behaviour in nation states, particular in welfare states like Germany, as well as at the global level has two features: the controlling one, which the GAL project has focused on so far, the so called “Außenrecht” (external law) but also the internal law one. The internal law part, the paper argues, deals with similar questions of validity and weight. It can be used as a field of inspiration and to enhance our understanding of GAL. To illustrate this claim, a neglected field of administrative cooperation in the German Federal Republic will be used as a case study, the “Länderarbeitsgemeinschaft (LAGA) Abfall”, state-federal working group in waste management.

As a background, the paper will start with a description of the features, characteristics and functions of the administration in general, followed by the waste sector and the global administrative space in particular. In the subsequent part, it will be argued that national settings provide a good starting point for a comparative approach for some of the questions the GAL project is concerned with. With this in mind, chapter four will contrast the role and the functions of administrative law as set out in the GAL literature with a broader concept of administrative action in German administrative law. The fifth part will illustrate this broader concept by using the guidelines issued by the LAGA waste management, a federal-state working group, as an example. The paper does not argue for unreflective borrowing from national settings. Instead, national law should be categorized as one source of inspiration for the further development of the GAL approach. However, the internal law part and the LAGA example might lead us to the conclusion that some of these new international phenomena might not be entirely new but might be old wine in new bottles and that there is a wide range of national settings and debate we can fruitfully apply to the global sphere. The weight of a norm might not only be due to “publicness” but also due to a room to manoeuvre of the administration and its gained expertise in a certain field.

## 2. Searching For A Definition Of The Administration

Let us start with a definition of the term administration. Definitions are import-

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7. ARMIN VON BOGDANDY, *Gubernative Rechtsetzung: Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen, 2000, p. 450 ff.; ANNA LEISNER, *Verwaltungsgesetzgebung durch Erlasse*, *Juristenzeitung*, 2002, pp. 219-231, p. 220.

ant. They define what we are looking at and also what we are looking for. They set the perspectives, the scene and determine the boundaries between what is regarded as to fall into the definition and what is outside of the definition. How we define something is crucial for the focus of our analysis. Defining administration has been a difficult task in the past; some have even claimed an impossible one.<sup>8</sup> Nevertheless and due to the importance of a definition this paragraph describes and defines the term public administration, first more general and then with a view towards waste management.

### 2.1 The administration in general terms

Before going into depth about a definition for public administration, it has to be kept in mind that any definition of public administration is closely linked to a certain vision of the division of powers in a nation state. Harlow and Rawlings famously distinguish two competing schools of thought with regard to public administration: red and green light theories.<sup>9</sup> The red light theorists believe that the administration needs to be kept in check by the law. In addition, liberty is perceived as the right to be left alone. In contrast, the green-light theorists believe “that public administration is not a necessary evil to be tolerated, but a positive attribute to be welcomed”.<sup>10</sup> Here, liberty is perceived as something that is either constituted or at least facilitated by the state and ultimately depends upon the state.

Keeping these two theories in mind, we start our definition with a look into the Oxford online dictionary. Here, administration is defined as running a business, an organisation or something similar. This paper is only concerned with one particular organisation, the state or, at the international level, the public in general and therefore with public administration. To conclude, the literal meaning of public administration is running or operating a state or the public in general.

In legal scholarship one often referred description for public administration is a negative one. For running or operating a state, usually three powers are necessary: legislative power, adjudicative power and administrative power. According to the negative description of public administration, public administration is everything that is neither a legislative action nor a judicative one.<sup>11</sup> All the leftovers in a state that are neither regarded as being legislative in nature nor judicative are pooled as being administrative. The GAL literature also refers to this negative definition. “As a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither

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8. EBERHARD BOHNE, Gegenstand, Methodische Grundlagen und theoretischer Bezugsrahmen der Verwaltungswissenschaft, *Die Verwaltung*, 2014, pp. 159-95.

9. CAROL HARLOW and RICHARD RAWLINGS, *Law and Administration*, 4<sup>th</sup> ed., Cambridge, 2009.

10. ADAM TOMKINS, In Defence of the Political Constitution, *Oxford Journal of Legal Studies*, Vol 22, No 1, 2002, pp. 157-175, p. 158f.

11. EBERHARD BOHNE, Gegenstand, Methodische Grundlagen Und Theoretischer Bezugsrahmen Der Verwaltungswissenschaft, *Die Verwaltung*, p. 162

treaty-making nor simple dispute settlements between parties.”<sup>12</sup> The question, however, is whether such a vague description is sufficient to work with. Can an analysis of the administration be built on such a definition? Aren’t administrative tasks more than just neither legislative tasks nor judicative tasks? And how helpful is such a definition in a global setting where there is no world state?

Generally, the negative description can be turned around to a more positive one. So it has been argued, at least for German administrative law and more in line with the green theorists, that leftovers to be solely decided by the administration are necessary. Article 20 III of the basic law for the Federal Republic of Germany states that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. The legislator has to decide a clear road map that can be followed by the administration. The legislator has to set goals and has to regulate essential and crucial matters. The administration has to implement these goals. In order to do so, it needs to decide about how to implement. It needs to interpret the law, concretise the law, define typologies and develop guidance for the implementation. All these not so crucial matters have to be left for the administration to deal with.<sup>13</sup> Coming back to the definition given at the beginning, the administration needs to make sure that the state is running smoothly. So we moved from a negative description to the fact that there needs to be some room to manoeuvre or discretion for the administration to decide and regulate particularly not so essential issues on its own.

What is the substance of this room? One possibility to define the substance could be a description of the administration in more positive and functional ways. What are the functions of the administration? For Henry “public administration is a broad ranging and amorphous combination of theory and practice; its purpose is to promote a superior understanding of government and its relationship with the society it governs, as well as to encourage public policies more responsive to social needs and to institute managerial practices attuned to effectiveness, efficiency, and the deeper human requisites of the citizenry.”<sup>14</sup> In other words, the public administration has to be responsive to the needs of the citizens. It is their function to fulfil these needs effectively and efficiently. They have to act and implement the law in the public interest. They have to organise the state in accordance with the public interest. The legislator might set policy goals, but the function of the administration is to reach those goals. In order to do so, the administration needs a room to manoeuvre or discretion. To sum up, this paper adheres to the green theory of public administration. The administration plays an active role in the public interests. It implements, enforces and shapes policies. It monitors the implementation of policies and it builds expertise in several different areas relevant for running a state or the global space.

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12. KINGSBURY/KRISCH, and STEWART, *The Emergence of Global Administrative Law, Law and Contemporary Problems*, 68, 2005, pp. 15-60, p. 17.

13. KARL-PETER SOMMERMAN, ‘Art. 20’, in Hermann von Mangoldt, Friedrich Klein, and Christian Starck (eds.), *Kommentar Zum Grundgesetz*, München, 2010, Art. 20 III, para 274 ff.

14. NICHOLAS HENRY, *Public Administration and Public Affairs*, 12. Ed., New York, 2012, p. 11.

## *2.2 The Administration in Waste Management*

These more vague positive functions of the administration in general are more specific when it comes to waste management. Waste Management is concerned with the provision of public goods to the citizens. Unregulated waste disposal causes a threat to human health, the environment and can increase climate change.<sup>15</sup> Waste Management is therefore concerned with “waste handling at the source, collection, transport processing, transformation, and disposal”.<sup>16</sup> The legislator will set goals, procedures or standards which then have to be operationalized, implemented and organised by the administration in a cost-efficient manner. Especially in environmental law and even more so in a field like waste management that is highly technical and developing very fast, the goals set by the legislator cannot be implemented straight away. Precise guidance on how to implement and an ongoing and consistent exchange about the different technical possibilities, solutions and new developments is necessary.

The functions of the administration in waste management are generally twofold: implementation and monitoring. The administration will, for example, define different categories of waste. The administration will organise the collection of waste, the transport and the planning of landfills or incinerators. It can fulfil these tasks by itself, e.g. the collection of waste; it can also use third parties in order to do so, like private waste collecting companies. But not only is the administration in charge for implementing goals set by the legislator, like planning landfills. The administration is also in charge of monitoring the goals set by the legislator, for example preventing that hazardous waste is dumped somewhere in the countryside or that a landfill does not fulfil the requirements of the law and the best available practice. In order to fulfil this specific task, a room to manoeuvre and the exchange of knowledge and best practices are necessary. Freedom from hazardous waste or environmental damage, to turn it positively, a life under healthy environmental conditions can only be reached through a well-functioning administration. The legislator itself as well as the adjudicator itself cannot reach this goal on their own.

## *2.3 The global administrative space*

As has been described, public administration exists at the national level. The question remains whether it also exist in the global arena. Kingsbury/Stewart and Krisch point out that many “international lawyers still view administration largely as the province of the state or of exceptional interstate entities with a high level of integration, such as the European Union.” In this view, “international action might coordinate and assist domestic administration, but given the lack of international executive power and capacity, does not constitute administrative action itself.”<sup>17</sup> Due to the lack of enforcement power, they conclude that such a

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15. SINTANA E. VERGARA and GEORGE TCHOBANOGLOUS, ‘Municipal Solid Waste and the Environment: A Global Perspective’, *Annual Review of Environment and Ressources*, 37 (2012), 277-309.: p. 280.

16. Ibid.

17. KINGSBURY/KRISCH and STEWART, ‘The Emergence of Global



thing as global administrative bodies does not exist. This vision mirrors the view of state/administration vs. the people. As described above, enforcement is just one task carried out by the administration. There are several other tasks global administrative bodies could fulfil, for example, knowledge exchange. In addition, what about all the international and transnational regimes like the OECD networks and committees, the committees of the WTO, the World Bank, the Basel Convention and so forth? All these bodies administer action to some degree. Do they fall outside the scope of “normal” administration?

In contrast to this perception, Kingsbury/Krisch and Stewart argue for a global administrative space which already exists. They come up with five different ideal types of administrative bodies at the global level: “(1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental–private arrangements; and (5) administration by private institutions with regulatory functions.”<sup>18</sup>

All these administrative bodies can have different functions and act in different environments.<sup>19</sup> For example, the aim of an administrative body can be to achieve desired changes in private conduct by imposing regulatory obligations. To implement these obligations in national administrative procedures, guidelines might be necessary. One example in the area of waste management is the implementation and compliance committee of the Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The objective of the committee is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention (Article 15, paragraph 5 (e) of the Convention). One of the ways in which the committee assist the member states in improving the implementation of and compliance with paragraph 4 of Article 4 and paragraph 5 of Article 9 of the Convention is considering an expansion of the checklist for the legislator and the development of strategies to promote full legislative implementation. In addition, in 2013 the committee issued a “Methodological guide for the development of inventories of hazardous wastes and others wastes under the Basel Convention”.<sup>20</sup> This guide explains how to set up a hazardous waste inventory that would ultimately lead to national hazardous waste legislation which is in compliance with the convention. Similar to national waste management, the committee is in charge of monitoring and implementing. It can issue guidelines or reports. There is also a compliance

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Administrative Law’ (2005), 15-60, p. 18.

18. Ibid., p. 20.

19. For a rich case study of the WTO’s multiple dimensions of Global administrative Law see RICHARD B. STEWART, MICHELLE RATTON and SANCHEZ BADIN, *The World Trade Organization: Multiple dimensions of Global Administrative Law*, I-CON, 9, 2011, pp. 556-586.

20. Available at: <http://www.basel.int/Implementation/LegalMatters/Compliance/Activities/NationalReportingDevelopmentofInventories/tabid/3194/Default.aspx>

mechanism<sup>21</sup> which can be described as a weaker form of enforcement.

To conclude, something is out there that administers the global space. It comes in different shapes but the tasks are similar to national administrations. Global administrative bodies govern the global space via reports and guidelines, but also issue decisions, monitor compliance and so forth.

### 3. Reflective Borrowing From National Settings

If the administration plays a huge part in modern day societies, the next question that arises is: What kind of law should govern administrative practices? Do we need an administrative law framework at the global level or is it possible to compare and to borrow from national settings? To enhance our understanding about global administrative law, it is worth looking towards national administrative law. National regulatory structures can be used as a field of inspiration, as indicators or a starting point. However, it has to be kept in mind that such a comparison has limits, as both levels are different. They act in different environments. They have different institutional settings, different capacities and so forth. Fortunately, those differences are not so huge to render a comparison irrelevant.

The GAL literature is well aware of the approach to use national administrative law as a source of inspiration for the construction of GAL principles. They call it the “bottom-up” approach. However, they also highlight the challenges such an approach faces. “The transposition of tools and approaches from domestic administrative law to global governance issues may be productive, but it faces important limits, stemming mostly from the different structure of global administration – from the relative informality of many of its institutions, its multi-level character, and the strength of private actors in it.”<sup>22</sup> Those are the cautious words of someone who tries to highlight the exceptionalism of law in the global arena. When it comes to the concept of law, the words are even more cautious as Kingsbury points out that many of the phenomena that occur in GAL are not included in the administrative law concepts at the national level.<sup>23</sup> As will be shown, particularly in the area of quasi-legislative administrative provisions and administrative self-regulation, the limits of borrowing as described above might be less relevant and therefore less problematic. In these settings, we can also find informality and the inclusion of private bodies and stakeholder. Especially with regard to the concept of law, Somek provocatively states: “Aside from the ostensible lack of coolness associated with relying on domestic analogies, it is difficult to understand why GAL should ignore the important conceptual lessons

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21. See for the work and establishment of this compliance mechanism JULIETTE VOINOV KOHLER, Compliance with and Enforcement of the Basel Convention: Latest Developments and Things to come during the tenth Meeting of the Conference of the Parties, available at: [http://inece.org/conference/9/proceedings/28\\_Kohler.pdf](http://inece.org/conference/9/proceedings/28_Kohler.pdf)

22. KINGSBURY/KRISCH, and STEWART, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, 68, 2005, pp. 15-60, p. 53.

23. BENEDICT KINGSBURY, The Concept of Law in Global Administrative Law, *European Journal of International Law*, 20, 2009, pp. 23-57, p. 27.

which can be learned from the evolution of its domestic predecessor.<sup>24</sup>

#### 4. Administrative Law

After a definition has been given for the functions and features of the administration and the fruitfulness to compare different concepts of administrative law, the question arises: What is the law that organises and guides the administration? What constitutes administrative law and is there a difference between global administrative law and national administrative law? In the GAL literature, the concept of law referred to is in most cases not stated clearly. Cassese points out that we can find the “entire arsenal of administrative law, as it is known to national governments” in the global space.<sup>25</sup> However, he stresses that this does not mean that GAL and national administrative law are identical. He identifies three differences: “First, global administrative law is not hierarchical: there is no single regulatory regime that has supremacy”. And second GAL should be distinguished from international law, “as this law is mainly based on transactions, while global law has developed a more robust hierarchy of norms.” “Third, global administrative law is sectoral, due to the presence of many different global regulatory regimes.”<sup>26</sup>

Other publications engage with the question why law should regulate global governance and therefore GAL in general. Coming to the conclusion that law should restrain global actors in the same way as judicial oversight is available for measures of domestic administrative agencies.<sup>27</sup> As Benvenisti points out: “There is therefore no reason to maintain a romantic view about global governance bodies in whatever shape or form. But there is no reason to be negative about them either. Just as domestic governance is indispensable, so is global governance. The challenge that remains is how to tame power, level the institutional playing field and ensure that all affected interests are adequately represented or at least taken into account. This was the task of domestic law – to counter domestic power – and is now the task of the law that regulates global governance.”<sup>28</sup>

The degree to which the objective of national administrative law is to counter power and enable effective oversight is controversially debated in national settings as well. It depends upon the political culture and the different schools of thought present. As has been outlined above, the views with regard to judicial oversight differ between adherers of the green vs. the red theories.<sup>29</sup> In addition, the concept of administrative law more generally also changes over time. As Jerry Mashaw points out for the administrative constitution of the US, in the

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24. SOMEK, The concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury, p. 987.

25. SABINO CASSESE et.al, Foreword, in *Global Administrative Law: The casebook*, III, Rome New York, 2012, pp. XXIII-XXXI, p. XXIV.

26. Ibid.

27. EYAL BENVENISTI, *The Law of Global Governance*, Nijhoff, 2014.

28. Ibid., p. 78.

29. CAROL HARLOW and RICHARD RAWLINGS, *Law and Administration*, 2009.

21<sup>st</sup> century our sources of administrative law tend to be solely based on principles being developed by judicial review. He concludes: “Our forms of law have shifted in ways that make prior practices appear to be not a different system of administrative law, but no law at all.”<sup>30</sup>

A detailed analysis of all these debates lies outside of the scope of this paper. We should just keep in mind that there are several and competing concepts of law, especially with regard to administrative law. In this paper, one particular path to explore the concept of law in GAL is chosen: the concept of law developed by Benedict Kingsbury in his article from 2009.<sup>31</sup> In this article, he argues for a mixture of Hart’s law as social fact combined with the criterion of publicness. In a second step, this concept is contrasted with the German concept of administrative law especially the law quality of administrative internal self-regulation “*Verwaltungsvorschriften*”. It will be shown that, even in national settings, it is difficult to draw the line between law and non-law and weight also matters.

#### *4.1 GAL: Publicness and the “social fact” of law*

What is global administrative law? First of all, it is not international administrative law. The word “global” was explicitly chosen to distinct global administrative law from the sources of law usually referred to in international law, e.g. international treaties, customary international law and general principles (Article 38 (1) ICJ Statute), as the sources of GAL go beyond this.<sup>32</sup> Instead of using the international law sources, Kingsbury argues for a combination of Harts rule of recognition and “publicness”. In short, law is a social fact and therefore what courts, relevant state officials and entities exercising international public authority regard as law. And second, it has to fulfil the requirement of publicness. Kingsbury’s proposed concept of law seems like legal positivism with a pinch of natural law theory.<sup>33</sup>

In a first step, Kingsbury highlights that any concept of GAL “involves not only questions of validity (‘is this a valid legal rule?’), but also assessments of weight (‘what weight should Public Entity X give to a norm set by Public Entity Y?’). Whereas positivist thought within a unified legal system has focused on the binary validity/invalidity, or binding/nonbinding, the absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision. Law is a social practice, and it is a feature of the particular social practices involved in GAL that both validity and weight are important. A

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30. JERRY L. MASHAW, *Creating the Administrative Constitution*, Yale 2012, p.289 f.

31. BENEDICT KINGSBURY, ‘The Concept of Law in Global Administrative Law’, 2009.

32. BENEDICT KINGSBURY, *The Concept of Law in Global Administrative Law*, 2009, p. 25.

33. This is similar to a new strand of literature in legal philosophy called “inclusive legal positivism”. See ALEXANDER SOMEK, *The concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury*, *European Journal of International Law*, 20, 2009, pp. 985-995, p. 989.

useful concept of law in global administrative law must elucidate both aspects.”<sup>34</sup> In a second step, Kingsbury chooses one specific model for the concept of law: Hart’s model of law. For him, this model is an obvious choice for two reasons. First, Hart’s positivistic model of law does not have the state at its centre, like for example Hobbes’s command theory of law. As we do not have a global world state, a model that does not depend on the state seems much more suitable. And second, Kingsbury agrees that we live in a pluralistic world. In such a pluralistic world, there is no room for one natural law theory based on one set of right and just principles, as the views on what is right and just differ. Therefore choosing positivistic approaches for international law “may well be the best way to promote basic order”.<sup>35</sup>

From Hart’s theory of law, Kingsbury focuses on the “social fact condition” of the concept of law and the rule of recognition. What is the social fact condition of law? In Kingsbury’s reading of Hart, the social fact condition means that part of the concept and therefore the existence of law itself is that it is regarded as law. For the emergence of GAL “the internal attitudes actually held by leading participants and by those dealing with and critically evaluating them and their practice”<sup>36</sup> are decisive. Those attitudes of relevant officials like states, courts and entities exercising international public authority are essential to establish law. He comes to the conclusion that “Hart thus provides a methodology for empirical identification of law”<sup>37</sup>. Does this mean that by asking officials on specific rules we are able to detect law? Kingsbury’s answer to this question is: no. Analysing attitudes of officials to find out whether something is regarded as law by them is necessary, but not sufficient to call something law; we also need “publicness”.

Kingsbury claims that only “rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law”.<sup>38</sup> In his view, it is even under modern democratic conditions not sufficient to define a source to call something law, instead, the fulfilment of the publicness criterion is crucial for calling something “law”. Publicness is the essential feature of public law. But what does it entail? Here, Kingsbury borrows from Waldron<sup>39</sup> and describes publicness as “the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.”<sup>40</sup> The indicative list provided by him for publicness looks as follows: the principle of legality, the principle of rationality, the principle of proportionality, the rule of law and human rights.

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34. BENEDICT KINGSBURY, *The Concept of Law in Global Administrative Law*, 2009, p. 27.

35. *Ibid.*, p. 29.

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*, p. 30.

39. JEREMY WALDRON, *Can There Be a Democratic Jurisprudence?*, *Public Law & Legal Theory Research Paper Series*, NO. 08-35, 2008, pp. 1-58.

40. BENEDICT KINGSBURY, ‘The Concept of Law in Global Administrative Law’, 2009, p.31.

Can the criteria of publicness be included into Hart's concept of law? To answer this question we have to explain Hart's concept of law in more detail. Hart divides the different rules in a legal system into two categories: primary and secondary rules.<sup>41</sup> Primary rules are those rules that lay down how people are obliged to behave. Secondary rules, instead, are those rules that lay down how primary rules are established, changed and applied. One of these secondary rules is the rule of recognition. This rule tells us how to recognize that some other rule is a legal rule. Kingsbury is of the opinion that his criteria for publicness can be included into Hart's concept of law via the rule of recognition. He states, "if the rule of recognition is understood as including a stipulation that only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law", publicness can be included into Hart's concept of law.<sup>42</sup> He concludes: "It may thus be possible to be a Hartian positivist, at least in a loose sense, and also to accept these publicness requirements as necessary to law."<sup>43</sup> In other words, "Kingsbury embeds the substantive notion of publicness in the practice of law."<sup>44</sup>

Whether a legal positivist, an adherer to Hart's concept of law, would follow Kingsbury's line of argumentation, will not be discussed in this paper. The question, we ask instead, is: If we follow Kingsbury's line of argumentation, do we already have global administrative law? Here Kingsbury has to admit that "GAL as a social practice has not yet gone so far: typically, compliance with publicness considerations becomes more and more important in determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met, the more doubt there is about recognition, the greater the levels of resistance, and the greater the extent to which individuals or other private actors and their basic rights and welfare are affected."<sup>45</sup> To conclude, we are not there yet. Even Kingsbury admits that from his own concept of law we are still at the pre-stage of law. The question is still one of weight and not one of validity in general. The binary code of law/non-law has become less black and white and includes another category – grey. Grey is non-law that has some weight and might at some point become law if the legal community will accept its legal status.

#### *4.2 Administrative Law: Innenrecht vs. Außenrecht*

Grey administrative law or administrative law in-between is something also the German administrative law literature is well aware of. The German administrative law scholarship distinguishes between „Innenrecht“ (internal law) and “Außenrecht” (external law).<sup>46</sup> This distinction is not drawn along the lines of the

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41. HART, *The concept of law*, 2 ed., 1994, p. 79.

42. BENEDICT KINGSBURY, 'The Concept of Law in Global Administrative Law', 2009, p. 30.

43. Ibid. p. 30 f.

44. MING-SUNG KUO, The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury, *European Journal of International Law*, 20, 2009, pp. 997-1004, p. 999.

45. BENEDICT KINGSBURY, 'The Concept of Law in Global Administrative Law', 2009, p. 31.

46. HARTMUT MAURER, *Allgemeines Verwaltungsrecht*, 18. ed., München, 2011, § 3,

sources of law but along the lines of the different functions of law and the subject or addressee of the law. If the law regulates the internal organisational matters, the state structure in general or the relationship between different administrative agencies, all this broadly falls within the category of internal law. On the other hand, if the state interacts with its citizens and not only with itself, this is called external law. However, there is a huge area of grey in between and a long standing debate about the possibility of internal law becoming external law.

The distinction between those two different categories of law is not new, but rather old. It was drawn by Georg Jellinek and Paul Laband in the 19<sup>th</sup> century. Both scholars developed the so called “Impermeabilitätstheorie“, the theory of impermeability. According to this theory, the entity state was impermeable for law. The argument was that law can only exist in relationships between different legal subjects. Different legal subjects could be entitled to various claims, like paying damages. Just one legal subject on its own, like the state, cannot sue itself for damages or a restraining order. In their view, the state was only one legal entity, therefore, the law regulating the internal structure of the state and the relationships between its different parts was not law.<sup>47</sup> This distinction was more or less an attempt to diminish the power of the monarch and the power of the administration, which was controlled by the monarch. It was, however, severely criticized. The state cannot be this one entity, if so, with regard to international law, the citizens of a state would be included in the entity state. The state-citizen relationship would not be guided by law, only the interstate relationship at the international level would be guided by law: international law. In addition, it is not clear why an administrative regulation of some sort, being compulsory for an administrator to follow, should not be called law.<sup>48</sup> Even so, it constitutes the guiding principles the administrator has to follow.

Modern German administrative law still distinguishes between internal and external law.<sup>49</sup> In the literature, the legal status of administrative guidelines belonging to the category of internal law is debated controversially. Some call those administrative guidelines the “ungesicherte dritte Kategorie des Rechts”<sup>50</sup> (unsecured third category of law). Some scholars are of the opinion that administrative guidelines are only internal law, they do not bind third parties and therefore have no external effect towards the citizens.<sup>51</sup> In contrast, other claim that internal law provisions which develop, supplement or elaborate the law, such as administra-

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para 6.

47. HANS HEINRICH RUPP, *Grundlagen Der Heutigen Verwaltungsrechtslehre: Verwaltungsnorm Und Rechtsverhältnis*, 2. ed., Tübingen, 1991, pp. 19 ff.

48. Ibid.

49. This distinction is also well known in other jurisdictions. The UK administrative law literature calls those administrative provisions “quasi-legislation” (R. E. MEGARRY, *Administrative Quasi-legislation*, *Law Quarterly Review*, 60, 1944, pp. 125-129. In Australia the term Grey-letter-law is used (CAROL HARLOW and RICHARD RAWLINGS, *Law and Administration*, p. 190 ff., FN 4.

50. FRITZ OSSENBÜHL, *Zum Verfassungsvorbehalt für Rechtserzeugung*, in: FS Josef Isensee, 2007, pp 307 fff, p. 315.

51. HARTMUT MAURER, *Allgemeines Verwaltungsrecht*, 18. ed., München, 2011, § 24, para 3.



tive guidelines, are also law and have and should have external effects.<sup>52</sup> Last but not least, Matthias Knauff claims that we should view administrative guidelines as soft law.<sup>53</sup>

The internal law category uses different forms for self-ordering. The most common one is called “Verwaltungsvorschrift” administrative guideline or quasi-legislation. Germany is not the only country with such a tradition of administrative self-governing norms. Such “rules” can also be found in other jurisdictions.<sup>54</sup> These administrative guidelines lay down the organisational internal structure of an administrative agency. They also set out a framework for the normal course of business and the collaboration with other administrative bodies. Such provisions or guidelines can come in different shapes and can have several functions. Generally, they will be enacted by a higher administrative body to guide the behaviour of the subordinate administrative body. This is particularly important when it comes to the process of implementation of statutes. Generally, executive agencies have explicit enforcement authority, sometimes, however, that authority needs to be further refined or explained. In such cases, an administrative agency may develop and implement policies and write guidance to assist the subordinate agency in the implementation of the law. These administrative guidelines enable the administration to fulfil the function of implementing the law, gathering expertise, knowledge exchange and so forth. The competence to enact “Verwaltungsvorschriften” rests generally in the administrative room to manoeuvre and in the hierarchical structure of the administration. Higher administrative bodies have the competence to give order to their subordinates.<sup>55</sup>

Generally, “Verwaltungsvorschriften” are less formal than other categories of administrative law, for example the directive. They are divided into different categories. *First*, we have those administrative guidelines that lay down the organisation and the internal structure of an administrative body. In addition, those provisions also include the budget and the distribution of resources towards the different divisions. Generally, these kinds of provisions are not regarded as having any external effect.<sup>56</sup> Even so, which resources are given to a certain divisions within an administrative body may very well have an influence on citizens.<sup>57</sup>

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52. FRITZ OSSENBÜHL, *Autonome Rechtsetzung der Verwaltung*, in Josef Isensee and Paul Kirchhof (eds.), *Handbuch Des Staatsrechts*, Heidelberg, 2007, pp. 305-51.: para 5 ; WALTER KREBS, *Verwaltungsorganisation*, in Josef Isensee and Paul Kirchhof (eds.), *Handbuch Des Staatsrechts*, Heidelberg, 2007, pp. 457-519.: para 32 ff.

53. MATTHIAS KNAUFF, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*, 2010, pp. 354 f.

54. ARMIN VON BOGDANDY, *Gubernative Rechtsetzung: Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen, 2000, p. 450 ff.

55. HERMANN HILL/MARIO MARTINI, *Normsetzung und andere Formen exekutivischer Selbstprogrammierung*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle, *Grundlagen des Verwaltungsrechts*, Band II, Informationsordnung, Verwaltungsverfahren, Handlungsformen, 2012, pp. 1025-1126, p. 1063.

56. HARTMUT MAURER, *Allgemeines Verwaltungsrecht*, 2011, § 24, para 8.

57. HILL/MARTINI, *Normsetzung und andere Formen exekutivischer*



In the *second* category (norminterpretierende Verwaltungsvorschriften), we can find administrative guidelines on how to interpret the law.<sup>58</sup> These kinds of provisions are usually enacted by a higher administrative body and should help other administrative bodies to apply the law. They define terms and substantiate undefined legal concepts. Generally, they are not regarded as law, due to the fact that interpreting the law is the competence of courts and not the administrator.

The *third* category (ermessenslenkende Verwaltungsvorschriften) is similar to the second category.<sup>59</sup> Here, criteria are laid down for the application of the discretionary power in a regulation. Such rules should not only help the administrative agency to apply the law, but to apply the law in a coherent manner. Still, these administrative guidelines are not regarded as law. However, through the non-discrimination principle laid down in Article 3 of the German Basic Law the administration is compelled to comply with its own rules. It is not regarded as pure law, but weight is given to these kind of administrative guidelines. The courts usually protect legitimate expectations if such administrative guidelines have been in place.

The *fourth* category (gesetzesvertretende Verwaltungsvorschriften) includes administrative guidelines in areas where law does not yet exist. In such cases administrative guidelines are in place instead of law.<sup>60</sup> They are only permitted if the area they regulate is not essential, otherwise law enacted by the legislator is necessary. Everything that touches upon human rights is usually regarded as essential and requires legislative action. Therefore, the scope for these kinds of provisions is very limited. Due to the fact that those administrative guidelines are in place instead of law, courts and the legal scholarship regard them as law.

The *fifth* category contains (normkonkretisierende Verwaltungsvorschriften) administrative guidelines that concretise norms.<sup>61</sup> This category has been created by the judiciary and is regarded as binding and therefore recognized as law. In these cases, the judiciary argues that there is a room to manoeuvre for the administration. This room enables them to enact law. Usually, we find this special room to manoeuvre in environmental law matters or other more technical areas where the administration is acknowledged to have special expertise. The acknowledgement, however, is only the first step. In a second step, the court assesses whether the administration considered all other enacted laws and legal principles as well as the current state of the art of experiences and knowledge in that particular field. Furthermore, an extensive participatory process has to take place to secure that the guideline mirrors the experience gained and the present state of the art in that field.<sup>62</sup> This requirement comes close to the “publicness” criterion as proposed by Kingsbury.

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Selbstprogrammierung, 2012 p. 1066.

58. HARTMUT MAURER, *Allgemeines Verwaltungsrecht*, 2011, § 24, para 9.

59. *Ibid.*, para 10.

60. *Ibid.*, para 11.

61. *Ibid.*, para 25.

62. Decision of the German Federal Administrative Court (Bundesverwaltungsgericht), 19.09.1985. *Die öffentliche Verwaltung*, 1986, p. 431.

The standard example referred to in such norm-concretising cases, is the technical circular air, first enacted in 1974. It is the first administrative instruction to implement the law on protection against pollution. The competence to enact such provisions is laid down in § 48 Federal Immission Control Act (BIm-SchG). According to this and after hearing the parties concerned (section 51), the Federal Government shall issue, with the consent of the *Bundesrat*, general administrative provisions for the implementation of this act. German case law establishes that this circular, unlike other administrative guidelines which only interpret a legal rule, is binding on administrative courts within the limits laid down by the legal rule itself.<sup>63</sup> Interestingly, the European Commission as well as the ECJ were not convinced that this circular was a sufficient implementation of Council Directive 80/779/EEC. The ECJ stated “that, in the particular case of the technical circular ‘air’, the Federal Republic of Germany has not pointed to any national judicial decision explicitly recognizing that that circular, apart from being binding on the administration, has direct effect vis-à-vis third parties. It cannot be claimed, therefore, that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations”.<sup>64</sup> So even in this small area, where the German judiciary gives legal force to administrative provisions, this legal force is disputed by the ECJ.

Not even in national settings, the law quality of administrative guidelines or quasi-legislation is easy to assess. Due to the lack of a global state, GAL cannot be the same as national administrative law, however, it can learn from national administrative law and it could learn even more if the whole range of national administrative law were looked at, including internal administrative law or non-law. Opening up the concept of GAL to those settings would overcome some of the general issues raised in the GAL literature concerning the possibility of a comparison with national settings. Internal administrative law also includes more informal structures. It deals with cooperation between different administrative agencies at different levels. It addresses the question of self-ordering and the possibilities thereof. It includes stakeholders and other private parties.

## 5. Case Study: Laga In Waste Management

As has been argued internal administrative law and self-ordering of the administration could be another source of inspiration for the discussion about administrative law at the global level. Here, some of the concerns and shortcomings for comparing GAL to national settings do not apply. The “law” in these cases is usually also less formal. As we will see, stakeholders can be involved and multi-level governance does also exist. This argument will be explored in more depth by analysing one example: the LAGA (Landesarbeitsgemeinschaft) waste management and their respective reports. The LAGA is a federal-state working

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63. Ibid.

64. Decision of the ECJ, 30.05.1991, in European Court Reports 1991 I- 2596, 2602.

group dealing with waste management. When looking at some of the administrative provisions enacted by the LAGA we can clearly see that similar questions are raised. Is this law? Is there an obligation to include stakeholders into the discussions before an administrative guideline is enacted? What is the legal weight that we should attach to administrative guidelines and so forth? Studying the work of the LAGA in more depth should therefore be fruitful for global discussions about administrative measures and guidance and it shows us that not everything that happens at the global level is exceptional and does not have a national predecessor. It also shows us that the range of administrative measures in national-settings is broader than only enforcement. It reaffirms Kingsbury's publicness requirement with regard to the law quality of administrative provisions, at the same time, it questions this requirement with regard to weight and adds knowledge and expertise.

### *5.1 LAGA waste management*

As a background, waste management law in Germany is mostly enacted at the federal level, nowadays with a huge influence from the EU. The application and administering of the law is done by individual states (Länder). The LAGA waste was founded a long time ago in 1967, which is even before Germany enacted its first federal waste management statute in 1972. The goal of the LAGA is a coherent implementation of the federal law in waste management. It also serves as a platform for knowledge exchange between the individual states. In addition, the LAGA discusses developments in waste management and issues proposals and statements for the development of the federal waste management regime. Furthermore, the LAGA gives its views and expertise for a common German position with regard to developments in international or EU waste management regime developments.<sup>65</sup> To some extent the LAGA waste management is similar to the Committees of the Basel Convention.

The internal structure of the LAGA is laid down in their rules of procedure (Geschäftsordnung).<sup>66</sup> The LAGA consists of a general committee, which usually meets twice a year, and three subordinate committees, the committee for product responsibility, the committee for waste technology and the committee for waste regulation usually also meeting twice a year. In addition, it is possible to establish ad-hoc working groups for one year. Both levels of governance, the federal and the state level, are considered equal in the committees. Members of the committee are the heads of the waste authorities in the individual states as well as the head of the federal waste authority. Every member has one vote. Resolutions are passed with simple majority. Through four different means the LAGA can assist the individual states in their implementation process: guidelines, directives and information materials as well as model administrative provisions which can be used by the individual states to implement the law. Especially in waste management, there is a necessity for guidance on specific issues. The first waste law for

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65. More information about the LAGA is available at <http://www.laga-online.de/servlet/is/23348/>.

66. Available at <http://www.laga-online.de/servlet/is/23835/>.

example only stated that waste disposal should not impair public welfare. Which kinds of waste disposal would not impair public welfare was left to the administrators to decide. To assist them in their decision, the LAGA issued guidelines. All these guidelines and information, which have been issued so far, are very technical and dense. Most of this is regarded as internal law.

The functions and the structure of the LAGA are therefore similar to other international/global committees or administrative bodies. The “law” is informal. We have a multi-level setting and to a limited extend the inclusion of stakeholders or other private parties.

### *5.2 Validity and Weight of LAGA report number 20*

Are the reports, guidance and information materials, which are issued by the LAGA, law? In 2005, the Federal Administrative Court of Germany, the highest court for administrative matters, had to decide whether guidelines issued by the LAGA waste are administrative provisions that concretized a norm and, therefore, binding upon the court and the parties. The administrative guideline relevant in this case was report number 20 (Mitteilung Nr. 20)<sup>67</sup> Technical Rules “Requirements on the material recycling of mineral residues/wastes”. In this case, a company in charge for filling an unused mine had applied for an extra permission to use some specific waste as filling material. The first permit for filling the mine included as filling materials construction rubble and excavation waste. While filling the mine, the company detected that much more filling material than expected was necessary. Therefore, they applied for an extra permit to also use industrial residual waste specified as Z2 in the LAGA report number 20. The administrative body issued this extra permit. In their assessment of the risk related to filling a mine with this industrial residual waste, they relied on the LAGA report number 20 and followed the requirements laid down in this guideline. The Federal Administrative Court declared that just applying those non-binding rules is not sufficient for a risk assessment as required in § 48 BBergBG together with the requirements in BBodSchG. The Federal Administrative Court was of the opinion that the LAGA report was not an administrative guideline that concretized a norm and was, therefore, non-binding upon the parties. Only relying on these norms was not appropriate.<sup>68</sup>

After the decision was issued, several lower courts highlighted that the Federal Administrative Court did not state that the report number 20 was of no value at all. Lower courts claimed that it was still possible to give weight to the report because this report was seen as a provision that was issued by a committee of experts. If no other rules concerning a special situation are available, the report number 20 can still be used. However, the courts did not go so far as to make them binding again by claiming that the report belongs into the fourth category

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67. Cp. LUDGER-ANSELM VERSTEYL and ANGELA DAGEFÖRDE, *Rechtliche Rahmenbedingungen zur Entsorgung von Böden und Bauschutt aus der Altlastensanierung, Natur und Recht*, 2002, pp. 189-197.

68. Judgement BVerwG 14.04.2005 – 7C 26.03 – Tagebau Fortuna

(gesetzesvertretende Verwaltungsvorschriften), administrative guidelines, in areas where law does not yet exist, however, they gave them considerable weight in their judgements and referred to them as subordinate law.<sup>69</sup>

Other courts claimed that the report could be used as an instrument to interpret legal terms. The reason given here was that the report was issued by a committee of experts and, therefore, includes special expertise in the area of waste management as well as the legal concepts and terms used in this area.<sup>70</sup> To conclude, after the decision of the Federal Administrative court the LAGA report number 20 could no longer be regarded as law, however, the courts still attached some significant weight to the report.<sup>71</sup> The concept of validity and weight is, therefore, something also known and relevant in German administrative law. This weight was not given because of the fulfilment of Kingsbury's "publicness" criterion, but because of a certain expertise of the administrative body. It also showed that, especially in the field of administrative "law", grey-law is part of an overall concept of administrative law.

## 6. Conclusion

The paper has argued administrative law consists of two features: internal and external law. By just viewing global administrative law through an external law prism or even reducing it to enforcement and accountability, we don't see the whole picture. The concept of law in global administrative law should, therefore, also look towards internal law of the administration. Even so, this internal law might not even be called law in national administrative law settings either. It makes us aware of the fact that non-law like administrative provisions, circulars or quasi-legislation are also part of administrative behaviour and part of global governance and part of a global understanding of administrative law. Legal analysis of global governance do not have to stop when something is not external law, but can also analyse, criticise and include features of global governance which belong to the internal law category.

To illustrate this claim the paper has chosen the federal working group (LAGA) in waste management as a case study. Here the different levels of governance come together and exchange their knowledge about different ways to implement waste regulations. The LAGA issues guidelines similar to other committees at the global level. Those guidelines are generally not perceived as law, but they are given weight in the legal discourse. The reasons for giving weight are closely related to expertise and knowledge. Special expertise and knowledge is something that so far does not play a crucial role in Kingsbury's concept of law. Besides his criterion of "publicness", expertise and knowledge might be candidates also

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69. E.g. Judgement OVG Sachsen-Anhalt 2. Senat, Case 2 L 34/10, 25.08. 2011; judgement VG Hannover 11. Kammer, Case 11 A 5612/07, 18.11.2009.

70. Decision of VG Düsseldorf 17. Kammer, Case 17 K 6189/06, 25.11.2008.

71. For an assesement of a different LAGA report see LUDGER GIESBERTS and JULIANE HILF, EG-rechtliche und verfassungsrechtliche Zulässigkeit normkonkretisierender Verwaltungsvorschriften: Die LAGA-Abfallliste auf dem Prüfstand, *UPR*, 1999, pp. 168-172.

to include into the concept of GAL. The lack of this aspect, so far, might also be due to the solely negative description of the functions and features of public administration. A more positive definition at the global level might lead to a room to manoeuvre where expertise and knowledge can have a value.

Generally, administrative guidelines are not categorized as law, at least not as external law. However, administrative provisions that concretise norms, were categorized as being binding upon the administration by German courts. Similar to Kingsbury's publicness criterion, here the courts require that the administration considered all other enacted laws and legal principles as well as the current state of the art of experience and knowledge in that particular field and an extensive participatory process has to take place to secure that the guidelines include the experience gained so far in that field and the present state of the art in the field. For all other administrative guidelines, the inclusion of stakeholders is usually not a requirement. However, transferring this fact unto the global level might be misleading. At the global level, the participation of stakeholders and a transparent process might be a functional equivalent for the national embedded public administration. Even if the LAGA is not as inclusive as one might hope for, nonetheless, it is embedded in the German state and the German public.

The paper has also shown that the whole "new" debate about soft law, guidelines and global governance might in some respects be old wine in new bottles. If we dive deep into the organisational structure of public administration in particular administrative self-governance, we can find similar features like reports, guidelines and so forth at the national level. We also find similar discussions about the law quality of all these provisions. However, the paper has only focused on one particular case in German administrative law, more comparative research is necessary to draw broader conclusions. In addition, we might look out for the limits to a national-global comparison.

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