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BURNT BY THE SUN OF INTERNATIONAL ADMINISTRATIVE LAW:

A SKETCH OF A LEGAL CHAMELEON

ABSTRACT

In 1906, D. Donati presented his thesis on existence of two particular subdisciplines of public law: administrative international law (*diritto internazionale amministrativo*) and international administrative law (*diritto amministrativo internazionale*). Here, D. Donati followed a dualistic approach, arguing for a strict distinction between public international law and municipal law. So, he understood administrative international law as an integral part of public international law and international administrative law as an integral part of municipal law. This article aims to address the reception of Donati's thesis on existence of international administrative law (*diritto amministrativo internazionale*) in the subsequent scholarship of public law. It argues that while the term itself has been used in various jurisdictions for several decades, the scholarship has never reached any common understanding on what international administrative law *actually is* and where it belongs. Consequently, several different understandings if the term "international administrative law" have emerged in various jurisdictions. This article argues that absence of this common understanding is not given by *differences* in legal problems, but rather has been a product of an *isolationistic approach* of scholarship to this field of law, which hasn't provided for a common understanding of this academic discipline. Further, this article also argues that despite a common position, the emergence of this branch of law in various jurisdictions demonstrates that international administrative law represents a part of an *ius publicum europaeum*.

KEY WORDS: International administrative law – legal chameleons – legal dualism – public law – international private law

INDEX: Introduction – I. Terminological clarification – II. A sketch of a legal chameleon – 1. A doppelgänger – 2. Part of international private law – 3. Autonomous discipline – III. Nemesis of isolationism – IV. Conclusions

Introduction[1] [2]

In 1906, great Italian scholar and founder of the "Paduan School of Public Law", D. Donati, discussed[3] the issue of mutual relations between international law and administrative law. He reflected upon the fact that several earlier authors[4] had argued for the existence of an "international administrative law" as a particular discipline of public law that governed international aspects in administrative law. This discussion had emerged as a reaction to various international agreements[5], addressing international co-operation in various fields of public administration and adopted by European States in the 2nd half of the 19th Century.

In this context, D. Donati presented a more elaborated thesis, reflecting the norms of public law dealing with the internalisation of public administration. Commenting upon a dualistic theory on the distinction

[1]This is a written and much expanded version of my lecture entitled "Two faces of international administrative law", which was held at the Department of Law, University of Naples "Federico II" in 2019. Sincere thanks go to Associate Professor Luigi Ferrara for his cordial invitation and hospitality.

[2]This research was funded by Czech Science Agency through its project "International Administrative Law: Legal Discipline Rediscovered" (No. 20-01320S).

[3]D. DONATI, *I trattati internazionali nel diritto costituzionale,* Torino, Unione tipografico-editrice torinese, 1906, 430-438.

[4]This was, in particular, the case of F. MARTENS, *Das Consularwesen und die Consularjurisdiction im Orient,* Berlin, Weidmannsche Buchhandlung, 1874; L. STEIN, *Handbuch der Verwaltungslehre,* Stuttgart, Verlag der J.G. Cotta'schen Buchhandlung, 3rd ed, 1887; P. FEDOZZI, *Il diritto amministrativo internazionale. Nozioni* sistematiche, Perugia, Unione tipografica cooperative, 1901 and of P. KAZANSKY, *Théorie de l'administration internationale*, in *Revue générale de droit international public,* IX/1902, 361-367. The fact is, however, that in strict contrast to D. Donati, earlier authors had understood international administrative law (*internationales Verwaltungsrecht, diritto amministrativo internazionale, droit administratif international*) as an "umbrella term" for norms governing international administration in the activities of States, international societies and their organs, and international organs such as the various congresses, bureaus, commissions, and international arbitral tribunals.

[5]For example the International Telegraph Convention (1865), the Treaty concerning the formation of a General Postal Union (1874), the Brussels Sugar Convention (1902).

between public international law and municipal law, developed by H. Triepel[6], D. Donati proposed that two particular subdisciplines be distinguished: Administrative international law (*diritto internazionale amministrativo*) as a part of international public law on one hand, and international administrative law (*diritto amministrativo internazionale*) as a part of municipal law on the other. Here, *diritto internazionale amministrativo* was proposed to address those sources of public international law governing matters of administration. To the contrary, *diritto amministrativo internazionale* was understood as a particular subdiscipline of municipal law, dealing with those administrative relations where a certain foreign element appears.[7] In this respect, *diritto amministrativo internazionale* represented a kind of parallel of international private law in the realm of public law.

The fact is, that D. Donati denied the proposed distinction as being artificial. Firstly, he argued that one can only barely refer to *any* administrative international law, as there is nothing like an "international administration". Even administration executed by confederations or by international administrative unions, stemmed – in the understanding of D. Donati - from administrative powers of *participating* sovereign States.[8] Secondly, he further denied[9] the existence of international administrative law as a *distinctive* subdiscipline of municipal law. He argued that norms addressing foreign elements in the relations of administrative law do not differ in substance from those norms of administrative law which govern relations of purely domestic nature.

While D. Donati *himself* concluded that the discussed distinction between administrative international law and international administrative law is artificial,

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[6]See H. TRIEPEL, *Völkerrecht und Landesrecht,* Leipzig, C. L. Hirschfeld, 1899, reprint by Aalen: Scientia Antiquariat, 1958, 273. H. Triepel himself mentioned the existence of international administrative law (*internationales Verwaltungsrecht*) in one group of disciplines, along with international criminal law, international private law and international procedural law.

[7]D. DONATI, *op. cit.*, 437-438.

[8]ibid, 431.

[9]ibid, 447.

his theory on the existence of these two distinctive subdisciplines has influenced several generations of scholars of public law.[10] Today, more than hundred years after it was presented, the thesis on existence of these two subdisciplines of public law is still the subject of inspiration[11] and, to a certain extent, controversy.[12]

This article aims to address the reception of Donati's thesis on existence of a specific branch of municipal law (*diritto amministrativo internazionale*) in the subsequent scholarship of public law. It argues that his thesis gained considerable reflection in the scholarship abroad. In this respect, this article identifies various approaches to this branch of law, which emerged in various jurisdictions. Thus, this article will not deal with respective legal frameworks, existing in various jurisdictions, but rather with conceptualisation of these frameworks in legal academia.

Simultaneously, this article aims to argue that despite an impressive reception of Donati's thesis, the subsequent legal scholarship failed to establish

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[10]In Italian scholarship, see U. BORSI, *Carattere e oggetto del diritto amministrativo* internazionale, in *Rivista di diritto internazionale* 2/1912, 352-362; J. D' ALESSIO, *Il diritto amministrativo internazionale e sue fonti*, in *Rivista di diritto pubblico* 10, 276-273 (1913); E. BONAUDI, *A proposito di „Diritto amministrativo internazionle"*, in *Annali della Facoltà di Giurisprudenza di Perugia,* 1928, 101-184; A. RAPISARDI MIRABELLI, *Diritto internazionale amministrativo,* Milano, Antonio Milani, 1939; U. FRAGOLA, *Diritto amministrativo internazionale. Manuali di szienze guiridiche ed economiche,* Napoli, Pallerano & Del Gaudio, 1951; G. BISCOTTINI, *Diritto amministrativo internazionale. La rilevanza degli atti amministrativi stranieri,* Padova, Ed. Antonio Milani, 1964.

[11]See L. CASINI, *Global Administrative Law scholarship*, in S. CASSESE (ed), *Research Handbook on Global Administrative Law,* Cheltenham, Edward Elgar, 2016, 548-549. Also see J. TERHECHTE and C. MÖLLERS, *Europäisches Verwaltungsrecht und Internationales Verwaltungsrecht,* in J. TERHECHTE (ed), *Verwaltungsrecht der Europäischen Union,* Baden Baden, Nomos Verlag, 2019, 1445-1446.

[12]See S. AGO, *What is 'international administrative law'? The adequacy of this term in various judgements of international administrative tribunals,* in P. QUAYLE (ed), *The role of international administrative law at international organizations,* Leiden, Brill Nijhoff, 2020, 88-102. Here, Professor Shinichi Ago argues (at pp. 90-91) that «*Properly, therefore, the notion of 'international administrative law' is closer to the concept of 'international institutional law' or the so-called Global Administrative Law (GAL), proposed by a research group at New York University. Both notions are based on the assumption that there is an international public interest (intérêt public international) or global governance which is administered by a set of international rules. GAL, as presented by Professors Kingsbury, Stewart and Krish, covers a wide range of phenomena that present 'administrative' relationships among various stakeholders in the global society. (…) However, 'international administrative law' does not seem to be an appropriate term to define the laws applied by IATS. The fact that IATS are organs of an international administrative institution does not automatically lead us to conclude that they apply 'international administrative law' in its literal legal sense.*»

any common understanding of what international administrative law actually is and where it belongs. Thus, this article argues – as its title clearly indicates - that international administrative law represents a salient example of a "legal chameleon".[13] In this respect, this article also aims to identify reasons for this common understanding.

Lastly, this article argues that, despite absence of a common understanding concerning what international administrative law is, the spontaneous emergence of this branch of law in various jurisdictions demonstrates that the idea of a *diritto amministrativo internazionale* must be considered as a part of a common public law of Europe (*ius publicum europaeum*).[14]

I. Terminological clarification

The issue deserves a terminological clarification. The implications of the terms, which were used by Donati, were twofold.

On one hand, in the Italian original, the distinction between *diritto internazionale amministrativo* and *diritto amministrativo internazionale* clearly implies the different fields of legal relations involved. While *diritto internazionale amministrativo* refers to public international law, governing the relations between sovereign States (subjects of international public law), *diritto amministrativo internazionale* refers to municipal law, addressing relations between the State and its subject in the relations of administrative law. In this respect, the terms used by D. Donati in Italian are perfectly capable of reflecting the dualistic approach to public international law on the one hand and municipal law on the other.

The other Romance languages possess the same capacity to express the essence of this dualistic approach: So, in the Francophone scholarship, the

[13]A "legal chameleon" represents a feature in law, which appears differently when analysed from theoretical perspectives. See e.g. A. C. BOHRNSEN and J. E. RYAN, *Tort Law in Washington: A Legal Chameleon,* in *Gonazaga Law Review*, 1975/1976, 73-132.

[14]See e.g. J. BARNES, *New Frontiers of Administrative Law: A Functional and Multi-Disciplinary Approach,* in H. J. BLANKE, P. CRUZ VILLALÓN, T. KLEIN and J. ZILLER (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber,* Vienna, Springer International, 2015, 563-588.

terms *droit international administratif* and *droit administratif international* were used.[15] Similarly, the Latin American scholarship has refereed to *derecho internacional administrativo* and to *derecho administrativo internacional.*[16] Also the Slavonic languages have the capacity to capture the difference between the two fields being discussed.[17] However, the fact is that these terms have never been used consistently. Thus, the terms *droit administratif international* and *derecho administrativo internacional* were also regularly used as "umbrella terms" – to cover administrative issues arising in international relations in general.[18]

On the other hand, Donati's terminology represented a problem for those scholars outside the family of Romance languages. In German scholarship, K. Neumeyer explicitly referred[19] to Donati in the introductory note to the 4th volume of his monumental monograph. He proposed[20] to use the terms *Verwaltungsvölkerrecht* and *internationales Verwaltungsrecht.* While the first term was proposed to refer to those part of public international law governing the issues of administration, the second was used by Neumeyer to designate a particular field of administrative law governing relations with certain foreign

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[15]See K. NEUMEYER, *Le droit administratif international,* in *Revue générale de droit international public,* 1911, 492-516 ; J. GASCON Y MARIN, *Les transformations du droit administratif international,* in *Recueil des cours de l'Académie de droit international,* 1930, 6-32 ; P. NEGULESCU, *Principes du droit international administratif*, in *Recueil des cours de l'Académie de droit international*, 1935, 595-625; P. WEIL, *Le Droit administratif international: bilan et tendances,* Paris, Institut des hautes études internationales, 1962; M. S. NGUYEN, *Droit administratif international*, in *Revue de droit suisse*, 2007, 77-125 etc.

[16]See C. G. OVIEDO, *Derecho administrativo,* Madrid, E.I.S.A., 4th ed, 1953, 15-16 ; A. GUAITA, *Derecho administrativo especial,* Tomo I., Madrid/Zaragoza, Librería General, 1960, 28-29; R. MANADÉS, *Introduccion al derecho administrativo internacional*, Buenos Aires, Novum, 2014, 12; J. A. MENDÉS RIVERA and A. OLGUÍN TORRES, *El Derecho internacional administrativo y su relación con el Derecho internacional ambiental*, in T. RENDÓN HUERTA BARRERA and J. J. SORIANO FLORES (eds), *Reflexiónes jurídicas* contemporáneas, Guanajuato, Universidad de Guanajuato, 2015, 233-254.

[17]See J. HANDRLICA, *A treatise for international administrative law,* in *The Lawyer Quarterly* 4/2020, 274-282.

[18]See J. GASCON Y MARIN, *Les fonctionnaires internationaux*, in *Recueil des cours de l'Académie de droit international*, 1932, 721-797 (here, the term "droit administratif international" refers to the sources of international public law).

[19]K. NEUMEYER, *Internationales Verwaltungsrecht. Vierter Band. Allgemeiner* Teil, Zürich, Verlag für Recht und Gesellschaft AG, 1936, 3-4.

[20]ibid, 20-24.

elements. However, the distinction embodied in these two terms has not been consistently followed in the subsequent scholarship.

Thus, some three decades later, K. Vogel bitterly observed[21] in his habilitation thesis that the German language does not possess terms that would appropriately reflect the difference, embodied in Italian *diritto internazionale amministrativo* and *diritto amministrativo internazionale.* Consequently, the term *internationales Verwaltungsrecht* has been used by German scholars in several meanings. While some scholars[22] used this term rigorously in the sense of Donati's *diritto amministrativo internazionale,* others argued for a broader usage, covering also what Donati understood as *diritto internazionale amministrativo*.[23] The Dutch scholarship, which has used the term *internationaal administratiefrecht,* has faced similar terminological difficulties.[24]

Nor has the terminology been consistent in English-written scholarship. Some early authors[25] from the United States used the term *international administrative law* to refer to the law of international administrative unions.[26] Consequently, the term came to be used[27] in the scholarship in order to refer

[21]K. VOGEL, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm. Eine Untersuchung über die Grundfragen des sog. internationalen Verwaltungs- und* Steuerrechts, Frankfurt am Main, Alfred Metzner, 1965, 161. It is interesting to note that the author himself referred to the "so called international administrative law", instead of the "international administrative law" in the title of his book.

[22]See T. MERKLI, M. EICHBERGER and A. BATLINER, *Internationales Verwaltungsrecht, das Territorialitätsprinzip und seine Ausnahme*, in *Liechtensteinische Juristen-Zeitung* 10/2003, 82-94; C. MÖLLERS, A. VOSSKUHLE and C. WALTER (eds), *Internationales* Verwaltungsrecht, Tübingen, Mohr Siebeck, 2007; G. BIAGGINI, *Die Entwicklung eines internationalen Verwaltungsrecht als Aufgabe der Rechtswissenschaft* in C. HILLGRUBER, U. VOLKMANN, G. NOLTE and R. POSCHER (eds), *Die Leistungsfähigkeit der Wissenschaft des Öffentlichen Rechts,* Berlin, De Gruyter, 2014, 413-440.

[23]See H. ERICHSEN and D. EHLERS (eds), *Allgemeines* Verwaltungsrecht, Berlin, De Gruyter, 14th ed, 2010, 188-192.

[24]See O. JANSEN, *Internationaal bestuursrecht weer voor het voetlicht*, in W. DEN OUDEN, T. BARKHUYSEN, B. MARSEILLE, R. SCHLÖSSELS and H. PETERS (eds), *25 jaar Awb: In eenheid en* verscheidenheid, Haag: Wolters Kluwer, 2018, 425-439.

[25]See P. REINSCH, *International administrative law and national sovereignty*, in *American Journal of International Law* 3/1909, 1-45; P. REINSCH, *Public International Unions: Their Work and Organisation. A Study in International Administrative Law*, Boston, Ginn and Company, 1911; F. SAYRE, *Experiments in International* Administration, New York: Harper & Brothers, 1919.

[26]Such as Universal Postal Union, International Telecommunications Union, International Commission for Air Navigation etc.

[27]See D. G. PARTAN, *International administrative law*, in *American Journal of International Law,* 2/1981, 639-644; C. F. AMERASINGHE, *The future of international administrative law*, in *Inter-*

either to the administrative activities of international organisations, or to their own internal administration. In parallel, the term *international administrative law* has also been used in literature[28] to refer to the field of municipal law that D. Donati labelled as *diritto amministrativo internazionale* and which is a subject of interest in this article. Thus, one can very easily observe that authors writing in English have regularly used the same term to label very different fields of public law.

The fact is that the scholarship reacted on this *ambiguous* use of the term *international administrative law* in literature, proposing several alternatives. Use of the terms *administrative international law* and *international administrative law* was once proposed[29] and is also being used in this article. However, this terminology hasn't been generally accepted in legal scholarship. In German scholarship, the term *öffentliches Kollissionsrecht* ("a public choice-of-law") was proposed[30] to react to the ambiguous use of international administrative law, however, in the same meaning and Donati's *diritto amministrativo internazionale.* More recently, the term *transnational administrative law* has been proposed as an alternative to *international administrative law* and this term is being gradually used by many European scholars.[31]

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national and Comparative Law Quarterly, 4/1996, 773-795; E. D. KINNEY, *The emerging field of international administrative law: its content and potential*, in *Administrative Law Review* 2/2002, 415-433; C. D. COOKER, *The effectiveness of international administrative law as a body of law,* in *Queen Mary Studies in International Law*, 2012, 319-332; P. QUAYLE, *The Modern Multilateral Bureaucracy: What is the Role of International Administrative Law at International Organisations?,* in P. QUAYLE (ed), *The role of international administrative law at international* organizations, Leiden, Brill Nijhoff, 2020, 1-21.

[28]See K. VOGEL, *Administrative Law: International Aspects*, in R. BERNHARDT (ed), *Encyclopedia of Public International Law, Vol. 9: International Relations and Legal Cooperation in General* , Amsterdam, North Holland, 1986, 3-6.

[29]E.g. M. RUFFERT and S. STEINECKE, *The Global Administrative Law of* Science, Heidelberg, Springer, 2011, 21.

[30]See C. OHLER, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts. Strukturen des deutschen Internationalen* Verwaltungsrechts, Tübingen, Mohr Siebeck, 2005, 3.

[31]See S. W. SCHILL, *Transnational legal approaches to administrative law*, in *Rivista trimestrale di diritto publico* 1/2014, 1-33; K. SOMMERMANN, *Objectives and methods of a transnational science of administrative law,* in J. BLANKE, P. VILLALON, T. KLEIN and J. ZILLER (eds), *Common European Legal Thinking: Essays in Honour of Albrecht* Weber, Vienna, Springer International, 2015, 543-561; J. A. GONZALEZ, *The overcoming of territorial paradigm ad its effects in administrative law. Normative basis of transnational administrative law*, in *Revista de derecho politico*, 1/2018, 157-190 etc.

The author of this article is aware of ambiguity of the term *international administrative law*. However, despite proposals towards a new terminology, this article is using this traditional, yet somewhat controversial term. This is to pay homage to the authors of the past and to the tradition of legal scholarship of Europe.

II. A sketch of a legal chameleon

The difficulties with terminology that were briefly outlined above, go hand in hand with problems in understanding what *international administrative law* actually is.[32] While Donati discussed the existence of this particular field of law, he failed to address the question of what, exactly, is the actual content of this branch and what are its relations to other fields of public, or private law. Due to the emergence of a set of particular norms dealing with foreign elements in the relations of administrative law in various jurisdictions, the above-mentioned questions triggered the attention of the subsequent legal scholarship.[33]

One may at least identify three various approaches to what *international administrative law* actually is. Firstly, several authors have understood international administrative law as an integral part of administrative law of their respective jurisdictions, which represents a kind of a twin-stranger (doppelgänger) of international private law. Secondly, another understanding has emerged, arguing that international *administrative* law actually represents a part (or a sub-discipline) of international *private* law. Lastly, some authors have argued that international administrative law actually represents a field of its own. Despite differences in these approaches, all of them are, to a certain

[32]This juxtaposition between the ambiguity in terminology and the various interpretations of its content was firstly thematised in F. MATSCHER, *Gibt es ein Internationales Verwaltungsrecht?* in O. SANDROCK (ed), *Festschrift für Günther Beitzke zum 70. Geburtstag am 26. April* 1979, Berlin, De Gruyter, 1979, 641-650.

[33]See M. A. ANTONESCO, *Essai de détermination méthodologique du droit administratif international*, in P. NEGULESCU (ed), *Mélanges Paul Negulescu*, Bucureşti, Monitorul oficial i Imprimeriile statului, 1935, 230-235.

extent, based on the Donati thesis on the existence of a particular branch of municipal law that addresses international aspects of public administration.

The following paragraphs aim to address these three various approaches and their mutual relations.

1. A doppelgänger

The thesis on the existence of international administrative law (*diritto amministrativo internazionale*) as a branch of municipal law gained considerable attention, especially in the German scholarship. Here, it was that K. Neumeyer further elaborated this thesis.[34] Neumeyer himself presented[35] a very detailed knowledge of the contemporary Italian scholarship, addressing the subject and considering the dualistic approach developed by Donati, as "the highlight of the scientific debate" on this topic.[36]

When presenting his concept of an international administrative law (*internationales Verwaltungsrecht*), Neumeyer argued that this field of law represents a kind of parallel to the field of international private law in the realm of public law.[37] While international private law aims to address cases, where a foreign element appears in the relations of private law, the aim of international administrative law was to *govern* those cases, where such foreign elements arise in the relations of public law.

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[34]For further details on the personality and academic achievements of K. Neumeyer, see H. BREITENBUCH, *Karl Neumeyer – Leben und Werk (1869–1941)*, Berlin, Peter Lang, 2013. Apart from common interest in the field of international administrative law, another similarity between both academicians must be mentioned here. In the same vein as D. Donati, K. Neumeyer also became a target of political persecution because of his Jewish origin in the 1930s. However, while D. Donati escaped from persecution by exile in Switzerland, K. Neumeyer refused any opportunity to emigrate from Germany and in 1941 committed suicide along with his wife in their apartment in Munich. This tragedy also echoed abroad, see e.g. H. J. MORGENTHAU, *Professor Karl Neumeyer*, in *American Journal of International Law*, 3/1941, 672.

[35]K. NEUMEYER, *op. cit.* sub 18 above, 3-4 and in particular, in fn. 23, 24 and 25.

[36]ibid, 3.

[37]In this respect, K. Neumeyer further elaborated arguments of two earlier German scholars, namely those of Ernst Issay and Fritz Stier-Somlo. See E. ISAY, *Internationales Verwaltungsrecht,* in F. STIER-SOMLO and A. ELSTER (eds), *Handwörterbuch der Rechtswissenschaft. Bd. 3,* Berlin, De Gruyter Recht, 1928, 344 and F. STIER-SOMLO, *Grundprobleme des internationalen Verwaltungsrechts*, in *Internationale Zeitschrift für Theorie des Rechts* 1930/1931, 222-228.

In contrast to the realm of public law, the field of international private law possessed its own dogma and principles, which Neumeyer used to conceptualise international administrative law. In this respect, he argued that international administrative law is being composed by the norms of various substantive fields of administrative law – such as traffic law, water law, university law, mining law, tax law etc. Indeed, Neumeyer approached the issue of conceptualization of international administrative law by addressing various branches of the extant substantive law of the German Empire and the subsequent Weimar Republic in the first three volumes of his monumental monograph, entitled "International Administrative Law".[38] Only afterwards, the fourth volume was aimed at addressing systematic issues of international administrative law as an academic discipline.[39]

When analysing various branches of substantive law, Neumeyer identified several types of legal norms that – according to his opinion – composed the backbone of international administrative law. He referred to these as "delimiting norms"[40] and this term gained considerable reception in the subsequent German scholarship.[41] In this respect, his concept was built upon the dogma of *unilaterality* of international administrative law.[42] Pursuant to this dogma, foreign law is unable to produce any effect *vis-á-vis* municipal law.

Consequently, special regulation of any foreign element[43] must always be provided by the norms of municipal law. For example, any exemption of

[38]See K. NEUMEYER, *Internationales Verwaltungsrecht, Innere Verwaltung I.,* München, J. Schweitzer Verlag, 1910 (passports, health and safety, societies and foundations, education, nobility, church), K. NEUMEYER, *Internationales Verwaltungsrecht, Innere Verwaltung II.*, München, J. Schweitzer Verlag, 1922 (natural resources, enterprises, social security), K. NEUMEYER, *Internationales Verwaltungsrecht, Innere Verwaltung III.*, München, J. Schweitzer Verlag, 1926 (road traffic, rail traffic, inland water traffic, aviation traffic).

[39]K. NEUMEYER, *op. cit.* sub 19 above.

[40]ibid, 121-126.

[41]See e.g. J. MENZEL, *Internationales Öffentliches Recht, Verfassungs-und Verwaltungsgrenzrecht in Zeiten offener* Staatlichkeit, Tübingen, Mohr Siebeck, 2011, 21-22.

[42]K. NEUMEYER, *op. cit.* sub 19 above, 115.

[43]For example a foreign citizen, diplomatic personel of a foreign State, foreign certificate, such as driving licence, pilot licence, university diploma etc.

diplomatic corps from the tax obligations of the respective State must be provided by the municipal tax law. The legal obligations of foreign certificates, such as driving licenses, university diplomas, vaccination passports, must be – in the same vein – provided by the norm of municipal law. In this respect, Neumeyer argued that there were delimiting norms, which require application of such foreign law in certain legal relations, where a foreign element appears. At the same time, a delimiting norm may also provide for recognition of foreign administrative acts in the municipal law. Thus, classification of delimiting norms in international administrative law was proposed, reflecting the dichotomy between *direct* and *indirect* application of foreign law, which remains in the scholarship of international private law.

At the same time, Neumeyer also provided for a strict delimitation of the field of international administrative law *vis-á-vis* other areas of law.[44] In this respect, he strictly followed the thesis developed by Donati, arguing for a dualistic distinction between *diritto internationale amministrativo* and *diritto amministrativo internazionale*. In this respect, Neumeyer did not deny that States may enter into mutual agreements, governing certain aspects of public administration. However, in the same vein as Donati, he understood legal relations established by such agreements to be of relevance *only* for States or other subjects of international public law.[45]

In this respect, relations between the State and its citizens can only be provided by the norms of municipal law, i.e., by the field of international administrative law. Consequently, delimiting norms may represent the reflection of international agreements, as adopted by the respective State. However, international administrative law is not necessarily limited to those cases, where an international agreement requires reception, as a sovereign State may also opt for a unilateral solution in certain cases where a foreign element appears.

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[44]K. NEUMEYER, *op. cit.* sub 19 above, 20-25.
[45]K. NEUMEYER, *op. cit.* sub 19, in particular fn. 2.

The fact is that Neumeyer's concept of international administrative law was based on the thesis that each of the (sub)disciplines of administrative law contain specific norms governing relations with a foreign element. Consequently, under this understanding, international administrative law fails to represent a homogenous field of law. Rather, it serves an *auxiliary* function. Therefore, Neumeyer also labelled his international administrative law as a "delimiting law" – a kind of "parallel" to international private law.

The concept of international administrative law, which was developed by Neumeyer gained considerable credence in the subsequent German scholarship.[46] The concept of international administrative law as a set of delimiting norms, governing relations of public law where any foreign element appears, is considered – despite the fragmented and unharmonized nature of this field of law – as a viable one even today.[47] This line of legal thinking later emerged into conceptualization of new (sub)disciplines of public law in the scholarship regarding international tax law, international social security law, international aviation law etc.[48]

Simultaneously, however, in the subsequent scholarship, the concept presented by Neumeyer also became the subject of criticism. Thus, three decades after Neumeyer, K. Vogel questioned[49] the entire concept of international administrative law. He argued that while in the field of private law,

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[46]See H. SCHLOCHAUER, *Internationales Verwaltungsrecht*, in F. GIESE (ed), *Die* Verwaltung, Braunschweig, Loseblatt, 3rd ed, 1955, 56-59; E. STEINDORFF, *Internationales Verwaltungsrecht,* in K. STRUPP (ed), *Wörterbuch des* Völkerrechts, Berlin, De Gruyter, 1962, 581-592; G. HOFFMANN, *Internationales Verwaltungsrecht*, in I. MÜNCH (ed), *Besonderes* Verwaltungsrecht, Berlin, De Gruyter, 1985, 851-562; C. OHLER, *Internationales Verwaltungsrecht – ein Kollisionsrecht eigener Art?*, in S. LEIBLE, M. RUFFERT (eds), *Völkerrecht und Internationales* Privatrecht, Jena, Jaener Wissenschaftlicher Verlag, 2006, 131-148; J. MENZEL, *Internationales Öffentliches Recht. Verfassungs- und Verwaltungsgrenzrecht in Zeiten offener* Staatlichkeit, Tübingen, Mohr Siebeck, 2011, 48-50 etc.

[47]Accord in C. OHLER, *op. cit.* sub 29 above, 6.

[48]See T. RUPP, J. T. KNIES, J. P. OTT, T. FAUST, M. HÜLL, *Internationales* Steuerrecht, Stuttgart, Schäffer Poeschel Verlag, 4th ed., 2018; G. BRÄHLER, *Internationales Steuerrecht. Grundlagen für Studium und* Steuerberatung, Wiebaden, Gabler Verlag, 2010, 2-6; R. REK, M. BRÜCK, A. LABERMEIER, S. PACHE, *Internation ales Steuerrecht in der* Praxis, Wiebaden, Gabler Verlag, 2008, 19-20 etc.

[49]K. VOGEL, *op. cit.* sub 21 above, 237.

various legal regimes existing in different jurisdictions are considered to be equal by the sovereign States, there is no such equality in the realm of public law. Consequently, any parallel drawn between international private law and the field of public law is – as argued by K. Vogel - an erroneous one.

More recently, a "plea for a new international administrative law" was made.[50] In this respect, it was argued that «*the prevalent usage of international administrative law refers to the public law on conflict of laws, developed in linguistic parallel to private international law, which is to say, it refers to national laws on the applications of laws in fact constellations with a foreign link*.»[51] Again, this concept of international administrative law has become subject to criticism, however, from another viewpoint as made by Vogel half a Century ago.

Recently, E. Schmidt-Assmann charged that «*administrative law scholarship should abandon the inaccurate parallel and radically reorder the formation of terminology. International administrative law is to be understood as the administrative law originating under international law*.»[52] This position reflects the increasing number of norms governing public administration and being contained in the sources of international public law itself. Such norms govern in particular the areas of administrative co-operation among the administrative authorities of respective States and the establishment of various networks of co-operation.

Even this position, however, echoes Donati's thesis on the existence of a *diritto amministrativo internazionale*, as it explicitly claims that *national* administrative law "*remains the main point of orientation for the practical administrative activity of most agencies*."[53]

2. Part of international private law

The Donati thesis on the existence of a particular branch of law (*diritto amministrativo internazionale*) also gained considerable attention in the field of

[50]See E. SCHMIDT-ASSMANN, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, in *German Law Journal* 2008, 2061-2076.
[51]ibid, 2076-2077.
[52]ibid, 2077.
[53]ibid.

international private law. This line of argument has also understood international administrative law as a part of municipal law, i.e., as a "national project" of the respective jurisdiction.

Here, a major line of scholarship has emerged in various European jurisdictions, which has considered international administrative law to actually be a particular sub-discipline of international private law.[54] The reasons for this concept of international administrative law are twofold. Firstly, the fact is that norms addressing foreign elements in the relations of administrative law lack any codification in various national jurisdictions. Consequently, this fragmented and un-codified nature of international administrative law has caused a myriad of application questions. For example, if a norm of domestic law required application of administrative law of another State by a domestic administrative authority, how will such authority proceed by obtaining information about the content of such foreign law? Further, how will such administrative authority proceed in a case, if it will prove impossible to find out the content of the foreign law that is required to be applied? While norms of administrative law do not provide an explicit answer, the norms of international private law offer solutions to these problems by written rules.

Secondly, international private law has traditionally dealt with the problem of mutual recognition, particularly in those cases when foreign acts imply effects *vis-á-vis* the relations of private law. In this respect, the norms of international private law in various jurisdictions have traditionally addressed the issue of mutual recognition of foreign judgements. The fact is however that various measures, also issued by the administrative authorities, are capable to cause legal effects in the sphere of private law.

[54]See L. BAR, *Internationales Privat-, Straf- und Verwaltungsrecht mit Einschluß des Zivilprozeß- und des Strafprozeßrechtes*, in F. HOLZENDORFF, J. KOHLER (eds), *Enzyklopädie der* Rechtswissenschaft, Berlin, Duncker & Humblot, 7th ed, 1914, 223-230; G. LIPPERT, *Handbuch des Internationales* Finanzrechts, Wien, Oesterreichische Staatsdruckerei, 2nd ed, 1928, 11 (arguing, that international tax law belongs to the realm of international private law); J. WEISBART, *Internationales Privatrecht und öffentliches Recht*, *Juristenzeitung* 6/1956, 769-776; K. VOGEL, *Qualifikationsfragen in Internationalen Verwaltungsrecht*, in *Archiv des öffentlichen Rechts* 84/1959, 54-68; P. H. NEUHAUS, *Die Grundbegriffe des internationalen Privatrechts*, Tübingen, J. C. B. Mohr, 1976, 5-7 etc.

Consequently, the problem of administrative acts as foreign elements has traditionally triggered attention of the scholarship of international private law. The fact is that the approach as outlined, also gained favour outside the region of Europe, in particular in the legal academy of certain Latin American countries.[55]

3. Autonomous discipline

Lastly, a third line of understanding what international administrative law actually is, has emerged in legal scholarship. Pursuant to this line of argument, international administrative law represents a kind of "delimiting law" *sui generis*, which differs considerably from the ordinary substantive administrative law. To a certain respect, this line of argument followed the thesis of Neumeyer, who argued for a strict separation of public law governing the legal status of third-country nationals[56] and international administrative law.[57] This approach, gained considerable support by scholars of public law.[58] The fact is that this approach was also quite regularly reflected in the scholarship of international private law.[59]

Neither has this approach been consequently followed in legal scholarship. E. Bonaudi criticized[60] the conceptualisation of international

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[55]See H. M. ENNIS, *Derecho internacional privado*, Buenos Aires, D. T. Lelong Editores, 1953, 571 (here, the author argued that international tax law represented a part of international private law); O. A. TENÓRIO, *Direito internacional privado,* Rio de Janeiro, Freitas Bastos, 11th ed, 1976, 471 etc.

[56]Fremdenrecht, droit des étrangers, dirrito degli stranieri.

[57]K. NEUMEYER, *op. cit.* sub 19 above, 83-89.

[58]See R. H. HERRNRITT, *Grundlehren des Verwaltungsrecht: mit vorzugsweiser berücksichtigung der in Österreich (Nachfolgestaaten) geltenden rechtsordnung und praxis* dargestellt, Tübingen, Mohr Siebeck, 1925, 101-108; F. REU, *Anwendung fremden Rechts. Eine Einführung,* Berlin, Junker und Dünnhaupt, 1938, 102-104; T. FLEINER-GERSTER, *Grundzüge des Allgemeinen und schweitzerischen* Verwaltungsrecht, Zürich, Schulthess, 2nd ed, 1980, § 10 ("In fact, we can today refer about international administrative law as about an independent discipline"); C. BREINING-KAUFMANN, *Internationales Verwaltungsrecht*, in *Zeitschrift für schweizerisches Recht,* 2/2006, 125 ("international administrative law represents a legal discipline *sui generis*").

[59]See G. LIPPERT, *Handbuch des Internationales Finanzrechts,* 2nd ed., Oesterreichische Staatsdruckerei, Vienna, 1928, 11 (arguing, that international tax law belongs to the realm of international private law); J. P. NIBOYET, *Les doubles impositions au point de vue juridique*, in *Recueil des Cours de l'Académie de la Droit International*, 1930, 44-65 etc.

[60]See E. BONAUDI, *op. cit.*, 144.

administrative law as a "delimiting law" *sui generis*, arguing that due to lack of any codified norms, this branch of law merely represents a part of substantive administrative law. Later, Vogel argued that statutory provisions delimiting administrative law more often than not are embodied in substantive law, since this delimitation is prerequisite for the application of substantive administrative law.

Such provisions are considerably less abstract than those of international private law and are more closely connected to the structure and policies of the substantive law in question. "It follows from this (frustrating through this may be for a specialist in conflicts law) that it will be at best impractical, and to large extent impossible to treat these provisions separately from substantive law, since they fail to constitute a province of law of their own."[61]

Consequently, Vogel argued that international administrative law cannot represent itself as autonomous from the strictly separated substantive administrative branch of public law. Several current authors[62] also share this viewpoint.

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The above-mentioned outline of various perceptions of international administrative law in different national academia underlines the "chameleonic" nature of this field of law. This outline also demonstrates that the uncertainty regarding the nature of international administrative law represents an invariable feature in the legal scholarship. Here, one may agree with J. Terhechte and C. Möllers, who argued that even after decades of research, "international administrative law still represents more a field of emerging research, than an established legal discipline".[63]

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[61]See K. VOGEL, *op. cit.* sub 28 above, 5.
[62]See J. MENZEL, *op. cit.*, 21.
[63]See J. TERHECHTE and C. MÖLLERS, *op. cit.*, 1445.

At the same time, the various perceptions of the existence of international administrative law in different jurisdictions shows impact of the thesis, presented by D. Donati. In particular German authors had referred to his concept of *diritto amministrativo internazionale* in their works. Indirectly, the thesis of D. Donati has subsequently influenced also the scholarship in Latin America.

At the same time, conceptualisation of international administrative law in various jurisdictions hasn't been necessarily the reception of the thesis presented by D. Donati. Such conceptualisation has been regularly just a reflection of domestic law, governing specific relations where a foreign element appeared. However, also in this respect, the thesis of D. Donati may be considered as prophetic one.

III. Nemesis of isolationism

As outlined above, the Donati thesis of has gained a wide reflection in legal scholarship over the last Century in Europe and beyond. Nearly six decades after the thesis was published in Italy, K. Vogel observed in his book turned into a habilitation thesis that the entire existing legal research on international administrative law began with D. Donati.[64] However, as previously indicated, the subsequent legal scholarship has never agreed upon any common understanding of what international administrative law actually is. The reasons for this lack of common understanding are twofold.

In the same vein as international private law,[65] international administrative law has been understood as a "national project". Legislations in various jurisdictions have addressed the issue of foreign elements appearing in the relations of public law. Thus, different national legislations have established their own rules to address the existence of various foreign elements. These national legislations have reflected autonomous institutions of administrative

[64]See K. VOGEL, *op. cit.* sub 21, 161.

[65]See A. H. NEIDHARDT, *The transformation of European private international law: a genealogy of the family anomaly*, Florence, European University Institute, Ph.D. thesis, 2018, 20-21.

law, existing in various jurisdictions. At the same time, these national legislations also reflected mutual relations between international public law and municipal law in these various legislations, i.e., various forms of monistic and dualistic approaches to this issue. Also, the lack of any harmonization of rules governing foreign elements in the relations of public law, which appears to be common in various jurisdictions, also contributed to the absence of a common understanding of this branch of law.[66]

So, we can only barely refer to any universal international administrative law, but rather about various and to a certain extent quite different frameworks of international administrative law of the respective jurisdictions. In this regard, the concept of international administrative law has also been reflected in the scholarship of public law, existing in various national academia.[67] Consequently, this isolationistic approach to the issue discussed has implied various perceptions of the subject in various national scholarships.

However, the absence of a common understanding concerning what international administrative law is, cannot be explained only by the existence of various national approaches. As indicated above, the differences in perception of the discussed field of law have existed even *within* the national jurisdictions. The fact is that the concept of international administrative law as proposed by D. Donati stood upon a strict dualistic approach to two realms of legal relations. Here, the mutual relations between sovereign States and the relations between the State and its citizens stood in a splendid contradiction.

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[66]See J. Handrlica, *A treatise for international administrative law. Part II: On overgrown paths*, in *The Lawyer Quarterly* 1/2021, 178-181.

[67]See e.g. M. Potočný, *Výklad českého mezinárodního práva správního*, in V. Mikule, V. Sládeček, V. Vopálka (eds), *Veřejná správa a právo. Pocta Dušanu Hendrychovi k 70.* narozeninám, Praha, C. H. Beck, 1997, 213-220 (international administrative law of the Czech Republic); F. Seyersted, *Interlegal offentlig rett, særlig internasjonal forvaltingsrett*, in A. Bratholm, T. Opsahl, M. Aarbakke (eds), *Samfunn, Rett, Rettferdighet. Festskrift til Torsten Eckhoffs 70*-årsdag, Oslo, Tano Aschehoug, 1986, 599-620 (international administrative law of Norway); J. R. Stellinga, *Internationaal administratiefrecht*, in *Nederlands Juristenblad* I/1946, 33-40 (international administrative law of the Netherlands); A. Tachos, *Le «droit administratif international» hellénique,* in *Revue hellénique de droit international*, 1986, 179-195 (1986) (international administrative law of Greece) etc.

In this respect, K. Neumeyer presented a literal reception of the thesis, as presented by D. Donati, when arguing that "there is no administrative law apart from municipal law".[68] However, the Donati thesis of inevitably reflected the state-of-art of public administration existing at the beginning of the last Century. In this respect, the modern scholarship of administrative law posed a legitimate question as to whether the basic concept, which stand upon the antagonistic differentiation between international public law and municipal law with respect to public administration, remains viable.[69]

The fact is, that the concept of *diritto amministrativo internazionale* as proposed by D. Donati had inevitably reflected the realities of public administration that existed at the beginning of the 20th Century. However, while the thesis that "there is no administrative law apart of municipal law"[70] had perfectly reflected the state-of-art of public administration one hundred years ago, using this thesis today would trigger serious questions.

Having said this, one may also argue that the absence of any common understanding of what international administrative law is, is also implied by the fact that the original concept reflected a rather isolationistic design of public administration.[71] Public administration is no longer limited to the simple relations between the State and its citizens, but came to be composed of a complex of more elaborated relations.

Firstly, various networks of mutual relations between the administrative authorities of different States have been established, both under the international public and EU law. Secondly, administrative functions are not being executed exclusively by the administrative authorities of the States, but also by the authorities of international organizations. Thirdly, a complex

[68]K. NEUMEYER, *Vom Recht der Auswärtigen Verwaltung und verwandten Rechtsbegriffen*, in *Archiv des öffentlichen Rechts* 3/1913, 129, 133.

[69]See E. SCHMIDT-ASSMANN, *op. cit.*, 2077.

[70]K. NEUMEYER, *op. cit.* sub 67 above, 133.

[71]See H. P. LOOSE, *Administrative law and international law: The encounter of an odd couple*, in P. H. F. BEKKER, R. DOLZER, M. WAIBEL (eds), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev* Vagts, Cambridge, Cambridge University Press, 2010, 380-405.

system, which has been labelled as the Union of Composite Administration has emerged under the umbrella of the European Union. Within this complex system, the administration is being executed by national authorities, agencies of the EU and also the authorities of other States. Thus, one may argue that with respect to the current design of administrative relations, the strict dichotomy between *diritto internazionale amministrativo* (as a part of international public law) on one hand and *diritto amministrativo internazionale* (as a part of municipal law) is no longer capable of addressing the complexities of public administration.

In the light of these considerations, one could easily advocate abandoning of the traditional dualistic approach as outdated. In this respect, one must ask how to evaluate the concept of *diritto amministrativo internazionale*, as proposed by D. Donati, with respect to the realities of today. Here, this article aims to make two following observations:

Firstly, the fact is that international administrative law has emerged as a "national project" in various jurisdictions. Thus, the emergence of the norms addressing foreign elements in the relations of administrative law in various national regimes has not been a consequence of any targeted harmonization, or unification by the means of international public law, but merely the product of the necessity to reflect the existence of such foreign elements. Neither has the emergence of international administrative law been a product of any regional legal framework. In this respect, international administrative law can be considered as the perfect antithesis of EU administrative law, which relies on such regional grounds.

Despite this lack of a common legal basis in the means of international public law, or EU law, one may argue that European international administrative law has definitively emerged. The fact is that, independently from the developments in international public law, the norms addressing foreign element in administrative relations were adopted spontaneously in various European jurisdictions. In the decades after the D. Donati thesis of

was published, the legal scholarship has conceptualized the notion of international administrative law in Germany[72], the Netherlands[73], Switzerland[74], Greece[75], Norway[76] etc. Thus, one may argue that, in parallel to the processes of legal harmonization and unification, various "national" regimes of international administrative law have emerged.

Consequently, international administrative law seems to represent a part of the existing common European legal tradition, without being necessarily linked to any formalized supra-national frameworks.

The second observation is of major importance. Despite emerging systems of administrative co-operations in international public law and EU administrative law, municipal law still represents the backbone of administrative law in various States. This applies, in particular to those jurisdictions which follow a dual approach to the mutual relations between national law and international law. From this perspective, the concept of *diritto amministrativo internazionale* as a particular field of municipal law, addressing foreign elements, also seems viable today. Taking the increasing number of cases, where foreign subjects, foreign public law and foreign authorities interact with the domestic structures of public administration, one may argue that the concept of *diritto amministrativo internazionale* can be considered – despite dogmatic differences regarding its place within the realms of public/private law – as a viable one.

In the same vein as administrative law, international administrative law also must be considered as a "national project" and consequently, instead of referring to a *universal international administrative law*, we must defer to the German, French, Italian, Spanish, or to Dutch international administrative law.

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[72]See C. OHLER, *op. cit.*
[73]See J. R. STELLINGA, *op. cit.*
[74]See M. S. NGUYEN, *op. cit.*
[75]See A. TACHOS, *op. cit.*
[76]See F. SEYERSTED, *op. cit.*

In this regard, this article argues that the D. Donati thesis may also be recently considered as viable.

IV. Conclusions

This article aimed to address the reception of D. Donati's thesis on existence of international administrative law (*diritto amministrativo internazionale*) in the subsequent scholarship of public law. It argues that while the term itself has been used in various jurisdictions for several decades, the legal scholarship has never reached any common understanding on what international administrative law *actually is* and where it belongs. Consequently, several different understandings if the term "international administrative law" have emerged in various jurisdictions. In this respect, international administrative law represents a kind of a "legal chameleon".

In this respect, this article argues that absence of this common understanding is not given by *differences* in legal problems, but rather has been a product of an *isolationistic approach* of scholarship to this field of law, which hasn't provided for a common understanding of this academic discipline. Further, this article also argues that despite a common position, the emergence of this branch of law in various jurisdictions demonstrates that international administrative law represents a part of an *ius publicum europaeum*.