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HIDING IN PLAIN SIGHT? CONCEPTUALIZATIONS OF DATABASES IN MIGRATION LAW AND INTERNATIONAL TAX LAW

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Databases are increasingly used in international law settings. This requires new strategies for those who want to critique international legal practices and their effects. In this essay, we claim that legal scholarship tends to conceptualize the database in ways that leave older and inadequate ideas of legal method(s) and sovereignty in the context of international law largely unquestioned or even serve to reinforce them. Further, we argue that these tendencies obstruct proper understandings of international legal practices and prevent adequate critique. To illustrate the extent of these tendencies, we provide examples from our own research areas: migration law and international corporate income tax law. We contend that empirical studies of how databases are used in these and other legal settings, can help demystify and rework well-established assumptions through which international law, and the database, are seen.

The Database as a Hidden Concept: Legal Method in Sweden's Migration Courts

Our first example concerns the interpretation of international law obligations in Sweden's migration courts. In this setting, the database occupies a visible, yet invisible, position. On a general level, it is sometimes mentioned in Swedish legal scholarship that Swedish judges look at former cases on similar legal issues from the same and other (lower) domestic courts in Sweden when they write judgments. In a governmental report from 2008, this approach is even described as a "tradition."[1] Commercial databases that continuously collect judgments from other domestic courts facilitate this approach.[2] By typing one or more keywords into a search engine (such as a section or principle), the databases provide the judicial employee with an overview of how her colleagues have interpreted and decided similar legal issues during the last year, month, or week. The commercial databases offer statistical data on "trends and differences in today's legal society"[3] and market themselves as a "valuable support"[4] that "help you make better decisions faster—you can call us the market's legal coach!"[5] At the same time, however, this

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[1] Swedish Government Official Reports, SOU 2008:106, *Ökat förtroende för domstolarna – strategier och förslag (Increased Trust in Courts of Law – Strategies and Suggestions)*, at 191 (2008); *see also* Stefan Strömberg, *Styrningen av de självständiga domstolarna – några funderingar*, *in* SVEA HOVRÄTT 400 ÅR (Fredrik Wersäll et al. eds., 2014).

[2] While some databases are owned by local, private companies, others are subsidiaries of corporations owned by, *inter alia*, international fund management companies and private equity funds.

[3] JP Infonet, *JP Rättfallsnet* (last visited Apr. 28. 2023).

[4] JP Infonet, *Om företaget* (last visited Apr. 28. 2023).

[5] Norstedts juridik, *Om oss* (last visited Apr. 28, 2023).

practice is rarely mentioned in the scholarly discussions on legal method(s). When big data or artificial intelligence is picked up in these discussions, the focus tends to be on the implications of fully automated decision making, i.e., decisions without any human involvement.[6] A digital decision support system has thus established itself in Swedish courts, but without getting much attention. In the literature on the migration courts, legal methodology is mainly conceptualized through the lens of theories of dualism and legal polycentricity, in which the database holds a hidden position. As will be clarified below, these conceptualizations risk obscuring the role of international law in Swedish courts. In 2016, and as a response to an increase in the numbers of asylum-seekers in Sweden, the Swedish government enacted a temporary law that restricted the opportunities to be granted a residence permit in Sweden. This emergency law provided, *inter alia*, for temporary residence permits for refugees (instead of permanent ones) and limited the possibilities for family reunification in Sweden. However, several of these restrictions would not be applicable in cases where a rejection of an application for residence permit would constitute a violation of "international obligations of Sweden."[7] In practice, the migration courts' rulings that concerned these "safety valves" were characterized by fairly cursory reasoning. The courts rarely justified why a rejection was or was not in accordance with international law.[8]

Now, let us assume that an individual wants to use the indeterminacy of law to critique and change these outcomes, for example, by arguing that the migration courts' assessments violate the prohibition of torture and other ill-treatment under Article 3 or the right to family life under Article 8 of the European Convention of Human Rights (or some other international law obligation). One way to go about that is to look at how the decision-making practices of the migration courts are discussed in legal scholarship. This discussion revolves around two interrelated themes: Sweden's status as a dualist state and the question of whether Swedish legal consciousness has undergone a shift from Scandinavian legal realism to a more polycentric, human rights-based understanding of law.[9] What these themes have in common is that they provide top-down strategies for solving legal problems. However, as will be clarified below, such strategies seem misleading.

According to some, the migration courts' inflexible application is a consequence of the doctrine of dualism—i.e., the idea that international law regulations require national legislative measures to be domestically applicable. This tradition makes it inappropriate for Swedish judges to consider international law obligations in each individual case. Rather than being left to the courts, the reach of Sweden's international obligations should be thoroughly addressed by the domestic legislator in the *travaux préparatoires* (traditionally in Swedish legal scholarship, preparatory works, such as government bills, are considered important means of statutory interpretation). These statements can then be interpreted by the courts.[10] According to others, Swedish courts are accustomed to considering international law obligations, i.e., even in the absence of explicit consideration of such obligations in the *travaux préparatoires*. The parties to the case increasingly steer contemporary court proceedings, and the polycentric character of law can be used for strategic purposes, for example, by arguing that national legislation breaches international law obligations.[11]

[6] For example, see contributions in Law, AI and Digitalisation (Katja de Vries & Mattias Dahlberg eds., 2022).

[7] SFS 2016:752.

[8] Red Cross, *Humanitära konsekvenser av den tillfälliga utlänningslagen* (Oct. 3, 2018); Swedish Refugee Law Center, *I strid mot ett svenskt konventionsåtagande? En redogörelse för avgöranden som bifallits enligt 11 § lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige - Ett verktyg för verksamma jurister* (Mar. 28, 2018); Lovisa Häckner Posse, Hur tänker du försörja oss? – En undersökning av migrationsdomstolarnas hantering av försörjningskravet vid familjeåterförening (unpublished manuscript).

[9] For a more general example of this discussion, see contributions in Svea Hovrätt 400 år, *supra* note 1.

[10] Rebecca Thorburn Stern, *When the Ends Justify the Means? Quality of Lawmaking in Times of Urgency*, 7 Theory & Prac. Legis. 85, 98 (2019).

[11] Agnes Hellner, *Perspektiv på framtidens förvaltningsprocess*, 3 Förvaltningsrättslig tidskrift 589 (2021).

The legal theoretical discussion thus suggests that, in order to make courts adopt a rights-based perspective, at least one of the two following courses of actions are needed. Either one must make sure that consultative bodies discuss such obligations during future legislative processes and that the discussions are given prescriptive weight by the domestic legislator in the *travaux préparatoires*. Or one must ensure that public counsels that work with residence permit appeals argue more intensively that domestic legislation is incompatible with international law standards.

But what if the legal method in Sweden's migration courts is neither focused on the sovereign legislator's (supposed) intentions, nor polycentric and steered by the parties to the case? If we take the commercial databases' self-descriptions seriously, judges solve cases by using a horizontal, inductive method whereby they map out a statistical body of earlier outcomes. Moreover, studies of the migration courts' application of other aspects of the temporary law imply that the courts use a technocratic method, where arguments and formulations converge without necessarily referring to the legal sources mentioned in the literature (or to conflicts and vagueness in these sources). That is, formulations occur repeatedly, but consist of strikingly few references to statements by the legislative organs in the *travaux préparatoires* or to case law from the European Court of Human Rights.[12] This tendency needs more thorough investigation. It nonetheless seems compatible with the semi-automated decision-making processes that the databases offer. Such a lateral approach also seems to foreclose arguments that the courts' assessments violate international law standards, especially since such arguments seem to assume that the courts use top-down strategies when solving legal problems. Thus, by studying the courts' practices through the lens of databases, it becomes clear that we need tools for critique that go beyond established legal theories (that is, regardless of whether these influential ideas ever provided correct descriptions of what is going on in Swedish courts).

"Reclaiming Sovereignty": The Database and International Corporate Income Tax Law

Our second example concerns a database-centered system for the gathering and exchange of tax-related information regarding the global activities of multinational enterprises. Since the financial crisis of 2008, the Organization for Economic Cooperation and Development (OECD) has taken it upon itself to bring "an end to bank secrecy and tax evasion through global tax co-operation."[13] Currently, information on the global activities of large multinational enterprises is routinely and automatically gathered and exchanged through bilateral treaty networks, and the OECD's efforts on this issue have received widespread acclaim. The "end of bank secrecy," that this database-centered system is given credit for, is particularly lauded for safeguarding a global, top-up minimum tax, which will tax multinational profit up to a floor of fifteen percent.[14] This minimum tax will not be global in the sense of being universally applied (the tax targets corporate headquarters and will mainly be levied by high-income countries), but because it covers ninety percent of global corporate revenue. Appreciation for the database-centered system and the minimum tax alike dovetail with certain conceptual frameworks of tax sovereignty. As will be clarified below, the database-centered system is obscured by the predominant assumptions of what tax sovereignty is and can do, while also reinforcing these assumptions in harmful ways.

The ways in which tax sovereignty is imagined in mainstream literature today creates a particular understanding of what is wrong with corporate income taxation, and how it can be fixed. According to a recent study, over a third

[12] Lovisa Häckner Posse, *Hur tänker du försörja dig? En studie av försörjningskravet vid anhöriginvandring och av rättsliga kontroll- och sållningsmekanismer under nyanlända personers etablering i Sverige*, Nordisk socialrättslig tidskrift 45 (June 2019); Häckner Posse, *supra* note 8.

[13] OECD, *Tax Transparency* (last visited May 2, 2023).

[14] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (Dec. 20, 2021).

of global profits go untaxed each year.[15] Moreover, the taxes that are levied on corporate income are historically low and falling lower still. According to leading literature, this is caused by two interrelated problems.[16] First, coordination issues between tax sovereigns create legal loopholes that multinational enterprises exploit for tax planning purposes. Second, tax sovereigns are forced within a globalized, highly digitalized economy, dominated by multinational corporate groups, to undercut each other regarding taxes levied on corporate income, in order to attract and keep capital formations within sovereign borders. The term "race to the bottom" is often used in this context, and the tax sovereign is imagined as autonomous not only from other sovereign powers, but also from the global multinational enterprise, the activities of which are rarely discussed as determined by sovereign rule. When the database centered system of information exchange enters international tax law discourse, it is already embedded in these narratives of tax sovereignty. Thus, it is greeted as a hard-won win for tax cooperation, and for tax sovereignty as conceptualized in leading literature, over multinational business.

But what if the split, which this literature upholds, between the tax sovereign and the global activities of multinational enterprise, makes for a false or an incomplete picture? A short glimpse of the history of the struggle for financial transparency seems to indicate something to this effect. Today, the globalized economy is dominated by a particular, monopolizing form of the multinational enterprise, structured by high levels of within-firm trade and by highly specialized global value chains.[17] When the New International Economic Order movement garnered force in the early 1970s, a globally liberalized and internationalized economy, and the form of the multinational enterprise, was just emerging. One of the key demands of this movement was for corporate transparency from budding multinational enterprises.[18] Financial transparency was considered then, as it still is today, absolutely central for the design of effective tax systems. Forcing a veto in the United Nations, OECD/G20 countries effectively put a stop to the New International Economic Order's struggle for corporate transparency. Furthermore, the OECD/G20 countries, alongside leading audit firms, proceeded to set up a global accounting standard to counter the G77 standards.[19] Today, these standards form the *sine qua non* basis of the OECD/G20 struggle to end bank secrecy and "rein in" multinational enterprise by way of minimum taxation.[20] The fact that these standards were designed and implemented with the explicit purpose of preempting global financial transparency (and that the bilateral nature of the database centered system of fiscal transparency still excludes lower income countries from accessing the information) is curiously missing from the current discourse on the form of the tax sovereign.

At the moment of writing, OECD countries are applauded for "breaking bank secrecy." However, it may be argued that they themselves have established this financial opacity, in order to safeguard the growth of their multinational enterprises.[21] By gatekeeping corporate transparency, OECD countries preempted the taxing powers of the countries in which the multinational enterprise would settle, extract value, and grow into the dominant force of our time. Today, countries that host the headquarters of multinational enterprises are able to exert unrivaled control over the formation of a truly global tax base, by using (global, top-up minimum) tax law as a tool for directing global flows of capital. Meanwhile, the particular form that tax sovereignty assumes in popular belief still lends

[15] Thomas Tørsløv et al., *The Missing Profits of Nations*, Rev. Econ. Stud. 1, 1–36 (July 22, 2022).

[16] *See, e.g.*, Tsilly Dagan, International Tax Policy: Between Competition and Cooperation (2017).

[17] World Bank, World Development Report (2020).

[18] Alex Cobham, Peter Janský & Markus Meinzer, *A Half-Century of Resistance to Corporate Disclosure*, 25 Transnat'l Corp. 1 (2018).

[19] Established in the seventies, the standard setting body, the International Accounting Standards Committee, changed its name at the turn of the century to the International Accounting Standards Board (IASB).

[20] Today, the International Financial Reporting Standards (IFRS), handled by the IASB, form the basis for country-by-country reporting, the database-centered system that enables global top-up minimum taxation.

[21] Hedvig Lärka, *Neither National nor International: A Posthumanist Retelling of Tax Sovereignty*, *in* Posthumanism and International Law (Matilda Arvidsson & Emily Jones eds. forthcoming 2023).

unnuanced promise to the concept of tax cooperation. When the sovereign is imagined as weakened by the growth of the multinational enterprise, tax-cooperation—e.g., the database-centered system of information exchange—is seen as a way for sovereignty to reclaim itself. Promise is then afforded the agency of sovereign states to work toward a just system of global distribution of taxing powers. Even when this promise is criticized in leading literature, there remains a hope that the international community would rise above their tragic choices and circumstances.[22] The hope and promise of international tax co-operation, especially with regards to the database-centered system, and the breaking of financial secrecy which it entails, still rely on a certain view of what the tax sovereign is and can do.

Seeing With the Database: Making Visible the Assumptions of International Law

As the examples above illustrate, the incorporation of databases into the mainstream legal literature does not imply a destabilization of established assumptions in this literature. Either the discussion on the database is kept separate from certain legal contexts (as in the case of the migration courts), or the database is incorporated into established legal narratives (as in the case of corporate income tax law). At the same time, studies from our research areas indicate that international legal actors are engaged in database-related practices that are not captured by these assumptions. Mainstream legal scholarship is thus rendered unable to adequately account for international law's effects. This suggests that we need more evidence-based studies of the role(s) of databases in international legal settings, i.e., without taking older legal conceptualizations as our starting point. Studies of how databases are used in specific legal contexts can form the basis of a revitalized critical discussion of international legal practices and can help rework theories of international law. This includes reworking central assumptions through which international law, and the database, are seen. If older legal assumptions keep informing the ways in which legal practices and effects are interpreted, including the role(s) of databases in these processes, we will keep witnessing a gap between theory and practice (that is not to say that they ever fully coincide). Other than granting renewed life to inadequate ideas of the function and effects of international law, such accounts of the practices of international law risk foreclosing successful strategies for resistance.

[22] Tsilly Dagan, *Unbundled Tax Sovereignty – Refining the Challenges*, 76 Bull. Int'l Taxation 1 (2022).