Form and Flexibility: The Normalisation of 'Magnitsky Sanctions' in the Face of the Rule of Law

Abstract

So-called 'Magnitsky laws' in various jurisdictions are turning unilateral sanctions into normalised instruments for the international promotion of the rule of law. However, the considerable regulatory and executive flexibility introduced by these laws is at strain with the fundamental requirements of the rule of law, both domestically and internationally. Despite a growing literature on sanctions, a systematic and comparative assessment of Magnitsky laws against both the national and international requirements of the rule of law is still lacking. This paper offers a first comparative analysis of the compatibility of US, Canadian, UK, and Australian unilateral sanctions laws with the formal and procedural principles of the rule of law that constitute the common core of both its national and international notions. By analysing the formal aspects of the legal basis, design and application of these laws, our study identifies and conceptualises the legislative techniques that enable the normalisation of Magnitsky sanctions. We find that these techniques, which we name the 'generalisation' of sanctions laws, are not inherently incompatible with the rule of law, but so far national legislators have failed to ensure the right balance between the flexibility introduced by such techniques and the rigorous requirements of legality. The principled recommendations we propose based on our findings seek to help lawmakers around the world to strike the right balance between form and flexibility.

1 Introduction

Unilateral targeted sanctions – that is, coercive restrictions such as asset freezes or travel bans on foreign persons autonomously imposed by states, outside any international obligation such as those deriving from United Nations Security Council (UNSC) resolutions – are becoming normalised measures for the international protection and promotion of the rule of law. Domestic legislation in various countries gives national governments general and permanent powers to unilaterally impose sanctions on foreign individuals or entities to protect the rule of law against threats such as transnational organised crime or corruption that do not necessarily concern international crises (Bradshaw 2020). The pioneering example of such legislation is the United States (US) Sergei Magnitsky 'Rule of Law Accountability' Act 2012 (SMRLAA),[1] which enables the President to impose sanctions on Russian persons to support the people of the Russian Federation to realise their full economic potential and 'to advance democracy, human rights, and the rule of law'.[2] The Act served as a template for the Global Magnitsky Human Rights Accountability Act of 2016 (GMHRAA),[3] which authorises the President to impose unilateral sanctions on 'any foreign person' involved in 'gross violations of internationally recognised human rights' or 'acts of significant corruption'[4] without having to declare a national emergency. In Canada, the Justice of Victims of Corrupt Foreign Officials

[1] § 584.311 Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Magnitsky Act, Public Law 112-208, title IV, 126 Stat. 1502 (2012).
[2] SMRLAA, s402(a)(1).
[3] Title XII, Subtitle F of P.L. 114–328; 22 U.S.C. §2656 note.
[4] GMHRAA, s1263(a).

Act 2017 (JVCFO) (the so-called 'Magnitsky Law')[5] explicitly defines the 'rule of law' as a principle 'integral' to international law[6] and – as part of Canada's commitment to protect it along with human rights and fundamental justice – authorises the Government to make unilateral sanctions also in response to gross violations of human rights or serious corruption.[7] In the UK, the Sanctions and Anti-Money Laundering Act 2018 (SAMLA) gives Ministers the power to impose targeted sanctions to promote 'democracy, the rule of law and good governance',[8] amongst a broad range of 'discretionary purposes'.[9] Most recently, in Australia, the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021 authorises the use of unilateral sanctions to deal with 'activities undermining good governance or the rule of law, including serious corruption'.[10] A similar normalisation is also taking place in European Union (EU) jurisdictions, although this process is slightly different as it is driven by EU law requiring member states to adopt sanctions that, while being autonomous from UNSC resolutions, are still the result of multilateral cooperation within the EU (cf. Birben 2017; Beaucillon 2021; Tilahun 2021a and 2021b).

The adoption of the rule of law as a justification for unilateral targeted sanctions logically implies that their legitimacy depends on their compliance with the principles of the rule of law: if the rule of law is a justification, then it must also be a limitation. Legal safeguards should be in place to prevent the risk that the regulatory and executive flexibility introduced to expand sanction powers disregards the rigorous requirements of legality imposed by the rule of law, both at a national and international level. Such safeguards must be based on a rigorous assessment of the compatibility of this type of sanctions with the rule of law. However, such an assessment is very problematic. Many problems spring from the relativity of the notion of the rule of law. The scope and interpretation of such a notion are notoriously controversial, with definitions ranging from 'thin' versions focused only on formal and procedural properties of the law to 'thicker' versions requiring its contents to embody particular moral or political values (Craig 1997). Things are even more complicated in an international context, as the notion of the 'international rule of law' is even more debated and underdeveloped (Chesterman 2008; Kanetake 2012 and 2016; Arajärvi 2021). All domestic Magnitsky laws nominally aim to protect the same value of the 'rule of law' in international contexts, but neither such laws nor international law define what it actually means. This leaves any assessment of the compatibility of Magnitsky sanctions with the rule of law to the discretion of domestic governments and courts, which is bound to be affected by particular local cultural, moral and political values. As a result, despite their supposedly common international purpose and extraterritorial reach, the scope, limitations and ultimately the legitimacy of such sanctions can vary from one country to another. Moreover, this makes Magnitsky sanctions and their law extremely politicised. Without a clear definition, the notion of the rule of law can be exploited by national governments to justify actions motivated by the most different of political purposes, and even to give an appearance of legitimacy to actions that in fact are against its core values (Krygier 2009 and 2018; Scheppele 2013 and 2019). This can have detrimental effects on the rights and interests of individuals and entities targeted by sanctions or obliged to implement them. It can also hinder the formation of an international consensus on the appropriate use of such sanctions, thus limiting their international effectiveness and legitimacy.

These difficulties might explain why a systematic assessment of the compatibility of so-called 'Magnitsky laws' with a set of principles constitutive of a clearly identified notion of

[5] Justice of Victims of Corrupt Foreign Officials Act (JVCFO), SC 2017, c21.
[6] JVCFO, Preamble.
[7] Special Economic Measures Act 1992 (SEMA), s4(1.1) as amended by JVCFO.
[8] Sanctions and Anti-Money Laundering Act 2018, s1(2)(i).
[9] SAMLA, s2(1).
[10] Autonomous Sanctions Act 2011 (ASA), s3(3)(e).

the rule of law is still lacking. Research suggests that unilateral targeted sanctions, like their multilateral counterparts, pose many challenges to various substantive and formal principles usually associated with the rule of law both at a national and international level. Domestically, the statutory delegation of extensive discretionary powers to the executive is inherently at strain with the rule of law's core purpose to restrain government action (Tamanaha 2004, pp. 114-115) and limit the instability and unpredictability of 'particular legal orders' made by the executive (Raz 1979, p. 216). Internationally, the extraterritorial reach of unilateral sanctions raises serious issues of international legality (Hofer 2018 and 2019; Hovell 2019; Barber 2021), sovereign equality, fundamental rights and freedoms (Farrall 2007; Eckes 2009; Peksen 2009; Chachko 2019; Douhan 2021), judicial review and due process (Cannizzaro 2006 and 2009; Eriksson 2009; Genser and Barth 2010; Tridimas 2010; Eckes 2013; Larik 2014). However, such research suffers from various limitations. So far, studies have mostly focused on individual jurisdictions (Gilligan 2016; Firestone and Contini 2018; Nesbitt 2016) or assessing the international legality of unilateral sanctions (Marossi and Basset 2015; Asada 2019; Dufour and Veremko 2019). Although both kinds of study provide relevant insights on the compatibility of unilateral sanctions with, respectively, national and international dimensions of the rule of law, the former does not capture issues that are common to different jurisdictions, while the latter does not consider domestic implications. Most importantly, many critiques of sanctions – unilateral and multilateral alike – are based on substantive principles, such as human rights, equality, democracy, justice, or effectiveness, that are not universally accepted as constitutive principles of the rule of law. Such principles are relevant only to 'thick' notions of the rule of law based on specific moral and political theories that are not necessarily common to all jurisdictions. As a result, the findings of such studies can be rejected by governments with different moral or political views.

This paper seeks to contribute to the development of a depoliticised and possibly universal evaluation of the legitimacy of Magnitsky sanctions by assessing the compatibility of relevant US, Canadian, UK, and Australian laws with the minimum set of principles that constitute the common core of any notion – thin or thick, national or international – of the rule of law. To do so, we will adopt a strictly minimalist notion of the rule of law that will not address the content of the law but will focus exclusively on formal principles concerning the manner in which the law was promulgated, the clarity of the enacted norm, its temporal dimension (prospective or retrospective) and the fairness of the processes through which it is applied (Craig 1997). Since these principles concern essential properties of the law *as* law (Tamanaha 2004), they are truly universal, regardless of local cultural or political values and constitutional traditions (Chesterman 2008, pp. 340–342). This is not only particularly suited to the comparative nature of our study, but it will also support the generalisability of our findings and theoretical framework to other jurisdictions. A comparative analysis is ideal to highlight not only common legal developments and problems but also original and effective domestic frameworks that could influence the practice of other jurisdictions. With this in mind, our analysis seeks to conceptualise and assess the legislative techniques – the means, methods and processes – that enable the normalisation of unilateral targeted sanctions as instruments of protection and promotion of the rule of law. We will also formulate principled recommendations to make them more compliant with the rule of law and strike a better balance between form and flexibility – that is, between the rigorous requirements of legality and the flexibility introduced by such techniques. To be clear, we will focus on unilateral sanctions targeting individuals or entities which are specifically aimed to protect or promote the rule of law. Although these are commonly known as 'Magnitsky sanctions' and, for the sake of simplicity, we will use this expression to summarise them, our study will cover not only sanctions related to the death of Sergei Magnitsky, but any non-country and non-situation specific sanctions targeting any foreign person that are justified by the protection or promotion of the rule of law. This study

will not address, except incidentally, other kinds of unilateral sanctions, such as sanctions against states, collective sanctions or 'thematic' sanctions seeking to address different purposes, such as, for instance, national security or cybersecurity. Some of our findings might well apply to non-Magnitsky unilateral sanctions, especially other unilateral targeted sanctions regimes which pursue purposes that are more or less directly related to the rule of law. When this is the case, we shall try to state this explicitly, but we do not make any general claim in this respect and we leave it to the reader and future research to further explore the applicability of specific findings of this study to other types of unilateral sanctions.

The theoretical and practical implications of our findings can be significant. They can provide a relevant contribution to the still underdeveloped understanding of unilateral sanctions, as well as to broader studies on sanctions in general and on the normalisation of executive powers. Moreover, our findings can help in furthering the discussion and developing an international consensus on the justification, limitations and, crucially, the legitimacy of using unilateral targeted sanctions as a tool to promote the rule of law. This consensus is necessary to support the development of a common legal framework on the minimum formal and procedural requirements of unilateral sanctions laws. This is particularly important to counterbalance increasing calls for more extensive unilateral sanctions powers with a better awareness of their implications on the core principles of the national and international rule of law. Our recommendations will also support lawmakers in different jurisdictions in assessing, reforming and enacting sanctions laws in full compliance with such principles.

The next section of the paper explains our methodological and theoretical framework especially in outlining the principles of the rule of law that support our analysis. The third section introduces the main legislative techniques used in the US, Canada, UK and Australia to make unilateral targeted sanctions a normalised measure to promote and protect the rule of law. The section discusses in detail the first of these techniques – the adoption of 'umbrella legislation' and delegated legislation as the legal framework for such sanctions – and its implications for the national and international legal basis of such legislation. The fourth section discusses the second technique – the statutory attribution to the executive of general and abstract powers to make sanctions – and how it affects the openness, prospectiveness and clarity of unilateral sanctions laws and their ability to effectively constrain executive discretion. The fifth section discusses the final technique – the lack of special provisions concerning judicial review – and its compatibility with the principles of natural justice. The sixth section then conceptualises and critically assesses such techniques and proposes our principled recommendations. The last section draws some conclusions based on our findings.

2 Methodological and Theoretical Framework

This study is a comparative legal analysis of the law of unilateral targeted sanctions aimed at protecting the rule of law (so-called 'Magnitsky sanctions') in the US, Canada, UK and Australia against the principles of a formal notion of the rule of law from both a national and international perspective. We will illustrate and justify this notion in more detail in the subsection below. The decision to extend the analysis to the international dimension of the rule of law is motivated by the extraterritorial effects of domestic sanctions legislation on both the individual rights of foreign persons and the sovereignty of foreign states. The doctrinal analysis (Hutchinson and Duncan 2012) of relevant domestic statutes and regulations is supported by a documental analysis (Bowen 2009) of complementary sources such as explanatory notes, parliamentary debates and other policy documents. We will try to address all of the relevant 'formants' of domestic law, including scholarly opinion and case law (Sacco 1992a and 1992b). However, our focus on formal and procedural principles, together with the relative scarcity of

research and judicial decisions on these issues, will inevitably cause our analysis to focus predominantly on legislation.

The choice of the US, Canada, UK and Australia satisfies many criteria for the selection of case studies (Gerring 2006; Yin 2009). First, all cases are typical examples of domestic legislation that has evolved to authorise governments to unilaterally impose non-country-specific sanctions for the protection and promotion of the rule of law. As we will see in section 3, the legislation in all of these jurisdictions has been gradually growing and expanding so as to enable the use of unilateral targeted sanctions for increasingly varied and often general and abstract (non-country or non-situation specific) purposes. The purpose of protecting and promoting the rule of law is one of the latest stages of this evolution. Second, each case study has singular features that make it intrinsically interesting. The US has a two-century history of imposing unilateral sanctions (Rathbone et al 2013; Nephew 2019), and its novel Magnitsky laws served as a template for analogous laws in other jurisdictions. In contrast, the UK, Canada and Australia have started using unilateral sanctions only in the last few decades. While Canadian law shows a good degree of similarity with some elements of the US model, UK and Australian laws depart from it significantly. Third, the homogeneity of these legal systems – all based on the common law tradition and the English language – facilitates the finding of structural regularities as well as differences (Sacco 1992a, pp. 3-6). Fourth, the selected jurisdictions have a significant influence in the common law tradition and international law and relations – especially the US and the UK, as permanent members of the UNSC.

2.1 A Minimalist Notion of the Rule of Law

While domestic laws regulating unilateral sanctions declare that their purpose is the protection or promotion of the rule of law, they fail to define it. Nor can such definition be found in international law, which often proclaims the rule of law as a universal good – also in regulating sanctions (cf. Farrall 2007, p. 24) – without clarifying what it means. At the national level, theories of the rule of law sit on a spectrum between two distinct conceptions: formal, procedural or 'thin' ones on the one hand, and substantive or 'thick' ones on the other. Formal conceptions do not address the content of the law but only its mode of generation and application – namely, the manner in which the law was promulgated, the clarity of the enacted norm, its temporal dimension (prospective or retrospective) and the fairness of the processes through which it is applied (Craig 1997). According to such theories, the purpose of the rule of law is to ensure the stability and predictability of the law, as universal conditions of individual and social prosperity independent from any local context (Raz 2019, p. 2). Joseph Raz identified the contents of this notion in eight principles: (1) all laws should be prospective, open, and clear; (2) laws should be relatively stable; (3) the making of particular laws should be guided by open, stable, clear, and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible; and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law (Raz 1979). Substantive conceptions also accept these formal and procedural requirements as the core rule of law principles (Hayek 1944, p. 54; Fuller 1969, pp. 38-39; Rosenfeld 2001, p. 1313; Walker 2009, p. 121; Bingham 2010), but, in addition, require the law to embody particular values of justice, morality or human rights (Dworkin 1985). In these conceptions, the rule of law becomes a philosophical or political theory (Barnett 2020, p. 52) which lays down aspirational standards of 'good law' (Rijpkema 2013, p. 795).

Scholarly opinions are even more divided when it comes to the notion of the international rule of law. Some claim that such a notion is still underdeveloped (Chesterman 2008) or purely

formal (Kanetake 2012 and 2016; Raz 2019). Attempts to transpose domestic definitions to international settings (Beaulac 2009) tend to ignore the fundamental structural differences between national and international law (Hurd 2014 and 2015). Recent studies abandon the domestic analogy and suggest that, even at its minimum, the international rule of law encompasses both formal and substantive requirements, because the authority of international law norms, unlike those of national norms, depends on the agreement of the regulated subjects – that is, states – to both their formal and substantive merits (Gorobets 2020, pp. 244–245). Empirical research on international sources suggests that the core elements of the international rule of law are non-arbitrariness – that is, respect of sovereign equality and due process – consistency and predictability, which are strictly related and concern the non-selectivity, certainty and stability of the law (Arajärvi 2021). Although some of these principles could be developed into substantial requirements, they surely encompass the formal requirements of stability and predictability and their corollaries of prospectiveness, openness, clarity and natural justice.

A minimalist notion of the rule of law focused on such core principles and, more specifically, the eight principles identified by Raz, seems more appropriate for our analysis. First, since it concerns essential, universal properties of the law *as* law (Tamanaha 2004), regardless of local cultural or political values and constitutional traditions (Chesterman 2008, pp. 340–342), this notion is better suited to the comparative nature of our study. Second, it seems more compatible with domestic sanctions legislation, which usually mentions the rule of law as a value distinct from good governance, democracy and human rights, suggesting that its notion might not encompass these substantive values. Third, detaching our analysis from any political or moral theories maximises the generalisability of our findings and the development of an international consensus. Fourth, whilst we confine our analysis to a thin notion of the rule of law for the above reasons, we do not claim this notion as the 'true' one, nor that sanctions should not be compatible with values such as justice, democracy, equality, and fundamental rights. A formal assessment of the law should support and complement substantive assessments, which are also necessary for an exhaustive evaluation of particular sanctions regimes. Finally, although the thin definition of the rule of law we adopt in this paper says nothing about fundamental rights, equality, or justice, it is still a fundamental safeguard for the individual at the receiving end of sanctions. The formal and procedural principles of a minimalist notion of the rule of law identified by Raz are not only what make the law capable of being obeyed and guiding the behaviour of its subjects (Raz 1979, pp. 213–214), but they are also what can protect the individual from the risk of abuses and arbitrariness of the state (Scheppele 2019). As we shall see throughout the paper, such risk is particularly concrete for Magnitsky laws given their strong political implications.

We will organise our understanding of the rule of law and our analysis around three main categories that seek to capture not only the core principles of the rule of law but also their relationships. This should help to avoid a checklist approach, which might fail to address the interactions between different principles (Scheppele 2013 and 2019). These categories are: (a) legal basis; (b) law design; and (c) application of the law. Legal basis concerns the requirement that executive powers are founded in and authorised by laws properly made according to clear, stable, open and general rules of law-making (Raz's principle no. 3). Law design concerns the legal certainty of the wording of the laws conferring and limiting executive powers (Raz 1979, p. 216) – that is, their open, clear and prospective nature and their ability to provide stability and predictability (principles 1 and 2) and to prevent distortions caused by government discretion (principle 8). Application of the law concerns the minimum requirements of judicial review and natural justice or due process (principles 4–7) – that is, the right to be heard (*audi alteram partem*) by an accessible and impartial court (*nemo judex in re sua*) (Shauer 1976).

With respect to multilateral sanctions, these requirements were famously affirmed by the Court of Justice of the EU in the *Kadi* cases.[11]

3 Legal Basis: Magnitsky Laws in the United States, Canada, the United Kingdom and Australia

The legislation of the US, Canada, the UK and Australia attributes their respective governments permanent powers to impose unilateral sanctions to promote or protect the rule of law internationally from various threats such as gross human rights violations, transnational organised crime or corruption. Relevant statutes and regulations in all of these jurisdictions explicitly include the rule of law amongst their purposes or justifications.[12] Our comparative analysis shows that the normalisation of unilateral sanctions as measures for the promotion or protection of the rule of law is enabled by a set of legislative techniques that can be summarised as the *generalisation of sanctions laws*. These techniques are the means, methods and processes chosen by legislators to expand sanction powers and make them increasingly general and abstract. All of these techniques reflect the strain between the need for the flexibility requested by national executives (Tomaras 2011; Nault 2017, p. 14; Nesbitt 2016, p. 524; Nephew 2019, p. 100) and the rigorous requirements of formal legality and present significant challenges to the principles of even a minimalist notion of the rule of law.

We can identify three main techniques or factors each affecting the three main categories in which we have arranged the principles of the rule of law. The first technique concerns the legal basis of Magnitsky sanctions and involves the introduction of 'umbrella legislation' (Nesbitt 2016, pp. 515-516) to provide a uniform statutory basis for unilateral sanction powers as well as the use of delegated legislation. The second technique concerns law design and involves the attribution of increasingly general, abstract and sometimes permanent unilateral sanctions powers to government often detached from specific countries and situations. The last technique concerns the application of sanctions law and, except for UK legislation, involves the lack of specific provisions to ensure an accessible and impartial judicial review according to the principles of natural justice. In this section, we will examine the first technique distinguishing between the implications it might have on national and international legality. The other two techniques will be addressed, respectively, in sections 4 and 5.

3.1 National Legality: Umbrella Legislation and Delegated Legislation

The introduction of umbrella legislation seeks to provide a uniform domestic statutory basis for unilateral sanction powers. The US autonomously spearheaded this movement. The other countries followed suit motivated by the wish to collaborate with international allies[13] or like-

[11] C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351; C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] EU:C:2013:518.

[12] In the US: Executive Order 13581 of 25 July 2011, Blocking Property of Transnational Criminal Organizations, Preamble; SMRLAA, s402(a)(1) and (5); Executive Order 13818 of 20 December 2017, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, Preamble. In Canada: JVCFO, Preamble. In the UK: SAMLA, s1(2)(i). In Australia: ASA, s3(3)(e).

[13] Explanatory Notes to the Sanctions and Anti-Money Laundering Bill [HL] as introduced in the House of Lords on 18 October 2017 (HL Bill 69), para 12.

minded countries[14] and inspired by each other's laws.[15] In the US, the permanent power to impose unilateral sanctions has been available to the US President since the 1970s. The International Emergency Economic Powers Act of 1977 (IEEPA)[16] authorises the President to impose financial sanctions on foreign countries and their nationals 'to deal with any unusual and extraordinary threat […] to the national security, foreign policy, or economy'[17] and make any necessary regulations.[18] The Act requires the President to declare a national emergency with respect to such threat,[19] and prohibits the use of these powers for any other purpose.[20] But the broad formulation of the IEEPA has allowed the President to declare national emergencies vis-à-vis non-country specific situations that pose an 'unusual and extraordinary threat' to the rule of law, such as transnational organised crime.[21] More recently, the Global Magnitsky Human Rights Accountability Act of 2016 (GMHRAA)[22] authorises the President to impose unilateral sanctions on 'any foreign person' involved in 'gross violations of internationally recognised human rights' or 'acts of significant corruption' without having to declare a national emergency. Unlike the power under IEEPA, this authority is subjected to a sunset clause of six years.[23] As we already saw, the Act is modelled on the Sergei Magnitsky 'Rule of Law Accountability' Act (SMRLAA).[24]

In Canada, unilateral sanctions are relatively new. Their use became more significant with the enactment of Canada's umbrella unilateral sanctions legislation: the Special Economic Measures Act 1992 (SEMA) (Nesbitt 2016, pp. 515-516). SEMA originally authorised the Government to make unilateral sanctions only to address 'a grave breach of international peace and security' that could result 'in a serious international crisis'.[25] In 2011, in response to the events of the Arab Spring, the Canadian Parliament enacted the Freezing Assets of Corrupt Foreign Officials Act, which allowed the Government to inflict financial sanctions on politically exposed persons accused by any foreign state of misappropriation of property. These sanctions were not country-specific but their scope was still quite narrow. In 2017, the Justice of Victims of Corrupt Foreign Officials Act (JVCFO) (the so-called 'Magnitsky Law')[26] sought to reorganise the complex and fragmentary Canadian sanction system into a more coherent legislative framework (Nault 2017, pp. 12-16) and amended SEMA to authorise unilateral sanctions also in response to gross violations of human rights or serious corruption.[27]

In the UK, Brexit was the trigger for unilateral sanctions legislation. Until 2017, the UK had in place 35 sanction regimes subjecting approximately 2000 individuals, groups and businesses to restrictive measures, most of which were implementations of UN or EU sanction regimes.[28] Only occasionally did the UK adopt unilateral sanctions to address specific situations, such as terrorism.[29] In 2018, the Sanctions and Anti-Money Laundering Act 2018 (SAMLA) was passed to confer to any 'appropriate Minister' the general power to 'make sanction

[14] Autonomous Sanctions Bill 2010, Replacement Explanatory Memorandum, p. 1.
[15] JVCFO, Preamble.
[16] 50 USC ch35.
[17] IEEPA, §1701(a).
[18] IEEPA, §1704.
[19] IEEPA, §1701(a).
[20] IEEPA, §1701(b).
[21] Executive Order 13581, n 12.
[22] See n 3.
[23] GMHRAA, §1265.
[24] See n 1.
[25] SEMA, s4(1) prior to the 2017 amendment.
[26] See n 5.
[27] SEMA, s4(1.1) as amended in 2017.
[28] Explanatory Notes to the Sanctions and Anti-Money Laundering Bill, n 13, para 4.
[29] Terrorist Asset-Freezing Act etc. 2010.

regulations'[30] and impose targeted sanctions not only in compliance with international law obligations[31] (i.e. multilateral sanctions), but whenever that Minister 'consider that it is appropriate'[32] for a broad range of generic 'discretionary purposes'.[33] These include national and international security, foreign policy, and the promotion of human rights and 'democracy, the rule of law and good governance'.[34]

In Australia, the Autonomous Sanctions Act 2011 (ASA) was the first piece of legislation to give the government a general power to make unilateral sanctions. Before then, unilateral sanctions were made as *ad hoc* measures based on legislation regulating various subjects such as migration, banking or customs (Tomaras 2011). ASA was intended to provide a general legal framework to 'strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures that Australia can implement, thus ensuring that Australia's autonomous sanctions match the scope and extent of measures implemented by like-minded countries'.[35] The long title of the Act clarified that unilateral sanctions could be adopted 'to facilitate the conduct of Australia's external affairs, and for related purposes'. The Explanatory Memorandum to the Act stressed that these purposes referred to 'situations of international concern' such as the grave repression of the human rights or democratic freedoms of a population by a government, the proliferation of weapons of mass destruction, or internal or international armed conflict.[36] In 2021, following calls for an Australian Magnitsky Law, the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021 expanded the list of purposes of unilateral 'thematic' sanctions to explicitly include, amongst others, 'activities undermining good governance or the rule of law, including serious corruption'.[37]

As we can see, in each of these jurisdictions, the statutory basis is often *general*, as it covers any exercise of such powers (any sanctions regime), and *abstract*, as it does not necessarily refer to any concrete geopolitical situation. Generalisation and abstraction inevitably entail the delegation to government of the power to regulate at least the specific technical aspects of sanction regimes addressing concrete geopolitical circumstances. This explains why all of the states considered here resort to delegated legislation as the legal framework for the regulation of unilateral sanctions. Statutes debated and enacted by the respective parliamentary assemblies explicitly authorise national governments to make orders and regulations to adopt and implement unilateral sanctions. This is often justified by political demands for more flexibility to enable government to respond quickly to global developments avoiding lengthy and complex legislative processes (cf. Nephew 2019, p. 100).[38]

The legislative delegation of regulatory powers to the executive entails inherent risks of legal uncertainty, as we shall see in the next section, but is perfectly compatible with the 'basic idea' of the rule of law that all government action must have a foundation in law (Raz, 1979, p. 212), as long as it follows clear, open, stable and general rules of law-making. This appears to be the case in every jurisdiction we examined: the delegating legislation was regularly issued by Parliament according to ordinary legislative processes and following parliamentary debates.

---

[30] SAMLA, s1(1).
[31] SAMLA, s1(1)(a) and (b).
[32] SAMLA, s1(1).
[33] SAMLA, s2(1).
[34] SAMLA, s1(2)(i).
[35] Autonomous Sanctions Bill 2010, Replacement Explanatory Memorandum, p. 1.
[36] Ibid.
[37] ASA, s3(3)(e).
[38] In the UK see Delegated Powers and Regulatory Reform Committee, *Sanctions and Anti-Money Laundering Bill* (HL 2017-2019, 38) paras 20–21 and Select Committee on the Constitution, *Sanctions and Anti-Money Laundering Bill [HL]* (2017-2019, 39) para 12. In Australia, see House of Representatives Deb 26 May 2010, 'Second reading speech: Autonomous Sanctions Bill 2010' (Stephen Smith) p. 4112.

Furthermore, domestic statutes tend to compensate for the delegation of broad regulatory powers to the executive with the introduction of special rules to strengthen parliamentary scrutiny and government accountability in terms of the width of powers, their relationship to the main aims of the sanctions and their adherence to the rule of law.[39] This is usually achieved through statutory requirements for government to submit reports to Parliament to give an account of the concrete exercise of the delegated powers,[40] and mechanisms for Parliament to review and/or participate in relevant executive decision-making.[41] Although the scope and thoroughness of these rules vary from country to country, they all seek to improve the democratic 'supervision of popularly elected bodies over law-making by non-elected ones', which go well beyond the requirement of a formal legal basis and, therefore, a minimalist notion of the rule of law (Raz 1979, p. 216). It is safe to say, therefore, that in all jurisdictions examined, unilateral sanctions powers are compliant with the basic requirement of the rule of law for there to be a legal basis.

3.2 International Legality: The Lack of International Regulation of Unilateral Sanctions

The international legality of Magnitsky sanctions is a much more complex issue related to the broader question of the international legality of unilateral sanctions in general. Extensive literature exists on this question, but it would be a difficult and somewhat superfluous undertaking to summarise it to the full extent here. Since our analysis is based on a formal notion of the rule of law, our focus in this section must remain on the formal legality of Magnitsky sanctions, that is whether such sanctions are founded in and authorised by international law properly made according to clear, stable, open and general rules of law-making. However, here is where things get complicated.

From a purely formal point of view, there is no dedicated international legal instrument that explicitly and directly authorises and regulates unilateral sanctions in general, nor Magnitsky sanctions specifically. However, the lack of an explicit legal basis does not automatically imply a violation of the principle of formal legality at an international level. By virtue of the principle of sovereignty, state law does not need to be expressly authorised by international law, provided it is compatible with it. This means that assessing the international legality of these sanctions – and, therefore, their compatibility with the international rule of law – inevitably requires engagement with substantial aspects, in line with the definition of the international rule of law suggested by Gorobets (2020). Such aspects include the nature of the violation they seek to address and their own compatibility with other principles of international law, including *jus cogens* norms, fundamental rights, and specific treaty obligations (Barber 2021). This is further complicated by the fact that unilateral sanctions are a heterogeneous category of measures that can have very different international legal implications depending on their content, the situations they seek to address and the positions of the parties involved. As a result, their legal nature can vary and their international legality must be assessed on a case-by-case basis (cf. Dupont 2016, p. 39; Hofer 2018, p. 2; Asada 2019, p. 10). This might explain the seemingly contradictory positions of the UN General Assembly which, on the one hand, has often recommended states to adopt unilateral coercive measures, but on the other hand has condemned unilateral sanctions as contrary to international law (Barber 2021). Therefore, to

[39] The only exception is the Australian ASA, which refers to the ordinary rules of delegated law-making set by the Legislative Instruments Act 2003.
[40] In the US: GMHRAA, s1264. In Canada: SEMA, s9. In the UK: SAMLA, ss2(4–6), 18(2–7), 30(5–7), 32, 46.
[41] In the US: GMHRAA, s1264. In Canada: SEMA, s9 and JVCFOA, s16. In the UK: SAMLA, s55.

evaluate the international legality of Magnitsky sanctions, it is first necessary to establish what their legal nature is according to international law. This is very much a substantive issue, requiring us to answer questions such as who are the persons targeted by these sanctions, what are the reasons for their adoption and whether sanctions violate any obligations towards the targeted entity (cf. Hofer 2018, p. 86).

International practice recognises a number of unilateral measures which a state can adopt against another state to enforce international obligations or react to internationally wrongful acts. These include self-defence, multilateral or international sanctions, retorsion, reprisals, countermeasures, termination and suspension of treaties and the exception of non-performance (*exceptio inadimpleti*) (cf. Crawford 2013; Dupont 2016 citing Arangio Ruiz 1991). Not all of these measures are clearly regulated by international law. Some of them – namely, self-defence, termination and suspension of treaties, or *exceptio inadimpleti* – are obviously irrelevant to Magnitsky sanctions. So is the category of multilateral or international sanctions as the sanctions we are considering are by design and definition unilateral. The US, Canadian, UK and Australian legislation we are examining is not based on any UNSC resolution and precisely allows the imposition of unilateral targeted sanctions to protect the rule of law beyond any requirement deriving from such resolutions. This is particularly evident in the UK SAMLA, which explicitly separates sanctions imposed in the implementation of international obligations, from those imposed for the purpose of protecting the rule of law.[42] Reprisals can also be excluded, as recently, this category has been restricted to action taken by belligerents in the context of international armed conflict, while forms of reprisals not linked to armed conflict are now considered countermeasures (Crawford 2013, p. 685). The categories of unilateral measures that could apply to Magnitsky sanctions – like other unilateral sanctions (Dupont 2016; Ruys 2016; Asada 2019; Hofer 2018; Hovell 2019) – are retorsion and countermeasures.

Measures of retorsion are acts of retaliation in a manner that does not violate international obligations adopted in response to unfriendly, but not necessarily unlawful conduct of another state. Retorsion is largely unregulated by international law as it is considered a state's freedom (Crawford 2013, p. 677; Dupont 2016, p. 42). Countermeasures are pacific in nature but intrinsically unlawful reactions to another state's allegedly internationally wrongful acts. Unlike retorsions, countermeasures have a positive international legal basis and regulation in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which subjects them to very tight procedural and substantive requirements. To determine whether Magnitsky sanctions are acts of retorsion or countermeasures it would be necessary to assess, as we alluded to above, their compliance with substantive international law. *If* they do not intrinsically violate international obligations then they *might* constitute acts of retorsion. *If* they do, then they *might* constitute countermeasures, provided they satisfy ARSIWA's procedural and substantive requirements. Some also suggest that *if* the sanctions are internationally unlawful *and* do not satisfy ARSIWA's requirements for countermeasures, then their international legality would depend on whether they encroach upon the targeted states' *domaine reserve*, thus violating sovereign equality and the principle of non-intervention. A state's *domaine reserve* does not entail unlimited freedom to violate international law – especially international human rights law – and coercive measures from other states such as unilateral sanctions might be allowed to enforce international obligations (Barber 2021).

The mere analysis of the legislation of the jurisdictions examined here – that is, the national legal basis for Magnitsky sanctions – does not allow us to reach any definitive conclusion on the substantive compliance of such sanctions with international law and, therefore, on their international legal nature. This is mostly due to the use of umbrella legislation such as the US

[42] SAMLA, s1(1).

IEEPA, the Canadian SEMA, the UK SAMLA or the Australian ASA which prevents the identification of a general international rule applicable to all of the sanctions that can be possibly inflicted under such legislation. The vagueness of the definition of the abstract purposes and situations – e.g., the promotion of the rule of law, 'acts of serious corruption' etc. – which domestic statutes identify as possible justifications for unilateral sanctions further aggravates the problem. As we will explain fully in subsection 4.2 below, such vagueness leaves considerable discretion to national governments in determining when and against whom to apply such sanctions. Therefore, the assessment of the substantial legality of Magnitsky sanctions must be conducted case-by-case, on the basis of the concrete circumstances in which sanctions are inflicted. Previous studies that have attempted to determine the legal nature of unilateral sanctions (Dupont 2016; Ruys 2016; Asada 2019; Hovell 2019) and Magnitsky sanctions specifically (Hofer 2018) proved that this can be a very challenging interpretative endeavour – a real 'rabbit hole' (ibid., p. 23). Much of this difficulty depends on insufficient or inadequate international regulation. Not only is a dedicated international legal instrument to serve as a legal basis and regulate unilateral sanctions lacking, but the regulation of unilateral coercive measures is still fragmented, vague and incomplete. As we said, retorsions are largely unregulated and, despite ARSIWA's provisions, countermeasures remain controversial and liable to abuse due to their broad and flexible definition and factual inequalities between states (Crawford 2013, p. 685-686). These difficulties and international regulatory deficiencies have considerable implications for the rule of law as they leave the identification of the formal international legal basis of Magnitsky sanctions and the assessment of their substantive international legality open to interpretation. This can compromise not only the clarity and stability of Magnitsky laws but especially their perceived international legitimacy thus fuelling disagreements amongst states on their use.

4 Law Design: Openness, Prospectiveness, Clarity and Discretion

As we saw above, the ability of the law to ensure the stability and predictability needed to guide the behaviour of its subjects – the core objective of a minimalist rule of law – depends not only on the presence of a regularly formed legal basis for the law, but also some of its properties – namely, openness, clarity and prospectiveness – and, thus, its ability to prevent government discretion from perverting the law (Raz 1979). The second technique driving the normalisation of Magnitsky sanctions – the attribution of increasingly general and abstract unilateral sanctions powers to government – can seriously affect these legal properties.

4.1 Openness and Complexity

If openness simply means publicity, there can be little doubt that Magnitsky laws are 'open', as they are published on institutional websites freely accessible from anywhere in the world.[43]

[43] US Department of the Treasury (2022) Office of Foreign Assets Control – Sanctions Programs and Information. https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information; Government of Canada (2022) Canadian sanctions. https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/index.aspx?lang=eng&_ga=2.213353812.1564561355.1645085219-1682816097.1645085216; Foreign, Commonwealth & Development Office (2022) UK Sanctions Regimes. https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act; Australian Government (2022) Australia and sanctions. https://www.dfat.gov.au/international-relations/security/sanctions. All links accessed 19 June 2022.

Thus, all those potentially affected by sanctions legislation, whether the specific subject or those persons and organisations required to comply with sanctions, or even laypersons and the public interested in this area, are at least able to access the law.

However, if openness also includes the appropriate conditions to identify the applicable law in order to regulate one's own behaviour, then the openness of these laws becomes questionable once the complexity of the legal framework is factored in. Despite local peculiarities and differences, the complexity of sanctions law in each of the jurisdictions examined is such that it is difficult to see how specific targets of sanction measures, or the stakeholders potentially charged with their compliance, can adequately adjust their behaviour. Moreover, laypersons (and perhaps even lawyers who are not experts in this area) may find it difficult to navigate their contents to make free and informed decisions. Technical and systematic complexity is not an exclusive property of sanctions laws – many areas of the law share similar problems (Bingham 2010, p. 37–42) – but sanctions laws are particularly fragmented and their extraterritorial reach and international implications make such complexity a particularly acute issue for these laws.

At the time of writing, in the US there are 37 active sanctions regimes,[44] in Canada 22,[45] in the UK 38,[46] and in Australia 23.[47] Some of these are thematic, some are geographic, some are unilateral, some are multilateral, and some are a mixture (e.g. the Australian sanction regimes for North Korea, Iran and Libya). Each regime is subjected to its own regulation, generally through a variety of statutory instruments and executive orders. The complexity of such regulation varies from jurisdiction to jurisdiction, the US certainly having the most complex regulatory apparatus due to the stratification of various sanction regimes over time. In Canada and the UK, the introduction of comprehensive 'umbrella' legislation prevented the proliferation of statutes, but the expansion of delegated executive powers entailed by such legislation led to the proliferation of executive regulations. The Canadian sanctions regime related to Ukraine, for instance, enacted under the authority of SEMA, is subjected to two different regulations,[48] one of which has been amended 16 times between 2014 and 2021.[49] In the UK, the Government issued different statutory regulations for each new sanction regime, such as the Global Human Rights Sanctions Regulations 2020 (GHRSR) and the Global Anti-Corruption Sanctions Regulations 2021 (GACSR). Moreover, regimes related to EU sanctions required specific amendments after Brexit, leading to 15 special regulations being issued between 2019 and 2022. In Australia, one individual statutory instrument – the Autonomous Sanctions Regulations 2011 (ASR) – regulates every sanction regime. This avoids a multiplicity of regulations, but undermines clarity, as ASR's provisions tend to be much more

[44] US Department of the Treasury (2022) Sanctions Programs and Country Information. https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information. Accessed 19 June 2022.

[45] Government of Canada (2022) Current sanctions imposed by Canada. https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng. Accessed 19 June 2022.

[46] Foreign, Commonwealth & Development Office, n 43.

[47] Australian Government (2022) Sanction Regimes. https://www.dfat.gov.au/node/123620. Accessed 19 June 2022.

[48] The Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations (SOR/2014-44) and the Special Economic Measures (Ukraine) Regulations (SOR/2014-60).

[49] Government of Canada (2022) Canadian Sanctions Related to Ukraine. https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/ukraine.aspx?lang=eng#a7_1. Accessed 19 June 2022.

obscure than those of Canadian and UK instruments as they require multiple references to internal definitions and other instruments.[50]

As alluded to earlier, more than other areas of the law, sanctions laws can directly affect the decisions and behaviour of foreign individuals and entities. Designated targets, their families, employees, business partners, and their lawyers might not be familiar with the local system and might not have access to the domestic tools necessary to penetrate the complexity of the law and understand its requirements. However, such complexity can have equally, if not more problematic implications for those who are obliged to comply with the specific obligations (prescriptions and prohibitions) required by the law to ensure the effectiveness of sanctions. In this respect, it is crucial to note that sanctions do not achieve their restrictive effects directly – that is, by imposing legal obligations on designated persons – but only indirectly, by imposing obligations on other persons. These would generally be all persons residing within the issuing state's jurisdiction, as well as that state's own nationals and certain entities, such as businesses, regardless of where they reside.[51] For example, in the UK, asset freezes are implemented by prohibiting any person to deal with funds or economic resources owned, held or controlled by a designated person.[52] The logic in this is simple. By prohibiting a state's own nationals and those located within the borders of that state from transacting with sanctioned persons or jurisdictions, sanctions deprive designated persons of access to that state's financial system (Goldman and Lindblom 2021, p. 132). The complexity of sanctions laws might seriously affect the ability of all the persons subjected to these obligations to understand what is required of them and freely determine their conduct, with potentially burdensome implications for their lives, businesses and assets. This is especially troublesome in light of the rather serious legal consequences deriving from the violations of such obligations, which can amount to criminal offences that can be punished with long-term imprisonment.[53]

Online guidance on institutional websites can complement the openness of the law, but it cannot replace it, as it does not provide the stability that a legal text should do, and it cannot remove the uncertainty caused by vague or ambiguous provisions. In fact, the emergence of dedicated websites is not only a consequence but a further driver of normalisation of unilateral sanctions. The more their scope broadens, the more systematic and comprehensive information and communication are needed. The more systematic and comprehensive information becomes available, the easier it is to build social understanding and acceptance of these measures and expand them in the future.

4.2 Clarity and Discretion

If the intrinsic complexity of the subject leads to highly technical or obscure provisions, an even more serious problem is legislative vagueness. Vagueness not only undermines clarity

[50] An example is regulation 3A(1) of the Australian ASR: 'If both part of a country, and the country, are specified in regulation 4, 4A or 5, the following rules apply: (a) for regulation 4—goods are export sanctioned goods for the part of the country if they are export sanctioned goods for the country, but are not export sanctioned goods for the country merely because they are export sanctioned goods for the part; (b) for regulation 4A—goods are import sanctioned goods for the part of the country if they are import sanctioned goods for the country, but are not import sanctioned goods for the country merely because they are import sanctioned goods for the part; (c) for regulation 5—a service is a sanctioned service for the part of the country if it is a sanctioned service for the country, but is not a sanctioned service for the country merely because it is a sanctioned service for the part'.

[51] In the US: GMHRAA, s1263(f). In the UK: SAMLA, s21. In Canada: SEMA, s4(2) and JVCFOA, s4(3). In Australia: ASR, ss12-16.

[52] GHRSR, s11 and GACSR, s11.

[53] In the US: IEEPA, §1705(c) and GMHRAA, s1263(f). In the UK: SAMLA, s17(4). In Canada: SEMA, s8. In Australia: ASR, s16.

but also the stability and predictability of the law by enabling excessive executive discretion. There are two interrelated law design issues in this respect. The first issue is the general balance between statutory and executive regulation of Magnitsky sanctions – that is, how much is regulated by legislation and how much is delegated to government. This is a systemic issue depending on the extent and detail of the enabling legislation and its effects on the overall regulatory framework. The second issue is the wording of individual statutory provisions conferring or limiting specific executive powers – namely, the power of making sanctions and the power of making designations. The issues are intertwined because, as we shall see, even detailed or extensive statutes can result in excessive government discretion if their wording is unclear or imprecise.

As for the general extent and detail of legislation, the jurisdictions considered are all rather different. Some statutes are mere enabling acts that *directly* delegate almost blank regulatory powers to government. IEEPA and ASA are the clearest examples, as they focus mostly on procedural aspects of such powers, save for some vague definitions of purposes,[54] contents of sanctions,[55] and some provisions on enforcement – including the criminalisation of sanction violations.[56] As we saw, the substantial aspects of sanctions, including types, exact contents and designation criteria, are regulated by detailed and extensive executive instruments: in the US, specific executive orders and regulations for each sanction regime; in Australia, the general ASR, applicable to all sanction regimes. The US GMHRAA, the Canadian SEMA and JVCFO and the UK SAMLA include a more comprehensive regulation of substantial elements. However, as we will see, the lack or vagueness of statutory definitions of important general and substantial aspects such as purposes, situations or designation criteria results in an *indirect*, but extensive delegation of regulatory powers to the executive. SAMLA is the most striking example in this respect. While it provides probably the most extensive and systematic legislative framework to circumscribe sanctions powers, the vagueness of its wording is such that the regulation of many fundamental aspects of the general functioning of sanctions is in fact left to government discretion. So much so that the regulations enacted by government with respect to different sanction regimes – such as the GHRSR, the GACSR or the Cyber (Sanctions) (EU Exit) Regulations 2020 – are largely overlapping in structure and content. This illustrates the delegation to government of the power to regulate not only technical aspects depending on the peculiarities of each sanction regime, but also general aspects of the functioning of any sanctions – such as the meaning of 'designated person'[57] – that could be more appropriately regulated by the enabling legislation. The broad executive discretion resulting from such delegation makes the law of sanctions unstable and unpredictable and compromises the clarity and consistency of the system.

This brings us to the second issue – the vague wording of specific provisions. The most problematic provisions in this respect are those that define the purposes or the situations that sanctions should address and the criteria for target designation. Provisions that authorise sanctions to address specific situations such as 'gross human rights violations',[58] 'acts of serious corruption',[59] or a 'grave breach of international peace and security […] likely to result in an international crisis',[60] tend to include definitions that are almost as precise as those of criminal offences. However, provisions that authorise unilateral sanctions for broadly termed

[54] IEEPA, §1701; ASA, s3(3).
[55] IEEPA, §1702; ASA, s10(1).
[56] ASA, ss16–17.
[57] GHRSR s10 and GACSR s10.
[58] GMHRAA, §1263(a)(1); SEMA, s4(1.1)(c); SAMLA, ss1(2)(f) and 7, which refers to s241A of the Proceeds of Crime Act 2002.
[59] GMHRAA, §1263(a)(3); SEMA, s4(1.1)(d).
[60] SEMA, s4(1.1)(b).

purposes such as addressing an 'unusual and extraordinary threat […] to the national security, foreign policy, or economy',[61] 'threats to international peace and security',[62] 'matters that are of international concern',[63] or foreign policy, democracy, the rule of law and good governance,[64] are much vaguer and open to interpretation. Furthermore, the vagueness of purposes is not always compensated by precise standards for government decision-making. IEEPA does not specify any requirement in this respect, whereas ASA requires a Minister to 'be satisfied' that sanctions regulations will achieve their purpose. SAMLA allows Ministers to make sanctions regulations whenever they consider it 'appropriate' to do so – that is, whenever they determine that there are 'good reasons' to pursue a statutory purpose and that sanctions are 'a reasonable course of action'.[65] SEMA allows the imposition of sanctions whenever the Governor in Council 'is of the opinion' that any of the proscribed situations has occurred.[66] Not only do such vague expressions undermine clarity, but, by leaving ample freedom of interpretation to government, they expand executive discretion to the point of making its exercise unstable or unpredictable – especially if, as we will see, judicial review is unavailable or restricted. They can also enable perversions of the law (cf. Raz 1979) such as selective applications that frustrate its purposes or misuses for purposes different from those for which the law was originally intended. Poorly defined purposes such as the protection of the rule of law lend themselves to opportunistic political exploitations aimed at giving a semblance of legitimacy to otherwise unlawful actions (Krygier 2009 and 2018; Scheppele 2013 and 2019). The practice of national governments shows the flexibility and selectivity of their interpretations of statutory purposes. By imposing sanctions on foreign transnational criminal organisations, the US Executive Order 13581 qualifies transnational organised crime as an 'unusual and extraordinary threat' and a 'national emergency'. Transnational organised crime, however, is not necessarily exceptional, but rather an ordinary, if perhaps globalised form of crime.[67] The UK Government has so far refused to use unilateral sanctions against transnational organised crime, claiming that criminal law is the appropriate tool for it,[68] although – contradictorily – it uses them against serious corruption, because, amongst other things, it is 'linked to […] serious and organised crime'.[69] However, the Government has also indicated that the purposes and powers in SAMLA 'are already wide enough' to impose sanctions against transnational organised crime should they wish to do so.[70]

The definition of designation powers is equally problematic. Situation-based provisions seem to lead to more punctual designation criteria than purpose-based provisions. GMHRAA and SEMA, for instance, require designated individuals to be foreign public officials responsible or complicit for the proscribed situations or an associate of such officials.[71] However, while GMHRAA requires the President to determine that there is 'credible evidence' of these circumstances,[72] SEMA is silent on the point, leaving the specification of the standard of evidence to government regulations. As we shall see, limitations to judicial review and judicial deference to the executive might fail to compensate for the lack of statutory precision. Purpose-based norms generally lead to much vaguer designation criteria. IEEPA and ASA do

[61] IEEPA, §1701(a).
[62] ASA, s3(3)(a).
[63] ASA, s3(2).
[64] SAMLA, s2(1); ASA, s3(3)(a).
[65] Ibid, s2(2).
[66] SEMA, s4(1).
[67] Executive Order 13581, n 12.
[68] HL Deb 21 November 2017, vol 787, col 124 (Lord Ahmad of Wimbledon).
[69] Explanatory Memorandum to the Global Anti-Corruption Sanctions Regulations 2021 No. 488, para 7.1.
[70] HL Deb 21 November 2017, n 68, col 124 (Lord Ahmad of Wimbledon).
[71] GMHRAA, §1263(a)(3); SEMA, s4(1.1)(d).
[72] GMHRAA, §1263(a).

not define any designation criteria, giving national governments the apparently unlimited discretion to designate any person not only by name but also by description – that is by targeting broad categories of persons. Executive Order 13581, for instance, simply designates four foreign criminal organisations as well as any 'foreign person' determined by the Secretary of State 'that constitutes a significant transnational criminal organization'.[73] SAMLA sits somewhat in-between the extremes. While it does define designation criteria, it allows the Government to designate not only persons directly or indirectly 'involved' in any 'activity' specified by Government itself,[74] and persons 'associated' with these,[75] but also persons 'connected with a prescribed country'[76] or merely identified by description.[77] The statutory attribution of the power to designate by association, connection or description can enable potential abuses, allowing government to inflict sanctions upon innocent people, as aptly observed by the British House of Lords,[78] and candidly accepted by the very same British Government as a necessary evil.[79] The possibility is even more apparent if legislation fails to define the exact meaning of association, connection or description.

Vague statutory provisions can also compromise the effectiveness of any scrutiny on government discretion. Some statutes seek to counteract the broad discretion conferred to national executives by surrounding delegated powers with mechanisms to allow parliamentary scrutiny. SAMLA, in particular, requires the Government to submit numerous reports to Parliament to give an account of the exercise of sanctions powers. This includes a report to explain the reasons for each sanctions regulation,[80] a report to specify and justify offences created by regulation,[81] an annual report explaining whether sanctions are still appropriate for their purposes and stating the action taken in consequence of such review,[82] and an annual report to Parliament specifying the sanctions regulations that have been made.[83] These safeguards are beyond the scope of a minimalist notion of the rule of law, as they do not concern the form of the law, but rather the democratic controls on its substantial application by government. However, the effectiveness of such controls depends on the clarity and precision of the 'ground rules' laid down in the statutes (cf. Raz 1979). Vague and broad definition of executive powers makes the criteria of parliamentary and judicial scrutiny unclear and unstable.

4.3 Prospectiveness

Magnitsky laws also present problems of retroactivity, as they enable national governments to inflict coercive measures on individuals and entities for behaviour and events that took place before the passing of these laws. This is evident in the formulation of the provisions concerning designations. Both US and Canadian law authorises the executive to impose sanctions on foreign persons who are 'responsible for' or have 'engaged in' or have materially assisted,

[73] Executive Order 13581, n 12, s1(ii)(A).
[74] SAMLA, s11(3)(a)-(c).
[75] SAMLA, s11(3)(d).
[76] SAMLA, ss3, 6(6)(a)(ii) and 7(1)(e)(ii) and (8)(a)(ii).
[77] SAMLA, s12(1).
[78] HL Deb 21 November 2017, n 68, cols 130–131 (Lord Judge); Select Committee on the Constitution, *Sanctions and Anti- Money Laundering Bill [HL]* (2017-2019, 39) paras 15–16.
[79] HL Deb 21 November 2017, n 68, cols 131–133 (Lord Ahmad of Wimbledon).
[80] SAMLA, s2(2), (4) and (6).
[81] SAMLA, s18.
[82] SAMLA, s30.
[83] SAMLA, s32.

sponsored or supported certain activities predating the relevant regulations.[84] Similarly, UK and Australian law refers to past situations to define designated entities ('is or has been involved', 'is assisting, or has assisted', 'has contributed to, or is contributing to', 'was a close associate to', 'current or former' officers).[85]

Retroactivity is common to any sanctions designed to have not only the preventive effect of modifying a target's future conduct but also the retrospective effect of providing accountability for past behaviours. It is therefore a defining feature of various types of sanctions. Such retroactivity is not particularly problematic when such behaviours constitute blatant violations of international law that pre-exist the passing of domestic sanctions laws such as gross human rights violations. In fact, in the absence of a proper global system of justice, it is this retroactivity that makes sanctions an important instrument for the enforcement of fundamental international obligations without having to resort to military force (cf. Reisman and Stevick 1998). Nor is retroactivity particularly problematic when sanctions are multilaterally used to enforce or provide accountability for acts that, whether formally codified as illegal by international law or not, the whole international community deems contrary to 'universally accepted norms, standards or obligations'.[86] This is likely to happen, for instance, in situations of proper international emergencies in which some individuals or entities engage with unprecedented and unpredictable conduct that does violate internationally recognised values or principles, but which no international legal instrument yet envisages and qualifies as illegal.

In the specific case of Magnitsky laws, some complications can derive from the unilateral and, at the same time, extraterritorial nature of the sanctions, especially when they address situations that are not real crises or emergencies. There is a risk that an issuing state might want to use sanctions to unilaterally punish foreign persons for behaviours that are neither illegal in the receiving country nor against international law or the values and interests of the international community but simply conflict with the interests of that state. Of course, this would create considerable uncertainty for the citizens of the receiving country, who might find their rights restricted by a foreign state for behaviour that at the time it was committed was perfectly legal both nationally and internationally. However, upon closer inspection, this problem is first and foremost a problem of strict legality and, in particular, a conflict of norms generated by the unilateral nature of sanctions. Should a state adopt unilateral targeted sanctions to punish behaviours that are not in conflict with international law, such sanctions would not only probably lack an international legal basis but would be against international law themselves, according to the principles we outlined above, under section 3.2. Such sanctions would constitute an obvious intrusion into the receiving state's *domaine reserve* and, therefore, a violation of the principles of sovereign equality and non-intervention. It is also a problem of lack of legislative precision and clarity, as vague statutory definitions of purposes, situations and designation criteria give national governments excessive discretion in the identification of the relevant behaviours. For instance, SAMLA leaves government regulation to specify the 'activity' in which a person must be involved in order to be designated.[87] Similarly, the 'acts of significant corruption' that justify unilateral targeted sanctions in the US, Canada or Australia[88] lend themselves to include acts that do not necessarily violate norms of international law and, in fact, might even be legal in the foreign country.

[84] GMHRAA, §1263(a); Executive Order 13818, n 12, s1(a)(ii); SEMA, s4(1.1); Freezing Assets of Corrupt Foreign Officials Act 2011, SC 2011, c10, s13; JVCFO, s4(2).
[85] SAMLA, s11(3); ASR, Reg 6.
[86] UN General Assembly (14 October 1997) Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Report of the Secretary General. UN Doc A/42/459, 16.
[87] SAMLA, s11(3)(a).
[88] GMHRAA, §1263(a)(3); JVCFO, s4(2)(c); ASR, Reg 6(5).

Although we could not find any example of States using unilateral targeted sanctions to censure behaviours that are not illegal under international law, the legislative framework in the jurisdictions examined does present such a risk. One could claim that, at least in such jurisdictions which are all democratic countries strongly committed to the rule of law, the various safeguards adopted to ensure the legitimacy of sanctions such as Parliamentary scrutiny or, as we are about to see, judicial review would minimise this risk. However, the risk becomes more serious in light of the rapid and widespread diffusion of unilateral targeted sanctions in different countries – also under the influence and pressure of powerful democratic countries like those considered in this paper. Rogue states or authoritarian regimes could exploit unilateral sanctions to target foreign persons according to their own interests – for instance, to punish political dissent. Remote as it might be, such a risk cannot be underestimated and adequate safeguards must be in place to prevent it. This is precisely the role of the principles of the rule of law: to pre-empt and guard against existing any possible threat to legality through fair and adequate forms and procedures.

5 Application of Sanctions Laws: Judicial Review and Natural Justice

The last technique for the normalisation of Magnitsky sanctions concerns the absence of specific provisions to provide an accessible judicial review according to the principles of natural justice – namely, the right to be heard by an accessible and impartial court – which are fundamental minimum requirements of the rule of law. Domestic laws generally establish processes for designated individuals to apply for an administrative review of the sanctions by the relevant Minister[89] or other government bodies, such as the US Treasury's Office of Foreign Assets Control (OFAC).[90] While these processes allow designated targets to submit evidence and challenge the accusations made against them, they do not afford the same procedural rights as judicial review (Barnes 2016, p. 206). They lack the impartiality of an independent court since the review is normally conducted by bodies of the same government that issued the sanctions (cf. Nault 2017, p. 33; Pasculli 2019, p. 219). Moreover, in the US and Australia, the administrative review is established and regulated by government regulations and therefore easily subjected to changes from the executive. With the exception of SAMLA, none of the domestic statutes we analysed establishes special judicial remedies or directly addresses judicial review, neither to authorise it nor limit it. As a result, the availability of a judicial review of unilateral sanctions powers depends on domestic constitutional and administrative law.

In the US, two main avenues are available in principle: the constitutional review of executive action before the US Supreme Court, or the judicial review of executive action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' under the Administrative Procedure Act (APA) (McCarthy et al 2018; Chachko 2019; Boyle 2021). Thus far, the US Supreme Court has never reviewed IEEPA designations directly, and federal courts have proven particularly deferential to the executive branch on matters involving sanctions (Barnes 2016, p. 210). Some judicial decisions do suggest that constitutional challenges to IEEPA actions may be viable in certain circumstances (McCarthy et al 2018).[91] However, constitutional protections are afforded only to persons with significant ties to the US (Chachko 2019, pp. 160–161), so might be precluded to foreign designated persons. Judicial

[89] JVCFOA s8; ASR 2011, Reg 10(3)-(2) and 11; SAMLA 2018 s23.
[90] Office of Foreign Assets Control, Department of the Treasury, 31 CFR §501.807.
[91] *Al Haramain Islamic Federation v. U.S. Department of Treasury* 686 F.3d 965 (9th Cir. 2012); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* 647 F. Supp. 2d 857 (N.D. Ohio 2009).

review under APA is still rather infrequent and the limited evidence available suggests that courts tend to be largely deferential to government (Chachko 2019, pp. 160-162). Moreover, court decisions are usually based on the evidence submitted by the government, which is often classified and therefore inaccessible to the applicants (Boyle 2021). Finally, foreign persons might be unable to challenge travel bans given the long-maintained position that the power to expel or exclude foreign citizens is 'a fundamental sovereign attribute exercised by the Government's political departments' which is 'largely immune from judicial control'.[92]

In Canada and Australia, given the relative novelty of unilateral sanctions, the courts have not developed any specific case law as yet. Political debates surrounding the relevant legislation suggest that judicial review would be available to designated persons in Canada (Nault 2017, pp. 32–33) as much as in Australia.[93] In Australia, however, a 2010 Federal Court decision[94] suggests that, at least in some circumstances, designations could be considered non-justiciable political decisions (cf. Sapienza 2015; Tomaras 2011).

The situation is different in the UK, as there is a statutory appeal procedure for sanctions, in addition to common law judicial review. SAMLA allows designated persons or other affected persons to challenge ministerial decisions on review applications before the High Court or Court of Session in Scotland,[95] and according to the principles for judicial review.[96] However, judicial reviews of financial restrictions follow the rules in the Counter-Terrorism Act 2008,[97] which allow for closed material procedures to protect secret intelligence. This means that the court may authorise the relevant Minister not to disclose materials on which they rely or that can affect the case other than to the court and a special advocate.[98] The Joint Committee on Human Rights (JCHR) described this practice as 'Kafkaesque', as it can compromise the meaningful participation of the applicant.[99] The normalisation of closed material procedures in UK domestic proceedings has been heavily scrutinised in recent years (e.g. Jackson 2016; Nanopoulos 2015; Amnesty International 2012; Metcalfe 2009), not least due to the perceived detrimental impact upon the principles of open and natural justice.

The limits of national judicial review are aggravated by the extraterritorial implications of unilateral sanctions law. Access to domestic courts can be more difficult for foreign persons, who may struggle to engage with legal representation and meaningfully participate in the trial or review proceedings (Stanford 2019). Furthermore, when domestic judicial review is denied, the lack of any international mechanism of judicial review, analogous to that afforded to EU citizens by the European Court of Justice, means that no judicial review will be available at all unless sanctions infringe human rights that are justiciable in international or regional human rights courts.

6 Discussion and Recommendations

[92] See e.g. *Fiallo v. Bell*, 430 U.S. 787 (1977).
[93] Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee report: Criminality, corruption and impunity: Should Australia join the global Magnitsky movement? (5 August 2021) p. 13. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Government_Response. Accessed 19 June 2022.
[94] *Aye v Minister for Immigration and Citizenship* [2010] FCAFC 69 (11 June 2010).
[95] SAMLA, 2018 s38.
[96] SAMLA, 2018 s38(4).
[97] SAMLA, 2018 s40; Counter-Terrorism Act 2008, ss66–68.
[98] Counter-Terrorism Act 2008, s67.
[99] JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post–Charge Questioning* (2006-07, HL 157, HC 394), para 210.

Each of the legislative techniques of the process that drive the normalisation of unilateral sanctions as instruments of protection and promotion of the rule of law – a process that we called the *generalisation of sanctions laws* – presents unique challenges to the rule of law.

The first technique is the introduction of umbrella legislation to provide a uniform *general* and *abstract* statutory basis covering any exercise of such powers (any sanctions regime) not necessarily referring to any concrete geopolitical situations. As we saw, the generalisation and abstraction of such a statutory basis lead states to adopt delegated legislation as the ordinary form of sanction regulations. At a domestic level, this technique is not in itself in conflict with the rule of law. In fact, it could improve compliance with its principles. Thus, a single statute can provide a more coherent and easily identifiable legal basis for sanctions powers than multiple pieces of legislation addressing different sanction regimes. It can also help the simplification and rationalisation of the regulatory framework and, therefore, its accessibility and openness. Moreover, comprehensive legislation regulating as many aspects of sanctions as possible could make sanctions laws more stable and predictable, by limiting executive regulation to regime-specific technical elements. However, these outcomes require legislators to strike a fine balance between the exhaustiveness needed for a single statute to cover most aspects of sanction regulation, the detail and precision needed to define and limit executive regulatory powers, and the flexibility needed for sanction legislation to serve as a legal basis to the most disparate sanction regimes.

Our analysis shows that domestic legislation tends to prefer flexibility over exhaustiveness and precision. In all jurisdictions examined, the detail and precision of the ground rules laid down by statutes are never sufficient to prevent the direct or indirect delegation to government of the power to regulate not only regime-specific technical aspects but also substantial elements of the general functioning of sanctions. Even the most comprehensive statutes, such as the UK SAMLA, end up conferring broad regulatory discretion through vague wording. Such broad delegation of regulatory powers to the executive is particularly problematic for the rule of law. Not only does it undermine the stability and predictability of sanctions law, but it can lead to the proliferation of executive instruments (cf. Judge 2015), which can in turn cause fragmentation and complexity and then compromise clarity and openness. Overlaps between similar, but slightly different regulations in some jurisdictions suggest that primary legislation should perhaps define the general functioning of sanctions, while secondary legislation should determine only the details relating to the particular circumstances to which each sanction regime applies.

The generalisation of sanctions legislation also raises problems with respect to the international rule of law. Since there are no international legal instruments that specifically regulate unilateral sanctions, the international legality of Magnitsky sanctions depends on the particular circumstances in which they are employed. The use of umbrella legislation and the vagueness of the provisions defining the situations and purposes of such sanctions compromise the assessment of the formal and substantive international legality raised by different concrete applications of Magnitsky sanctions and may thus lead to unlawful applications that can undermine the international legality and the political legitimacy of these sanctions. This is particularly evident in provisions defining the justification of sanctions through vague purposes, such as promoting good governance and the rule of law, whose pursuit through sanctions might lead to unlawful interferences in other states' sovereignty (Barber 2021). Another risk is that the normalisation of Magnitsky sanctions laws across many countries might affect, with time and repetition, international law itself, becoming either state practices that will support customary law or *opinio juris* as states act under the assumption that a legal obligation to do so exists (Kanetake 2016).

The second technique is the attribution of increasingly general and abstract unilateral sanctions powers to government. This is generally achieved through statutory provisions that

make these powers (a) *deterritorialised* – that is, detached from any particular country; (b) *thematic* – that is, aimed at addressing generic purposes rather than concrete situations; and (c) *permanent* – that is, not subject to any sunset clause. This technique is also in a potentially contradictory relationship with the rule of law. On the one hand, it strengthens the general and abstract nature of sanctions laws, making them less selective. Of course, with a minimalist notion of the rule of law, the generality of the law does not mean equality of its precepts and application and does not, therefore, exclude selective or even discriminatory concrete exercises of sanctions powers by national governments (Raz 1979, p. 216). On the other hand, the shift from situations to purposes leads to broader executive discretion in the definition of the circumstances that justify the use of sanctions, as well as the criteria that determine the designation of targets. Such discretion not only undermines the stability and predictability of the law by making the law more uncertain but could be exploited by governments to pervert the law in the ways outlined above.

The last technique is the lack of specific provisions to ensure an accessible and impartial judicial review according to the principles of natural justice. The absence of special rules might imply the applicability of general principles and rules of judicial review as set by domestic administrative and constitutional law. However, as we saw, such applicability is problematic and suffers various limitations. The extraordinary and political nature of the circumstances in which sanctions are adopted may prompt varying degrees of judicial deference that can affect the availability or the scope of judicial review. Moreover, foreign persons affected by sanction decisions might face not only practical but also legal obstacles to accessing judicial review such as a failure to satisfy legal requirements related to nationality. The only exception to this trend is the UK legislation, which takes the opposite approach of introducing a special statutory appeal procedure with respect to sanctions powers. This approach has the benefit of making judicial review unequivocally available to all parties affected by the sanctions. However, the introduction of special rules can also have the effect of restricting the scope of the review and/or the rights of applicants, for instance, by denying them access to certain evidence.

6.1 Recommendations

In principle, none of the legal techniques we examined is irremediably in conflict with the rule of law, although, in practical terms, they are currently applied by states in ways that undermine compliance with its principles. A conscious legislative commitment to identifying factors of incompatibility and removing them by intervening with relevant formal aspects of the law would be sufficient to restore compliance. Our analysis allows us to enunciate some guiding principles and recommendations for national and international lawmakers. Some of these may be helpful not only to improve the regulation of Magnitsky sanctions but also that of other types of unilateral targeted sanctions.

1) *International legal basis:* international law should regulate unilateral sanctions in general (not only Magnitsky ones). The increasing normalisation of sanctions across many jurisdictions shows that the time has come for the international community to develop appropriate instruments of international law that lay down the ground rules – including conditions and limits – for the legitimate exercise of unilateral sanction powers. Who should develop these instruments and how (e.g. an international treaty, regional conventions, or UN General Assembly or UNSC resolutions) is beyond the scope of this paper, but perhaps the harmonisation of unilateral sanctions laws amongst EU countries driven by EU law might provide a helpful example. National legislators should also include in unilateral sanctions legislation clear indications of the international legality of sanctions. This could be done, either by including in the relevant statutes a specific section setting out the requirements for the

international legality of concrete exercises of unilateral sanctions powers or by providing a more precise definition of purposes and situations that explicitly clarify their compatibility with such requirements (see below, point 4).

2) *Strict legality (through legislative comprehensiveness, exhaustiveness and detail)*: as unilateral targeted sanctions of any type become normalised, thus losing their exceptional and temporary nature, their legal regulation should be increasingly removed from government and entrusted to legislation. An umbrella statute regulating sanctions powers in general can provide a clearly identifiable legal basis. However, generality does not mean genericity: such a statute should never be simply an act enabling carte blanche powers; quite the opposite, generality should mean comprehensiveness, exhaustiveness and sufficient detail. To prevent uncertainty, instability, unpredictability and excessive executive discretion, the general procedural and substantial aspects of unilateral sanctions common to any sanction regime should be regulated by legislation. Only the regulation of regime-specific technical aspects should be delegated to government, such as the actual designation of targets. The UK SAMLA could offer a good model (although more precision is required, as we will see), whereas broad enabling acts such as IEEPA and ASA are less ideal.

3) *Simplification and rationalisation:* the overall regulatory framework of sanctions must be as systematically coherent and open as possible. Exhaustive and detailed umbrella legislation should help reduce the number of executive orders and regulations. Further, clear consolidated versions of relevant instruments reflecting any amendments should be regularly updated and promptly published. Comprehensive and intuitive websites are helpful in this respect and can facilitate access to the law. The Australian website is an example of a user-friendly design that can help in locating relevant information explained in plain language ('Who We Are'; 'What You Need to Know'; 'What You Need to Do'; 'What We Can Do to Help'; 'About sanctions' etc.). Overly complex websites such as the US's can be too difficult to navigate, while the fragmentary publication of documents and regulations through uncoordinated webpages as it happens in the UK is unhelpful.

4) *Precision:* the wording of statutory provisions conferring and limiting executive powers should be as precise as possible. Legislation should include precise definitions of any expression related to the general functioning of sanctions and, especially, any purposes, situations and designation criteria. In this respect, situation-based provisions are preferable to purpose-based provisions as they inherently lead to more precision in the definition of designation criteria. Besides, most purpose-based provisions can be easily converted into situation-based provisions by defining the actions and circumstances that can undermine that purpose. Explicit references to the international legal sources that qualify such situations as illegal would help corroborating not only the clarity and precision of the relevant statute but also its international legality. For instance, the generic purpose of promoting human rights can be converted into deterring and providing accountability for gross violations of international human rights law. Similarly, the promotion of the 'rule of law' or 'good governance' should be defined through reference to specific violations of internationally recognised principles. Explicit mention of the rule of law amongst the justifications of sanctions can also serve as a limitation to government power, but only if the notion is clearly defined. Otherwise, it can be politically exploited to justify actions that are against it.

5) *Legitimate retroactivity:* the retrospective application of Magnitsky sanctions is not in itself illegitimate. To argue otherwise would mean that sanctions could never be issued to respond to past situations, and therefore most sanctions regimes would be useless. However, the unilateral and extraterritorial nature of sanctions, together with the vagueness of domestic legislation can make the retroactivity of such legislation problematic. To strike a necessary balance between the practical efficacy of sanctions and the requirement of prospective law, sanctions should only be applied retrospectively when the behaviour being sanctioned is widely

accepted as a violation of universally accepted norms, standards or obligations. To be clear, building on the first recommendation, sanctions should be justified only as a response to situations and activities that are already internationally recognised as illegal (see above, point 1). This would include both breaches of existing provisions of international law and acts that, while not being explicitly identified and defined as illegal by international law, constitute unpredictable or unprecedented violations of universally accepted norms, values and principles. This can be achieved by explicitly introducing a general requirement to this effect in sanction legislation. This would be particularly helpful to allow sanctions to address unprecedented and unforeseen situations. Furthermore, relevant statutes should refrain from indicating vague purposes or situations as the justification for applying unilateral sanctions retrospectively. Whenever possible, legislation should identify the basis for unilateral targeted sanctions in internationally recognised illegal acts – such as gross violations of human rights law or conduct that is criminalised by international conventions. This would also strengthen the deterrent effect of sanctions as well as their function of promoting international legality.

6) *Statutory right of judicial review according to the principles of natural justice (or due process):* sanctions legislation should explicitly regulate the rights to judicial review and its processes according to the fundamental principles of natural justice. A ministerial review should never replace or otherwise obstruct judicial review. The more sanctions are viewed as normal instruments to address ordinary, albeit serious manifestations of international illegality such as corruption or gross human rights violations, the less judicial deference to political power or exceptions to the principles of due process will be justified. Sanctions legislation should expressly recognise the right of any legal or natural person whose rights are affected by sanction decisions to be heard by, and present evidence to, an accessible and impartial court. The judicial review process should be clear and possibly regulated by the same statute that authorises sanctions, as happens in the UK in this context. Departures from the ordinary process of judicial review set by administrative or constitutional law such as limitations to access to secret intelligence can be allowed, provided that they do not frustrate the principles of natural justice or facilitate any perversion of the law. Statutory mechanisms to facilitate the access by foreign persons to national courts should be in place to complement existing advisory bodies.

7. Conclusion

The normalisation of unilateral targeted sanctions as an instrument to promote and protect the rule of law – so-called 'Magnitsky sanctions' – calls for a clear understanding and close scrutiny of the laws that enable it. The inclusion of the rule of law inherent in the statutory purposes that justify unilateral targeted sanctions implies that these must be compliant with the rule of law. In other words, the rule of law becomes both a justification for and a limit to the exercise of unilateral sanction powers. To contribute to the development of such understanding and scrutiny we have assessed the sanctions laws of four major common law jurisdictions – the US, Canada, the UK and Australia – against a minimum set of formal principles of the rule of law common to most constitutional traditions and to most definitions of the international rule of law.

Our comparative analysis showed that the normalisation of Magnitsky sanctions is driven by three main legal techniques that we called *generalisation of sanctions laws*. These include: (1) the use of umbrella legislation to attribute general sanction powers and its by-product – the delegation to government of the power to regulate general substantial and procedural aspects of unilateral sanctions; (2) the authorisation of increasingly general and abstract unilateral sanction powers; and (3) reliance on general rules of judicial review instead of providing a

special regime or regulation. Although in principle, none of these techniques is inherently incompatible with a formal notion of the rule of law, the way states have employed them shows a common tendency to prioritise the flexibility of legislation and the powers it confers to government, rather than the requirements of formal legality mandated by the rule of law. As a result, each of the domestic regulatory frameworks examined here is, to varying degrees, in conflict with some core principles of the national and international rule of law such as legality, openness, clarity, and the need for judicial review and natural justice.

Exceptions to such principles might be a (questionable) legacy of past legislation that authorised unilateral sanctions as an extraordinary measure to respond to international emergencies. However, they are less acceptable as sanctions become normalised as measures to deal with situations that do not necessarily qualify as proper emergencies, such as serious corruption or organised crime. Improved institutional awareness of the implications of sanctions laws on the national and international rule of law can help legislators make more effective use of the legal techniques behind the normalisation of unilateral sanctions, and turn such techniques into a device to strengthen the compliance of sanctions with the rule of law.

Our analysis led us to outline some principled recommendations. First, the time seems ripe for the international regulation of unilateral sanctions. National legislation should also be more mindful of the international legal limits to sanctions powers. Second, domestic legislation should be as comprehensive and detailed as possible, leaving to government regulation only the technical aspects of each sanction regime. Third, the whole national regulatory framework of sanctions should be simplified and rationalised. Fourth, statutory provisions should always be very clear and precise. Fifth, sanctions should apply retrospectively only in response to acts that are internationally recognised as violations of universally accepted norms, values and principles. Finally, specific provisions should regulate judicial review according to the principles of natural justice.

Our observations were limited to four countries and to a very specific category of unilateral sanctions, although some of them could potentially apply to other types of unilateral sanctions, especially unilateral targeted and thematic sanctions aimed at purposes related to the rule of law. Further comparative research can considerably improve our understanding of the normalisation of Magnitsky sanctions and other unilateral sanctions and the legal processes behind it. It would be worthwhile, in particular, to examine the sanctions laws of other common law jurisdictions and to compare these with EU sanctions law. More in-depth research could be also conducted on specific issues that we could analyse only relatively briefly in this paper, such as, for instance, the availability of domestic judicial review.

References

Amnesty International (2012) Left in the dark: the use of secret evidence in the United Kingdom. Amnesty International Publications.

Arajärvi N (2021) The core requirements of the international rule of law in the practice of states. The Hague Journal on the Rule of Law 13:173–193.

Arangio Ruiz G (1991) Third report on state responsibility. UN Doc A/CN.4/440 and Add 1, (1991) II(1) ILC Ybk.

Asada M (2019) Definition and legal justification of sanctions. In: Asada M (ed) Economic sanctions in international law and practice. Routledge, London, pp. 3–23.

Barber R (2021) An exploration of the General Assembly's troubled relationship with unilateral sanctions. International and Comparative Law Quarterly 70(2): 343–378.

Barnes R (2016) United States Sanctions: delisting applications, judicial review and secret evidence. In: Happold M, Eden P (eds) Economic sanctions and international law. Hart, Oxford, pp. 197–226.

Barnett H (2020) Constitutional and administrative law. 13th ed, Routledge, Abingdon.

Beaucillon C (2021) The European Union's position and practice with regard to unilateral and extraterritorial sanctions. In: Beaucillon C (ed) Research Handbook on Unilateral and Extraterritorial Sanctions. Edward Elgar, Cheltenham, UK – Northampton, MA, USA, pp. 110–129.

Beaulac S (2009) The rule of law in international law today. In: Palombella G, Walker N (eds) Relocating the rule of law. Hart, Oxford, pp. 197–224.

Bingham T (2010) The rule of law. Allen Lane, London.

Birben B (2017) EU autonomous sanctions: igniting passive revolution? UNISCI Journal 43:35–51.

Boyle A (2021) Checking the President's sanctions powers: a proposal to reform the International Emergency Economic Powers Act. Brennan Center for Justice at New York University School of Law, New York.

Bowen G A (2009) Document analysis as a qualitative research method. Qualitative Research Journal 9(2):27–40.

Bradshaw A (2020) Financial sanctions as a weapon for combating money laundering. In: Ryder N, Pasculli L (eds) Corruption, integrity and the law: global regulatory challenges. Routledge, Abingdon, pp. 127–141.

Cannizzaro E (2006) A Machiavellian moment? The UN Security Council and the rule of law. International Organizations Law Review 3:189–224.

Cannizzaro E (2009) Security Council resolutions and EC fundamental rights: some remarks on the ECJ decision in the Kadi case. Yearbook of European Law 28(1):593–600.

Chachko E (2019) Due process is in the details: U.S. targeted economic sanctions and international human rights law. American Journal of International Law 113:157–162.

Chesterman S (2008) An international rule of law? The American Journal of Comparative Law 56(2):331–361.

Craig P (1997) Formal and substantive conceptions of the rule of law: an analytical framework. Public Law 4:467–487.

Crawford J (2013) State responsibility: the general part. Cambridge University Press, Cambridge.

Douhan A F (2021) Expert consultation on 'The Notion, Characteristics, Legal Status and Targets of Unilateral Sanctions,' convened on 26 April 2021 by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Prof. Dr. Alena F. Douhan. UN Office of the High Commissioner for Human Rights (OHCHR). https://www.ohchr.org/Documents/Issues/UCM/expert-consultation-26April2021.pdf. Accessed 19 June 2022.

Dufour G, Veremko N (2019) Unilateral economic sanctions adopted to react to an erga omnes obligation: basis for legality and legitimacy analysis? A partial response to Alexandra Hofer's article. Chinese Journal of International Law 18(2):449–456.

Dupont (2016) Unilateral European sanctions as countermeasures: the case of the EU measures against Iran. In: Happold M, Eden P (eds) Economic sanctions and international law. Hart, Oxford, pp. 37–66.

Dworkin R (1985) A matter of principle. Oxford University Press, Oxford.

Eckes C (2009) EU counter-terrorist policies and fundamental rights: the case of individual sanctions. Oxford University Press, Oxford.

Eckes C (2013) EU counter-terrorist sanctions: the questionable success story of criminal law in disguise. In: King C, Walker C (eds) Dirty assets: emerging issues in the regulation of criminal and terrorist assets. Ashgate, Farnham.

Eriksson M (2009) In search of a due process – Listing and delisting practices of the European Union. Uppsala University, Uppsala.

Farrall J M (2007) United Nations sanctions and the rule of law. Cambridge University Press, Cambridge.

Firestone T, Contini K (2018) The Global Magnitsky Act. Criminal Law Forum 29:617–628.

Fuller L (1969) The morality of law. 2nd edn. Yale University Press, New Haven, CT.

Genser J, Barth K (2010) When due process concerns become dangerous: the Security Council's 1267 regime and the need for reform. Boston College International and Comparative Law Review 33(1):1–41.

Gerring J (2006) Case study research: principles and practices. Cambridge University Press, Cambridge (UK).

Gilligan E (2016) Smart sanctions against Russia: human rights, Magnitsky and the Ukrainian crisis. Demokratizatsiya: The Journal of Post-Soviet Democratization 24(2):257-277.

Goldman Z, Lindblom A (2021) The US position and practice with regards to unilateral and extraterritorial sanctions: reimagining the US sanctions regime in a world of advanced technology. In: Beaucillon C (ed) Research handbook on unilateral and extraterritorial sanctions. Edward Elgar, Cheltenham, UK – Northampton, MA, USA, pp. 130–147.

Gorobets K (2020) The international rule of law and the idea of normative authority. The Hague Journal on the Rule of Law 12:227–249.

Hayek F A (1944) The road to serfdom. Routledge, London.

Hofer A (2018) The 'curiouser and curiouser' legal nature of non-UN sanctions: the case of the US sanctions against Russia. Journal of Conflict Security Law 23(1):75–104.

Hofer A (2019) The developed / developing divide on unilateral coercive measures: legitimate enforcement or illegitimate intervention? Chinese Journal of International Law 16(2):175-214.

Hovell D (2019) Unfinished business of international law: the questionable legality of autonomous sanctions. American Journal of International Law 113:140-145.

Hurd I (2014) The international rule of law: law and the limit of politics. Ethics and International Affairs 28:39–51.

Hurd I (2015) The international rule of law and the domestic analogy. Global Constitutionalism 4(3):365–395.

Huscroft G, Miller BW, Webber GCN (eds) (2014). Proportionality and the rule of law: rights, justification, reasoning. Cambridge University Press, Cambridge.

Hutchinson T, Duncan N (2012). Defining and describing what we do: doctrinal legal research. Deakin Law Review, 17(1):83–119.

Jackson J (2016) The role of special advocates: advocacy, due process and the adversarial tradition. International Journal of Evidence and Proof 20(4):343–362.

Judge L (2015) The safest shield. Hart, Oxford.

Kanetake M (2012) The interfaces between the national and international rule of law: the case of UN targeted sanctions. International Organizations Law Review 9:267–338.

Kanetake M (2016) The interfaces between the national and international rule of law: a framework paper. In: Kanetake M, Nollkaemper A (eds). The rule of law at the national and international levels: contestations and deference, p. 11–42.

Krygier M (2009) The rule of law: legality, teleology, sociology. In: Palombella G, Walker N (eds) Relocating the rule of law. Hart, Oxford, pp. 45–70.

Krygier M (2018) The Security Council and the rule of law: some conceptual reflections. In: Farrall J M, Charlesworth H (eds) (2018) Strengthening the rule of law through the UN Security Council. Routledge, Abingdon, pp. 13–26.

Larik J (2014) The Kadi saga as a tale of ‘strict observance’ of international law: obligations under the UN Charter, targeted sanctions and judicial review in the European Union. Netherlands International Law Review 61(1):23–42.

Marossi A Z, Bassett M R (eds) (2015) Economic sanctions under international law: unilateralism, multilateralism, legitimacy, and consequences. Springer, The Hague.

McCarthy T J, Tysse J, Wolverton C (2018) Challenging executive actions under IEEPA. The National Law Journal. June 2018.

Metcalfe E (2009) Secret evidence. JUSTICE, London.

Nanopoulos E (2015) European human rights law and the normalisation of the 'closed material procedure': limit or source? Modern Law Review 78(6):913-944.

Nault R D (2017) A coherent and effective approach to Canada's sanctions regimes: Sergei Magnitsky and beyond. Report of the Standing Committee on Foreign Affairs and International Development. 42nd Parliament, first session. Parliament of Canada, House of Commons, Ottawa.

Nephew R (2019) Implementation of sanctions: United States. In: Asada M (ed) Economic sanctions in international law and practice. Routledge, London, pp. 93–115.

Nesbitt M (2016) Canada's 'unilateral' sanctions regime under review: extraterritoriality, human rights, due process, and enforcement in Canada's Special Economic Measures Act. Ottawa Law Review 48(2):507-574.

Pasculli L (2019) Brexit, integrity and corruption: local and global challenges. In: Pasculli L, Ryder N (eds) Corruption in the global era: causes, sources and forms of manifestation. Routledge, Abingdon, pp. 212–232.

Peksen D (2009) Better or worse? The effect of economic sanctions on human rights. Journal of Peace Research 46(1):59–77.

Rathbone M, Jeydel P, Lentz A (2013) Sanctions, sanctions everywhere: forging path through complex transnational sanctions laws. Georgetown Journal of International Law 44(3):1055–1126.

Raz J (1979) The rule of law and its virtue. In: Raz J (ed) The authority of law: essays on law and morality. Oxford University Press, Oxford, pp. 210–229.

Raz J (2019) The law's own virtue. Oxford Journal of Legal Studies 39(1):1–15.

Reisman M W, Stevick D L (1998) The applicability of international law standards to United Nations economic sanctions programmes. European Journal of International law 9:86–141.

Rijpkema P (2013) The rule of law beyond thick and thin. Law and Philosophy 32(6):793–816.

Rosenfeld M (2001) The rule of law and the legitimacy of constitutional democracy. Southern California Law Review 74(5):1307–1352.

Ruys T (2017) Sanctions, retorsions and countermeasures: concepts and international legal framework. In: van den Herik L (ed) Research handbook on UN sanctions and international law. Edward Elgar, Cheltenham.

Sacco R (1992a) Legal formants: a dynamic approach to comparative law (Installment I of II). The American Journal of Comparative Law 39(1):1–34.

Sacco R (1992b) Legal formants: a dynamic approach to comparative law (Installment II of II). The American Journal of Comparative Law 39(2):343–401.

Sapienza A (2015) Justiciability of non-statutory executive action: A message for immigration policy makers. AIAL Forum (79):70–86.

Scheppele K L (2013) The rule of law and the Frankenstate: why governance checklists do not work. Governance: An International Journal of Policy, Administration, and Institutions 26(4):559–562.

Scheppele K L (2019) On being the subject of the rule of law. The Hague Journal of the Rule of Law 11:465–471.

Shauer F F (1976) English natural justice and American due process: an analytical comparison. William & Mary Law Review 18:47–72.

Stanford B (2019) Justice in exile? The implications of 'temporary exclusion orders' for the right to a fair trial. Asian Yearbook of Human Rights and Humanitarian Law 3:494-507.

Tamanaha B Z (2004) On the rule of law: history, politics, theory. Cambridge University Press, Cambridge.

Tilahun N (2021a) The EU Global Human Rights Sanctions Regime: between self help and global governance. International Community Law Review. (Published online ahead of print 2021). doi: https://doi.org/10.1163/18719732-bja10067.

Tilahun N (2021b) What is the added value of the EU Global Human Rights Sanctions Regime? European Foreign Affairs Review 26(3):477–498.

Tomaras J (2011) Autonomous Sanctions Bill 2010. Bills Digest no. 111 2010–11. Parliament of Australia, Canberra. https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd111#_ftn35. Accessed 19 June 2022.

Tridimas T (2010) Economic sanctions, procedural rights and judicial scrutiny: post-Kadi developments. Cambridge Yearbook of European Legal Studies 12:455–490.

Yin R K (2009) Case study research: design and methods, 4th edn. Sage, Thousand Oaks.

Walker N (2009) The rule of law and the EU: necessity's mixed virtue. In: Palombella G, Walker N (eds) Relocating the rule of law. Hart, Oxford, pp. 119–138.