EUROPEAN PRIVATE LAW: LEGAL NATURE, PROBLEMS AND PROSPECTS OF DEVELOPMENT

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The private law is part of a coherent legal system owing its validity and legitimacy to the fact that it is conceived as a coherent whole and enacted or enabled by the state. The goal of this article is to describe how recent developments call the traditional view into question. To the extent that the European Union shapes private law, private law is not the product of a state, at least in the traditional sense. Here private law is created within the plurality of legal orders shaped by globalization, it is not the product of one state. When private actors or agencies make and enforce their own law, this law is not the product of any state.

Europeanization. Europeanization of private law has three different meanings that sometimes overlap but must be held apart for analysis, since the role of private law and the state is different in each of them.

European Communities. One meaning concerns the growing importance of the European Communities [1], which have recently, after originally dealing with other areas, focused on private law. The view the European Community takes of private law is clearly instrumental – European private law must serve the common market. This has different consequences. First, differences between member-state private laws are said to require supranational harmonization of conflict of laws rules [2]. Second, private-law norms of member states can violate EC law if they interfere with the free movement of goods, services, labor, and capital. This is so not only for mandatory norms but even, as has been argued, for non-mandatory, truly "private", norms. Third, because private law is considered relevant for the functioning of a common market, the EC has begun to harmonize substantial parts of market-oriented private law through directives [3]. Some even argue that differences between the member-state private-law norms require general unification of private law, through either a real codification [4] or a legislative instrument *sui generis:* a common frame of reference [5]. Defendants of state private law invoke the cultural heritage represented in the member states' own private laws or argue that unification is unnecessary in practice [6]. Sometimes, U.S. federalism is invoked as a model of non-unified private law, although the situations are not fully comparable, since similarities of legal cultures and styles between the U.S. states are greater than between EU member states. The impact on private law and the state is ambivalent. On the one hand, this institutionalized Europeanization reduces the importance of the member states and their private law because they must yield sovereignty to the European Union. On the other hand, the European

Union itself in many ways resembles a state, functionally and structurally, whether it is called a state or not. In this sense, institutionalized European private law partly replicates state private law on a higher level. The result is a system of shared sovereignties and overlapping private law systems, regardless of whether the European level is superior, subordinated, or equal to the state level.

Transnational Legal Science. A second meaning of Europeanization of private law goes beyond the EU and refers to European identity building; it concerns the revival of a pan-European legal science and exchange between judges [7]. There are several variants of such an academic "European" private law: a reinvigorated *ius commune* as basis of, or model for, an academic transnational private law, restatements, networks, pan-European casebooks, and research on a common core. In addition, courts seem more willing than before to look to the courts of other European states for guidance in private- law cases. A widely shared hope is to keep private law relatively free from instrumental concerns and allow it to maintain its own logic and rationality. Unsurprisingly, EC directives are mostly frowned upon and European codification is widely opposed; if at all, it should be performed by academics with as little political influence as possible [8].

Regulatory Competition. Finally, a third meaning of Europeanization of private law refers not to unification but to greater interdependence resulting in regulatory competition [9]. Proponents hope for a pluralist private law that is autonomous not only from the state but also from judicial and academic interventions, a private law created by, and developing under, the forces of the market. The hypothesis is that states cannot maintain regulatory laws that are inefficient (as is often assumed in the area of private law, where many favor market autonomy over centralized state power), since this would put their corporations at a competitive disadvantage vis-a-vis foreign participants and may encourage these corporations to relocate. This competitive effect is intensified by party autonomy in choice of law, which gives parties the ability to choose the private law applicable to them and thereby opt out of unfavorable private-law rules.

These three concepts of Europeanized private law imply very different relations between private law and the state. Proponents of academic Europeanization defend a private law that is largely independent of instrumental considerations, a private law with its own logic and rationality. By contrast, the view the European Community takes of private law is not only instrumental – European private law must serve the common market – but also bound to the state-like regulatory functions of the EU. Regulatory competition presupposes an instrumental private law as well, but with the important difference that the goals are set not by states or the Community but by the inner rationality of the market for legal rules. Not surprisingly, the tensions between these views of Europeanized private law are becoming more and more visible [10].

Globalization. Attempting to define globalization in the abstract would be less fruitful than identifying where globalization discourse addresses changes in the role of the state that are relevant for private law. Many of these developments – supranational regulation, international unification, regulatory competition – bear some similarity to those under Europeanization. However, since an organization comparable to the EU is lacking on the global plane, any concept of global private law will likely be plural and therefore significantly different from private law within the state.

World State. Many authors think that globalization leads to a decline of the state, but this is far from certain. A world state, the closest analogy to the European Union would be a world state, underlies two interpretations of globalization in political science. A neo-Kantian interpretation sees a world government without a world state, made up of different supranational branches (the WTO as world legislator, the international court of Justice as world court, etc.) or of networks between the different branches of national governments – a network of legislators, one of judges, etc [11]. This would place the production and adjudication of private law in a framework that is familiar from historical experience with the nation states. A neo-Marxist interpretation holds that the western state will globalize into a global state or empire that would resemble the liberal state opposed by Marx, with a clear delimitation of the public and the private spheres [12]. Such political theories may or may not be convincing: what is undeniable is that global organizations are in fact exerting pressure on state private laws. The World Bank, for example, requires developing countries to adopt functioning private-law regimes, frequently modelled after American law, in return for loans. In addition, it has begun to rank legal systems of all states according to their efficiency – with devastating results for some civil-law countries. That French scholars now protest against the methods involved and invoke the cultural and social values of their national private law highlights the tension between global regulation and regulatory competition on the one hand and state control over private law on the other.

Treaties. Absent a world state, the main tool for unifying private law is the treaty [13]. So far, the dream of global private law unification has never been realized. Even the most important international text on private law, the UN Convention on the International Sale of Goods (CISG), although it treats an intensely international field and is based on extensive preparatory studies in comparative law, has gained relatively marginal importance in legal practice and theory. Undeterred by such developments, the then-Secretary of UNCITRAL proposed work towards a Global Commercial Code. Whether such a global, relatively uniform private law can be created without strong global regulatory institutions remains to be seen.

Regulatory Competition. While these developments could lead to uniformity, global competition between private law regimes would require a

plurality of private laws. Such competition differs from that in Europe on a crucial point: an overarching regulatory institution like the European Communities is lacking in the global sphere; regulatory competition is unregulated. This means that states that are strong enough can apply their laws extraterritorially and thereby hamper the possibilities for private parties to opt out of their laws, whether through party autonomy or through physical relocation. We can see this in the conduct of the U.S. and the EU, both of which are unwilling externally to submit themselves to the regulatory competition they require internally from their respective member states [14]. Similarly, the effect of party autonomy is more dramatic than in the European Communities. On a global level, party autonomy turns the hierarchical relationship between the state and the individual upside down. In the traditional view, the individual is subordinated to the state, even in the realm of private law. By contrast, party autonomy subordinates the state and its private law to private parties and their choices. Parties are not confined to using the autonomy granted to them by the legal order; rather, they have the autonomy to choose the very legal order that grants this autonomy. All of this means that global private law will likely remain pluralistic and non-hierarchical, an important difference to a hierarchical state-based private law.

Americanization. Competition between private laws does not necessarily occur on a level playing field, for better or worse. Globalization strengthens big powerful states like the United States (and the EU), while weakening midsize states. In accordance with this view, some view globalization as an increased Americanization of the law in the world, including private law [15]. Some private-law projects in Europe can be viewed as a reaction; they aim, implicitly or explicitly, at protecting European private law with its social aspects against such Americanization, while at the same time promoting European (and German) private law as a model for other states. If globalization weakens the power of mid-size states, then both the strengthening of the European Union and the Europeanization of private law can be viewed as reactions to globalization. The tension between U.S. and German private law is then also tension over the role of specific states in private law, not just of the state in the abstract.

Privatization. All these developments concern the shift of state power to other states or global institutions. Yet, perhaps the most important development of globalization is the shift away from states altogether towards the private sphere. In a globalized world, in addition to states an increasing number of non-state institutions – NGOs, multinational corporations, and individuals – are relevant international or transnational actors [16]. In various ways and degrees, these have all become not only subjects and objects of international law, but also creators and shapers of law. Since these organizations are private, the resulting law is a kind of privatized private law that is independent from the state to the extent that the

state does not interfere and is not required for its enforcement.

Transnational Legal Science. One consequence could be the emergence of a transnational legal science with a global academic debate and a worldwide community of courts. While some such developments can be observed in the human rights sector, similar developments in private law are made more difficult by the relative lack of common intellectual and cultural roots worldwide; even communication between German and U.S. law is sometimes riddled with misunderstandings. Nonetheless, one such development is occurring in the area of commercial law, in the form of academic restatements or private codifications of private law. Modelled after both European national codifications and the American Restatements, several different and sometimes competing private codifications exist on the global level [17]. Whereas European private codifications offer themselves, at least in part, as models for a possible future European codification and thus for incorporation into the political system, worldwide models remain permanently outside the structure of states. They serve either as mere academic constructions or as potentially applicable law for international contracts, most importantly (up until now) in arbitration. Formally similar to "official" codifications but lacking a legislator's authority, they present a challenge to traditional concepts of private law: their character as "law" is disputed; their functions oscillate between potential and actual description and prescription.

Privately Created Orders. More controversial is the idea of privately created legal orders. Although various kinds of such orders are often presented indiscriminately, closer analysis identifies these orders as reflections of different themes of globalization. The primacy of economy and markets, a favourite globalization topic, is reflected in the idea of a new *lex mercatoria*, a transnational body of substantive rules created not by states but by the needs and practices of commerce and applied and developed by international arbitration [18]. A second globalization theme, technological advances and the rise of the internet, corresponds to the conceptualization of private law created within the Internet community. A third group of private laws substitutes community trust created by close religious or ethnic ties for the state's enforcement scheme and thereby exemplifies a move in globalization from territoriality to community affiliation [19]. A fourth group, finally, contains private legal orders that are specific to certain functional sectors of world society; they reflect the move towards global functional systems: a transnational sport law *(lex sportiva)*, a transnational construction law *(lex constructionis)*, etc. Both the existence and the legal character of all these orders are disputed.

All things considered, much of the debate is inconclusive: it confounds conceptual analysis with questions of validity and legitimacy, and throws together issues of general acceptance, legal validity, intrinsic quality, and of definition, obviously, privately created private law can only

be called “law” if the concept of law is not confined to state-created orders; whether such a definition is useful depends on the context.

In our opinion, more important is the actual relation of these private orders to the state, especially the question whether they provide the applicable norms in a choice-of-law analysis. Traditionally, states have been unanimous in rejecting the applicability of non-state private laws in choice of law; demands to the contrary have so far remained unheeded. This attitude may be changing at least for quasi-official private codifications: the current proposal for a European Regulation on choice of law in contracts would allow parties to choose private codifications like the UNIDROIT Principles over state law as the law applicable to their contracts.

As to our mind, this would be a triumph for privately made, non-state law, which will achieve an equal footing with state-made private law. However, it would also be a victory (not yet realized by all) for state-made private law as the model for what can be accepted as law: privatized private law will only be recognized when it appears as a code, sufficiently similar, in form and substance, to state law.

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