New Approaches to Lawmaking

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I. Introduction

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," the great US judge and professor of law *Oliver Wendell Holmes* once wrote in his *prediction theory*. This classical self-conception of the law has since been superseded. Research into law is facing radical change in two respects today:

- *From the study of the application of law to the study of lawmaking:* Modern (elite) research is increasingly focusing less on the application of law and more on lawmaking. Under the banner of *better regulation*, it no longer sees its main task in the organisation and systematisation of judicial case law but instead primarily in forward planning to provide new ways of resolving legal problems. Such a research approach promises attractive returns, especially in the light of the scarcity of academic resources. The marginal benefit of the *legislative study of law*, focusing, for example, on the future of creditor or consumer protection in Europe, is far greater than that of the system-inherent refinement of case law on hidden contributions in kind or grounds for objection with consumer credit.

- *From state sovereignty to the denationalisation of law:* Lawmaking has for some time no longer been governed by a national legislator enacting binding laws for the legal subjects in its sovereign territory. Today, we instead deal with a number of legislators at very different levels who increasingly also include private standard-setters. This affects traditional fields of law, such as contract law (*principles of European contract law*) and company law (*corporate governance codes*) as well as more recent or very new areas of law (sports law, internet law). Private standard-setters often appear when international regulatory issues occur that exceed the capabilities of national state legislators. State sovereignty is often not sufficiently well developed at supranational level to serve as a basis for traditional lawmaking.

Against this background, three major lines of development can be identified under the heading of *New Approaches to Lawmaking* on which legal research is focusing today: (1) the seemingly unstoppable rise of private players as lawmakers, (2) the development of options

models as a new legislative instrument at national and supranational levels and (3) the emergence of multi-level systems as the new legislative architecture.

II. Private players as lawmakers

Private standard-setters take different forms at national and international level. Probably the most important development in the field of civil law is traced back to an initiative by academics who supported and drove forward the process of the Europeanisation of private law on a broad level and from the foundations. Various groups of academics undertook the development of reference texts drawn up in the form of rules on a broad comparative law basis, which to a certain extent constitute non-legislative codifications. The *Principles of European Contract Law* by the *Lando* Commission, which were inspired by the notion of a *restatement* of European private law, were of a pioneering nature. A similar document, albeit aimed at global legal standardisation, was presented by the UNIDROIT Institute in Rome in the *Principles of International Commercial Contracts*. The idea of these model principles proved so attractive that they were adopted by other working groups. Some of them came together in a *Joint Network on European Private Law* in the aim of developing a *common frame of reference* for European contract law. Building upon this and other preliminary work, the European Commission recently presented a draft regulation for a *Common European Sales Law*. The process of the Europeanisation of private law entered into a new stage with this document.

Examples of private lawmaking are found in a wide range of forms, including company and capital market law, where codes of conduct for listed companies are today amongst the key elements of corporate governance in the western world. They are drawn up by stock exchanges, industry associations or semi-governmental regulatory commissions. Their content and priorities depend upon the respective author: regulations drafted by stock exchanges primarily focus on issues of internal *board* organisation; government-related sets of regulations put greater emphasis on external legal and regulatory matters; codes issued by industry associations give comparatively little consideration to accounting and transparency requirements. Beyond *corporate governance codes*, the influence of private standard-setters is also increasing in corporate governance and corporate supervision. They are often transnational players who ensure global circulation of certain corporate governance models, vividly described as “migrating standards”. The forces driving corporate governance are the leading stock exchanges which provide minimum standards of good corporate governance through their admission conditions and sometimes even tighten up the legal requirements. Corporate governance rules are also co-determined by institutional investors. CalPERS – the pension fund for civil servants in California – occupies a prominent position amongst them.

Finally, *proxy advisors* have seen their status rise to acquire hidden corporate governance power in recent times.

From a commercial law perspective, the international law firms deserve recognition. As transaction cost engineers and reputation intermediaries, they contribute to the establishment of certain contractual clauses in M&A agreements worldwide. A prominent example is the "deal protection" agreements through which the prospective buyer exerts mild pressure on the accomplishment of the M&A transaction. In conceptual parallel to the *legal transplants* by means of new legal provisions, such contractual clauses can be termed *private legal transplants*. They largely reflect Anglo-American negotiation practices and cannot often be smoothly inserted into continental European legal systems. The resultant sources of friction, lines of conflict and inconsistencies constitute a generally little-explored research topic of comparative commercial law.

Another phenomenon has been observed in international law which has been termed "the exercise of international public authority". International organisations, such as the OECD, exercise significant influence over national education policy and other policy areas through their regular educational performance studies. The same applies to the Basel Committee on Banking Supervision of the Bank for International Settlements which has significantly co-determined banking regulation with its reform package known as "Basel III". Through the lens of individual and collective self-determination, these and other governance instruments can be seen as the manifestations of public power. If public law should legitimise and restrict the exercise of public power, international law faces the question of how to deal with the challenges of the increasing exercise of public power by *international* organisations and *transnational* networks. Similar problems arise in relation to the dominance of international courts which have long since ceased to merely serve the purposes of dispute settlement but now increasingly also perform *international judicial lawmaking*.

However, from a long-term historical perspective, denationalised or even de-territorialised law is not a completely new phenomenon. "Law without state" was instead the norm historically. European and comparative legal history is therefore increasingly focusing on standards development processes from this pre-state period. This also includes the emergence of non-state law, such as the law of the Roman Curia, which, in the light of European expansion, was faced with the challenge of *global governance* and the development of corresponding normative structures. Even the nation states of the 19th century did not always insist upon a monopoly over the creation of law. There were many areas of autonomous development of law amidst the conflicting priorities of modern state power, such as in

technical standards but also under the protection of contractual freedom in the field of private law. The term “regulated self-regulation” was coined for such forms and has today become a dictum in governance research.

III. Options models as regulatory instruments

A second notable trend in modern lawmaking is the development of options models. In contrast to conventional regulations, they do not bindingly stipulate any specific set of legal rules for the market players but instead give them a choice between different regulatory models. Such option and choice systems are becoming increasingly significant amongst national and supranational legislators. Their advocates emphasise that they combine the benefits of optional standards with those of mandatory law. On one hand, they offer the market players a certain degree of choice while, on the other, continuing to ensure legal certainty and transparency through the restriction of influence.

Options models can be systematically categorised based on different perspectives. They do not exclude one another but can instead be combined. An initial categorisation depends on whether the option decision concerns individual regulatory elements or an entire set of regulations. Secondly, options models can be differentiated under Union law depending upon whether the option right is granted to the Member States or the market players themselves. A third distinction differentiates between regulations that apply if the party entitled to choose does not decide against them (*opt-out* model) and those which must expressly be approved (*opt-in* model). The structure of the legal options model can influence private autonomous choices – “menus matter!” As the theoretical and empirical research shows, some “menu options” are more tempting than others. Distortions of perception and persistence tendencies as a result of network or learning effects influence the actual “menu selection” of those at whom the standards are addressed. The legislator can make use of the so-called *endowment effect* to promote its regulatory objectives, which results in market players waiving optional standard regulation less frequently in legal reality. In general terms, the optimal legal design of options models is becoming an increasingly important fundamental question for law and legal practice.

Options models are currently proving extremely popular in European private law, where they are also referred to as the “28 model”. This means the provision of supranational forms of organisation, legal titles or regulatory systems which do not replace the legislation of the 27 Member States of the European Union but instead complement it. To illustrate the point by way of example, anyone wishing to set up a limited company which is to operate in the single market should not just have the French *société anonyme* (SA) or the Dutch *namenlose*

vernootschap (NV) available to them but instead also the European company (SE) as a genuinely supranational form of organisation. Optional legal instruments are also commonplace in European intellectual property law. With the community trade mark and the community design, supranational protective titles have been created which exist in parallel to national protective laws. They should above all contribute to overcoming the territorial restriction of national protective rights. They have now also been joined by the European patent. Academic preparatory work on an optional instrument in Europe has also made significant progress in insurance contract law. As part of the *Draft Common Frame of Reference*, an international group of researchers has presented a draft regulation for general issues of insurance contract law: the *Principles of European Insurance Contract Law*. They are set out as a fully developed model of an optional instrument which can be chosen by the market players. Regulations for specific insurance segments are still pending. The most recent example of optional Union private law is the European Commission's draft regulation on a Common European Sales Law. It is also based on the options model by leaving national contract law unaffected and only entering into force if the contracting parties agree.

The discussion over the legal nature, objective, legal framework, areas of application, benefits and problems of such optional instruments and their possible contribution to the completion of the European single market is still at an early stage. Different issues present themselves here from one field of law to another. A handful of fundamental issues across all fields can nevertheless be identified. At the start of all reform debates over options models is the question of the jurisdiction of Union law. It has been settled for company and intellectual property law but, for example, is fiercely contested for sales law. Once Union jurisdiction is established, the question of a legal policy requirement is not answered but instead first presented. Seriously addressing this is important above all because the unification of laws takes up significant resources and an estimated cost-benefit calculation must therefore at least be made. Conceptually, attention should also be paid to the interlocking of supranational and national provisions. Is a full supranational law the best approach or should extensive references to national law be used? How should the closing of loopholes be addressed? Finally, options models raise the question of the competition of legal systems in European private law – admittedly from a little-explored perspective to date. This does not concern the horizontal competition between several Member States but instead vertical regulatory competition between the supranational level and the Member States level. The operating conditions and disturbance variables of such vertical regulatory competition have not yet been extensively examined academically.

IV. Multi-level systems as regulatory architecture

The new diversity of regulators and legal sources often also results in a new regulatory architecture which could be described with a term from European political science research, *multi-level governance*. As a vivid metaphor, it not only refers to the simple distribution of decision-making and responsibility at different levels but also emphasises the need to link them together to establish a comprehensive integral system. In addition to different regulatory levels (supranational – national), the widely understood governance term also refers to different forms of governance (hierarchical – non-hierarchical) and a new diversity of players (state – non-state). Special attention should be paid to the emergence of soft governance instruments and the increase in importance of private players as promoters of European policy. As an ideal-typical interaction model in the multi-level system of the European Commission, political scientists differentiate between hierarchy, negotiation, competition and cooperation.

The interdisciplinary bridge or network concept of multi-level governance also lends itself outstandingly well to the conceptualisation of corporate governance in Europe. A first problem level concerns the distribution of tasks in European company and capital market law between national and supranational legislators (keyword: jurisdiction issues of corporate governance). On a second level, it concerns the legal relationship between sovereign lawmaking and self-regulation (keyword: corporate governance through codes of conduct). The third level involves private market players as effective standard-setters (keyword: corporate governance by stock exchanges, institutional investors and proxy advisors). As in other regulatory areas, policy coordination in European company and capital market law oscillates between hierarchical governance, mutual amendment and inter-jurisdictional competition.

A similar regulatory pluralism and a similar regulatory architecture are also found in many fundamental and individual issues in the law of the European Union, in the field of international criminal law and in international accounting and tax law. Historical forms of multi-normativity are a major research subject for legal historians. They are often interested in the co-existence of secular/legal and religious normativity.