Review of the book Making European Private Law

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Making European Private Law: Governance Design By Fabrizio Cafaggi and Horatia Muir-Watt (eds) (Edward Elgar: Cheltenham and Northampton 2008) xi + 355 pages inc table of cases, index, £85, Hardcover ISBN 978-1-84720-198-0

This book is a fundamental and welcome contribution to the field of European private law. Until now, the debate about European private law mainly focused on the drafting of substantive rules (such as the Principles of European Contract Law and the rules of the 'Common Frame of Reference'), on the question of what are the best methods of harmonization and on whether such harmonization is actually needed or possible. The question about so-called 'governance design' was neglected: the consequences of Europeanization for the institutional setting of private law. As private law operates through both public legislation (of national and European origin) and private law-making, one important question is what Europeanization means for the optimal allocation between public and private regulation: it is not likely that the allocation we have had since the nineteenth century (in which private law was entirely a matter for the national States) can remain as it was. A related question is whether European private law is in need of a governance structure of its own: the legislative products of the European Union are framed according to policy fields and do not follow the traditional distinctions between private and public law. The complex interrelationship of national and European private law also does not fit the traditional scheme of a hierarchy of norms familiar to us at the national level.

This volume aims at discussing these (and other) questions of institutional design in European private law. Apart from the introduction by Fabrizio Cafaggi (EUI, Florence) and Horatia Muir-Watt (Paris), there are 13 contributions, loosely organized in four different parts. I will briefly discuss each of these contributions and end with an overall conclusion.

The first part ('Different facets of market integration') contains contributions by Giuliano Amato (EUI), Michele Taruffo (Pavia), Wolfgang Kerber (Marburg),

Antonina Bakardjieva Engelbrekt (EUI), and Katalin Cseres (Amsterdam). Of these five authors, Wolfgang Kerber ('European system of private laws: an economic perspective') comes closest to what the editors had in mind when they carved out the questions to be addressed in this book. Kerber discusses the factors influencing the choice of the optimal degree of centralization and decentralization of legal competences. He identifies seven groups of economic criteria, based on efficiency, normative criteria, and regulatory competition. This leads him to claim that mandatory rules should combine minimum harmonization and decentralization while facilitative rules should be part of an optional code. This is an important insight, but one that the European Commission does not seem to accept: in its recent draft for a new directive on 'consumer rights' (2008), it proposes full harmonization in the area of consumer protection (typically a field for mandatory rules).

Kerber's contribution fits in well with the brief article by Giuliano Amato about 'multilevel Europe' in which the present state of affairs concerning overlapping sources of legitimacy and competencies is described in clear wording. As Amato says: 'civil law scholars will not receive from Europe the perfect wholeness of a civil code' (p 45) and he is right in stating that while there may be more than one level of governance, the citizen has the right to expect clear and harmonious rules. This sketches the true dilemma in making European private law: as long as private law comes from two different sources (the European and the national), it is impossible to re-create the unified system that private law once was. If one also accepts private regulation as a legitimate source of law, the proper institutional setting is even more difficult to imagine.

The other contributions in Part 1 deal to a much lesser extent with the central question of governance design. Michele Taruffo discusses the harmonization of civil litigation in Europe: while a European procedural code is impossible and undesirable, Taruffo still considers it useful to find a European common core of procedural law by way of principles, thus allowing the ALI/Unidroit Principles of Transnational Civil Procedure (2006) to get the attention they deserve. Taruffo correctly looks at this set of principles as a frame of reference. Engelbrekt (EUI) and Cseres (Amsterdam) both look into the consequences of the EU enlargement on private law (in particular consumer law and competition law). Europeanization of law in the new Member States is different because of the traditionally different relationship between public and private law in these countries: the role of the State was much more important and the judicial profession was always marginalized. The Europeanization process creates challenges even bigger than those in the old Member States.

Part 2 looks at two non-governmental organizations engaged in private lawmaking. While harmonization efforts are now often initiated by private parties, this must mean something for the institutional design of European private law, including the requirements the 'law'-making parties should meet as to legitimacy and accountability. The first contribution is by Hans van Loon (The Hague),

who discusses the Hague Convention on Private International Law as a law-making organization. The interesting experience of the Hague Convention is that a combination of hard and soft law works best in legitimizing new rules. I like to think this view is in line with Kerber's plea to have mandatory minimum rules where necessary and leave more freedom where possible.

The second article in this part was written by Lance Liebman, director of the American Law InstĂtute. Liebman's overview is useful in that it sketches the criticism expressed against the ALI's Restatements, criticism that is very similar to the critique on European sets of principles in the area of private law. First, are general principles of law possible at all? The American experience shows they are, albeit that they can be applied to a much greater extent in the US (with one language and one legal culture) than in Europe. It is not likely that a national highest court in Europe would hold what the Arizona Supreme Court held in 1938, namely that the Restatements would be followed where Arizona law was silent. Second, should such recommendations be made by an elite? This is debated in the United States, where the ALI represents only a small portion of the country's legal professionals. In Europe, the discussion is about the democratic legitimacy of rules such as those in the Draft Common Frame of Reference for European Private Law (2008). Liebmann is right to suggest that privately made rules may not have any official authority, but will only exert influence when the rules are persuasive to those who *do* act with democratic legitimacy (such as the legislators and the courts). If this is true, the lack of democratic input in the European process should be put into perspective. In the end, Liebman suggests creating a similar institution to the ALI for Europe.

Part 3 looks in more detail at the relationship between governance and European private law. In a brief contribution, Mark Freedland (Oxford) discusses the personal work contract in its European and national setting, suggesting this is a fruitful area for looking into the optimal design of governance—unfortunately, the relevant questions are only touched upon.

Tony Prosser (Bristol) provides a much needed public law perspective on governance of private law. In his contribution on 'Regulatory agencies, regulatory legitimacy, and European private law', he rightly assumes that the work of regulatory authorities cannot be easily classified as either private law or public law. One only needs to think of regulation of the Internet, financial services, industry standard-setting, and broadcasting to realize that regulators often make use of private law tools (such as contracts) to implement regulatory schemes. This is important because we need to realize that the new European 'private law' will be different from the private law that we are familiar with in the national context. The age-old distinction between private and public law can no longer be maintained under the influence of Europeanization; Prosser is right to state that this calls for new forms of legitimacy and for a vision of how to design appropriate governance arrangements. Although Prosser is right to raise these questions, he does not provide the answers.

Colin Scott (Dublin) offers an important analysis of the nature of private regulation: why would such regulation be binding and why should it be legitimate to leave law-making to actors other than governments and parliaments? In particular the legitimacy question is important when designing an optimal system of European private law: if private regulation has to have a role in that system, it should be clear when it is legitimate to leave rule-making to private parties. Scott shows convincingly that there are several arguments why private rule-making can be just as legitimate as public legislation. One is that in many cases of public legislative authority Parliament is not involved either. Another is that legitimacy does not only have a 'procedural' dimension, but also a substantive one: if the outcomes or effects of rules are generally considered to be 'right', we need not bother too much about the way in which they came about. What this means in the context of designing a new private law for Europe does not immediately become clear—other than that private regulation *can* play a role.

The article by Hugh Collins (LSE) is highly interesting because it takes stock of how the position of the European Union today differs from that of the nineteenth century nation States when addressing regulation of civil society through private law. A first difference is that the EU has only limited competence, prompting the need for a multi-level private law. Accepting Collins' insight, one should raise the question how it can be that the Draft Common Frame of Reference for European Private Law (2008) takes this insight so little into account: private law at the European level can only be like a code in a very superficial way and will have to be applied and interpreted differently from national law. A 'European Civil Code' can never ensure uniformity of laws in the present political constellation in Europe, in which a federal private law court does not exist and in which there are as many private law cultures as countries. A second difference is the changing character of private law itself. One aspect of this is that private law is now often of a regulatory nature; another is that it needs to take into account (to quote Teubner) 'transnational sectoral private law regimes'. The latter point goes to the heart of this book: how to fit such regimes (for example on private commercial transactions or the *lex sportiva*) into the broader institutional setting? Should this be left entirely to private actors or should the European legislator create default rules? The governance implications of such choices are quite clear.

The fourth and last part of this book contains one lengthy contribution by Fabrizio Cafaggi in which he adds his own conclusions. It is a valuable piece of work that sketches the most important developments and remaining questions in the area of designing European private law. Cafaggi's main point is that there is a strong correlation between the level of harmonization and the necessity of a governance system: the lower the level of harmonization, the greater the need for a system of governance. This makes sense as coordination between governance levels is particularly needed where these levels compete; in a fully harmonized

system (unlikely to establish at the European level), such coordination is superfluous.

At a more concrete level, some of the relevant issues are whether to adopt principle or rule-based legislation and mandatory or default rules. Cafaggi sees the need for governance of European private law emerge at three different levels: legislative design, implementation of legislation, and coupling institutions with legislation to build consumer confidence and address market failures. This focus on legislative design and implementation brings us to the core of the governance question. For Cafaggi, total harmonization is not the answer: European private law should remain a multi-level system, but one that should be better coordinated at both the level of the Commission and of the judiciary. This can be done by creating a permanent judicial conference specialized in European private law.

All in all, the great merit of this book is that it puts the issue of governance of private law high on the academic agenda. Several of the contributions (in particular those of Kerber and Cafaggi) also try to provide concrete answers, but on the whole the book is better at asking questions than at answering them. This is no criticism: in this relatively new field—at least when applied to private law—we may need more questions than answers and the book excels in providing these questions. It thus sets an important research agenda for the coming years.

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