# Private Law and the State

## Comparative Perceptions and Historical Observations

By Nils Jansen, Münster/Westfalen, and
Ralf Michaels, Durham, N.C.*

*Table of Contents*



---

* This is a preparatory article for a Joint Conference of the *American Journal of Comparative Law* and *Rabels Zeitschrift* "Beyond the State – Rethinking Private Law", to be held at the Max-Planck-Institute in Hamburg on July 12–14, 2007. For further information, see <www.private-law.org>. Thanks for valuable comments to *Joan Magat*, *Mathias Reimann*, and *Reinhard Zimmermann*.

*Literature cited in abbreviated form: Harold J. Berman*, Law and Revolution, The Formation of the Western Legal Tradition (1983); *Helmut Coing*, Europäisches Privatrecht I: Älteres Gemeines Recht (1500–1800) (1985); *Martin van Crefeld*, The Rise and Decline of the State (1999); *Marie T. Fögen*, Römische Rechtsgeschichten (2002); *Nils Jansen*, Die Struktur des Haftungsrechts, Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz (2003); *Ralf Michaels*, The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism: Wayne L.Rev. 51 (2005) 1209ff.; *Mathias Reimann*, The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code: Am.J.Comp.L. 37 (1989) 95ff.; *Wolfgang Reinhard*, Geschichte der Staatsgewalt, Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart[3] (2002); *Fritz Schulz*, Geschichte der Römischen Rechtswissenschaft (1961); *Werner Teubner*, Kodifikation und Rechtsreform in England, Ein Beitrag zur Untersuchung des Einflusses von Naturrecht und Utilitarismus auf die Idee einer Kodifikation des englischen Rechts (1974); *Gunther A. Weiss*, The Enchantment of Codification in the Common-Law World: Yale J. Int.L. 25 (2000) 435ff.; *Franz Wieacker*, Privatrechtsgeschichte der Neuzeit[2] (1967) (cited Privatrechtsgeschichte); *id.*, Römische Rechtsgeschichte, Erster Abschnitt (1988) (cited Röm. Rechtsgeschichte); *Reinhard Zimmermann*, The Law of Obligations, Roman Foundations of the Civilian Tradition (paperback ed., 1996) (cited Obligations); *id.*, Codification: History and Present Significance of an Idea: European Review of Private Law 3 (1995) 95ff. (cited Codification).

RabelsZ Bd. 71 (2007) S. 345–397

Everyone is talking about the challenges that Europeanization and globalization pose for the law, including private law. Yet there is remarkably little conceptual clarity about exactly what these challenges consist of. To a significant degree, such developments appear to concern the relation between private law and the state. Yet, although the general relation between law and the state is a regular topic for legal theory, the specificities of private law are often lost. Even cursory analysis suggests, however, that the relation of private law to the state is not only highly complex and distinct, it is also, apparently, not the same in different legal systems. Nevertheless, it has not yet been comprehensively analysed; in fact, little is known of how private law relates to the state in any single legal system.

This article, together with a companion piece[1], aims to shed light on some of the issues involved. Of course, the manifold relations between private law and the state are far too complex to be analysed comprehensively in a single article, or even two. The primary aim of these two articles is not to provide answers, but to raise questions that may stimulate further discussion. Whereas the other article will structure and organize the fragmented debate in legal theory and comparative law on the impact of Europeanization and globalization, this article provides a historical and comparative background to the issues involved. Its first part identifies different perceptions of the relation of private law and the state in Germany and in the United States in the 20th century. A second part turns to the earlier history of the relationship of the state and private law. There, we examine, on the one hand, for which historical conditions and reasons the state became the ultimate source of authority for private law in Europe. On the other hand, we ask why the state nevertheless

[1] *Michaels/Jansen*, Private Law Beyond the State: Europeanization, Globalization, Privatization: Am.J.Comp.L. 54 (2006) 843ff.

remained largely irrelevant for doctrinal discussions and jurisprudential decisions within private law. At the same time, we identify factors that may explain the different developments in the United States and on the European continent. On the basis of these comparative and historical observations, we conclude with more general, "theoretical" remarks on some of the problems that may be seen as core aspects of the relation of private law and the state.

## I. Comparative Perceptions

### 1. European Perceptions: The State in the Background

During much of the 19th and 20th centuries, European scholars worked on two closely connected assumptions. One was that the validity of all law, including private law, ultimately depends exclusively on the state[2]. Nearly all private disputes discussed in academic literature had been, or could have been, brought before the state's courts, which applied, as a matter of course, a state's law. For most lawyers, this was neither a problem nor in any sense peculiar: Was it not obvious that *all* law's validity depended on the state? In fact, when *Hans Kelsen* and *Herbert Hart* described the positive law's validity and identity as conceptually depending on a basic norm or a rule of recognition[3] and thus presupposing a sovereign's authority[4], they gave expression to a common understanding. For most lawyers it was simply assumed that such a sovereign could only be a national state[5] – be it represented by legislative or judicial authorities.

The second assumption was that insofar as one looked at the substance of rules and principles guiding the relations between private individuals (private

[2] See only *Eugen Ehrlich*, Internationales Privatrecht: Deutsche Rundschau 126 (1906) 419, 425: "Jetzt ist es selbstverständlich nur der Staat, der bestimmt, welches Recht in seinen Gemarkungen gelten solle" (see *Michaels* 1245f.); *Reinhard* 281: "Recht ist heute von der Staatsgewalt monopolisiert."

[3] *Hans Kelsen*, Reine Rechtslehre[2] (1960) 196ff. (cited: Rechtslehre); *id.*, Pure Theory of Law (1967) 193ff. (cited Theory of Law); *Herbert L.A. Hart*, The Concept of Law[2] (1994) 100ff. Note that both authors relativised the distinction between public and private law: *Kelsen*, Rechtslehre, 284ff.; *id.*, Theory of Law, 281f.; *Hart*, *loc. cit.*, 27ff.

[4] *Hart*, The Concept of Law (previous note) 50ff.

[5] For a non-representative sample of authors from various traditions, see *Klaus F. Röhl*, Allgemeine Rechtslehre[2] (2001) 184ff., 186, 282ff.; *Dieter Grimm*, Rechtsentstehung, in: Einführung in das Recht[2], ed. by *id.* (1991) 40ff., 41: "Produkt staatlicher Entscheidung"; *Johann Braun*, Einführung in die Rechtswissenschaft[2] (2001) 216ff.; (critically) *Josef Esser*, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts[4] (1990) 337: "der rechtstheoretische Solipsismus der etatistischen Haltung entspricht völlig dem Ausschließlichkeitsanspruch des politischen Positivismus"; *Roberto M. Unger*, Knowledge and Politics (1975) 281–284. For a succinct summary, see *Edgar Bodenheimer*, Jurisprudence (1940) 52ff.

law)[6], it was largely irrelevant that the law's validity depended on the state. Even if the state monopolised the administration of the law, private law in this sense was usually not seen as part of public governance, but as an expression of corrective justice that was largely autonomous of governmental decisionmaking. Codifications are normally written not by politicians but by legal experts; and the great European codifications were much more a restatement meant to improve the law technically[7] than a fundamental change of substance[8]. According to a classical view, basic principles of private law claim universal validity; and the state has no legitimate governmental interests in matters of private law[9]. Thus, the sovereign could be regarded as a neutral authority to balance conflicting interests of two parties and to find solutions for conflicts that were regarded as purely private[10].

This assumption was maintained even when the principles of corrective justice that applied to such conflicts became an object of political controversy. Obviously, in such cases modern states "intervened" into private law by means of (democratically legitimated) statutes; strict liability and consumer protection are more recent examples of such instances of private law becom-

---

[6] Of course, this statement presupposes a separable category of private law, which *Kelsen*, for example, denied: Reine Rechtslehre (*supra* n. 3) 109ff. For a more comprehensive discussion of the concept of private law in German and American discourse, see *Michaels/Jansen* (*supra* n. 1) 846ff.

[7] *Konrad Zweigert/Hein Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts[3] (1996) 78ff., 84ff. (for France), 137ff., 142ff.; *Paul Koschaker*, Europa und das römische Recht[4] (1966) 205 (for Germany). On the methodological debate see *Bernd Mertens*, Gesetzgebungskunst im Zeitalter der Kodifikation (2004) 18ff., 33ff., 51ff., further references within (cited Gesetzgebungskunst).

[8] See *Zimmermann*, Codification; *Nils Jansen*, European Civil Code, in: Elgar Encyclopedia of Comparative Law, ed. by *Jan M. Smits* (2006) 247ff. Thus, *Bernhard Windscheid* had understood the German Civil Code as a "point in the development" of the law ("ein Punkt in der Entwicklung"): Die geschichtliche Schule in der Rechtswissenschaft (1878), in: *id.*, Gesammelte Reden und Abhandlungen, ed. by *Paul Oertmann* (1904) 66, 75f.; cf. also *Gottlieb Planck*, Zur Kritik des Entwurfes eines bürgerlichen Gesetzbuches für das Deutsche Reich: Archiv für die civilistische Praxis (AcP) 75 (1889) 327, 331ff.

[9] On further tensions between the national-state form of the private law and its non-positive, universal values see *Christian Joerges*, Die Wissenschaft vom Privatrecht und der Nationalstaat, in: Rechtswissenschaft in der Bonner Republik, ed. by *Dieter Simon* (1994) 311ff., whose focus is, however, on the tensions between the supposedly apolitical, formalistic understanding of private law, which may be attributed to the 18th and 19th century German "Privatrechtsgesellschaft", and politically motivated changes during the 20th century. Here, the emphasis is more on the shift from a corrective to an instrumental understanding of private law. It is not unlikely, though, that both developments were intellectually connected.

[10] See *Philipp Heck*, Grundriß des Schuldrechts (1929) 1ff.; *Ludwig Enneccerus/Heinrich Lehmann*, Recht der Schuldverhältnisse, Ein Lehrbuch[14] (1954) 5ff.; *Ulrich Huber*, Leistungsstörungen I: Die allgemeinen Grundlagen, der Tatbestand des Schuldnerverzugs, die vom Schuldner zu vertretenden Umstände (1999) 24ff.; cf. also *Werner Flume*, Allgemeiner Teil des Bürgerlichen Rechts II[3]: Das Rechtsgeschäft (1974) 3ff.

ing politically controversial. However, most private lawyers did not regard such debates as more "political" than earlier doctrinal discussions concerning the *laesio enormis*[11] or *culpa levissima*[12]. Even if these conflicts were politically controversial and of significant relevance for the economy and society, they all were understood by most lawyers[13] as concerning only the purely private relations between private actors. Only exceptionally, when, in the heyday of the nation state, the economic constitution of society was discussed on a strongly ideological basis, did private law become the object of regulatory considerations[14]. Yet these discussions typically concerned only economic law, for only such "modern", innovative parts of private law were understood to especially shape and change the social reality[15].

---

[11] On contractual remedies because of some gross disproportionality in exchange cf. *Zimmermann*, Obligations 259ff., 264ff., further references within.

[12] Quasi-strict liability for slightest fault, amounting to "negligence without fault"; see *Jansen* 340ff., 433ff., further references within.

[13] But see, as exceptions, *Victor Mataja*, Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie (Leipzig 1888): an economic analysis, *avant la lettre*, of extracontractual liability (cf. *Izhak Englard*, Victor Mataja's Liability for Damages from an Economic Viewpoint: A Centennial to an Ignored Economic Analysis of Tort: International Review of Law and Economics 10 [1990] 173ff.); *Karl Renner*, Die Rechtsinstitute des Privatrechts und ihre soziale Funktion, Ein Beitrag zur Kritik des bürgerlichen Rechts (1965 [originally published 1929]) 58ff. and *passim*: a socio-economic analysis of central institutes of private law, inspired by Marxist ideas. It is no coincidence that both works have long been neglected by the dominant legal discourse.

[14] On the massive interventions into private law during the Republic of Weimar, see *Knut W. Nörr*, Zwischen den Mühlsteinen, Eine Privatrechtsgeschichte der Weimarer Republik (1988) 3ff. These interventions were largely due to wartime viz. postwar economy. What is more, genuinely economic, instrumental contributions, like *Franz Böhm*, Wettbewerb und Monopolkampf (1933) 187ff., 210ff., 318ff.; *id.*, Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung (1937) 54ff.; more reluctantly *id.*, Privatrechtsgesellschaft und Marktwirtschaft: Ordo, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 17 (1966) 75ff., were not published before the Third Reich. For more legal contributions see especially *Walter Schmidt-Rimpler*, Grundfragen einer Erneuerung des Vertragsrechts: AcP 147 (1941), 130ff., 149ff., 157ff.; *Walter Hallstein*, Von der Sozialisierung des Privatrechts: Zeitschrift für die gesamte Staatswissenschaft 102 (1942) 530ff., 546f.: the individual exercised his rights as "Funktionär" or "Organ der Rechtsordnung"; *id.*, Wiederherstellung des Privatrechts: Süddeutsche Juristen-Zeitung 1946, 1, 6f.; *Ludwig Raiser*, Wirtschaftsverfassung als Rechtsproblem, in: Festschrift (FS) Julius von Gierke (1950) 181, 196ff.; *Ernst Steindorff*, Politik des Gesetzes als Auslegungsmaßstab im Wirtschaftsrecht, in: FS Karl Larenz zum 70. Geburtstag (1973) 217ff.; *id.*, Wirtschaftsordnung und -steuerung durch Privatrecht?, in: FS Ludwig Raiser (1974) 621ff.; *Ernst-Joachim Mestmäcker*, Über das Verhältnis des Rechts der Wettbewerbsbeschränkungen zum Privatrecht: AcP 168 (1968) 235, 237ff.; cf. also *id.*, Der Kampf ums Recht in der offenen Gesellschaft: Rechtstheorie 20 (1989) 273, 281ff. A survey of the discussion is given by *Joerges* (*supra* n. 9) 324ff.

[15] *Nörr* 16ff., 42ff.; *Steindorff* 232f. (both *supra* n. 14). Accordingly, this debate was largely confined to economic jurists; it had no lasting impact on the general understanding of private law method – although the idea of economic law had been devised as a critique of exactly this method; see Wirtschaftsrecht als Kritik des Privatrechts, ed. by *Heinz-Dieter*

Accordingly, although influenced by changing or controversial social values, the traditional core areas of private law, such as the law of obligations, property and inheritance, were not regarded as a means of promoting social change or furthering third-party interests and collective goals[16]. At least in Europe, these latter objectives were widely understood to be the domain of public law; only in this domain was the state genuinely active in changing and shaping society. Even the regimes of the Third Reich and the German Democratic Republic soon gave up their (and their theorists') far-reaching plans to socialize private law[17] and left the structure of these core areas of private law largely in their traditional shape[18]. Private law changed its substance to a considerable (though as to its extent, disputed) degree, but these changes were brought about largely as an interpretative reaction to assumed changed circumstances in society, not through intervention by and on account of the state[19]. The plans for a "Volksgesetzbuch" failed[20], and when East Germany finally adopted a new private-law codification in 1975, it looked very much like a modernized version of the old Civil Code[21]. Accordingly, when the law

---

*Assmann et al.* (1980); most recently *Karsten Schmidt*, Wirtschaftsrecht: Nagelprobe des Zivilrechts, Das Kartellrecht als Beispiel: AcP 206 (2006) 169ff.

[16] *Nörr* (*supra* n. 14) 48ff., 72ff., 100ff. Later cf. especially *Ludwig Raiser*, Der Gleichheitsgrundsatz im Privatrecht: Zeitschrift für das gesamte Handelsrecht (ZHR) 111 (1948) 75, 78ff. Although proceeding from the assumption that the principle of equality could have the function of achieving a certain state of society (77) and despite arguing on the basis of arguments of *Böhm*, *Eucken* and *Hallstein* (93ff.; cf. n. 14), *Raiser* (this note) apparently understood these core areas of private law primarily as mirroring social life (77); accordingly, he mostly argued as if private law concerned only the relations between two (or more) individuals (cf. esp. 88, but see 95f.). Some opposing views can be found in: *Wolfgang Däubler u.a.*, Kommentar zum Bürgerlichen Gesetzbuch I-VI (1979–90) (Reihe Alternativkommentare); see also, e.g., *Christian Joerges*, Bereicherungsrecht als Wirtschaftsrecht, Eine Untersuchung zur Entwicklung von Leistungs- und Eingriffskondiktion (1977).

[17] *Inga Markovits*, Sozialistisches und bürgerliches Zivilrechtsdenken in der DDR (1969) 105ff.; *ead.*, Civil Law in East Germany – Its Development and Relation to Soviet Law and Ideology: Yale L.J. 78 (1968) 1, 35ff.; see also *Hans-Peter Haferkamp*, Das Bürgerliche Gesetzbuch während des Nationalsozialismus und in der DDR – mögliche Aspekte und Grenzen eines Vergleichs (2005).

[18] This conflict between program and action has confused some scholars; see, e.g., *Uwe Wesel*, Geschichte des Rechts (1997) 474 ("im Zivilrecht änderte sich einiges"), 475 ("Es änderte sich nicht viel.").

[19] *Prima facie*, this thesis appears to differ from *Bernd Rüthers*, Die unbegrenzte Auslegung, Zum Wandel der Privatrechtsordnung im Nationalsozialismus[6] (2005) 114ff. *et passim*, who emphasises political influence on legal methods in the Third Reich as opposed to economic and social influences in the Republic of Weimar. However, the distinction is less sharp once we accept that, in a totalitarian state, what *Rüthers* calls "political" encompasses economy and "the social".

[20] *Gerd Brüggemeier*, Oberstes Gesetz ist das Wohl des deutschen Volkes, Das Projekt des "Volksgesetzbuches": Juristenzeitung (JZ) 1990, 24ff.

[21] Das Zivilgesetzbuch der DDR vom 19. Juni 1975, ed. by *Jörg Eckert/Hans Hattenhauer* (1995).

of obligations in West Germany became more "social" in the course of the 20th century, the prevailing explanation was that the law had (more or less directly) responded to social and cultural change; apparently the state as such had no particular role to play in such processes[22].

Today, both of these assumptions have lost their self-evident character. As a matter of fact, they offered an incomplete picture of the law in 19th and 20th century Europe. Private-law rules could never be reduced to a fair balancing of the interests of individual parties in a legal conflict: The ability to acquire *bona fide* the property of a third person or the question of how to design the legal form of business enterprises have always been guided by the public interest in a flourishing market[23]; and the natural-law codifications were driven to a significant degree by an impulse to further the common good[24]. Furthermore, private arbitration[25] and transnational customs of trade developing independently, without a legal basis in a specific state's law[26], had existed long before the 19th century. But in the 20th century, scholars nonetheless by and large did not accept transnational law as autonomous *vis-à-vis* national legal systems[27]. Moreover, and more importantly, most scholars writing on private law considered such developments to be peripheral to what was understood to be private law.

---

[22] See *Franz Wieacker*, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft (1953) 18ff.; *Claus-Wilhelm Canaris*, Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner Materialisierung: AcP 200 (2000) 273ff.: Both authors attribute changes within the traditional core areas of private law primarily to judges expressing changing social values, not to interventions of the state.

[23] Cf. *David Mevius*, Commentarii in Jus Lubecense Libri Quinque[4] (Frankfurt and Leipzig 1700) *pars* III, *tit.* II, *art.* II, n. 5, arguing that the institute of *bona-fide* acquisition had been introduced by statutory law – against the principles of the *ius commune* – for public commercial interests: "Prospectum enim hâc in re est commerciorum utilitati & securitati, cui Lubecensis Jurisprudentia contra merum jus laxè opitulatur, quia nempe ad summum Reipublicae, cui Leges conduntur, pertineat."

[24] See *infra* at nn. 198f.

[25] *Knut W. Nörr/Kerstin Schlecht*, Zur Entwicklung der Schiedsgerichtsbarkeit in Deutschland: Gesetze und Entwürfe des 19. Jahrhunderts, in: From lex mercatoria to Commercial Law, ed. by *Vito Piergiovanni* (2005) 165, 166ff. (Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanischen Rechtsgeschichte, 24); *Julian D.M. Lew*, Achieving the Dream: Autonomous Arbitration: Arbitr. Int. 22 (2006) 179, 183f.

[26] Cf. *Hans Großmann-Doerth*, Der Jurist und das autonome Recht des Welthandels: Juristische Wochenschrift 1929, 3447ff.

[27] Cf. *Francis A. Mann*, Lex Facit Arbitrum, in: International Arbitration, Liber Amicorum for Martin Domke (1967) 157, 159: "In the legal sense no international commercial arbitration exists. … [E]very arbitration is a national arbitration, that is to say, subject to a specific system of national law"; today similarly *Christian von Bar/Peter Mankowski*, Internationales Privatrecht[2] (2003) § 2, nn. 75ff.

## 2. American Perceptions: Instrumentalism without a State

Interestingly, the American legal system has experienced a remarkably different development. On the one hand, even in the times of legal formalism, the distinction between public and private law was of less normative significance than on the European continent[28]. Today only proponents of corrective-justice approaches to private law, such as *Fried* or *Coleman*[29], explicitly argue for a sharp distinction of private and public law and explain private law as independent of public concerns. On the other hand, American judges had developed the law on the basis of instrumental considerations as early as the beginning of the 19th century[30]; and in the 20th century, as result of the legal realists' critique of the private/public distinction as artificial[31], it has been common for them to develop private law on the basis of public policy. For judges, it is a matter of course to understand private law as a means of achieving social ends. Although there is wide disagreement over what these ends should be, there is fairly little doubt that private law must be understood and evaluated in light of these ends. Indeed, even a decision like *Lochner* v. *U.S.*[32], now universally decried as an outburst of both judicial formalism and a false preference for an autonomous private sphere over valid public concern, is really based on the weighing of public concerns – on the one hand "the interest of the state that its population should be strong and robust"[33], on the other "the ability of the laborer to support himself and his family"[34]. Justice Holmes made clear that the decision concerned conflicting instrumental theories when he wrote, in dissent, that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*"[35].

However, whereas progressive legal realists and theoreticians of the New Deal connected these social ends explicitly with the state[36], today these

---

[28] *John H. Merryman*, The Public Law-Private Law Distinction in European and American Law: J. Publ. L. 17 (1963) 3ff.; see also *Michaels/Jansen* (*supra* n. 1) 846ff., 851f.

[29] Cf. *Charles Fried*, Contract as Promise (1981); *Richard A. Epstein*, A Theory of Strict Liability: J. Leg. Stud. 2 (1973) 151ff.; *Ernest J. Weinrib*, The Idea of Private Law (1995); *Arthur Ripstein*, Equality, Responsibility, and the Law (1999); *Jules L. Coleman*, The Practice of Principle (2001) 3ff.

[30] *Morton J. Horwitz*, The Transformation of American Law 1780–1860 (1977) 1ff., 17ff.

[31] Cf. *Morton J. Horwitz*, The Transformation of American Law 1870–1960 (1992) 206 (cited American Law 1870–1960); *id.*, The History of the Public/Private Distinction: U. Pa. L.Rev. 130 (1982) 1423ff.

[32] *Lochner* v. *U.S.*, 198 U.S. 45 (1905).

[33] *Lochner* v. *U.S.* (previous note) at 60.

[34] *Lochner* v. *U.S.* (*supra* n. 32) at 56.

[35] *Lochner* v. *U.S.* (*supra* n. 32) at 75. See also *Lawrence Friedman*, American Law in the 20th Century (2002) 18: "In a sense, Holmes and [the majority] saw eye to eye".

[36] Cf. *Robert L. Hale*, Coercion and Distribution in a Supposedly Non-Coercive State: Political Science Quarterly 38 (1923) 470ff.; *Morris R. Cohen*, Property and Sovereignty:

policies are apparently not derived from or connected with the political domination of the state. Instead, legal academia and, to a lesser degree, the courts have bound themselves interdisciplinarily to other social sciences, especially to economics, including public-choice- or game-theory[37]. Besides following precedent, judges are expected to implement moral norms based in and policies favoured by society, and even when they make decisions based on official policies, they do so not because these policies are official but because they have sufficient social support[38]. Indeed, it seems plausible that the common law in the United States, other than in continental Europe, is thought of as based in society rather than in the state. Paradoxically, it appears that whereas European private law is based on the state but not subordinated to the state's instrumental ends, private law in the United States is subordinated to such ends, but these ends (and the law's validity) are not founded in the state.

## 3. Misperceptions? Transnational Private Law and State Instrumentalism

Recently, this paradoxical difference has changed fundamentally: On the one hand, the state is apparently retreating from the legal system[39]. Thus, private lawmaking has become increasingly common, both within the national legal systems and on a transnational level, and in areas as diverse as labour law, accounting standards, good governance, and sport[40]. With the rise of party autonomy in choice of law it has become usual business for parties to choose the law they wish to be applied to their cases; thus the applicability of a nation's law is subordinated to a private choice. In a parallel development, national courts are regarded more and more as just one option besides international arbitration, which since 1950 has gained an increasing degree of autonomy from national legal systems[41]. Lawyers have started to act and think transnationally[42]. Thus, the intense debate about a modern "lex mercatoria"[43] may be

---

Cornell L.Q. 13 (1927) 8ff.; *id.*, The Basis of Contract: Harvard L.Rev. 46 (1933) 553, 585ff.

[37] Cf. *Brian H. Bix*, Law as an Autonomous Discipline, in: The Oxford Handbook of Legal Studies, ed. by *Peter Cane/Mark Tushnet* (2003) 975, 978ff.

[38] *Melvin A. Eisenberg*, The Nature of the Common Law (1988) 28.

[39] *Philippe Nonet/Philip Selznick*, Law and Society in Transition[2] (2001) 102f.

[40] For a recent overview *Johannes Köndgen*, Privatisierung des Rechts: AcP 206 (2006) 477, 479ff.; cf. *Jens Adolphsen*, Eine lex sportiva für den internationalen Sport?, in: Jahrbuch Junger Zivilrechtswissenschaftler, 2002: Die Privatisierung des Privatrechts, ed. by *Carl-Heinz Witt et al.* (2003) 281ff.; *id.*, Grenzen der internationalen Harmonisierung durch Übernahme internationaler privater Standards: RabelsZ 68 (2004) 154ff.

[41] *Lew* (*supra* n. 25) 184ff., 189ff., 195ff.

[42] Cf. *H. Patrick Glenn*, A Transnational Concept of Law, in: The Oxford Handbook of

understood as an expression of the feeling of many of the participants that an international body of law or legally binding custom is emerging, in addition to and independent of the legal systems of national states[44].

In a parallel development, legal scholars have begun to discuss doctrinal problems and systematic questions of private law as being independent of national legal systems[45]: "Principles" of European and transnational law have emerged[46]; they may be seen as an expression of the feeling that private law can – or even should – be understood as independent of the single states' laws[47]. Even judges are increasingly prepared to transgress the national borders

---

Legal Studies (*supra* n. 37) 839, 844ff.; *Peer Zumbansen*, Transnational Law, in: Elgar Encyclopedia of Comparative Law (*supra* n. 8) 738ff.

[43] Cf. *Ursula Stein*, Lex Mercatoria, Realität und Theorie (1995); for an analysis of the validity of such a body of transnational rules and customs *Michaels* 1218ff.; *id.*, Privatautonomie und Privatrechtskodifikation, Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien: RabelsZ 62 (1998) 580, 601ff., 614ff. (cited Privatautonomie und Privatrechtskodifikation). Defendants of the idea of a *lex mercatoria* include *Clive M. Schmitthoff*, Commercial Law in a Changing Economic Climate[2] (1981) 18ff.; *Jan H. Dalhuisen*, On International Commercial, Financial and Trade Law (2000) 63ff., 98ff.; *Hans-Joachim Mertens*, Nichtlegislatorische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff: RabelsZ 56 (1992) 219, 226ff. (cited Nichtlegislatorische Rechtsvereinheitlichung); *id.*, Lex Mercatoria: A Self-applying System Beyond National Law?, in: Global Law Without a State, ed. by *Gunther Teubner* (1997) 32ff.; *Köndgen* (*supra* n. 40) 501f.; cf. also *Klaus Peter Berger*, Understanding International Commercial Arbitration, in: The Practice of Transnational Law, ed. by *id.* (2000) 5ff.; The Empirical and Theoretical Underpinnings of Law Merchant: Chi. J. Int.L. 5 (2004) 1ff. (Symposium Issue). *Roy Goode*, Commercial Law in the Next Millenium (1998) 88ff., tries to avoid the question; more critically, *Filip De Ly*, International Business Law and Lex Mercatoria (1992) 207ff.

[44] Cf. *Gunther Teubner*, Globale Bukowina, Zur Emergenz eines transnationalen Rechtspluralismus: Rechtshistorisches Journal 15 (1996) 1996, 255, 264ff.

[45] Cf. *Ernst Rabel*, Das Recht des Warenkaufs I (1936); *Ernst von Caemmerer*, Bereicherung und unerlaubte Handlung, in: FS Ernst Rabel I (1954) 333ff.; *Zimmermann*, The Law of Obligations[1] (1990); *Hein Kötz/Axel Flessner*, Europäisches Vertragsrecht I: *Kötz*: Abschluß, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag (1996). In France, similar ideas were expressed already at the beginning of the 20th century; see *Christophe Jamin*, Saleilles' and Lambert's Old Dream Revisited: Am.J.Comp.L. 50 (2002) 701, 705ff. with references.

[46] *Ole Lando/Hugh Beale*, Principles of European Contract Law, Part I/II (2000); *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann*, Principles of European Contract Law, Part III (2003); *UNIDROIT*, Principles of International Commercial Contracts, 2004 ed. (first ed. 1994); see also *Michael J. Bonell*, An International Restatement of Contract Law[3] (2005); *European Group on Tort Law*, Principles of European Tort Law, Text and Commentary (2005); *Study Group on a European Civil Code/Christian von Bar*, Principles of European Law, Benevolent Intervention in Another's Affairs (PEL Ben. Int.) (2006).

[47] *Reinhard Zimmermann*, Roman Law, Contemporary Law, European Law (2001) 107ff.; *id.*, Ius Commune and the Principles of European Contract Law, Contemporary Renewal of an Old Idea, in: European Contract Law, Scots and South African Perspectives, ed. by *Hector MacQueen/Reinhard Zimmermann* (2006) 1ff.; *Reinhard Zimmermann.*, Comparative Law and the Europeanization of Private Law, in: The Oxford Handbook of Comparative Law, ed. by *Mathias Reimann/Reinhard Zimmermann* (2006) 539, 563ff.

of their legal systems and accept foreign judgements or international sources as authoritative. Much debate focuses on human-rights adjudication in which this is now commonplace[48]; in this context, a relevant factor may be the feeling among judges, or within their audiences, that human rights protect citizens against the state and should therefore be understood as an autonomous body of non-state law that is developed and justified in transnational discourse[49]. If similar developments can now increasingly be seen in private law[50], this suggests a possible, though implicit, similar assumption that private law emerges from transnational discourse[51].

On the other hand, state instrumentalism seems to be on the rise. In the United States, the rise of regulatory statutes is deplored as an intrusion of the state into the common law[52]. At the same time, the European Union (in this respect acting like a state) is more and more adopting an "American", instrumental approach to private law[53]: It increasingly uses private-law regulation for pursuing public goals. In consequence, the state becomes an "invisible party" to legal proceedings between private individuals[54]. Consumer

---

[48] *Anne-Marie Slaughter*, A New World Order (2004) 65ff.; *Christopher McCrudden*, A Common Law of Human Rights?, Transnational Judicial Conversations on Constitutional Rights: Oxford J. Leg. Stud. 20 (2000) 499ff., 506ff., with an illuminating discussion of a range of conceptual, normative and theoretical problems: *loc. cit.*, 510ff.; *Ruth Bader Ginsburg*, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication: Cambridge L.J. 64 (2005) 575ff. = Fla. Int. U.L.Rev. 1 (2006) 27ff.; cf. also *Angelika Nußberger*, Wer zitiert wen?, Zur Funktion von Zitaten bei der Herausbildung gemeineuropäischen Verfassungsrechts: JZ 2006 763, 765ff.

[49] *McCrudden* (previous note) 527ff.; *Jeremy Waldron*, Foreign Law and the Modern Ius Gentium: Harvard L.Rev. 119 (2005) 129ff.; *Roger P. Alford*, In Search of a Theory for Constitutional Comparativism: UCLA L. Rev. 52 (2005) 639, 659ff. (Natural Law); cf. also *Reinhard* 25f.

[50] Examples are *Fairchild* v. *Glenhaven Funeral Services* (2000), 1 A.C. 32ff. (H.L.); for Germany, *Bundesgerichtshof*, January 12, 2005, reference number: XII ZR 227/03 (BGHZ 162, 1, 7f.); *Walter Odersky*, Harmonisierende Auslegung und europäische Rechtskultur: Zeitschrift für Europäisches Privatrecht (ZEuP) 1994, 1ff.; *Hein Kötz*, Der Bundesgerichtshof und die Rechtsvergleichung, in: 50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft II (2000) 825ff. Cf. also, for Europe, *Ilka Klöckner*, Grenzüberschreitende Bindung an zivilgerichtliche Präjudizien, Möglichkeiten und Grenzen im Europäischen Rechtsraum und bei staatsvertraglich angelegter Rechtsvereinheitlichung (2006).

[51] Cf., within the European context, *Reinhard Zimmermann*, Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science: L.Q.Rev. 112 (1996) 576ff.; for a global (European-American) model, see *James Gordley*, Comparative Legal Research: Its Function in the Development of Harmonized Law: Am.J.Comp.L. 43 (1995) 555ff.

[52] *Guido Calabresi*, A Common Law for the Age of Statutes (1982) 1ff.

[53] On this approach cf. American Legal Realism, ed. by *William W. Fisher III et al.* (1993) 167ff., further references within.

[54] The picture is taken from *Berman* 37. It may be an overstatement if *Berman* interprets such developments as totally new: Society was already an "invisible party", when the *bona-fide*-acquisition of property was invented (*supra* at n. 23), or when the Roman *aediles* or-

law is a telling example: From a traditional perspective, as represented by Europe's different national legal systems, consumer law aims to protect "weak" consumers against dominant or even unfair business enterprises[55]; such law is based on a corrective-justice approach to private law. Modern European directives on consumer law, by contrast, are drafted to create and protect a common European market. They aim to further competition and trade and for this reason create convenient conditions for everybody to participate in this market[56]. Thus, they do not aim exclusively at balancing the interests of consumers and business enterprises. Instead, they utilize individual consumer rights as instruments to advance a public or collective interest of welfare maximization; they can be understood only from such an instrumentalist point of view.

## 4. State, Domination, and Instrumentalism

*Prima vista*, both developments run counter to each other, and they invite rethinking the role of the state in private law and in private-law thinking: To which degree are fundamental concepts of private law shaped by, dependent on, and focussed on the state? Would it be possible, or perhaps even desirable to detach private-law thinking from the state? From where could legal rules and arguments derive their legitimacy, if not from the state's authority? These questions require clarifying the relation between state and private law.

The state as it is understood today is a modern concept. It is an abstract legal entity or, more specifically, a juristic person dominating a people on a specific geographic part of the world[57]. In this sense, it describes neither the Roman Republic nor ancient and medieval empires nor even the early monarchies in Sicily, England, France, and Spain. In fact, the concept was coined only after the religious conflicts of the 16th and 17th centuries, when the traditional monarchies were transformed into European nation states[58]. It was not until

---

dered the seller of slaves to inform buyers about latent defects (infra at nn. 86f.). Thus, contrary to what *Berman* suggests, it is not sure that such developments will necessarily have a devastating effect on Western legal systems. On the theme of law's demise, see also *Steven Smith*, The (always) Imminent Death of the Law: San Diego L.Rev. 44 (2007) (forthcoming).

[55] Cf. *Reinhard Zimmermann*, The New German Law of Obligations (2005) 160ff.

[56] *Bettina Heiderhoff*, Vertrauen versus Vertragsfreiheit im europäischen Verbrauchervertragsrecht: ZEuP 2003, 769ff.; *id.*, Gemeinschaftsprivatrecht (2005) 79ff.; *Caroline Meller-Hannich*, Verbraucherschutz im Schuldvertragsrecht (2005) 59ff., 67ff., both with further references.

[57] Cf. *Georg Jellinek*, Allgemeine Staatslehre[3] (1914) 174ff., 180ff.; *van Crefeld* 1; cf. also *Reinhard* 15ff. In substance, this conception of the state goes back to *Hobbes*; today it is widely acknowledged.

[58] Cf. *Alan Harding*, Medieval Law and the Foundations of the State (2002) 295ff.,

then that the state was seen as an abstract entity independent of the monarch's person, that it developed an extensive, complex administration monopolising the exercise of power, and that it gained immediate control of its citizens[59]. However, attempts to publicly control and administer private law can be observed long before these modern states appeared. When reconstructing the modern relation between private law and the state, therefore, it may be more helpful to proceed from the Weberian concept of legitimate domination (*legitime Herrschaft*)[60]. This is not to say, of course, that the concept of the state is useless; to the contrary. "Domination" does not fully describe the place of the state in modern private law. Thus, it does not account for the fact that the modern state's power and control are abstract rather than personal and that its psychological role may go beyond "domination" in various ways. "Domination" nonetheless yields specific insights for a historical perspective, since it not only identifies core aspects of the modern relation between private law and the state, but it applies as well to other forms of government, like chiefdoms, ancient city-states, or empires.

Yet the idea of "external" domination over private law is not simple and evident, but complex and difficult to grasp. It presupposes a pre-existing field of private law onto which the external actor is thrust, be it the official of the government of an ancient city, a sovereign monarch, or the state. Thus it is assumed that private law can be thought of "prior to", and independent, of such public authority. Private law in this sense is no more than the system of rules guiding the relations between private individuals[61]. Now, with regard to private law domination can express itself in two forms that are, at least conceptually, rather different. First, the external authority can be seen as a disinterested and thus neutral sovereign or judge. In this case, private law continues to be thought of as independent of any external – public or private – interest. Domination in this sense expresses itself only in the monopolisation of the creation and administration of private law; it is based on the external authority's control over decisions within the field of private law. In the second form of domination, the external authority can actively pursue some external – individual or collective, private or public – interest by means of private law. Normatively, it thus becomes a

307ff.; *van Crefeld* esp. 124ff.; *Christoph Möllers*, Staat als Argument (2000) 215ff., further references within.

[59] Before, central domination had typically been mediated by independent powers; see *Reinhard* 196ff., 212ff.

[60] *Max Weber*, Die drei Typen der legitimen Herrschaft, in: Gesammelte Aufsätze zur Wissenschaftslehre[7] (1988) 475ff.; cf. also *id.*, Wirtschaft und Gesellschaft[5] (1972) 28f., 122ff.; for the English terminology *id.*, Economy and Society I, ed. by *Guenther Roth/Claus Wittich* (1968) 53f., 212ff.: "domination" is different from "power", as it is defined "as the probability that … commands … will be obeyed by a given group of persons"; it is normally based on "the belief in *legitimacy*".

[61] On the concept of private law see *supra* n. 6.

third party to private transactions. An example is European consumer-law directives drafted to further the common market[62].

Although both aspects of public domination over private law may come together, from an analytical and – as will be shown – from a historical perspective, they are independent of each other. On the one hand, full sovereignty may not be necessary for private law to be used as a means for pursuing collective goals, and, on the other hand, a sovereign who has fully monopolised private law may remain in a neutral, disinterested position. Thus, public domination over private law should not be equated conceptually with an instrumental, regulatory approach to the law. Instrumentalism and monopolisation of the law are independent aspects of public domination and shall be treated as such in the analysis that follows. Thus, private law may either be independent of any public domination, or it may be determined by some external dominator. Such domination may express itself either in the monopolisation of law creation and administration (to varying degrees), or in a political instrumentalisation of private law, as contrasted with a non-instrumental, corrective-justice approach.

## II. Historical Observations

### 1. Lawyers, Magistrates, and Emperors

Historical stories of private law typically start with Roman law[63], and, indeed, Roman law is probably the most important origin of the tradition of Western private-law thinking[64]. By contrast, the origins of the modern state's administrating and controlling private law might more adequately be traced to a much later stage, when the Catholic Church established itself as a legally structured, hierarchically organised society and thus developed the modern ideas of sovereignty and independent lawmaking[65]. The development of Roman law is particularly interesting precisely because of this temporal disjuncture: It provides a history of increasing public domination over private law in the absence of a state in the modern sense. What is more, although the ultimate outcome of this development, *Justinian*'s *Corpus iuris civilis*, was estab-

[62] *Supra* at nn. 54ff.

[63] This is true even in the common law (at least in England); cf. *David Ibbetson*, A Historical Introduction to the Law of Obligations (1999) 6ff.; *Stroud F.C. Milsom*, A Natural History of the Common Law (2003) 1ff., 20ff.

[64] On finding and inventing "origins" in historical research see *Nils Jansen*, "Tief ist der Brunnen der Vergangenheit", Funktion, Methode und Ausgangspunkt historischer Fragestellungen in der Privatrechtsdogmatik: Zeitschrift für neuere Rechtsgeschichte 27 (2005) 202ff. (cited: Brunnen der Vergangenheit).

[65] Cf. *Berman* 4f., 85ff., 113ff.; see also *Reinhard* 28, 186f., 259ff.

lished under imperial domination, it later became the point of reference for the *ius commune* – a tradition of legal learning, which conceived of private law as largely independent of such domination or political authority.

a) A Plural System of Legal Sources

Roman lawyers were normally reluctant to discuss abstract questions, like "sources" of the law or even the relation between private law and public domination or government. They were more interested in concrete cases; theoretical speculation was outside the scope of their business[66]. Yet they had to know where to find the law, and here *Gaius* told Roman students in the second century AD that it was preferable to speak of the laws of the Roman people in the plural (*iura populi Romani*). These laws consisted not only of the statutes (*leges*), the plebiscites, the Senate's opinions (*senatus consulta*), the Emperor's decisions (*constitutiones principium*), and the edicts of the magistrates, but also of the opinions of legal scholars (*responsa prudentium*)[67]. Thus, the Roman legal system consisted of different elements or "layers" of the law that had developed at different times and complemented or even corrected earlier law[68]; accordingly, these elements were conceived of as normatively independent of each other[69]. Hence, the law's validity was neither related to a "state" as such nor – at least until *Justinian* put the law into a new, comprehensive *corpus iuris*[70] – to the general will of a "sovereign". It was the product of different and independent actors.

Such a plural system of legal sources may *prima vista* be explained by the fact that the Roman jurists never really developed a modern concept of the state; conceptually the Roman "state" was still identical with the Roman people (*Populus Romanus*)[71]. True, towards the end of the Republic the Romans had come rather close to the modern idea of a separated state[72]. It was possible to speak of the *res publicae Populi Romani*, and the *Populus Romanus* could as such acquire rights and duties; in fact, the magistrates acted for the *Populus Ro-*

---

[66] Cf. *John P. Dawson*, The Oracles of the Law (1968) 113ff.; *Schulz* 70ff., 146ff.

[67] *Gaius*, Institutiones, I,2; see *Barry Nicholas*, An Introduction to Roman Law (1969) 14ff.

[68] Cf. *Papinian*, D. 1,1,7,1.

[69] *Wieacker*, Röm. Rechtsgeschichte 198ff.

[70] Cf. D. Const. Tanta, 19: The texts of the *Corpus iuris*, issued by the Emperor *Justinian*, were meant to replace all former law. Even *Justinian*, however, tried to legitimate his commands with the Roman tradition of legal learning; cf. Inst. Const. Imperatoriam, 3ff.; D. Const. Tanta, 13, 19, 21, 23f.; see *Schulz* 359f.

[71] See *Max Kaser*, Das Römische Privatrecht I$^2$ (1971) 304f. (cited Privatrecht I).

[72] Cf. also *van Crefeld* 53f.; see also *Walter Eder*, Der Bürger und sein Staat – der Staat und seine Büger, in: Staat und Staatlichkeit in der frühen römischen Republik, ed. by *id*. (1988) 12ff., and the other contributions to this volume.

*manus*[73], much as the prosecutor in today's United States represents "the people". Yet, in later times, domination was attributed personally to the Emperor, not to an abstract government of the *Populus Romanus*[74]. Furthermore, even at the end of the Roman Republic, Roman lawyers proceeded from a plural conception of their legal sources, which adequately presented the law as the product of different groups or actors within the legal system: Of course, the jurists believed that the XII Tables, the first Roman legislation and core of the *ius civile*, was a basic, integrative legal text for the Roman people as a whole[75]. But the senate's opinions represented primarily the Roman *nobilitas* or the political establishment; conversely, the plebiscites had been furnished with legal force in order to grant the *plebs* a balancing means of expressing its will in legally binding form. Even more importantly, the law had long been administered and developed outside the government by priests. They advised parties about the dates on which to take legal actions or about the correct, effective formulation of legal proceedings, last wills, or contracts; often such advice was innovative[76]. Later, this tradition had been continued by private *iuris consulti*, learned jurists, who devoted their lives to the law. Within a few centuries they developed a specific legal language and transformed the still archaic law of the XII Tables into a highly complex body of legal learning[77] based on methods of Hellenistic scholarship and remembered in voluminous textbooks. As result, at the end of the Republic this "privately produced" lawyers' law was largely independent of governmental domination and thus autonomous of the political system[78].

Nevertheless, the government had maintained means of controlling – loosely – the law's administration and influencing the law's substantial development. Thus, the senate continued to issue *senatus consulta*, authoritative senatorial opinions that, though technically not legislative acts, immediately became part of the legal system. A well-known example is the *senatus consultum Vellaeanum* that for purposes of public policy prevented women from in-

---

[73] *Wolfgang Kunkel/Roland Wittmann*, Staatsordnung und Staatspraxis der Römischen Republik, Zweiter Abschnitt: Die Magistratur (1995) 11 and *passim*.

[74] *Max Kaser*, Das römische Privatrecht II$^2$ (1975) 151f. (cited Privatrecht II). Now, the government acted as the *fiscus Caesaris*, which originally had been the Emperor's personal assets, distinct from the *res Populi Romani*: *Kaser*, Privatrecht I (*supra* n. 71) 305f.

[75] "(F)ons omnis publici privatique … iuris": *Livius*, Ab urbe condita, 3,34,6. Cf. also *loc. cit.*, 3,31–57; *Jochen Bleicken*, Lex Publica, Gesetz und Recht in der Römischen Republik (1975) 92f.; *Fögen* 63ff.; *Wieacker*, Röm. Rechtsgeschichte 287ff.

[76] *Wieacker*, Röm. Rechtsgeschichte 310ff., 551ff.; see also *Alfons Bürge*, Römisches Privatrecht (1999) 87ff.; *Fögen* 127ff.

[77] On the role of the learned jurists, see *Ernest Metzger*, Roman Judges, Case Law, and Principles of Procedure: L. Hist. Rev. 22 (2004) 243, 251ff. In fact, the *iuris consulti* may be seen as the main source of the classical Roman law.

[78] *Fögen* 174ff., 199ff., 207ff.

terceding[79]. Even more important was the magistrates' control of the legal administration. According to the rules of the formulary process[80], the *praetor* or the *aediles*, high magistrates in charge of the legal administration, were authorized to decide whether an action or exception was granted in a concrete case. Thus, they assumed a decisive role in the development of the law's substance by adopting new actions into their edicts, annually announcing the actions and defences they were prepared to acknowledge.

These magistrates were high officials of the government, and they were clearly acting as such. Even if most of them were probably unable individually to formulate the highly technical texts of their edicts and in this respect had to rely on professional advice of private *iuris consulti*[81], it would be wrong to infer that they were mere representatives or a "bridgehead" of the legal community within the political sphere[82]. Adopting a new formula and granting an action remained governmental decisions, and many of these formulas expressed interventions into the legal system based on public policy. Thus, the (modern) "aedilitian remedies" for defects of sold goods have grown out of an equally specific and pragmatic edict of the *aediles*, which ordered the notoriously ill-reputed slave-traders to inform potential purchasers of any latent illness or defect of the slave[83]. Every slave to be sold on the market had to wear a board on which his defects were listed, and the seller was made liable if he violated this duty. The parallels to the European Union's information requirements and individual rights of revocation[84] should be apparent: Political participants in the legal system use private-law instruments in order to create a functioning market for the general public.

Similarly, the *habitator* of a house, a man who rented the whole block, letting different flats or rooms to other tenants, was made strictly liable for damage caused by things thrown out of the building[85]. The prime purpose of this praetorian *actio de deiectis vel effusis* was a public policy one – not fair compensation but to fight the notoriously dangerous practice of throwing waste out

---

[79] D. 16,1; C. 4,29; Nov. 134,8; cf. *Zimmermann*, Obligations 145ff.; *Wolfgang Ernst*, Interzession, Vom Verbot der Fraueninterzession über die Sittenwidrigkeit von Angehörigenbürgschaften zum Schutz des Verbrauchers als Interzedenten, in: Rechtsgeschichte und Privatrechtsdogmatik, ed. by *Reinhard Zimmermann et al.* (1999) 395, 397ff.

[80] On this *Wieacker*, Röm. Rechtsgeschichte, 447ff. with further references.

[81] *Wieacker*, Röm. Rechtsgeschichte 452f.; *Schulz* 63; in detail, *Fögen* 190ff.; *Oliver M. Brupacher*, Wider das Richterkönigtum / A King of Judges?: Ancilla Iuris 2006, 107ff.

[82] *Fögen* 196ff.: "homunculus". The matter is debated among Romanists. Although there is much truth in *Fögen*'s critique of the traditional view, which saw the praetor primarily as a political "minister of justice", the political function of the *praetor* within the legal system should not be neglected.

[83] *Ulpian*, D. 21,1,1 pr.; see *Zimmermann*, Obligations 311ff., further references within.

[84] See *supra* at nn. 18ff.

[85] *Ulpian*, D. 9,3; see *Reinhard Zimmermann*, Effusum vel deiectum, in: FS Hermann Lange (1992) 301ff. (cited Effusum).

of the windows of upper floor flats[86]. The *habitator* was made liable independently of any personal fault[87] because he was the only person who could possibly proceed against the bad habits of his tenants. And when a freeman had been killed, the action was treated as an *actio popularis*, which meant that everybody was entitled to claim the penalty for himself[88].

b) The Autonomy of Private Law

Despite such political intervention into the legal system, and despite the formal governmental control of the law's administration, Roman law has become famous for the high degree of autonomy from political government it had gained by the end of the Republic. In fact, the *praetors* were never able fully to control the law's development; to a large degree, they simply acknowledged earlier developments within the privately developing legal system, as expressed in the collective expertise of the *iuris consulti*[89]. This autonomy of the law resulted from its scholarly, self-referential development in the hands of *iuris consulti*, who were both economically independent and not part of the political classes[90].

Such autonomy was not acceptable for the Emperors, who accordingly tried to take control of the legal system. Thus, from early on, the Emperors had allowed extraordinary appeals against decisions in the formulary process, and a new, "extraordinary" procedure administered by public servants (*cognitio extra ordinem*) came to replace the traditional formulary process. Around 130 AD, the Emperor *Hadrian* entrusted the young lawyer *Julian* with the formulation of an *edictum perpetuum*, a final version of the edict. Thus, the magistrates were no longer allowed, as before, to announce new forms of actions or legal exceptions on an annually new edict. Their constructive contribution to the law's development came largely to an end. Furthermore, already *Augustus* had tried to link influential *iuris consulti* with his political administration[91]. They became high officials within the governmental system[92]; since the end

[86] *Ulpian*, D. 9,3,1,1: "There is no one who will deny that the above edict … is most useful; for it is in the public interest that everyone should move about and gather together without fear or danger" (trans. by *Alan Watson*, The Digest of Justinian I [1998]); see *Zimmermann*, Effusum (previous note) 301ff.

[87] *Ulpian*, D. 9,3,1,4.

[88] *Ulpian*, D. 9,3,5,5; see also *Julianus B.M. van Hoeck*, D. 9,3,5,4: Übersetzungsfragen im Bereich der actio de deiectis vel effusis als Popularklage: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte/Romanistische Abteilung (SavZ/Rom.) 117 (2000) 454, 463ff.

[89] *Supra* n. 82.

[90] *Wolfgang Kunkel*, Herkunft und soziale Stellung der römischen Juristen[2] (1967) 41ff., 50ff., 58ff. (cited Herkunft); *Schulz* 48ff., 119ff.

[91] *Fögen* 200ff., further references within.

[92] *Schulz* 121ff.; thus, *Julian*, one of the most famous Roman lawyers, passed through a long, successful career as public servant; he was *decemvir litibus iudicandis*, *quaestor*, *tribunus*

of the second century AD, leading jurists were normally paid as public servants[93]. At this time, the Emperor's legal office had become the centre of the legal system, which was increasingly seen as a homogenous body of norms, backed by the Emperor's authority[94]. Thereafter, the law was developed by the Emperor's *constitutiones* and *rescripta*. Even if these were written by professional lawyers as a matter of course, the law was now dominated by the Emperor's governmental system.

### c) Private Law and Instrumentalism

The distinction between public and private law has been formulated already by Roman lawyers[95]. However, this distinction was neither factually nor conceptually clearly drawn – partly for the lack of the idea of a state that could represent the "public" side[96], partly because there was no developed administration, and partly because many of the functions of legal systems that are today understood as public responsibilities were fulfilled by private individuals. Thus, magistrates would proceed against crimes only if they regarded these as a threat to the *populus Romanus* as a whole; with crimes against individuals, the victims themselves had to initiate legal proceedings[97]. Furthermore, many proceedings were characterised by a mix of public and private interests; this was true not only for the criminal *iudicia publica*, "public" proceedings, initiated and partly controlled by private individuals[98], but likewise for the primarily "private" *actio de deiectis vel effusis*, which was regarded as an *actio popularis* if a man had been killed[99]. And the actions against governors who unlawfully exploited their provinces were step by step transformed from private actions into predominantly public criminal proceedings[100].

---

*plebis*, *praetor*, and *consul*. As *praefectus aerarii Saturni* and *militaris* he was in charge of the public finances; later he became governor of *Germania inferior*, of *Hispania citerior* and of *Africa*; see *Kunkel*, Herkunft (*supra* n. 90) 157ff. Of course, he was also member of the Emperor's *consilium*, where the Emperor was advised on the most important political decisions.

[93] *Kunkel*, Herkunft (*supra* n. 90) 290ff.

[94] *Kaser*, Privatrecht II (*supra* n. 74) 53f.

[95] *Ulpian*, D. 1,1,2; Inst. 1,1,4; cf. *Max Kaser*, "Ius publicum" und "ius privatum": SavZ/Rom. 103 (1986) 1ff.; *Wieacker*, Röm. Rechtsgeschichte 492f., both with further references.

[96] Cf. *J. Walter Jones*, Historical Introduction to the Theory of Law (1940) 141, 145ff. (cited History).

[97] Cf. *Bernado Santalucia*, Diritto e processo penale nell'antica Roma (1989) 37ff.; *Andrew M. Riggsby*, Crime and Community in Ciceronian Rome (1999) 151ff., 157ff.; *Jansen* 198ff.

[98] *Arnold H.M. Jones*, The Criminal Courts of the Roman Republic and Principate, with a Preface by John Crook (1972) 46, 63ff. (cited Criminal Courts); *Jansen* 227ff.

[99] *Supra* at nn. 85ff., 88.

[100] *Wolfgang Kunkel*, Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit (1962) 61f.; *Jones*, Criminal Courts (*supra* n. 98) 48ff., 63ff.

Accordingly, Roman magistrates and politicians never developed a feeling that public interests should be pursued only by means of public law – in fact, there was no administration that could have fulfilled such duties. Instead, the government acted on the basis of an instrumentalist conception of private law as a matter of course. The aedilitian remedies, the *actio de deiectis vel effusis*, or the *senatus consultum Vellaeanum* are telling examples of such a view of private law[101]; and *Augustus* is famous for his use of matrimonial law for population policy[102]. *Papinian*, one of the last "classical" jurists, even taught that the reasons for magistrates to intervene into the *ius civile* were always based on public policy[103]. Yet, this was only shortly before a new concept of *utilitas publica*, a principle of public utility, eroded all individual liberty or property and became the guiding measure of all law under the absolutistic, personal domination of the late Emperors[104].

Instrumental considerations of this sort had usually not been present in the work of the private *iuris consulti* of Republican times; for them, "utilitas" normally referred to individual utility[105]. Indeed, until the second half of the second century AD, when the legal profession became part of the administration, these jurists had very little interest in matters of public law[106]. Apparently, they proceeded from the intuitive assumption that the law concerned the individual interests of Roman citizens. Thus, they tried to integrate the

---

[101] *Supra* nn. 83ff.

[102] *Kaser*, Privatrecht I (*supra* n. 71) 318ff.; these laws included not only prohibitions of certain marriages, but also imposed duties on the Roman population to marry and have children.

[103] *Papinian*, D. 1,1,7,1: "ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam". Such arguments appear already in the writings of *Julian* (ca. 100–170 AD); cf. D. 9,2,51,2, where *Julian* reinterpreted the old rule of cumulative liability of joint tortfeasors, which originally was based on a corrective-justice argument of fair retaliation (*Jansen* 209), as being based on the public policy of punishing all wrongdoers.

[104] *Kaser*, Privatrecht II (*supra* n. 74) 14, 263ff. The expression "utilitas publica" can be found also in earlier texts, mostly among late classical lawyers, especially *Ulpian* and *Paulus*, occasionally also in earlier texts, but not before the 2nd century. Yet, for the classical lawyers "utilitas publica" usually referred to some sort of aggregated utility of individuals, not to the interest of an abstract state. See *Thomas Honsell*, Gemeinwohl und öffentliches Interesse im klassischen römischen Recht: SavZ/Rom. 95 (1978) 93, 101ff., for a recent, comprehensive analysis of the use of arguments based on *utilitas*, see *Marialuisa Navarra*, Ricerche sulla utilitas nel pensiero di giuristi Romani (2002), both with further references.

[105] Thus, the individual "utility" of a contract, *i.e.* the question of whether a party received a *quid pro quo* for performing its duty or not, was relevant for the standard of care; cf. *Dietrich Nörr*, Die Entwicklung des Utilitätsgedankens im römischen Haftungsrecht: SavZ/Rom. 73 (1956) 68ff.; *Zimmermann*, Obligations 198f. And under the *negotiorum gestio* a likewise individual requirement of administering the affairs "utiliter" was necessary for recovering expenses: *Ulpian*, D. 3,5,9,1. See *Zimmermann*, Obligations 442; *Hans Hermann Seiler*, Der Tatbestand der negotiorum gestio im römischen Recht (1968) 51ff., 109f., 302; most recently *Giovanni Finazzi*, Ricerche in tema di negotiorum gestio II/1 (2003) 515ff.

[106] Cf. *Schulz* 54ff., 106ff., 164f.

results of the government's instrumental interventions into the traditional body of law; the aedilitian remedies[107] or the treatment of the *senatus consultum Vellaeanum*[108] are illuminating examples[109]. If such integration was not possible, the *iuris consulti* treated governmental commands as exceptions based on some irregular consideration of public policy and binding only because of the magistrate's or Emperor's authority[110]. However, one would probably search in vain for explicit statements in this respect; Roman private law was never based on anything like an elaborated theory of corrective justice. Thus, it is still an open question, whether the lawyers' abstraction from public concerns was necessary for private law to become autonomous from governmental domination, or whether the concern for private interests and the sociological-institutional autonomy of this lawyer's law were parallel only by historical chance.

## 2. A Plural Legal World?

Although Roman law was based on a plural system of independent legal sources, from a procedural point of view, it was unified. As long as the *praetor* controlled the administration of justice, a choice between different courts was excluded as a matter of principle. Likewise, when the *cognitio extra ordinem* was later introduced as a procedure to acknowledge actions that were regarded as desirable but that would have been refused by the praetor, this introduction did not really create two independent systems of private law. Rather, in the *cognitio extra ordinem* the sovereign Emperor was seen as modifying and further

---

[107] *Supra* at nn. 83f.

[108] *Supra* n. 79. The *iuris consulti* could interpret this *senatus consultum* broadly on the basis of an assumed purpose to protect women; thus it was applied to all situations where a woman was endangered to bind herself too readily for others; on the other hand, they would, despite the wording of the *senatus consultum*, not apply it, where such danger was absent; cf. *Zimmermann*, Obligations 148ff., 705.

[109] *Negotiorum gestio* is another highly instructive example for this approach to private law. Today, *negotiorum gestio* is often understood instrumentally as a motivation for altruistic behaviour; cf. *Jeroen Kortmann*, Altruism in Private Law (2005) 91ff., 99ff. Although this understanding can be traced back to *Justinian*'s Institutes (3,27,1), the classical Roman lawyers did not think so. For them, the *negotiorum gestio* did not more than to acknowledge existing pre-legal social duties to help one's friends ("officia amici"). Thus, there is no parallel to *Justinian*'s formulation in the Institutes of *Gaius*; such an instrumental understanding was apparently not adequate before the private law had largely lost its autonomy. Cf., in more detail, *Jansen*, in: Historisch-kritischer Kommentar zum BGB, ed. by *Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann* III (to appear 2008) §§ 677–687, n. 9.

[110] *Paulus*, D. 1,3,16: "Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est." Correspondingly, such provisions were to be interpreted narrowly: *id.*, D. 1,3,14; 50,17,141 pr.

developing the Republican state of the law[111]; the introduction of the new procedure signified a shift of the legal system's centre of authority from the *praetor* to the Emperor.

In sharp contrast to such a model of a coherent legal system, legal historians have drawn a totally different picture of the European legal order between the 12th and the 16th century[112] – a legal order said to bear significant similarities to the increasingly plural legal world of our times that is characterised by conflicts between independent courts applying different legal rules and principles[113]. Instead of a unified legal system, it is said, the old European order was a plurality of legal systems that conflicted with each other. Every individual was subject to the local statutes of the city or to the customs of the place where he lived; as far as private law was concerned, these local laws were embedded into the increasingly universal *ius commune*[114]. At the same time, everybody was subject also to universal Canon law. The Catholic Church claimed extensive general jurisdiction for all *causae spirituales*, matters then regarded as inherently "spiritual", such as family law (because marriage was a sacrament), the law of succession, and even contract law (because contracts were typically confirmed by oaths and the church claimed jurisdiction over pledges of faith)[115]. Furthermore, noblemen were subject to feudal law, and peasants were subject to manorial law. Many artisans had to obey to the local statutes and customs of their guilds, and merchants did their business according to a supposedly universal "lex mercatoria".

---

[111] *Max Kaser/Karl Hackl*, Das Römische Zivilprozeßrecht[2] (1996) 435ff.

[112] This is a central thesis in *Berman* 10f., 199–519; similarly *Paolo Grossi*, L'ordine giuridico medievale (1996) 223ff.; *id.*, Ein Recht ohne Staat, Der Autonomiebegriff als Grundlage der mittelalterlichen Rechtsverfassung, in: Gedächtnisschrift Roman Schnur (1997) 19ff., 26ff. Cf. also, for the 16th and 17th century, *Peter Oestmann*, Rechtsvielfalt vor Gericht (2002), who focuses, however, on the special problems of secular law in the Holy Roman Empire that resulted from tensions between different – written and unwritten – local laws and the *ius commune*.

[113] Cf., for the European Union, *Massimo La Torre*, Legal Pluralism as Evolutionary Achievement of Community Law: Ratio Juris 12 (1999) 182ff. The concept of "legal pluralism" was originally coined for describing the legal world of former colonies, where European states had imposed their law besides the traditional customary order. For a survey of the debate about this concept, which has no homogenous, technical meaning, see *Sally Engle Merry*, Legal Pluralism: Law Soc.Rev. 22 (1988) 869ff.; *Franz von Benda-Beckmann*, Who's Afraid of Legal Pluralism?: J. Leg. Pluralism 47 (2002) 37ff.; *Michaels* 1221ff., 1250ff., all with further references.

[114] *Wieacker*, Privatrechtsgeschichte esp. 80ff., 124ff.; see also *Karl Kroeschell*, Universales und partikulares Recht in der europäischen Rechtsgeschichte, in: Vom nationalen zum transnationalen Recht, ed. by *id./Albrecht Cordes* (1995) 265, 270ff.

[115] *Richard H. Helmholz*, The Spirit of Classical Canon Law (1996) 145ff.; more generally on the ecclesiastical courts' broad jurisdiction *loc. cit.*, 116ff.; *Berman* 221ff.; *Winfried Trusen*, Die gelehrte Gerichtsbarkeit der Kirche, in: Handbuch der Quellen und Literatur der neueren Privatrechtsgeschichte, ed. by *Helmut Coing* I (1973) 467, 485f. (cited Handbuch I)

Yet the degree of this pluralism should not be overestimated. Feudal law was quite early integrated by legal scholars into the *ius commune*[116]. The most important source were the Lombard *libri feudorum* of the 11th and 12th centuries that combined a restatement of customary feudal law with some important imperial enactments[117]. At the beginning of the 13th century, this text had been included into *Justinian*'s Novels and thus became a part of the *Corpus iuris civilis*. At the same time, feudal rights were explained in terms of quasi-Roman property law (*dominium directum* and *dominium utile*)[118]. Thus, at least at this time, feudal law could no longer be regarded as an independent legal system. Likewise, the guild's statutes were easily integrated into the legal systems of cities. What is more, the different local and territorial laws – customary or written – were expressions of the complex political order; their relation was thus determined on a quasi-constitutional basis and by means of the theory of statutes, a predecessor of modern private international law[119]. Accordingly, as long as claims to jurisdiction were not politically contested, the multiplicity of legal sources did not necessarily result in genuine conflicts in the sense that independent courts would claim jurisdiction for the same cases and apply different laws with divergent results. Thus, it might be misleading to describe this legal world in terms of a genuine pluralism of conflicting, independent legal systems; at least in theory[120], it bore perhaps more similarity to an integrated federal system.

By contrast, the relation between Canon law and secular law was far more complex[121]. Apart from jurisdiction over *causae spirituales*, there was a broad

---

[116] *Coing* 36, 349f.; see also *Charles Donahue*, Comparative Law Before the Code Napoléon, in: The Oxford Handbook of Comparative Law (*supra* n. 47) 1, 10f.

[117] *Gerhard Dilcher*, Libri Feudorum, in: Handwörterbuch zur deutschen Rechtsgeschichte II (1978) cols. 1995ff.

[118] See *Robert Feenstra*, Dominium utile est chimaera: Nouvelles réflexions sur le concept de propriété dans le droit savant: Tijdschrift voor Rechtsgeschiedenis 66 (1998) 381ff.; *id.*, Dominium and ius in re aliena: The Origins of a Civil Law Distinction, in: New Perspectives in the Roman Law of Property, Essays for Barry Nicholas, ed. by *Peter Birks* (1989) 111, 112ff.; cf. also *Maximiliane Kriechbaum*, Actio, ius und dominium in den Rechtslehren des 13. und 14. Jahrhunderts (1996) 328ff., 335ff.

[119] See *Coing* 138ff.; *Reinhard Zimmermann*, Statuta sunt stricte interpretanda?: Cambridge L.J. 56 (1997) 315ff. (cited Statuta), both with further references.

[120] Reality, however, was much more complex; it was characterised by an extreme uncertainty about the applicable law; see, for a slightly later period, *Oestmann* (*supra* n. 112) further references within.

[121] *Peter Landau*, Der Einfluß des kanonischen Rechts auf die europäische Rechtskultur, in: Europäische Rechts- und Verfassungsgeschichte, ed. by *Reiner Schulze* (1991) 39, 40f. It is true that especially the Glossators emphasised the unity of their legal system as based on natural law and ultimately on the unity of the Roman-Christian European civilisation. Thus, it may be said that they proceeded from a "unified" concept of law: *Udo Wolter*, Ius canonicum in iure civili, Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte (1975) 23f.; cf. also *Jan Schröder*, Recht als Wissenschaft (2001) 21f. Nevertheless, in reality, canon and civil law existed as two different bodies of law, based on different

range of other bases for the church's jurisdiction[122]. In particular, the church claimed broad jurisdiction *ratione personarum* – not only over clerics, but also for travellers, members of universities, Jews in disputes with Christians, and for *miserabiles personae*, such as children or widows[123]. Attempts to clearly limit the provinces of Canon and secular law proved not very successful[124]; in fact, quite often, even in criminal law, a matter was regarded as falling into a "mixed forum", a jurisdiction of both secular and ecclesiastical courts. Such cases could be decided simply by the court into which they were brought first[125]. Additionally, however, the church also claimed jurisdiction *ex defectu iuris*. Appeal against a secular court to an ecclesiastical court was allowed if the secular judges had violated principles of justice[126]. Thus, genuine conflicts of jurisdiction must have become a daily experience, and not only in unusual, international, or politically contested cases.

In addition, even secular law exhibited a genuinely plural structure – at least if claims that a *lex mercatoria* existed as an independent transnational system of commercial law are true. Yet, despite some treatises on a "lex Mercatoria" between the 13th and the 17th centuries[127], whether such a system in fact existed is strongly disputed[128]. The dispute is perhaps less the historical matters

policies that were administered by independent judicial systems. Unity was more an intellectual ideal than a correct description of reality.

[122] For jurisdiction *ratione contractus* and because of prorogation, see *Trusen* (*supra* n. 115) 486f.

[123] *Trusen* (*supra* n. 115) 483ff.

[124] *Wolter* (*supra* n. 121) 27ff., 37ff., 91ff.

[125] *Helmholz* (*supra* n. 115) 117ff.

[126] *Trusen* (*supra* n. 115) 487; *Helmholz* (*supra* n. 115) 119f.

[127] The earliest treatise of an unknown author, entitled "Lex mercatoria", which dates from around 1280, is accessible, *inter alia*, in: Lex Mercatoria and Legal Pluralism, ed. by *Mary E. Basile et al.* (1998) (cited Lex Mercatoria); for a later text see *Gerard Malynes*, Consuetudo, vel Lex Mercatoria or The Ancient Law-Merchant (London 1622). Neither of these treatises can easily be taken as evidence for the existence of a law merchant, since both were written as political arguments favouring such a *lex mercatoria*. Nevertheless, both treatises may be taken as an indication that at least some merchants and lawyers advocated commercial customs that should be understood as a basis for a transnational commercial law which would be largely independent of governmental control.

[128] The existence of a medieval law merchant, similar to the modern *lex mercatoria*, is assumed by *Schmitthoff* (*supra* n. 43) 2ff.; *Hansjörg Pohlmann*, Die Quellen des Handelsrechts, in: Handbuch I (*supra* n. 115) 801ff., 810ff.; *Rudolf Meyer*, Bona fides und lex mercatoria in der europäischen Rechtstradition (1994) esp. 56ff.; *Kroeschell* (*supra* n. 114) 273; *Coing* 519; *Berman* 333ff.; *Grossi* (*supra* n. 112) 225; on specific procedures before the courts of merchants see also *Vito Piergiovanni*, Diritto e giustizia mercantile a Genova nel XV secolo: I consilia di Bartolomeo Bosco, in: Consilia im späten Mittelalter, ed. by *Ingrid Baumgärtner* (1995) 65ff. These views are criticised especially by *John H. Baker*, The Law Merchant and the Common Law before 1700: Cambridge L.J. 38 (1979) 295ff.; *Albrecht Cordes*, Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte/Germanistische Abteilung (SavZ/Germ.) 118 (2001) 168ff. (English translation in: From lex mercatoria to Commercial Law [*supra* n. 25]

of fact, however, than their conceptually correct interpretation[129]. In the late middle ages, commercial cases normally fell into the jurisdiction of commercial courts. These courts consisted typically of merchants, not professionally educated lawyers, and they were largely, though not fully, independent of governmental or ecclesiastical control[130]. The procedure displayed few formalities[131]; and it was assumed that mercantile customs determined the relations between merchants[132]: Mercantile law was "thought to come from the market"[133]. Of course this did not mean that all relevant common and local law was excluded, to the contrary: Normally, the *ius commune* was the basis for

53ff.: The search for a medieval Lex mercatoria); *Karl Otto Scherner*, Lex mercatoria – Realität, Geschichtsbild oder Vision?: SavZ/Germ. 118 (2001) 148, 156ff.; *Charles Donahue*, Benvenuto Stracca's De Mercatura: Was There a Lex mercatoria in Sixteenth-Century Italy? in: From lex mercatoria to Commercial Law (*supra* n. 25) 69ff.; cf. also the other contribution to that volume. An illuminating overview to the debate from the 13th century until the first half of the 20th century, with all its political implications, is presented by *Mary E. Basile et al.*, Introduction, in: Lex mercatoria (*supra* n. 127) 13, 20ff., 123ff., further references within. For an economic-functional comparison of medieval mercantile law and the modern *lex mercatoria*, see *Oliver Volckart/Antje Mangels*, Are the Roots of the Modern Lex Mercatoria Really Medieval?: So. Econ. J. 56 (1999) 427ff.

[129] *Joachim Rückert*, Rechtsbegriff und Rechtsbegriffe – germanistisch, römisch, kirchlich, heutig?, in: *Gerhard Dilcher/Eva-Maria Distler* (eds), Leges – Gentes – Regna (2006) 569, 579ff.

[130] Cf. *Wilhelm Endemann*, Beiträge zur Kenntnis des Handelsrechts im Mittelalter: ZHR 1862, 333, 355ff.; *Julius Creizenach*, Das Wesen und Wirken der Handelsgerichte und ihre Competenz (Erlangen 1861) 15ff.; *Wilhelm Silberschmidt*, Die Entstehung des deutschen Handelsgerichts (Leipzig 1894) 26ff.; for Italy, more specifically, *loc. cit.*, 4ff. (courts of *consules mercatorum*, elected by the guilds of merchants); for England and Germany *loc. cit.*, 18ff., 23ff. (courts consisting of elected aldermen, sometimes also of some representatives of government); *Bogdan Duschkow-Kessiakoff*, Das Handelsgericht, Ein Beitrag zu Geschichte, Wesen und Wirkung der Handelsgerichte (Diss. Greifswald, 1912) 18ff.; *Berman* 345f. But see *Baker* (previous note) 300ff., who argues that the mercantile cases could always be brought before common law courts, even if merchants normally preferred the local courts of merchants. There is remarkably little modern literature about the early history of the courts of merchants; see, for an exception, *Stephen E. Sachs*, From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant': Am. U. Int. L.Rev. 21 (2006) 685ff. At the end of the 19th century, commercial courts were by definition public courts, established by government (cf. *Silberschmidt*, [this note] 1f.). Accordingly, contemporary German authors typically ask, why "lay" judges became part of the public courts and thus initiate their investigation at a time, when the courts were already within the governmental control; cf. *Friedrich Merzbacher*, Geschichte und Rechtsstellung des Handelsrichters (1979), who begins with a privilege of Emperor Maximilian I of 1504; *Dorothea Schön*, Die Handelsgerichtsbarkeit im 19. Jahrhundert unter besonderer Berücksichtigung des Rheinlands (1999).

[131] Lex mercatoria (*supra* n. 127) ch. 1f. and *passim*; see also *Endemann* (previous note) 362ff., 383ff.; *Knut W. Nörr*, Procedure in Mercantile Matters, Some Comparative Aspects, in: The Courts and the Development of Commercial Law, ed. by *Vito Piergiovanni* (1987) 195, 197ff.

[132] *Endemann* (*supra* n. 130) 347ff.; *Scherner* (*supra* n. 129) 156ff.

[133] Lex mercatoria (*supra* n. 127) ch. 1.

decisions of the courts of merchants; the common law was described as the "mother of mercantile law"[134]. But the *ius commune* was routinely modified according to the merchants' needs; this is at least how the learned lawyers perceived the matter[135]. A suitable device for achieving the desired results was the idea of mercantile equity (*aequitas mercatoria*), allowing exceptions to the strict law[136]. Thus, in deviation from the Roman *ius commune*, merchants were not allowed to raise the *exceptio nudi pacti*, according to which a "naked", unwritten, agreement could not be enforced before a court[137]. Finally, in addition to its roots in different local and international customs and in the common law or *ius commune*, mercantile law was determined by numerous written local sources: statutes of the guilds and towns, on both procedure and substantive law, and by privileges of towns or princes granting special rights to marketplaces and to travelling merchants[138].

Such findings are open to interpretation and debate: Did mercantile courts decide on the basis of "law", or was it just "equity", based on customs?[139] What would have transformed commercial customs into genuine law? The modern answer, acknowledgement or incorporation by the state[140], was not available because, even conceptually, there was no legal monopoly before the modern state created one. For such customs to be regarded as law, would it be enough for there to have been an acknowledgement that typical forms of contracts were valid and could be used for interpreting incomplete agreements? Or would it rather be necessary that specific forms or contents of contracts were regarded as obligatory[141]? Parallels to the discussion about a mod-

---

[134] Lex mercatoria (*supra* n. 127) ch. 9. For a more detailed analysis of the complex relation between common and mercantile law, see *Basile et al.* (*supra* n. 128) 23ff., further references within.

[135] Cf. *Donahue*, Benvenuto Stracca's De Mercatura (*supra* n. 128) 109ff.

[136] *Charles Donahue*, Equity in the Courts of Merchants: Tijdschrift voor Rechtsgeschiedenis 72 (2004) 1ff. (cited Equity); *id.*, Benvenuto Stracca's De Mercatura 84ff.; *Meyer* 61ff., *Pohlmann* 801, 813 (all *supra* n. 128). This idea remained vivid, when the commercial courts had come under governmental control; see the references in *Donahue*, (this note) to Stracca, who wrote in the 16th century; *Andreas Gail*, Practicarum Observationum tam ad processum iudiciarium, praesertim Imperialis Camerae … libri duo (Cologne 1668) *lib.* II, *obs.* XXVII, n. 27.

[137] See, in more detail, *Donahue*, Equity (previous note) 4, 23ff., further references within.

[138] Cf. *Claudia Seiring*, Fremde in der Stadt (1300–1800), Die Rechtsstellung Auswärtiger in mittelalterlichen und neuzeitlichen Quellen der deutschsprachigen Schweiz (1999) 39ff.

[139] See the dissent in *Pillans* v. *Van Mierop* (1765), 97 E.R. 1035, 1041 (K.B.).

[140] Cf. *Michaels* 1231ff.

[141] This is apparently what *Cordes* (*supra* n. 128) 179, presupposes when he argues that there was no *lex mercatoria*. But this appears to leave no room for dispositive law. See also *Ralf Michaels*, Systemfragen des Schuldrechts, in: Historisch-kritischer Kommentar zum BGB, ed. by *Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann* II (2007) before § 241, n. 59 (cited Systemfragen des Schuldrechts).

ern "lex mercatoria"[142] are apparent. By contrast, another alleged property of a modern *lex mercatoria* – its transnational character (*i.e.*, absent "nations" in the modern sense, its independence of local polities) – finds no real parallel in history. If "transnational law" refers to legal norms applied everywhere in the world, then mercantile law was no such transnational law, since it was based primarily on the local customs and privileges of towns and fairs. Any "transnational" character consisted in a basic intellectual and normative similarity, a similarity grounded in a common understanding of what commerce was about and what was regarded as fair trade.

A final and perhaps more important question concerns the ambiguous idea of "independence" of legal systems. If independence presupposes an autonomous *Grundnorm* or a "rule of recognition"[143] for the legal system in question, it becomes difficult to clearly classify the *lex mercatoria* as "independent" given its ambiguous normative basis in the market and in the common law. If, alternatively, independence presupposes that the relevant norms, customs, and concepts constitute a complete "body of law" that is intellectually and normatively separated from other legal systems and from non-legal systems of norms and belief, the *lex mercatoria* does not qualify, since it was based largely on the common law. If, finally, "independence" is based on differences in substance, then not even Canon law would have constituted an independent legal system, since it has always been assumed that Canon law was based on the Roman *ius commune* ("Ecclesia vivit lege Romana")[144].

Apparently, "autonomy" and "independence" are classificatory alternatives; a legal system is either independent or part of a wider system. Such an alternative might be insufficient or even misleading for understanding the late medieval legal order; perhaps it is more appropriate to describe legal (sub)systems as more or less independent viz. more or less integrated. Then, the mercantile law might be viewed as more integrated into the *ius commune* than was Canon law, but less than feudal law. Accordingly, the late medieval legal order could perhaps be presented as a network of mutually connected, but not wholly integrated, subsystems of the law. Such a picture would raise further, highly interesting, questions about the concept of law and the idea of legal validity. Today, the law's validity is typically explained monistically – integrated via the state's authority[145]. In contrast, to describe medieval law it may be necessary to develop a genuinely plural conception of sources of legal validity. This leads to the questions of how lawyers and other legal decisionmakers of these days managed the uncertainty resulting from the relative independence

---

[142] Cf. *Teubner*, Globale Bukowina (*supra* n. 44) 265ff.; *Mertens*, Nichtlegislatorische Rechtsvereinheitlichung; *Stein*, Lex mercatoria 187ff. (both *supra* n. 43); *Michaels* 1224ff., 1231f., all with further references.

[143] Cf. *supra* n. 3.

[144] "The Church lives according to Roman Law"; see *Helmholz* (*supra* n. 115) 17ff.

[145] *Supra* at n. 5.

of different legal subsystems. Answers to these questions may be helpful also for understanding more recent developments – not, of course, because medieval concepts and instruments should be applied today, but because they could free modern lawyers from the unconscious conceptual constraints that result from later developments[146].

### 3. The "Lothar Legend": Legal Authority and the Emperor's Sovereignty

Commercial matters have at most times been brought before specific mercantile courts, and merchants were typically a part of these courts. Nevertheless, since the 16th century these courts were increasingly controlled by governmental authorities and became a component of the public administration of justice[147]. At the same time, the mercantile law was integrated – as the merchants' *ius singulare* – into the learned *ius commune*[148]. Thus, institutions that had developed among the merchants were now viewed as part of the common law. Apparently, this was connected with the rise of the state as the sovereign source of (all) legal validity. Yet it is an open question whether this integration should be interpreted more as an active expansion of governmental domination, expressing the states' sovereignty, rather than as an internal development within the legal system by which the actors of the law merchant themselves tried to ensure legal certainty. It may have been an important issue for the merchants' quasi-legal system to fix its boundaries from within by defining more clearly the distinction between legally binding norms and mere conventions. This dichotomy reappears today when proponents of a new *lex mercatoria* emphasize its autonomy from the state and the state's laws and at the same time advocate the duty of the state to adopt the *lex mercatoria* as valid "law"[149].

Interestingly, similar developments were apparent in other parts of the medieval legal world. If one had asked a jurist of the 14th century why the law merchant or the *ius commune* were valid and what this might mean, his answer would probably not have satisfied a modern lawyer. The jurist might have spoken of the grounds of legal authority, arguing that Canon law was based on

---

146 On this hermeneutic function of historical research *Jansen*, Brunnen der Vergangenheit (*supra* n. 64) 210ff.

147 See *Coing* 521ff.; *Merzbacher* (*supra* n. 130).

148 *Coing* 519ff.; for an example *Heinz Mohnhaupt*, 'Jura mercatorum' durch Privilegien, Zur Entwicklung des Handelsrechts bei Johann Marquard (1610–1668), in: FS Karl Kroeschell (1987) 308ff., 322f. In England, such developments can be seen already at the end of the 13th century: *Basile et al.* (*supra* n. 128) 31f. See also Lord *Mansfield* in *Pillans* v. *Van Mierop* (1765), 97 E.R. 1035, 1038 (K.B.): "The law of merchants, and the law of the land, is the same"; for adoption in the United States, see *Swift* v. *Tyson*, 41 U.S. 1, 20 (1842).

149 See *Michaels* 1232.

the authority of the Church and the Pope[150]; that the municipal law of his city was based on specific statutes on the one hand, and on privileges granted to the city by a superior or mightier prince on the other; and that mercantile law was likewise based on privileges and custom. The authority of Roman law was a different matter. Medieval lawyers treated the *Corpus iuris civilis* as a "holy book"[151]: an eminent text containing eternal legal truth. In its revealed authority, it was put on the same level as the Holy Scripture and the classical philosophical texts of *Plato* and *Aristotle* (as far as these were known). Its authority resulted from an idealised view on the Roman Empire as the cradle of European civilisation[152] and from the specifically legal rationality inherent in its texts: It was "natural law historically confirmed and metaphysically validated"[153]. However, it did not follow that Roman law was generally applicable. At least in theory (though not always in practice[154]), written municipal law had priority, and the Roman *ius commune* was only of subsidiary applicability[155]. It was not so much a set of rules applied uniformly before the courts than a common academic language: *Justinian*'s *Corpus iuris civilis* was, first of all, the authoritative textual point of reference of common legal knowledge[156]. Yet the validity of Roman law could not be explained on the basis of a concept of ideal, "natural" law. Natural law was a different concept; it did not refer to a transcendental ideal, but to a loose bundle of binding, yet not always directly applicable norms, such as the Decalogue[157]. At the same time, Roman law was also different from equity (*aequitas*). This was a further, independent source of law based, again, on a different source of legal authority; it has been seen in the treatment of mercantile custom[158].

---

150 *Landau* (*supra* n. 121) 40f.

151 *Raoul C. van Caenegem*, European Law in the Past and the Future (2002) 55.

152 *Koschaker* (*supra* n. 7) 69ff.

153 *Wieacker*, Privatrechtsgeschichte 48ff., 51: "Naturrecht kraft geschichtlicher Würde und metaphysischer Autorität"; the translation follows *Tony Weir*: *Franz Wieacker*, A History of Private Law in Europe (1995) 32.

154 *Koschaker* (*supra* n. 7) 88ff.

155 *Wieacker*, Privatrechtsgeschichte 80ff.; *Coing* 12f., both with further references.

156 See *Klaus Luig*, Institutionenlehrbücher des nationalen Rechts im 17. und 18. Jahrhundert: Ius Commune 3 (1970) 64ff. (cited Institutionenlehrbücher); *id.*, Der Geltungsgrund des römischen Rechts im 18. Jahrhundert in Italien, Frankreich und Deutschland, in: La formazione storica del diritto moderno in Europa (Atti del terzo Congresso internazionale della Società Italiana di Storia del Diritto) II (1977) (cited Geltungsgrund des römischen Rechts); *Raoul C. van Caenegem*, European Law in the Past and the Future, Unity and Diversity over Two Milennia (2002) 1ff., 13ff., 22ff.; *Zimmermann*, Ius Commune (*supra* n. 47) 8ff.; *id.*, Die Principles of European Contract Law als Ausdruck und Gegenstand Europäischer Rechtswissenschaft (2003) 17f.: "übergreifende(n) intellektuelle(n) Einheit": intellectual unity overarching the legal plurality of these days.

157 Cf. *Berman* 145ff.; *Schröder* (*supra* n. 121) 9ff.

158 *Supra* nn. 135f.

What is more, even if there is apparently little historic knowledge in this respect, the different sources of legal authority may have been connected with different policies. Whereas the Roman sources largely proceeded from an implicit corrective-justice approach to private law[159], medieval statutes were typically written for more instrumental considerations of public policy. Accordingly, they did not provide for a comprehensive codification, but were limited to matters of particular importance for the social and commercial order of the community[160].

All in all, quite different ideas and sources of legal authority or validity were present in the legal world of the late Middle Ages. It followed that the authority of legal sources could only be relative to that of others[161]. For contemporary lawyers, such a situation of uncertainty resulting from plural and relative authority cannot have been satisfactory. The conflicting authorities mutually qualified their respective authority[162] and thus largely undermined the law's claim to finally determine normative conflicts. Apparently, a source of absolute legal authority was needed, a source to which all authority could be reduced; and here the idea of sovereign legislation, according to which all legal validity is based on the "will" of the sovereign, may have come into play. Modern authors usually attribute this idea of sovereign legislation to political writers[163] who developed the concept of the modern state in the 16th and 17th centuries, such as *Jean Bodin*[164] or *Thomas Hobbes*[165]. The emerging modern state, so the story is told, took control over the law[166], including private law, as

---

[159] *Supra* 363ff.

[160] Cf. *Zimmermann*, Statuta (*supra* n. 119) 317. See also, as examples, *Petra Koch*, Die Statutengesetzgebung der Kommune Vercelli im 13. und 14. Jahrhundert (1995) 68ff., 76f., 99f.; *Peter Lütke Westhues*, Die Kommunalstatuten von Verona im 13. Jahrhundert (1995) 265ff. Most statutes were drafted after a political reform or a fundamental political change; they thus contained provisions on the polity's constitution and norms that were particular important for the city's social structure and for its economic activities; cf. *Armin Wolf*, Die Gesetzgebung der entstehenden Stadtstaaten, in: Handbuch I (*supra* n. 115) 517, 573ff., 606ff.

[161] *Thomas Duve*, Mit der Autorität gegen die Autoritäten?, Überlegungen zur heuristischen Kraft des Autoritätsbegriffs für die Neuere Privatrechtsgeschichte, in: Autorität der Form – Autorisierung – Institutionelle Autorität, ed. by *Wulf Oesterreicher et al.* (2003) 239ff.

[162] *Duve* (previous note) 249.

[163] See examplarily, *Jones*, History (*supra* n. 96) 81ff.; *Schröder* (*supra* n. 121) 97f.; *Stephan Meder*, Die Krise des Nationalstaates und ihre Folgen für das Kodifikationsprinzip: JZ 2006, 477, 479f. On the political-theoretical discourse about the sovereignty and the transpersonality of the state cf. *Reinhard* 100ff., 122ff.

[164] *Jean Bodin*, Les Six Livres de la République (1583) 135 (*liv.* I, *chap.* VIII). Cf. *van Crefeld* 175ff.; *John W.F. Allison*, A Continental Distinction in the Common Law (1996) 45f., both with further references.

[165] *Thomas Hobbes*, Leviathan (1651) ch. 26, for whom the sovereign was, within the state, the only source of legal validity.

[166] *Reinhard* 281ff.

part of its increasing immediate domination over all its citizens[167]. A similar interpretation would argue that the state's legislative authority was needed for solving fundamental problems of the legal system.

However, despite its plausibility at first sight, a couple of observations may raise some doubts about this interpretation. First, legislation had long before been a means of sovereign domination[168]. It is not a revolutionary thesis anymore that the Catholic Church became in many respects the intellectual and institutional model for the later national states: Since the 11th century, the Popes used legislation both internally to construct the Church as a corporate entity and externally to dominate the Christian world. In fact, this is where the idea of changing, as opposed to describing or restating, the law by means of legislation was developed[169]. City-republics with their statutes and early monarchic systems, like the Sicilian and the English, followed this example[170]. Thus, *Aquinas* could conceive of the law as an *ordinatio*, *i.e.* a sovereign's command[171], and for *Baldus* a statute's validity typically depended on a sovereign's "Sic volo sic iubeo"[172]. So the idea that the law's validity can be found in a sovereign's command cannot have been new in the 16th century. What was new was to describe the (national) state's sovereignty in terms of unlimited legislative competence. But this was not directly relevant for the conceptions of positive law or for legal authority and validity.

Second, at the end of the 15th century – before there was a developed conception of the modern state – scholars had attributed the validity of all secular law[173], and thus also the validity of the Roman *ius commune*, to the Emperor's command. In 1135, so they told, *Lothar III of Supplinburg* had prescribed the

---

[167] *Supra* n. 59.

[168] *Berman* 85ff., 113ff.; *Reinhard* 28, 186f., 259ff., 285f.; *Horst Dreier*, Kanonistik und Konfessionalisierung – Marksteine auf dem Weg zum Staat: JZ 2002, 1, 4ff., further references within. In fact, Canon law may be considered the first modern legal system: *Berman* 12, 116ff., 199ff.

[169] See, apart from *Berman*, *Helmut Quaritsch*, Staat und Souveränität I: Die Grundlagen (1970) 132ff.; *Landau* (*supra* n. 121) 45ff.; *Dreier* (previous note) 5, further references within. *Bonifaz VIII* expressly announced his *Liber sextus* as "new law".

[170] Cf. *Reinhard* 35ff., 60f., 64, 67f., 244ff., 291ff.; *Csaba Varga*, Codification as a Socio-Historical Phenomenon (1991) 61.

[171] *Aquinas*, Summa theologica II 1, *qu.* 90, *art.* 1 und 4: "[Lex] nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata"; cf. also *qu.* 91, *art.* 1; *qu.* 95, *art.* 2; *qu.* 96, *art.* 4; *qu.* 97, *art.* 1; *qu.* 104, *art.* 1. Thus, the formula *lex posterior derogat legi priori* was developed, and the prohibition on retroactive law became a fundamental principle of Canon law.

[172] "(S)tatuta terrarum … maiori parte magis consistunt [in] sic volo sic iubeo … (thus I want and thus I command)": *Baldus*, Super usibus feudalibus, as quoted in *Helmut Coing*, Zur Romanistischen Auslegung von Rezeptionsgesetzen: Fichards Noten zur Frankfurter Reformation von 1509: SavZ/Rom. 56 (1936) 264, 269.

[173] Detailed *Hermann Krause*, Kaiserrecht und Rezeption (1952) 126ff.

use of the recently found Digest[174]. Now, as a matter of historical fact, this story was simply wrong; it was an *ex post* invention that served to legitimise the use of Roman law: The modern idea that the authority of private law is based on sovereign domination was first developed by legal scholars as a fiction.

The results of this remarkable fiction were complex: By constructing an ultimate source of authority outside the legal system that had long before become incapable of being a dominant actor in matters of private law, the attribution preserved the autonomy and the growing influence of the Roman *ius commune*, as "administered" by legal academia. While purporting to interpret governmental commands, legal scholars continued to develop the law largely independently of governmental or judicial influence. Yet, despite the central place of the state in modern concepts of law, neither the motives for this fiction nor its consequences have been fully analysed. Instead, since the 17th century, the controversial debates of the reception as such of Roman law[175] have put this problem into the shadow. But the modern relation of private law to the state cannot be understood without a clear picture of the factors that led to the idea that legal validity could derive only from external domination and thus from the sovereign, the ultimate secular authority.

Finally, even in the 16th and 17th centuries, the sovereign monarchs or cities did not exhibit a particular interest in comprehensively determining the law. True, they had reduced the impact of Canon law and had monopolised the judiciary[176]. And an increasing number of statutes was issued regulating matters of public policy[177]. But this legislation concerned mostly matters of public law[178]; and – apart from criminal law[179] – there was no comprehensive, codificatory legislation until the 18th century[180]. Private law continued to be based

---

[174] *Wieacker*, Privatrechtsgeschichte 145; *Klaus Luig*, Conring, das deutsche Recht und die Rechtsgeschichte, in: H. Conring (1606–1681), Beiträge zu Leben und Werk, ed. by *Michael Stolleis* (1983) 355, 357f., 372f. (cited Conring).

[175] *Peter Bender*, Die Rezeption des römischen Rechts im Urteil der deutschen Rechtswissenschaft (1979); *Wieacker*, Privatrechtsgeschichte 124ff.

[176] *Reinhard* 281, 291ff.

[177] *Reinhard* 298ff. On the "Policeyordnungen" *Wilhelm Ebel*, Geschichte der Gesetzgebung in Deutschland (1958) 59ff.; *Michael Stolleis*, Geschichte des öffentlichen Rechts in Deutschland I: 1600–1800 (1988) 369ff., further references within.

[178] For the Holy Roman Empire, see *Heinz Mohnhaupt*, Gesetzgebung des Reichs und Recht im Reich vom 16. bis 18. Jahrhundert, in: Gesetz und Gesetzgebung im Europa der Frühen Neuzeit, ed. by *Barbara Dölemeyer/Diethelm Klippel* (1998) 83, 97, 101 (cited Gesetz und Gesetzgebung).

[179] On the *Constitutio Criminalis Carolina*, which codified the criminal law for the Holy Roman Empire, see *Harold J. Berman*, Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition (2003) 138–154, who explains this on the basis of specifically Lutheran ideas.

[180] On early, humanistic arguments for a codification of the law, cf. *Pio Caroni*, Kodifikation, in: Handwörterbuch zur deutschen Rechtsgeschichte II (1978) cols. 907, 911f.; *Hel-*

on the Roman texts of the *ius commune* and on local statutes. Thus, the appearance of the state was arguably irrelevant for the substance of private law and even preserved the private law's autonomy.

## 4. Sovereignty and Validity I: Codification and the State

Over the course of the 17th century, the validity of private law had become a fundamental problem for the legal system, again. On the one hand, the story of Emperor *Lothar III's* having enacted the Digest as positive law was irrelevant outside the borders of the German Empire. In 1643 it was buried as a "legend" in Germany as well, when *Hermann Conring* published his "De origine iuris germanici". On the other hand, the validity of the applicable "positive" law was now becoming more and more closely connected with a sovereign's will. In the 18th century, even customary law was reconceptualized as law tacitly agreed on, and thereby made valid, by the sovereign[181]. This led to the paradoxical and unsatisfactory situation that although the validity of law could depend only on the sovereign's command, the most important part of private law had never been enacted by any competent legislator. In fact, the Roman *ius commune* has been characterised as having been extraordinarily detached from the state's governmental domination[182]. Accordingly, it became difficult to justify the validity of the *Corpus iuris civilis* on the basis of the prevailing conception of law as based on legislative fiat[183]. Nevertheless, during the 18th century, Roman law was taught as a matter of course at the universities; and the courts applied it pragmatically[184]. More theoretical authors justified it on the basis of totally divergent arguments, such as *imperium* (a prince's tacit confirmation of the prevailing judicial practice), the traditional *usus* of Roman law, or its inherently legal qualities (*ratio* and *certitudo*). None of these arguments was regarded as really satisfactory by the jurists themselves[185].

---

*mut Coing*, Zur Vorgeschichte der Kodifikation, Die Diskussion um die Kodifikation im 17. und 18. Jahrhundert, in: La formazione storica del diritto moderno in Europa, ed. by *Bruno Paradisi* (1977) 797, 798ff., 805ff.; *Mohnhaupt* (*supra* n. 178) 103ff.

[181] *Oestmann* (*supra* n. 112) 367f., references within. Similarly, when *Malynes* emphasized that the law merchant had been "approved by the authority of all kingdoms and not as law established by the sovereignty of any prince" (*Malynes* [*supra* n. 127] i-3f.), implicitly he may have accepted that its validity depended on such tacit acceptance by the state.

[182] *Franz Wieacker*, Aufstieg, Blüte und Krisis der Kodifikationsidee, in: FS Gustav Boehmer (1954) 34, 35 (cited Kodifikationsidee).

[183] See, in more detail, *Luig*, Geltungsgrund des römischen Rechts (*supra* n. 156) 819ff., further references within.

[184] The German *Reichskammergericht*, though, was obliged to apply Roman law; this was provided for by the *Reichskammergerichtsordnung* of 1495.

[185] Cf. *Anton F.J. Thibaut*, System des Pandekten-Rechts[4] (Jena, 1814) vol. I, p. 11 (§ 13): "Daß der Grund der recipirten Rechte jetzt wegfalle, oder unsre Lage zweckmäßigere Gesetze erheische, steht *juristisch* der Anwendung derselben nicht entgegen."

Moreover, *Conring* did not write his refutation of the Lothar Legend as a disinterested scholar. He fought – successfully – for the acknowledgement of a genuine German legal history and German private law[186]; and he even argued for a new comprehensive legal basis (a "codification"[187]) of German private law[188]. Thus, on the one hand, the received Roman law was increasingly discredited as "foreign", and the concept of private law became, for the first time, intellectually connected with the idea of a nation. This idea of situating law in the nation was later deeply entrenched in European legal thinking, when *Montesquieu* published his *De l'Esprit des lois* in the 18th century, and when *Savigny's* idea of the law being an emanation of the common "consciousness" or "spirit" of the people (*Volksgeist*) became a central element of the 19th century German Historic School; similar ideas circulated in the English common law. On the other hand, the writers of the later *usus modernus* regarded customary law as a source of law even if it was not laid down in a written text[189]. As a consequence, the question of which law was applicable became even more difficult, and legal proceedings suffered from extreme uncertainty about the applicable law[190].

It was only at this stage that European legislators appeared on the scene and actively extended their sovereignty into the domain of private law. On the continent, private law was, within a remarkably short period, comprehensively codified[191]. Now, from a conceptual point of view, by reformulating the private law as an expression of the sovereign state's legislative intent, the law was incorporated into the state. It is thus *prima vista* highly plausible to regard codifications as an expression of the "strong state"[192]. Indeed, codifications were initiated by the governmental administration and thus originated in the political sphere. Interestingly, they were first successful only in strong states; but the form of government was immaterial for the codification idea: The law was codified in the still-traditional absolutist kingdom Bavaria (1756), by the

---

186 *Luig*, Conring (*supra* n. 174) 359ff., 375ff.

187 On earlier arguments for a codification of the law, cf. the references *supra* n. 180.

188 *Luig*, Conring (*supra* n. 174) 378: codification.

189 *Wieacker*, Privatrechtsgeschichte 207; more detailed *Klaus Luig*, Samuel Stryk (1640–1710) und der "Usus modernus pandectarum", in: FS Sten Gagnér (1991) 219, 225ff.; *id.*, Conring (*supra* n. 174) 381ff.

190 *Oestmann* (*supra* n. 112) *passim*.

191 On the history of the idea of codifying the law and of the codification projects, see *Wieacker*, Privatrechtsgeschichte 322ff.; *id.*, Kodifikationsidee (*supra* n. 182); *Coing* 77ff.; *id.*, Zur Vorgeschichte der Kodifikation (*supra* n. 180); *Zimmermann*, Codification 98ff.; *Caroni*, Kodifikation (*supra* n. 180); *id.*, Gesetz und Gesetzbuch, Beiträge zu einer Kodifikationsgeschichte (2003) esp. 14ff. (cited Gesetzbuch); *Weiss* 448ff., 470ff., all with further references.

192 *Meder* (*supra* n. 163) 477ff.; *Caroni*, Gesetzbuch (previous note) 39ff.; *Wieacker*, Privatrechtsgeschichte 324, 333: "Staatskunstwerk"; *id.*, Kodifikationsidee (*supra* n. 182) 35ff., 41; *Reinhard* 301ff.; *Varga* (*supra* n. 170) 71ff., 334ff.: "[C]odification is nothing but a means for the state to assert ist domination by shaping and controlling the law".

more enlightened Prussian King (1794) and the Austrian Emperor (1811), by the experimental parlamentarian system of Sweden (1734), and by the bourgeois post-revolutionary government of France (1804).

Nevertheless, codifications have also been described as "a specific historical phenomenon that originated in … legal science"[193]. In fact, it is remarkable that common-law systems have proved strongly resistant to codification[194]. Therefore, in order to understand the role of the state in the codification movement, it is necessary to look to the motives leading to codification that were apparently manifold and complex. The first was a mixture of pragmatic and theoretical considerations. The whole legal system was in need of fundamental reform and of a unified legislative foundation, not only because the present plural and insecure state of the law was highly unsatisfactory, but also because the normative status of Roman law as a source of positive law had become untenably awkward.

This was partly due to the second factor – the (assumed) need to rationally reorder and systematise private law. In fact, in the increasingly rationalistic world of 18th century, Roman law lost its previous status as legal *ratio scripta* that had long been a major rationale for its application: Reason had to be simple and evident for every clear mind, but Roman law and the civilian legal science were complex and full of apparently unnecessary controversy. Reason had to express itself in general propositions, *i.e.* abstract laws, but the digest was full of the subtle discussions of individual cases. Already in the 17th century, this had been a motive for humanist and natural-law scholars to rearrange and rationalise the traditional private law into new systems of legal order[195]; thus, *Leibniz* had proposed an ideal codification that could logically reorder civil law[196].

What is more, rationality and the idea of a system had become the foundation of natural-law thinking. In the 17th and 18th centuries, authors like *Grotius*, *Pufendorf*, *Thomasius*, *Heineccius*, and *Wolff* had transformed the traditional Christian school of natural law into a secular enterprise. Assuming that moral and legal truths are accessible for human reason, they developed logical, conceptually structured systems of natural law on the basis of a limited number of basic moral principles. Thus, the systematic structure of the law had become much more than a device of expository convenience. It was a matter of moral principle.

---

[193] *Zimmermann*, Codification 98; see also *Mohnhaupt* (*supra* n. 178) 104.

[194] More detailed *infra* 384ff.

[195] Notable examples are *Donellus'* Commentarii de iure civili (1589/90), *Grotius'* Inleidinge tot de Hollandsche rechtsgeleerdheid (1620/31), or *Domat's* Lois civiles dans leur ordre naturel (1689). Cf., with a special view on obligations, *Michaels*, Systemfragen des Schuldrechts (*supra* n. 141) nn. 24ff., 28ff.

[196] *Gottfried W. Leibniz*, Corpus Juris reconcinnatum (1672); cf. *Michael H. Hoeflich*, Law & Geometry: From Leibniz to Langdell: Am.J.Leg. Hist. 30 (1986) 95, 99ff.

Although these natural-law systems were not thought to be directly applicable, they proved highly influential in continental Europe, where they became a driving force in the codification movement. The idea of codifying the law appealed to enlightened princes and to the new *bourgeoisie*, and not only because such a codification would emphasize the Crown's sovereignty and the new state's identity[197] in the area of private law and because it would make the law accessible to everybody[198]: Another, possibly decisive, factor was apparently the instrumental, utilitarian character of this secular natural law, which was based on clear visions of a better, reasonable social order. Accordingly, a comprehensive and systematic reorganisation of the law in a natural-law codification promised to further the common good and bring about a better, more enlightened society[199]: The natural-law codifications were ultimately based on a reformative, instrumental view of private law[200]. Thus, they were initially drafted primarily not by legal elites, such as academic scholars or judges, but by philosophically and politically educated representatives of the administration[201]. (Of course, these draftsmen knew a lot of positive law; the codifications would not have been comprehensible had they not been based largely on traditional Roman law.) To trace and identify both the foundations and the results of this instrumental approach should provide important insights into the idea of codification and into the relation of private law to the state.

All in all, the codification idea was originally motivated by a bundle of highly divergent factors. What is more, this idea was in the 19th and 20th centuries connected with new political values, especially with the democratic ideal of the law as an expression of a people's will. It is doubtful, though, whether any of these moral ideals has ever been achieved: First, codifications have never made the law accessible to laymen outside the legal system. Even if

---

[197] On this aspect of codifications *Nils Jansen*, Binnenmarkt, Privatrecht und europäische Identität (2004) 19ff.; *Barbara Dölemeier*, Kodifikationsbewegung, in: Handbuch der Quellen und Literatur der neueren Privatrechtsgeschichte, ed. by *Helmut Coing* III/2 (1982) 1421, 1427; *Franz Wieacker*, Der Kampf des 19. Jahrhunderts um die Nationalgesetzbücher, in: *id.*, Industriegesellschaft und Privatrechtsordnung (1974) 79, 84ff.

[198] On these two additional factors motivating codification, see *Zimmermann*, Codification 99f.; *Caroni*, Kodifikation (*supra* n. 180) col. 909.

[199] *Wieacker*, Privatrechtsgeschichte 323; cf. also *Coing*, Zur Vorgeschichte der Kodifikation (*supra* n. 180) 806ff.: reform of the social order. Indeed, in order to translate its philosophical ideas into effective, positive law, natural law theory had during the 2nd half of the 18th century developed theories of legislation: *Diethelm Klippel*, Die Philosophie der Gesetzgebung, Naturrecht und Rechtsphilosophie als Gesetzgebungswissenschaft im 18. und 19. Jahrhundert, in: Gesetz und Gesetzgebung (*supra* n. 178) 225, 233ff.

[200] Cf. *Klippel* (previous note) 237ff.; *Dieter Grimm*, Zur politischen Funktion der Trennung von öffentlichem und privatem Recht in Deutschland, in: *id.*, Recht und Staat der bürgerlichen Gesellschaft (1987) 84, 96, with further references; cf. also *Mertens*, Gesetzgebungskunst (*supra* n. 7) 25ff.

[201] *Wieacker*, Privatrechtsgeschichte 324ff. with details.

the myth is true that every Frenchman used to carry his Code Civil with him, it is unlikely he understood it. In fact, already the enlightenment's legislators proceeded from the assumption that additional instruments were needed to make the codified law known by the general public[202]. Second, codifications today are not written by legislators and often not even by administrations, but by commissions of scholars and other legal experts. A democratic legitimization of the codification idea may therefore be regarded as artificial. In fact, even today the codification idea appears to be still connected with the natural-law intuition that the law can be "found" or "constructed" by abstract legal thinking (and therefore needs no democratic consent). Accordingly, it is reported by participants that current proposals for new "principles" of European law are occasionally written before the comparative research had been done[203]. Finally, even the more reformatory codifications did not fundamentally change the law: One of the main aims of codification has always been to restate the law simply[204]; accordingly, the courts have mostly just continued earlier lines of jurisprudence[205]. The legal system has thus retained large parts of its autonomy. Of course, governments influence the development of private law by means of legislative intervention; this has been seen above with respect to the European Union's directives and the Roman magistrates[206]. But codification has never fully shifted the development of private law from judges and scholars to the government. It follows that – as long as the judiciary is not conceived of as one aspect of a homogenous, metaphysical state[207]

---

[202] Thus, it was thought necessary to teach the codification at the elementary school, to read it in the churches and to produce easily accessible compendia with the codification's most important basic rules; more detailed *Mertens*, Gesetzgebungskunst (*supra* n. 7) 251ff.

[203] In fact, many of the preparatory papers for a European "Common Frame of Reference" (cf. *Jansen*, Traditionsbegründung im europäischen Privatrecht: JZ 2006, 536ff., with references) are still lacking the comparative material, although the rules have already been drafted.

[204] Cf. above n. 7.

[205] *Reinhard Zimmermann*, Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts, in: Historisch-Kritischer Kommentar zum BGB, ed. by *Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann* I (2003) Vor § 1, m.n. 17; cf. also the contributions to Das Bürgerliche Gesetzbuch und seine Richter, Fallstudien zur Reaktion der Rechtspraxis auf die Kodifikation des deutschen Privatrechts, ed. by *Ulrich Falk/Heinz Mohnhaupt* (2000); for France *Zweigert/Kötz* (*supra* n. 7) 88ff., 93ff.; *James Gordley*, Myths of the French Civil Code: Am.J.Comp.L. 42 (1994) 459; cf. also *Donald R. Kelly*, Ancient Verses on New Ideas: Legal Tradition and the French Historical School: History and Theory 26 (1987) 319ff. A detailed analysis will be found in *Jean-Louis Halpérin*, in: The Making of European Tort Law: Doctrine, ed. by *Nils Jansen* (forthcoming, 2008).

[206] For the European Union, see *supra* at nn. 53ff., for Roman law at nn. 79ff. For an illuminating picture of the German development during the Republic of Weimar, see *Nörr* (*supra* n. 14).

[207] On the specific place of the judiciary "between" the legal system and the state, see *infra* 382f.

– private law may be seen as largely independent of the state even today, despite its formal incorporation into the state by means of codification.

This brings us back to the initial question of the relation of the state and the legal system in the codification process. If this question is answered from a more formal perspective, it might appear decisive that the codifications replaced the plural legal sources of the late *usus modernus* by a single state law; the codification movement would thus be described as a process of the states' expanding their domination into traditionally autonomous areas of the legal system[208]. However, codification might likewise be understood as a primarily internal legal process by which an external source of legal validity is established without the legal system's giving up its internal autonomy. Seen from this internal perspective, the state might perhaps not have meant much more for Europe's legal systems than did the Roman *praetor* for Roman law[209]. However, the exact historical relation of internal legal and external political factors has not yet been sufficiently analysed. Such analysis is necessary not only for a complete picture of the historic development but also for understanding the relation of the state and private law today. A comparison of the different developments in continental European and in the common-law world might well help with this analysis.

## 5. Sovereignty and Validity II: The People and the Common Law

Even today, the relation between the state and private law appears to be significantly closer on the European continent than in the common law. This may be due not least to the common law's having always remained in the hands of judges who developed a high degree of independence from the state and a strong collective professional identity. Although the courts had everywhere become a part of the centralised administration of the state (or, in England, of the Crown), the judiciary had – in varying degrees – retained some sort of independence against the political government[210]. Even where the courts enjoyed no formal, constitutional independence[211], judges were able to protect individuals against absolutistic arbitrariness[212]. They formed a self-re-

---

[208] For this view, among others, *Wieacker*, Kodifikationsidee (*supra* n. 182) 35ff.; *Caroni*, Gesetzbuch (*supra* n. 191) 39ff.; *Meder* (*supra* n. 163) 477, 479ff.

[209] *Supra* 360ff.

[210] In England, the judiciary was practically independent since the Act of Settlement (1701); it was regarded as a guarantor of the people's liberties and as an independent actor within the state; cf. *Reinhard* 73, 121, 294.

[211] *Coing* 52ff.

[212] *Regina Ogorek*, Individueller Rechtsschutz gegenüber der Staatsgewalt, Zur Entwicklung der Verwaltungsgerichtsbarkeit im 19. Jahrhundert, in: Bürgertum im 19. Jahrhundert, ed. by *Jürgen Kocka* I (1988) 372, 385ff.; *Grimm* (*supra* n. 200) 86f.

cruiting professional elite and could thus develop specific values and a specific idea of law. Accordingly, they can often be placed "between" the state and the legal system[213]. Thus the roles of judges on the one hand and of government on the other may be crucial to the relation of private law and the state and so deserve special attention. The independence of judges – normative or factual – entails limits of governmental sovereignty[214].

Nevertheless, to draw a simple distinction between the "codified" civil law and the un-codified common law and to relate this distinction to the difference in the state's position in private law may be too simplistic. First, it is wrong to describe the common law as intrinsically averse to codification. Civil lawyers will probably know that the concept "codification" was coined by *Jeremy Bentham*[215], but there is less awareness of the many codification discussions in England, in the Commonwealth, and in the USA. The codification debate in England is as old as that on the continent[216], and from the 19th century onwards[217], these discussions were no less intense than those on the continent[218]. They resulted only exceptionally in civil codes, though, most notably in British India[219] and in Louisiana[220]. Instead, there are different, specifically American outcomes of the codification debate, namely the restatements and the UCC, both of which have created a substantial degree of national uniformity and systematization of the law. In contrast to European codifications, however, the restatements were initiated as a non-state enter-

---

[213] This point is different from the much-discussed question whether judges act as legislators (see, e.g., *Duncan Kennedy*, A Theory of Adjudication [fin de siècle] [1997] 23ff.). Whether or not judges act as legislators is at least in part different from whether or not they do so as an institution of the state.

[214] *Ogorek* (*supra* n. 212) 381f.

[215] *Hans Schlosser*, Grundzüge der Neueren Privatrechtsgeschichte[10] (2005) 112, 249.

[216] *Barbara Shapiro*, Codification of the Laws in Seventeenth Century England: Wis. L.Rev. 1974, 429ff.; *George L. Haskins*, De la codification du droit en Amérique du Nord au XVII[e] siecle: Une étude de droit comparé: Tijdschrift voor Rechtsgeschiedenis 23 (1955) 311ff.; *Teubner* 56ff.; cf. also *Varga* (*supra* n. 170) 145ff.

[217] In the 18th century, however, there was practically no such discussion; see *Teubner* 126ff.

[218] *Teubner* 136ff., 144ff.; *Reimann* 95ff.; *Weiss* 470ff., 498ff.; cf. also *Varga* (*supra* n. 170) 147ff., 154ff.

[219] Here codifications were necessary for overcoming a genuine plurality of conflicting legal systems; see *Zweigert/Kötz* (*supra* n. 7) 222f.; *Varga* (*supra* n. 170) 149ff.; *Weiss* 484ff., further references within. See also *Mertens*, Gesetzgebungskunst (*supra* n. 7), historically comparing the methodological debates in Germany, Austria and the Switzerland with those in England and especially British India.

[220] Here, the codification project was initiated immediately after Louisiana had become a State of the USA; it was apparently driven by the impulse to preserve its Spanish-French identity against the English America. See *Shael Herman*, The Louisiana Civil Code, A European Legacy for the United States (1993) 28ff.; *Zweigert/Kötz* (*supra* n. 7) 115; *Weiss* 499ff., further references within. Thus, it may be argued that the Louisiana codification results more from the civilian than from the common-law tradition.

prise[221] and have retained this status until today[222]. Thus, a comparison of the divergent codification processes on the European continent and in America is specifically helpful for understanding the relation of private law and the state.

Basically, the reasons offered for codification in England and America were similar to those in continental Europe[223]. It was argued that a codification would make the law more accessible and structure it in a rational way; its application would thus become efficient. Influential lawyers, especially *Bentham*, emphasised the function of a codification to promote social change towards a better society[224]. Furthermore, codes could have been seen as an expression of the American revolution; indeed, such arguments seem to have been important in early codification attempts in 17th century Massachusetts[225]. Why then, it might be asked, were these arguments ultimately less successful in the United States?

Standard answers are that codifications were regarded as unsatisfactorily inflexible; often the quality of a proposal was argued to be low. Common lawyers had always mistrusted the parliament and its legislative ability. Parliamentarians were opposed to social change. Politically influential lawyers were likewise conservative, and they may have had political interests in preserving the present state of law that was the basis of their professional identity and livelihood[226]. But the inflexibility of codes has not prevented European legislators from codifying the law even in the 20th century, and lawyers were no less conservative and self-interested in civilian jurisdictions than in English and American ones. Other reasons for the success of the codification-movement on the European continent and not in the common law may have been more decisive.

A first reason is apparently that neither the English nor the American legal order was plural in the same degree and sense that made the peoples on the European continent suffer from legal uncertainty[227]. The differences between

---

221 *Weiss* 517ff.

222 Cf. *Thomas Schindler*, Die Restatements und ihre Bedeutung für das amerikanische Privatrecht: ZEuP 1998, 277ff.; *Richard Hyland*, The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination, in: Towards a European civil code[3], ed. by *Arthur S. Hartkamp* (2004) 59ff., 64ff.

223 But see *W. Teubner* who argues that different weights were attached to similar arguments. But this underestimates both the impulse for social reform in continental Europe and the desire for a rational order of the law in England and the United States.

224 *Teubner* 132ff., 136ff.; *Weiss* 480, 511; *Reimann* 102.

225 *George L. Haskins*, Codification of the Law in Colonial Massachusetts, A Study in Comparative Law: Ind. L.J. 30 (1954) 1ff.

226 *Teubner* 176ff., 198ff.; *Weiss* 489f., 510f., 514, further references within.

227 *Teubner* 159f. On the unification of the laws in England by Henry II through centralization and specialization, see *Raoul C. van Caenegem*, The Birth of the English Common Law[2] (1988) 19ff., 88ff.

law and equity, between admiralty law and common law, were real, but probably less pressing than the differences among legal sources in Europe. Second, the prevailing common law was never seen as an alien, foreign system, as was the case with the Roman *ius commune* in the 17th century. In England and America, there was never an emotional distance from the prevailing legal system. To the contrary: Common lawyers identified with the common law[228]; and the sharp attacks against the common law by *Bentham*, the leading proponent of codification in England, may in turn have resulted in a fundamental distrust of the codification movement as a whole[229]. Interestingly, identification with the common law also happened in the United States, where, from around 1800, the American common law was perceived not as a received body of alien English law, but as the customary law of the American people[230].

Connected with this observation is, third, the different role of judges on the European continent and in the common-law world that might have accounted for the different attitudes towards legislation. Whereas the French revolution used codification as a governmental bulwark to protect the people from a corrupt judiciary[231], the objective in the common-law world was to protect the people through the courts from a corrupt government. The same desire for democracy and liberty may thus have turned into an argument for codification on the continent and against it in England and the United States and so ultimately provided a significant difference in the respective relationships between private law and the state.

For the present analysis, a fourth factor may be the most interesting one: The common law's legal validity was always thought of as independent of the state[232], this may seem doubtful for England, where the common law was developed by the common-law courts that in turn derived their authority from the King[233], and the King was actively engaged in the law's development. Yet, even if the common-law courts derived their authority from the King, the law they applied was thought to be found rather than made, and to bind the King, as well[234]: To overcome the law, the King had to resort a body of rules outside law, namely equity[235].

---

228 Cf. *Teubner* 179f., 184f., 193, 202, further references within.

229 *Teubner* 137ff., 161f.

230 *Horwitz*, American Law 1780–1860 (*supra* n. 30) 17ff.

231 See *Raoul C. van Caenegem*, Judges, Legislators & Professors (paperback ed., 1993) 152ff.

232 Cf. *Milsom* (*supra* n. 63) p. xvi.

233 Cf. *Berman* 445ff.

234 Thus, the courts could become independent actors within the state; cf. *Reinhard* 294. In the Middle Ages, the idea that the King was bound by customary law had been widespread also in Germany; but, during the 17th and 18th century, this idea had lost its relevance for the legal system; cf. *infra* at nn. 258ff.

235 See *van Crefeld* 89ff.; for all *Günther Lottes*, Souveränität, Recht und Gesetzgebung im England des 16. Jahrhunderts, in: Gesetz und Gesetzgebung (*supra* n. 178) 17, 26ff.

In any event, when the United States rejected the sovereignty of the English Crown, the common law they received was thereby stripped of such foundation in the will of the (English) Crown. American lawyers apparently never felt another positive source of law was needed for lack of the common law's legal authority. This is not to say that questions of the law's validity were not raised. To the contrary: In a remarkable historical parallel to the civilian development[236] in America in the 17th and 18th centuries, the validity of customary law was related to the sovereign's will. Yet, as far as we know, this created neither conceptual nor practical problems. Arguably, the reason it did not was that sovereignty was not attached to an abstract state but to the American people, whose consent was seen as essential not only to the Constitution ("We, the People"), but also to the common law, understood as customary law based on consent and formulated by the courts as representatives of the people[237]. There was simply no need to introduce an abstract state; government and the legislator had no necessary role to play in the development of private law. When Justice Story declared, in 1842, that federal courts sitting in diversity could develop a federal common law rather than the common-law rules of different states[238], he did so based on the idea of a national (and even transnational) common law (invoking ideas of *lex mercatoria*) that required no formal sovereign, whether state or federal, for its validity. It would take almost one hundred years until this idea of a private law grounded in neither the states nor in the federal government was found to be a "brooding omnipresence in the sky"[239] and dismissed[240]. Yet, even this dismissal was not so much a state-positivist attack against the idea that the common law derives its validity from society rather than from the state; it was an attack only against the idea that the relevant society was a national or even transnational society rather than one of each individual state[241].

---

[236] *Supra* at n. 181.

[237] *Horwitz*, American Law 1780–1860 (*supra* n. 30) 19ff.; see *Sheldon Amos*, Codification in England and the State of New York (London 1867) 20f.; *id.*, An English Code: Its Difficulties and the Modes of Overcoming Them, A Practical Application of the Science of Jurisprudence (London 1873) 57ff. (with an explicit reference to Savigny's idea of the law being an emanation of the *Volksgeist*). This idea was already present in earlier discussions in England (*William Blackstone*, Commentaries on the Law of England[4] I [Dublin 1771] 68ff., 73) where this understanding of judicial reasoning was sharply attacked by Bentham and the subsequent analytical school of jurisprudence.

[238] *Swift* v. *Tyson* (*supra* n. 148).

[239] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting): "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified … It always is the law of some state …". Here, "state" refers to the states of the Union.

[240] *Erie Railroad RR.* v. *Tompkins*, 304 U.S. 64 (1938).

[241] Of course, this is a radical simplification; for fuller historical analyses, see *Tony Freyer*, Harmony and Dissonance: The Swift and Erie Cases in American Federalism (1983); *Edward A. Purcell*, Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the

This feature of the American concept of private law became particularly significant in the debate about the New York civil code[242]. Here, *James Coolidge Carter*, the major opponent of the code project, relied on arguments very similar to those of *Savigny* in opposing a German Civil Code at the beginning of the 19th century. Apart from criticising the code as a poorly drafted misrepresentation of the present law of New York, he opposed, on a more fundamental level, the very idea of a codification itself. *Carter* argued that law was "an original, but ever growing body of custom" that reflected "the national standard of justice" and "public opinion"[243]. This was largely equivalent to *Savigny*'s idea of the law's being an emanation of the common "consciousness" or "spirit" of the people (*Volksgeist*). The only difference appears to have been that the *Volksgeist* had been expressed by scholars, while the "national standards of justice" were now collected in the precedents of the common law[244]. Yet, as *Mathias Reimann* has observed[245], this idea was much more congenial with the American legal mind and its original common-law tradition than with the German legal culture that was based on "foreign" Roman law and that had long regarded the state as the legal sovereign. Thus, whereas *Savigny* ultimately limited his argument to the claim that German law was not yet ripe for codification (and indeed such codification did come about later), *Carter* had no such grounds to qualify his argument; and the New York codification project ultimately failed.

This defeat is today regarded as a crucial event within the development of legislative codification in America[246]. A desire to authoritatively systematise and unify the law, however, has remained. It found a different expression in the restatements. As a purely private enterprise, these left the authority of the common law untouched. At the same time, they were conceptually and factually open for the law's development. They did not claim to authoritatively fix the law, but, less pretentiously, to reconstruct it with an authoritative text. As result, it was natural for the restatements to get out of date. They are peri-

---

Politics of the Federal Courts in the Twentieth-Century America (2000); for comparison with European private law, see *Koen Lenaerts/Kathleen Gutmann*, "Federal Common Law" in the European Union, A Comparative Perspective from the United States: Am.J.Comp.L. 54 (2006) 1ff.

[242] For comprehensive account of the discussion, see *Reimann* 99ff., further references within.

[243] References in *Reimann* 99ff.

[244] Cf. *Reimann* 111f.

[245] *Reimann* 108f.; see also *id.*, Historische Schule und Common Law, Die deutsche Rechtswissenschaft des 19. Jahrhunderts im amerikanischen Rechtsdenken (1993) 56–73; *Michael H. Hoeflich*, Savigny and his Anglo-American Disciples: Am.J.Comp.L. 37 (1989) 17ff.

[246] *Weiss* 511, 514f., further references within.

odically reformulated and thereby – substantially and systematically – adapted to the changes of the law[247].

All in all, different concepts of sovereignty are arguably one basic reason for the different role of the state in modern private law. Yet, the idea of private law's being based on a sovereign people's will or consciousness is perhaps even more a fiction than the concept of a state comprehensively dominating the law. It served to defend, on the one hand, the law's autonomy and, on the other hand, the interests of the elites of learned lawyers[248]. It is thus an interesting question, why, at some stage of Western legal history, a general consensus developed that the law conceptually needed some external source of authority, called sovereign. At any rate, the consequences of introducing such an external sovereign were complex: Conceptually, this amounted to a loss of the autonomy of private law. Yet, originally such an introduction of a sovereign was a fiction that helped preserve the factual autonomy of private law. Only in more recent times, it may, perhaps ironically, have paved the way also for a factual loss of autonomy. As a matter of fact, in the course of the last 150 years, the state has become more and more active within private law; and in view of the state's legal monopoly, it is difficult to criticise such development. Today, legislation pervades private law in the United States, as well[249]. Only now, it appears that sovereignty over private law is shifting from the people to the state.

## 6. The State, Society, and the Public/Private Distinction

Modern writers reconstructing the development of the distinction between private and public law often proceed from a political understanding of the public/private divide. They understand the idea of an autonomous private law as representing specific liberal (or libertarian[250]) values such as individual autonomy, freedom of contract, and an absolute concept of property. According to this theory, the bourgeois society constituted itself against the increasingly powerful state in the 18th and 19th century[251]. Liberal writers argued that private law was immune to governmental intervention; only the realm of public law was open to political decision-making. In matters of pri-

[247] *Hyland* (*supra* n. 222) 60.

[248] *Reimann* 110ff.

[249] *Calabresi* (*supra* n. 52) 1ff.

[250] American readers might understand the European concept "liberal" as representing social-democratic values; the European "liberal" is equivalent with the American "libertarian", understood, however, in an objective descriptive sense without pejorative connotation.

[251] An illuminating source can be found in *Georg W.F. Hegel*, Grundlinien der Philosophie des Rechts (Berlin 1821) § 182, who argued that the bourgeois society, though logically prior to the state, developed only when the state had come into being.

vate law, the legislator was restricted to describing a supposedly neutral, apolitical "natural" law based on historically developed principles of justice[252]. The division became entrenched in the legal system only as result of a certain political debate, when liberals sought to protect "society" against an increasingly dominant "state"[253].

Of course, this theory is highly plausible and contains an important truth: The distinction was indeed politicized in this sense; and the earlier secular natural law had often assumed an instrumental understanding of private law[254]. Furthermore, this theory may help to explain the different approaches of the common and the civil law towards the public/private divide: In England, the bourgeois establishment had achieved participation in the government as result of the Glorious Revolution; it did not need a sphere of immunity against the government[255]. Indeed, whereas German thinkers traditionally conceived of the state as an independent entity with abstract value in itself (*Hegel*)[256], the Anglo-American world saw the state simply as the product of society without an independent being or intrinsic value[257].

Nevertheless, it is doubtful whether this is the complete story. On the one hand, there may be more mundane reasons for the sharp divide in Germany, in particular the fact that different courts are competent for administrative and private matters. Since the 17th century, the state's administrative acts had increasingly been regarded as immune to judicial review; this development culminated 1806, when – as result of the end of the Holy Roman Empire – individuals lost their traditional constitutional protection against local governments[258]. Thus the judicial review of administrative acts had to be newly established, leading to specific administrative courts[259]. This institutional sepa-

---

[252] For a more recent defence of such a view see *Nigel E. Simmonds*, The decline of juridical reason, Doctrine and theory in the legal order (1984) 120ff., 128ff.: public law guided by *Rawls*ian principles of justice, private law guided by libertarianism as defended by *Nozick*.

[253] *Grimm* (*supra* n. 200) 84ff., 94ff.; *Horwitz*, The History of the Public/Private Distinction (*supra* n. 31); cf. also *Dirk Blasius*, Bürgerliches Recht und bürgerliche Identität, in: Vom Staat des Ancien Régime zum modernen Parteienstaat, FS Theodor Schieder (1978) 213, 221f. In America, this development is dated at a rather late stage, when the concept of an abstract state appeared in public discourse in the second half of the 19th century: *Horwitz*, American Law 1870–1960 (*supra* n. 31) 10f., 19f., 213ff.

[254] *Supra* at nn. 199f.

[255] *Teubner* 194f.

[256] *Hegel* (*supra* n. 251) §§ 257ff.

[257] *Reinhard* 19.

[258] *Grimm* (*supra* n. 200) 86ff., 91ff.; *Ogorek* (*supra* n. 212) 375ff.

[259] On the development of judicial review of administrative acts in the 19th century see *Wolfgang Rüfner*, Die Entwicklung der Verwaltungsgerichtsbarkeit, in: Deutsche Verwaltungsgeschichte III: Das Deutsche Reich bis zum Ende der Monarchie, ed. by *Kurt G.A. Jeserich/Hans Pohl/Georg-Christoph von Unruh* (1984) 909ff.; *Ogorek* (*supra* n. 212) 378ff., 401ff.

ration probably entrenched the academic division of public and private law as fundamentally different subjects – a division that had originally resulted from the fact that, after the 16th century, the constitutional frame of the Holy Roman Empire had to be developed independently of the Roman *Corpus iuris*, which remained, however, the main source of private law[260]. As result, even today, it would be impossible in Germany to hold a chair for administrative law and torts. An academic teacher is expected to be either a public or a private lawyer. Thus, there are strong sociological reasons for the sharp divide between public and private law thinking in Germany that on the one hand put the division beyond question and, on the other hand, prevented private lawyers from seeing private law as a means of public concerns.

On the other hand, the thesis that politics and the state were behind the distinction is doubtful in view of its pedigree. The distinction was already present in Roman law, and without a comparable political implication[261]. Of course, the distinction had lost much of its relevance as long as European societies were largely feudal. Under the feudal system, the prince did not directly dominate his people: Domination was mediated by intermediate vassals, and feudal relations were based on the ideals of voluntary consent and reciprocity[262]. These relations relied on principles of corrective justice; in fact, domination was legally conceived of in terms of property (*dominium*)[263] and thus in notions of private law, to which the public/private distinction was unsuited[264]. The difference between an individual's power over his possessions and the prince's power over his vassals and subjects was only a matter of degree[265].

Yet these feudal structures of the European society began to vanish before the state and the idea of a homogenous society, as opposed to the state, appeared on the scene. As early as the 14th and 15th centuries, the first monarchies had developed in Sicily and in England as forms of direct domination between the prince and his subjects[266]. Apparently in response to these developments, it was soon generally recognised that different principles applied to

---

260 *Rudolf Hoke*, Die Emanzipation der deutschen Staatsrechtswissenschaft von der Zivilistik im 17. Jahrhundert: Der Staat 15 (1975) 211, 223ff. More generally on the history of public and especially administrative law as academic subjects see *Stolleis* I (*supra* n. 177) 141ff., *id.*, Geschichte des öffentlichen Rechts in Deutschland II: 1800–1914 (1992) 229ff., 240ff. (English Translation: *id.*, Public Law in Germany, 1800–1914 [2001]).

261 See *supra* at nn. 95ff.

262 *Marc Bloch*, La société féodale (paperback ed., 1994) 183ff.

263 *Supra* at nn. 116ff. The Latin "dominium" embraces both, private "property" and public "domination": *Wieacker*, Röm. Rechtsgeschichte 376. In Roman law, by contrast, the concept of "dominium" had been restricted to the power over things and unfree persons; the power of the magistrates was more limited and conceived of as "imperium".

264 Cf. *Allison* (*supra* n. 164) 42f., further references within.

265 *James H. Burns*, Fortescue and the Political Theory of Dominium: The Historical Journal 28 (1985) 777, 778.

266 *Berman* 405ff.

such relations on the one hand and to relations among citizens on the other. This awareness is apparent in discussions of the distinction between distributive and corrective justice. Although this distinction had been authoritatively stated by *Aristotle* and *Aquinas*, neither referred to different social relations[267]. As far as we know, it was only Cardinal *Cajetan*, a leading representative of the late scholastic school of Salamanca, who in 1518 reconstructed this distinction as representing vertical and horizontal social relations. Whereas corrective justice guided the relations among citizens, principles of distributive justice were directed at a person representing the "whole" (community) distributing social benefits and burdens among its "parts" (citizens, or subjects). Conversely, the "parts" were guided by the principles of legal justice (*iustitia legalis*): the obligation to obey the law[268]. This was an expression of the intuition that sovereign domination makes a fundamental difference from a normative, legal point of view: Different principles apply to the public and to the private sphere. Within few years, and *before* the modern concept of a state[269] and the idea of a private society had been developed, this transformation of the Aristotelian doctrine had become generally accepted[270], and it has continued to determine all future discussions and legislation[271].

Accordingly, although secular natural lawyers often proceeded from an instrumental view into private law, they clearly separated it from public law. Thus, *Pufendorf*, in his "De iure naturae et gentium" first treats private relations in the *status naturalis* – such as tort, contract, and property law[272] – then proceeds to private relations of domination[273], before concluding with public[274] and administrative law[275]. Apparently he regarded the different areas of

---

[267] *Aristotle*, Nicomachean Ethics, 1130 b, 30ff.; 1131 a, 16ff. For *Aquinas* it was a matter of course that principles of corrective justice were guiding also the punishment of wrongs that affected the community; cf. Summa theologica II 1, *qu*. 61, *art*. 4: "et ideo punitur in hoc quod multiplicius restituat: quia etiam non solum damnificavit personam privatam, set rempublicam …".

[268] *Thomas Cajetan*, In secundam secundae … doctoris Thomae Aquinatis … commentaria (Paris, 1519) *ad* II-II, *qu*. 61, *art*. 1; cf. *John Finnis*, Natural Law and Natural Rights (1980) 184ff.; *Jansen* 83ff.

[269] *Supra* nn. 164f.

[270] *Domingo de Soto*, De iustitia et iure (1556, reprinted 1968) *lib.* III., *qu*. V., *art*. I, at *Secundo argumento* and *Quo responsio*.

[271] On the early division of statutory legislation into private and public cf. *Wilhelm Brauneder*, Frühneuzeitliche Gesetzgebung: Einzelaktionen oder Wahrung einer Gesamtrechtsordnung?, in: Gesetz und Gesetzgebung (*supra* n. 178) 109, 122ff.

[272] *Samuel Pufendorf*, De iure naturae et gentium libri octo (cum integris commentariis *Io. Nic. Hertii* atque *Io. Barbeyraci* [Frankfurt and Leipzig 1759]) *lib*. II, *cap*. II – *lib*. V.

[273] *Pufendorf* (previous note) *lib*. VI, where family law (De matrimonio, De patria potestate) and the domination over servants (De herili potestate) are treated.

[274] *Pufendorf* (*supra* n. 272) *lib*. VII: constitutional structure of the *civitas*: summum imperium civilis; seu Majestatis.

[275] *Pufendorf* (*supra* n. 272) *lib*. VIII.

the law as sufficiently distinctive to deserve separate treatment. The instrumental concept of private law does not make its specific foundation in corrective justice irrelevant. For example, private liability for negligence is justified on the basis of a preventive, penal consideration that will reappear much later in the economic analysis of law: Without such liability, citizens would not refrain from selfishly causing damage to each other[276]. But *Pufendorf* neither equated the law of delict with criminal law nor understood it as public law.

Furthermore, *Pufendorf* did not think that private law should be immune to public regulation. Many questions of private law were not finally determined by natural law and were therefore left to the sovereign's discretion[277]. This shows that a full understanding of the idea of private law as autonomous against public intervention requires tracing the equating of private law with the (equally fundamental) intuition of Western lawyers, held by civil and common lawyers (albeit in different ways), that certain principles of the law are beyond governmental discretion[278]. At any rate, a full understanding of the public/private-divide will be enhanced if its different historical layers of normative meaning are disentangled.

All in all, independently of any political argument, such as defending society against the state, the distinction between corrective and distributive justice may appear sufficiently important, from a normative point of view, to retain the distinction between public and private law. True, private relations can never finally be determined without distributive considerations of public policy[279]: The law of tort/delict distributively assigns protected interests and determines the extent of individual responsibility (strict liability vs. liability for fault)[280]. And contract law distributively decides for all citizens of a legal order which interests should be protected against other citizens. But such distributions concern bipolar relations that are normatively structured by corrective justice. They are different from distributions like those of tax law that are independent of such bipolarity. It might therefore be too rash to discredit the public/private distinction altogether as politically conservative.

---

[276] *Pufendorf* (*supra* n. 272) *lib.* III, *cap.* I, § 2.

[277] *Pufendorf* (*supra* n. 272) *lib.* VIII, *cap.* I, § 1.

[278] On the old, Germanic distinction of "Weistum", describing some naturally "given" law and "Gesetz", which was originally some kind of positive agreement of those affected, cf. *Ebel* (*supra* n. 177) 12ff. Roman lawyers clearly distinguished between civil law that was binding only for Romans and the *ius gentium* that was valid for all human beings, independently of their *civitas*; cf. *Gaius*, Institutiones, I,1: "naturalis ratio inter omnes homines". Today, this intuition is presupposed by the idea of human rights binding government, or even the state. For a recent explanation of ius gentium, see *Waldron* (*supra* n. 49) 132ff.

[279] *Hanoch Dagan*, The Distributive Foundation of Corrective Justice: Mich.L.Rev. 98 (1999) 138, 146ff.

[280] See, on the basis of a discussion of opposing views of authors like *Epstein*, *Coleman*, *Weinrib*, or *Ripstein*, *Jansen* 90ff.

## III. Concluding Remarks

All in all, these observations show that from a historical point of view, many questions regarding the relation between the state and private law are still open. Much of the historical genesis of this relation is unknown or open to debate. At the same time, even if it is not possible to draw "conclusions" from historic analysis, these observations may shed new light on more basic, conceptual and normative questions that arise as result of the developments described in the introduction.

### 1. Sovereignty, Validity, and Authority

The historical survey has shown that the idea of basing the validity of private law on some external sovereign was always somewhat fictional: Neither the American people nor the continental European states, as represented by governments, could ever comprehensively control the private law's development. Besides government, academics and judges remained important actors. Thus it might be possible to conceive of legitimate private law without roots in external sovereignty. Indeed, basing all validity monistically in one sovereign is perhaps not very helpful when the law becomes transnational[281]; such a concept is of limited use for conflicts between different national and transnational legal systems.

Now, private law without a state may be seen simply as a kind of natural law[282]. Indeed, this idea is again present in the debate of a *lex mercatoria*[283] and among the proponents of a European civil code[284]. Yet, for a new natural-law approach, more would be needed than a somewhat naïve belief in eternal legal values; and even if the idea of natural law does not depend on some external sovereign[285], natural law lacks the positivity which is indispensable also for transnational law[286]. Thus, older concepts related to the pluralism of legal sources and authorities may be more helpful for understanding and dealing with the modern complex state of the law. Here, contemporary legal theory has developed different concepts of validity[287] – legal validity, ethical validity,

---

[281] Cf. *Michaels* 1226; *id.*, Privatautonomie und Privatrechtskodifikation (*supra* n. 43).

[282] *Peter Jäggi*, Privatrecht und Staat (1946).

[283] *Dalhuisen* (*supra* n. 43) 30ff., 98ff.

[284] Cf. *supra* at n. 203.

[285] However, reason may be seen as the natural law's "external" sovereign.

[286] Modern system theory and autopoietic theory may explain the law's positivity without an external sovereign (*Niklas Luhmann*, Das Recht der Gesellschaft [1995] 98ff.; *id.*, Law as a Social System [1995] 122ff.; *Gunther Teubner*, Recht als autopoietisches System [1989] 1ff.; *id.*, Law as an Autopoietic System [1993]). However, autopoiesis may be better equipped to explain the law's creation, persistence and evolution, than its legitimacy.

[287] See *Michaels/Jansen* (*supra* n. 1) 874ff., with further references.

and social validity – relating them to different standpoints: to the internal interpretative point of view, to the superior moral point of view, and to the external descriptive point of view[288]. Historical experience, however, indicates that such standpoints can be combined. Thus, the idea of the law's authority may be a suitable instrument for describing the difficult questions, whether transnational sources could or should be used for solving a legal conflict. This concept allows for degrees and for a combination of different standpoints. It may thus complement the monistic concept of legal validity. However, to make such a still-vague idea of "legal authority" a useful legal instrument would require further analysis.

## 2. Justifying Policy: Democracy and Reason

This first conceptual problem of legal validity or authority becomes more practical when normative questions are the object of debate. It is common knowledge today that private law implies far-reaching decisions of policy: Simply speaking, private law may be more or less liberal or social. This is seen as one of the fundamental reasons for an authoritative, governmental codification of private law on the one hand[289], and for challenges to the legitimacy of transnational, global law, on the other[290]. This debate presumes that government is able to determine the development of private law, but history shows this presumption to be doubtful. Codifications are not drafted by the political legislator, and they have proved unable to determine the law's future development. Private law has kept a significant degree of autonomy, even when it had been codified. Thus, to acknowledge the autonomy of transnational or judicially made private law may in fact present fewer new problems than is commonly assumed. On the one hand, the states' governments maintain the option to intervene into such law; on the other, if it is simply not possible to justify private-law policy by means of governmental representation, it may be more promising to look for adequate forms of legal reasoning, for transparency of decisionmaking, and for other forms of (discursive) participation of those affected by a decision. Transnational discourse and consent may be seen as an adequate form of justification and thus as a source of legal authority and legitimacy[291].

---

[288] *Robert Alexy*, Begriff und Geltung des Rechts (1992) 47ff., 139ff.; *Michaels*, Privatautonomie und Privatrechtskodifikation (*supra* n. 43) 611ff.

[289] See, from different political camps, *Gordon Tullock*, The Case Against the Common Law (1997) 53ff.; *Ugo Mattei*, Hard Code Now!: Global Jurist Frontiers 2 (2002) No. 1, Article 1, <http://www.bepress.com/gj/frontiers/vol2/iss1/art1>.

[290] See *Michaels/Jansen* (*supra* n. 1) 879ff.

[291] *McCrudden* (*supra* n. 48) 529ff., with a discussion of objections to such an idea.

### 3. Systematising Private Law

Codifications structurally changed the nature of systematic and doctrinal legal reasoning. As long as the authoritative texts of a legal system do not presuppose an explicit or implicit system, as was the case in Europe before the codifications[292] and still is today in the common-law jurisdictions[293], systematic thinking may be constructive, innovative, and thus open to revision. Under such conditions, systems are brought to the law "from the outside"[294]. More recently, such an approach has been presupposed by the American restatements and by enterprises to formulate transnational doctrinal systems as a basis for comparative law[295]. As long as the different national systems exhibit sufficient similarities in substance, then, it may, in principle, be possible to formulate such systems transnationally[296].

Systematic thinking within a codified legal order, however, aims at finding and, at best, developing an authoritatively imposed system within the law[297]; it is part of the applicative hermeneutic process of interpreting a sovereign legislator's command[298]. Accordingly, codifications tend to ossify the systematic as-

---

[292] *Supra* n. 195; for the system debates of the 19th century German doctrine that ultimately determined the system of the German Civil Code, see *Andreas B. Schwarz*, Zur Entstehung des modernen Pandektensystems: SavZ/Rom. 42 (1921) 578ff.

[293] For approaches to systematise the common law see *Peter Birks*, Definition and Division: A Meditation on Institutes 3.13, in: The Classification of Obligations, ed. by *id*. (1997) 1ff.; *id*., English Private Law I and II (2000) esp. the introduction, pp. xxxv ff.; *Stephen Waddams*, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning (2003); cf. also The Division and Classification of the Law, ed. by *John A. Jolowicz* (1970). For a critique of such approaches *Geoffrey Samuel*, System und Systemdenken, Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law: ZEuP 1995, 375ff.; *id*., English Private Law: Old and New Thinking in the Taxonomy Debate: Oxford J.Leg. Stud. 24 (2004) 335ff.; *id*., Can the Common Law Be Mapped?: U. Toronto L.J. 55 (2005) 271ff.

[294] Methodologically they are perhaps best understood as a reconstructive enterprise, described (for political theory) as a "reflective equilibrium" by *John Rawls*, A Theory of Justice (rev. ed. 1999) 41ff. For legal doctrines see *Nils Jansen*, Dogmatik, Erkenntnis und Theorie im Europäischen Privatrecht: ZEuP 2005, 750, 768f., further references within (cited Dogmatik).

[295] Cf. *Ulrich Drobnig*, Methodenfragen der Rechtsvergleichung im Lichte der "International Encyclopedia of Comparative Law", in: Ius Privatum Gentium FS Rheinstein I (1969) 221, 228ff.; *Mauro Bussani/Ugo Mattei*, The Common Core Approach to European Private Law: Colum.J.Eur.L. 3 (1997/98) 339ff. These systems, however, are of a mere expository function; they do not aim at achieving internal, normative coherence of the legal system.

[296] Accordingly, in the times of the *ius commune* local laws were typically explained within the transnational systematic framework of *Justinian's Institutiones*: *Luig*, Institutionenlehrbücher (*supra* n. 156) 64ff. See also *Ralf Michaels*, The Functional Method of Comparative Law, in: The Oxford Handbook of Comparative Law (*supra* n. 47) 339, 372f.

[297] Cf. *Claus-Wilhelm Canaris*, Systemdenken und Systembegriff in der Jurisprudenz[2] (1983) 13 and *passim*.

sumptions of the times of their enactment and thus may become an obstacle to adequately describe the law's development over time. This is so, because only individual legal rules can be changed (relatively) easily by legislation or by judicial development[299]: To replace a traditional legal system with a new one has proved difficult and often even impossible. As a natural consequence, tensions emerge between the codification's implied systematic structure and the changing values and rules. Thus, the systematic assumptions implicit in codifications may create serious problems for legal reasoning and for the judicial development of the law[300].

If the law should remain responsive to such a change of values, or if such change is inevitable (as the history of codified law suggests)[301], it may be preferable to leave the task of system-building to academia and limit the legal competences of democratically legitimated legislative bodies to normative decisionmaking. In the end, the questions of how to formulate doctrine and systems should be decided by more "scholarly" criteria intrinsic to the law – like technical precision, adequacy, and internal coherence; these criteria are largely independent of political authority. In this way, legal knowledge could again become independent of national legal systems; the development of a European jurisprudence formulating "principles" of European law[302] can be seen as a step into this direction[303].

---

[298] On applicative and constructive legal theories *Jansen*, Dogmatik (*supra* n. 294) 764ff.

[299] *Zimmermann*, Codification 108f.

[300] This has been shown in more detail for the law of delict; cf. *Jansen* 76ff., 181ff., 271ff.; *id.*, Duties and Rights in Negligence, A Comparative and Historical Perspective on the European Law of Extracontractual Liability: Oxford J.Leg.Stud. 24 (2004) 443, 447ff.; *Reinhard Zimmermann*, Wege zu einem europäischen Haftungsrecht, in: Grundstrukturen des Europäischen Deliktsrechts, ed. by *id.* (2003) 19, 29f. More generally *Jansen*, Brunnen der Vergangenheit (*supra* n. 64) 210ff., 217ff.

[301] See, for Germany, especially the Historisch-kritischer Kommentar (*supra* n. 109); the contributions there make apparent that the law's development continued despite its codification; in fact, the German codification was only one step in the development of German private law.

[302] *Supra* at nn. 45ff.

[303] See *Michaels/Jansen* (*supra* n. 1) 878f. It would be necessary, however, to develop the adequate methodological instruments necessary for such an enterprise. This leads to a far range of further questions that do, however, not immediately concern the relation of private law to the state: Can legal principles be expressed adequately in legal systems? Is the choice to systematize in itself a normative decision, representing a certain (public) policy? Is the structure of a system neutral as to its content, or does it have an impact on the substance, or at least its perception? How much and what kind of similarity between different legal systems would be needed for doctrinal discourse and legal knowledge that transcend single legal systems?

## 4. Conclusion

These are questions not for the past but for the present and for the future; they are questions central to debates of Europeanization and globalization. Yet, this article has shown, on the one hand, that these questions are the result of a specific historical development: There is no "naturally given" relation between private law and the state. On the other hand, it has become apparent that these questions are not simply the fruit of totally new tensions between private law and the state, either. Similar questions have occupied the minds of lawyers for centuries. Accordingly, the article has shown a couple of answers given in the long and winding history of German and US-American law. Obviously, these answers cannot simply be copied; our period is different from those that came before it. At the same time, to ignore these debates in answering the questions of our time would mean to dispense with centuries of experience with these, or similar, questions. Even more importantly, our modern questions are often not fully understood if they are not seen as resulting from specific, partially contingent historical developments. If this article has succeeded in making this historical background of the modern debates more accessible, it has served its aims.