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Bridging the Public-Private Law Divide in the Conflict of Laws

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Abstract

As the name suggests, the methodology of private international law relates to substantive private law only. A parallel methodological system regarding public law does not exist. The paper argues that this methodological rift lacks any doctrinal justification. It concludes that there are no obstacles to all-sided conflict of laws rules in the public law domain. Since the paper finds that foreign public law is already applicable in private party cases (albeit heavily obscured), it focuses on public law relationships where a foreign state appears as a plaintiff. In this respect, it is shown why the application of foreign public law embodies an attractive compromise between legal assistance and recognition.

Keywords

Foreign Public Law; Public Law Taboo; Foreign State as a Party; Conflict of Laws; Private International Law.

1 Introduction

A bridge is only necessary if we want to cross a rift. We have to address the obstacle to be crossed first before we can discuss the nature of our bridge. So, what is the public-private law divide in the Conflict of Laws ("CoL")?

1.1 Defining Conflict of Laws Rules

Since the public-private law divide also relates to the reach of the term "CoL rules", we should address their definition, first: When we are talking about CoL rules, we are referring to (1) originally national rules that (2) designate

the spatial scope of application of (3) one or more substantive rules of one or more states.

1. The "originally national" nature of CoL rules refers to the so-called principle of autonomy: Generally, a state can decide freely if and to which extent domestic and/or foreign law shall be applicable.[1] CoL rules are neither a matter of public international law themselves nor do states consider their CoL rules a sole reiteration of public international law principles.[2] Due to the autonomy principle, a state is, of course, also free to engage in international harmonisation. However, it is essential to note that only the principle of autonomy and, accordingly, the national origin of CoL rules condition international harmonisation (not the other way around). That is why CoL rules remain "originally" national even if they have been harmonised by EU law or state treaties.
2. Additionally, CoL rules only designate the spatial scope of application of substantive rules. They do not solve any social conflict by themselves but only tell us which domestic or foreign rule might provide us with a solution.[3] Hence, CoL rules are "nonsubstantive" because they only tell us when domestic and/or foreign law is applicable.
3. Finally, CoL rules can relate to one specific rule of one specific state or to a whole legal field of many or all states. If a CoL rule relates to all states, we call it "all-sided".[4]

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1 Translated from the German original: *"We must examine whether foreign rules should rule, not whether they want to rule."* – KAHN, F. Gesetzeskollisionen. *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. 1891, Vol. 30, p. 129; see also MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, p. 84. The principle of autonomy is not to be confused with party autonomy.

2 HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934. Of course, just like any other national laws, CoL rules can be influenced and/or restricted by public international law. – Ibid.

3 Cf. BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.; DICEY, A., COLLINS, L., MORRIS, J. *Dicey, Morris and Collins on the Conflict of Laws*. 15. ed. London: Sweet & Maxwell, para. 1-036 ff. This is not as clear-cut as it sounds: We could argue that the designation of the law's scope of application is a social conflict ("meta conflict") as well. This objection can be addressed by adjusting the definition insofar as CoL rules do not solve any social conflict by themselves apart from meta conflicts.

4 BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.

We are most familiar with all-sided rules since they are the most common type of CoL rules. Take, for example, Article 4 para. 1 of the Rome II Regulation[5]: It tells us that we ought to apply the law on non-contractual obligations of the country where the damage occurred. It, therefore, relates to all states – not only to the domestic or one foreign state. If a rule relates only to one state – be it the domestic or a foreign state – we call it "one-sided".[6]

As a logical exercise, all-sided CoL rules can be fragmented into their one-sided components.[7] For example, we can explicate the one-sided component of Article 4 para. 1 Rome II Regulation regarding German substantive law as follows: *"The law applicable to a non-contractual obligation arising out of a tort/delict shall be German law if the damage occurs in Germany"*; or, regarding Swiss (or any other state's) law: *"The law applicable to a non-contractual obligation arising out of a tort/delict shall be Swiss law if the damage occurs in Switzerland"*.

1.2 The Public-Private Law Divide

CoL rules are often understood as pertaining only to substantive private law. That is why the terms "conflict of laws" and "private international law" are generally used synonymously. However, counterintuitively, "public international law" does not designate a CoL system regarding substantive public law. Instead, it refers to the law of nations.

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

6 BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.; MANN F. A. Statutes and the Conflict of Laws. In: WALDOCK, H., JENNINS, R. Y. (eds.). *British Yearbook of International Law, Vol. 46, 1972–1973*. Oxford: Oxford University Press, 1975, p. 119. It must be noted that the prevalent view only calls CoL rules on the domestic law's scope of application "one-sided". However, I argue that we should call CoL rules "one-sided" whenever they relate to one state, including a foreign state only (see the references in fn. 7).

7 The fragmentability of all-sided CoL rules relates to the number of states ("horizontal grouping") and the amount of individual substantive provisions of one particular state ("vertical grouping"). – Cf. HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 120 ff. Ultimately, the relationship between all-sided and one-sided CoL rules (as well as their smallest building block, so-called "elementary" CoL rules) can be conceptualised using set logic: All-sided CoL rules form a subset of one-sided CoL rules. One-sided CoL rules form a subset of the superset "elementary CoL rules" (HEMLER, A. forthcoming publications).

This terminological framework is closely linked to the assumption that, within CoL, those rules that we define loosely as "public law"[8] must be treated somewhat differently. These dissimilarities between the treatment of public and private law relate to an alleged methodological rift first and foremost: Its central claim is the thesis that all-sided CoL rules are only possible within the private law's domain. Hence, regarding public law, it is usually maintained that only one-sided CoL rules regarding the domestic law's scope of application are conceivable.[9] These one-sided CoL rules on domestic public law are usually called "delimiting" rules or simply "rules on the domestic law's scope of application".[10] Their existence is not disputed and, in my view, even compulsory.[11] Only all-sided CoL rules that allow for the application of foreign public law are usually deemed impossible.[12]

Let us consider an example. Article 6 of the Chinese Criminal Code states: *"*[The Chinese Criminal Code] *applies to all who commit crimes within the territory of the People's Republic of China…"* We should note that this is a one-sided CoL

8 As a working definition, I will understand "public law" as *"law that is concerned with the exercise of [sovereign] power within a state"* – cf. ELLIOT, M., FELDMAN, D. Introduction. In: ELLIOT, M. et al. (eds.). *The Cambridge Companion to Public Law*. Cambridge: Cambridge University Press, 2015, p. 1; Since I will reject any methodological difference between the application of foreign private and public law, a precise definition is unnecessary for CoL purposes.

9 This can be traced back to KAHN, F. Über Inhalt, Natur und Methode des Internationalen Privatrechts. *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. 1898, Vol. 40, p. 53; FEDOZZI, P. De l'efficacité extra-territoriale des lois et des actes de droit public. In: *Recueil des Cours 1929*. The Hague: Brill Nijhoff, 1930, Vol. 27, p. 149. The first detailed treatise on this subject was provided by NEUMEYER, K. *Internationales Verwaltungsrecht*. Zürich: Verlag für Recht und Gesellschaft, 1936, 600 p.

10 Ibid.; HANDRLICA, J. Is There an EU International Administrative Law? A Juristic Delusion Revisited. *European Journal of Legal Studies*. 2020, Vol. 12, no. 2, pp. 79–116, who uses the term "delimiting rules".

11 One cannot pronounce a normative "Ought" without an explicit or tacit statement on its scope of application (even if the connecting factor "always" is used (HEMLER, A. forthcoming publications). Cf., albeit only tacitly: DICEY, A., COLLINS, L., MORRIS, J. *Dicey, Morris and Collins on the Conflict of Laws*. 15. ed. London: Sweet & Maxwell, 2012, para. 1-037.

12 TORREMANS, P., HEINZE, C., GRUŠIĆ, U. *Cheshire, North & Fawcett: Private International Law*. 15. ed. Oxford: Oxford University Press, 2017, p. 115; Cf. HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 62 ff. for more details. The inapplicability of foreign public law is labelled "public law taboo" in common law jurisdictions. – LOWENFELD, F. A. Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction. In: *Recueil des Cours 1979*. The Hague: Brill Nijhoff, 1980, Vol. 163, pp. 322 ff.

rule since it prescribes the conditions of applicability of (domestic) Chinese criminal law of only one (the domestic) state. According to the traditional view, the following all-sided extension of this CoL rule is considered doctrinally impossible since it would allow for the applicability of foreign public (criminal) law: *"The criminal law of the country where the crime has been committed is applicable."*

2 Bridging the Methodological Rift Between Public and Private Law

There are several doctrinal justifications for the CoL's (alleged) methodological rift between public and private law (i.e., the belief according to which the application of foreign public law is impossible). The most prominent doctrinal arguments draw on two assumptions: First, it is believed that applying foreign law is only possible if the state is "neutral" toward the applicable law. Second, the application of foreign public law is explicitly or tacitly equated with an import of foreign state power. I will advance the view that those and other counter-arguments cannot be upheld and that, therefore, the CoL's methodology applies to both public and private law.

2.1 Neutrality

A popular justification for the non-applicability of foreign public law reads as follows:

1. The application of foreign law is only possible if the state is "neutral" or "indifferent" toward the foreign law's content.
2. Only concerning private law, (1) is true.
3. Therefore, we can only apply foreign private law.
4. Therefore, applying foreign public law is impossible.[13]

However, premise (1) already contradicts legal reality. I even argue that it has always been a doctrinal fiction: The modern state has never been "neutral" or "indifferent" toward the applicable law.

13 See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff. for more details and references.

This is not disputed concerning substantive private law: Obviously, the state aims to foster material interests such as party autonomy, the protection of weaker parties, consumer protection or other societal values by private law legislation. This should not come as a surprise: Law is the state's central tool to bring about societal change. Therefore, private law, too, is employed to realise political visions (even in the 19th century, just remember patriarchal marriage law). Hence, a "state-free" private law has never been more than a libertarian dream. Its existence remains a somewhat popular but ultimately unprovable claim.[14]

The legislator adopts the same perspective of interest-related non-neutrality within the CoL. This is quite visible within EU private international law. For example, Article 6 of the Rome I Regulation[15] aims to protect consumers, and Article 11 of the Rome I Regulation aims to favour the formal validity of contracts. Apart from the design of our CoL rules, several general instruments (public policy, adaptation, *fraus legis*…) help us to achieve verdicts that we deem just whenever we decide to solve cross-border cases by applying foreign law. Contrary to the prevalent opinion, this "materialisation" of CoL existed long before EU private international law arose.[16] Even *Savigny*, who tends to be painted as the godfather of a "value-neutral" CoL system, referred to material interests in order to establish his system of (usually) all-sided CoL rules. For example, concerning marriage law, *Savigny* argued that we must use the husband's domicile as a connecting factor since the husband is *"forever and among all peoples of the world recognised as the head of the family"*[17].

Hence, the CoL has never been "neutral" itself or adopted a "neutral" perspective toward substantive outcomes. The neutrality thesis' popularity among legal scholars might be grounded in a mistaken conclusion from the

14 See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff. for more details and references.

15 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

16 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff.

17 *"Über den wahren Sitz des ehelichen Verhältnisses ist kein Zweifel; er ist anzunehmen an dem Wohnsitz des Ehemannes, der nach den Rechten aller Völker und aller Zeiten als das Haupt der Familie anerkannt werden muss."* – SAVIGNY, F. C. von. *System des heutigen Römischen Rechts. Achter Band*. Berlin: Veit & Comp., 1849, p. 325.

nonsubstantive nature of CoL rules to a "value-neutral" approach: Yes, CoL rules are indeed "neutral" insofar as they do not decide on a social conflict by themselves. However, from this, it does not follow that substantive interests cannot govern CoL provisions or that CoL rules cannot favour specific substantive outcomes.

Furthermore, it must be noted that some proponents of the neutrality thesis, in particular those from the 19th century, were tacit or explicit supporters of an internationalist view: According to them, CoL was a subject of public international law that was concerned with the detailed allocation of limits to legislative state power.[18] If this were true, material interests of individual states would, of course, be unable to influence CoL provisions. However, while the internationalist view is intrinsically unconvincing for many other reasons,[19] it suffices to note that it was never observed in practice. The autonomy principle, according to which the CoL is a national matter, is firmly established – not only doctrinally[20] but also as a fact of legal reality[21].

Let us conclude: We can convincingly refute premise (1) since the state has never been "neutral" or "indifferent" toward the foreign law's content but, nevertheless, continues to apply it. Apparently, a "neutral" or "indifferent" perspective is no prerequisite for any foreign law application. Hence, we cannot exclude the applicability of foreign public law by reference to the neutrality thesis.

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18 Cf. MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 101; HEMLER, A. Improving Cross-Border Compliance of Private Individuals and Corporations by Applying Foreign Public Law in Foreign State as Party Cases (forthcoming). The "internationalist view" dates back to the 19th century. Since, back then, public international law was not as established as it is today, their proponents did not explicitly argue in favour of a public international law system. Instead, they used slightly different terms: They advocated for a "supranational" CoL system or one that should be "joint laws of all states".

19 Ibid.

20 MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; JENNINGS, R., WATTS, A. *Oppenheim's International Law. Volume 1 Peace*. 9. ed. Oxford: Oxford University Press, 2008, pp. 6 ff.

21 We can observe that diverging CoL provisions do not spark international outrage. Additionally, the state can ban or modify applicable foreign law freely, for example due to the public policy exception.

2.2 Embodied State Power

A second justification for the alleged inapplicability of foreign public law can be standardised as follows:

1. Applying foreign law translates to importing embodied foreign state power, which is an intrusion into domestic sovereignty.
2. This intrusion can only be justified by the notion of comity.
3. Comity can only justify applying foreign law when the state is not interested in the foreign law's content.
4. Only private law is a legal order in which the state takes no interest.
5. Therefore, the notion of comity can only justify applying foreign private law.[22]

This argument can be attacked swiftly and from multiple angles: First, premise (4) rests on the already rebutted neutrality thesis. Second, it is by no means certain that we apply foreign law on the grounds of comity, as premise (2) suggests. Instead, I argue that we apply foreign law to foster domestic distributive justice – not as a courteous favour to foreign states, as the comity approach claims.[23]

Let us, therefore, consider another widespread mutation of the above-mentioned argument:

1. Applying foreign law translates to importing embodied foreign state power, which is an intrusion into domestic sovereignty.
2. Only private law does not embody state power due to its "pre-state" nature.

22 A passionate proponent of this view was VOGEL, K. *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*. Frankfurt am Main: Metzner, 1965, p. 237; see also HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff.; HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934, for more details and references.

23 This thought is founded on the basic principle of equality, which demands treating similar cases similarly and different cases differently *("suum cuique tribue")*. Given that cases with foreign elements are different from purely domestic ones, we can fulfil this demand by applying foreign law. Since the application of non-domestic law embodies a different treatment of a different case (i.e., a just treatment), a better or worse legal situation than under domestic law is, therefore, something we actively want to enable (HEMLER, A. forthcoming publications). Additionally, the notion of comity is inherently problematic since it relies on the internationalist view of CoL (see above).

3. Hence, only the application of foreign private law does not violate domestic sovereignty.

Although we can tackle premise (2) in numerous ways,[24] let us focus on a rebuttal of premise (1): Due to the autonomy principle, the domestic state remains the ultimate authority over the extent to which foreign law is applicable. This also means that the state's sovereign will, the so-called "imperative element", persists whenever we apply foreign law.[25] Hence, the domestic state's sovereign decision to apply foreign law is never questioned. Since the domestic imperative element continues to exist even if we apply foreign law, the foreign law's element of sovereignty is structurally ignored.

Therefore, no application of foreign law (be it public or private) can ever be understood as an import of foreign state power or an intrusion into domestic sovereignty. Instead, we only use foreign legal ideas and disregard any element of foreign sovereignty whenever we apply foreign law.[26]

2.3 Further Arguments

On a doctrinal level, there are no more arguments that might ban the application of foreign public law altogether. In particular, concerns over the possibility of a loyal application of foreign public law[27], reciprocity[28]

24 Since private law remains the result of state-driven legislation, the alleged "pre-state" nature boils down to assumptions closely connected to the refuted neutrality thesis. Additionally, it must be noted that the "pre-state" nature of private law has only been stressed in CoL doctrine because scholars believed that foreign law application would otherwise violate the domestic state's sovereignty (premise (1)). Since this is not the case, it is superfluous to focus on private law's "pre-state" nature in order to explain its applicability. – HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 95 ff.

25 SCHURIG, K. *Kollisionsnorm und Sachrecht*. Berlin: Duncker & Humblot, 1981, pp. 70 ff.; SCHINKELS, B. *Normsatzstruktur des IPR*. Tübingen: Mohr Siebeck, 2007, p. 134; see also HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff.

26 This leads to strange consequences: Given that a CoL theory that relies on the autonomy principle must understand legal norms as a union of an imperative and rational element, endowing a foreign rational element with a domestic imperative element will create a hybrid legal norm ("hybrid law theory"). – See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff. and forthcoming publications.

27 TEO, M. Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine. *Journal of Private International Law*. 2020, Vol. 16, no. 3, p. 377.

28 Judgment of the United States Court of Appeals, Ninth Circuit, 21 June 1979, *Her Majesty the Queen in Right of the Province of British Columbia vs. Gilbertson*, para. 6, 14–17.

or increased difficulty[29] cannot justify a doctrinal blanket ban. This does, of course, not mean that they cannot play a role when we discuss the extent to which foreign public law might be applicable.

2.4 Applying Foreign Public Law in Legal Reality

Additionally, we can already observe the application of foreign public law in practice.

This is comparably widespread in private party cases: For example, foreign public law is applicable as an integral part of the foreign *lex causae* or as a preliminary question.[30] In EU private international law, foreign public law is also "given effect" through so-called foreign overriding mandatory provisions of the place of performance (Article 9 para. 3 of the Rome I Regulation) or due to the "consideration" of foreign rules of safety and conduct (Article 17 of the Rome II Regulation). Due to the above-mentioned (unsound) doctrinal reservations, we are merely reluctant to subscribe to the fact that we apply foreign public law. Instead, we hide behind unnecessary concepts like the "(factual) consideration" of foreign public law or intentional vagueness ("giving effect"). Both approaches are, ultimately, indistinguishable from any other "real" application of foreign law since, in all cases, we are endowing foreign normative ideas with domestic validity.[31]

However, in private party cases, we might argue that we do not really apply foreign public law as such but merely their private law consequences between private parties. That is why it is important to note that, in rare cases, foreign public law even applies to relationships between public and private actors. For example, within Schengen states, domestic police forces are bound to foreign police law when they engage in cross-border surveillance

29 BAADE, H. W. The Operation of Foreign Public Law. *Texas International Law Journal*. 1995, Vol. 30, no. 3, p. 483.

30 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 68 ff.

31 Ibid., pp. 74 ff.

(Article 40 of the Schengen agreement).[32] Furthermore, domestic social security bodies can, in some cases and only in the second degree, be obliged to pay social benefits under foreign public law.[33]

2.5 All-Sided CoL Rules: A Ubiquitous Methodology

This presents us with an exciting conclusion. Since our updated CoL doctrine provides for the applicability of foreign public law, CoL rules embody a ubiquitous methodology: Both in private and public law, CoL rules are concerned with the domestic law's scope of application. And both in private and public law, CoL rules might also allow for the application of foreign law.[34]

Hence, from a methodological point of view, a public-private law divide does not exist. The difference between public and private law turns out to be quantitative, not qualitative: Compared to the application of foreign private law, the application of foreign public law, albeit methodologically possible, is exceedingly rare.

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32 The Schengen acquis. *Official Journal of the European Union* [online]. 22. 9. 2000 [cit. 30. 5. 2022]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2000:239:FULL&from=EN – Art. 40 para. 1: *"Officers of one of the Contracting Parties who* […] *are keeping under surveillance in their country a person who is presumed to have participated in an extraditable criminal offence shall be authorised to continue their surveillance in the territory of another Contracting Party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance."*; Art. 40 para. 3 letter a): *"The officers carrying out the surveillance must comply with the provisions of this Article and with the law of the Contracting Party in whose territory they are operating."* Additionally, comparable bilateral provisions on cross-border police cooperation might provide for similar solutions. – Cf. HANDRLICA, J. A Treatise for International Administrative Law, Part II: On Overgrown Paths. *The Lawyer Quarterly*. 2021, Vol. 11, no. 1, p. 190, on Czech-Bulgarian and Czech-Austrian police cooperation.

33 On the respective bilateral Swiss-German treaty see TRUTMANN, V. Kollisionsnormen im Schweizerischen Sozialversicherungsrecht. In: MEIER, I., SIEHR, K. (eds.). *Rechtskollisionen: Festschrift für Anton Heini zum 65. Geburtstag*. Zürich: Schulthess, 1995, p. 473.

34 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019; see also HANDRLICA, J. Foreign Law as Applied by Administrative Authorities: Grenznormen Revisited. *Zbornik Pravnog fakulteta u Zagrebu*. 2018, Vol. 68, no. 2, pp. 193–215. I am sure my esteemed colleague *Handrlica* does not mind me pointing out a minor misunderstanding: Contrary to his assumption in HANDRLICA, J. Is There an EU International Administrative Law? A Juristic Delusion Revisited. *European Journal of Legal Studies*. 2020, Vol. 12, no. 2, p. 91, fn. 46, I have always, in fact, advocated for the applicability of foreign public law.

3 Bridging the Practical Rift Between Public and Private Law

Since applying foreign public law is doctrinally possible, when should we do so? Given that foreign public law is already applied in private party cases (see above), we should focus on cases where the domestic or a foreign state is a party. Since jurisdictional limitations typically prevent situations where domestic state authorities might be inclined to apply foreign public law,[35] we should focus on legal relationships between a foreign state and a private (usually domestic) actor. To be more precise: Can a foreign state appear in front of domestic courts (e.g., as a plaintiff) and request the application and enforcement of its foreign public laws against a private individual that falls under domestic jurisdiction? Or: Can a foreign state request the application and enforcement of its public laws by domestic authorities? According to the prevalent inapplicability thesis, the foreign state cannot do so. However, since doctrinal concerns could not be upheld and given that there are no additional general reservations toward a foreign state appearing in domestic courts,[36] we should reconsider this case in greater detail.

3.1 Trust

Before we can discuss individual cases, we should address a general matter: How much trust in the foreign legal system is necessary in order to apply foreign public law?

We can quantify the necessary degree of trust by comparing the application of foreign law to two other vital instruments employed to solve cross-border

35 HEMLER, A. *Improving cross-border compliance of private individuals and corporations by applying foreign public law in foreign state as party cases* (forthcoming). However, note that the above-mentioned examples (Schengen, social security) both constitute cases where domestic state authorities apply foreign public law.

36 In particular, state immunity is not an issue since the domestic state would not scrutinise a foreign act of state, but rather pronounce a domestic act of state (e.g., a domestic court verdict) under foreign public law as a result of an unsolicited subordination of the foreign state under the domestic court system. See also SIEHR, K. Commercial Transactions and the Forfeiture of State Immunity Under Private International Law. *Art Antiquity and Law*. 2008, Vol. 13, no. 4, p. 339. Albeit I think we should not even talk of a "forfeiture" of state immunity, as *Siehr* proposes. – HEMLER, A. *Improving cross-border compliance of private individuals and corporations by applying foreign public law in foreign state as party cases* (forthcoming).

cases: recognition and legal assistance. We can categorise them by reference to the origin of the foreign legal content, the law-applying authority and the imperative element.

When we provide legal assistance, which is widespread in the public law domain as well, the applicable law remains genuinely domestic: For example, a criminal who was previously extradited to the domestic state to be tried in front of domestic courts still faces sanctions from genuine domestic criminal law. Therefore, the legal content's origin remains domestic, just like the law-applying authority's origin (e.g., a court).

Given that the application of foreign law uses foreign legal ideas, the applicable legal content is not genuinely[37] domestic. However, when we apply foreign law, the law-applying authority's origin remains domestic.

The recognition of foreign legal decisions is similar to applying foreign law insofar as both instruments make use of foreign legal contents. However, when we recognise a foreign decision, even the application process is left to a foreign authority: We recognise the results of an application of foreign legal contents as pronounced by a foreign authority. Hence, the process of application is beyond our control.

All three methods remain firmly grounded on the above-mentioned autonomy principle: The domestic state decides for itself if and to which degree it provides or accepts legal assistance, applies foreign law or recognises foreign decisions. In all three instances, the ultimate sovereign will of the domestic state remains unquestioned. Hence, the imperative element continues to be of domestic origin.

The key takeaway from this structural comparison is the following: Legal assistance requires the least trust, albeit some (e.g., we need to be sure that the foreign state has not forged foreign documents we requested as evidence). When we apply foreign law, we make room for foreign legal ideas, which requires more trust – but at least we stay in control over the application process. With regard to recognition, we do not even govern the application process anymore, which is why, here, most trust is needed. Hence, with

37 This refers to the "hybrid law theory", according to which every application of foreign law creates new domestic, hybrid rules that endow a foreign legal idea ("rational element") with domestic sovereign validity ("imperative element"). – Cf. fn. 26.

an increasing amount of components of foreign origin (legal assistance: zero; foreign law application: one; recognition: two), the necessary degree of trust in the foreign legal system grows.

	Legal assistance	**Application of foreign law**	**Recognition**
The legal content's origin	Domestic	Foreign	Foreign
The law-applying authority's origin	Domestic	Domestic	Foreign
The imperative element's origin	Domestic	Domestic	Domestic
Trust in the foreign legal system	Low ———		High

Therefore, whenever recognition mechanisms in a particular legal field are in place, we already trust the foreign legal system (more than) enough to apply foreign law since, at least, we stay in control of the application process. For example, in German criminal law, some foreign criminal judgments can be recognised and enforced in Germany:[38] German citizen A was sentenced to prison in front of Swiss courts *(in absentia)* because A was speeding through the Swiss Gotthard tunnel. German courts recognised and enforced the Swiss penal judgment by imprisoning him in Germany.[39] Here, *de lege ferenda*, German prosecutors should equally well be able to prosecute A under Swiss law or even allow Swiss prosecutors to appear in front of German courts themselves.

However, it must be noted that recognising foreign verdicts is usually less complicated than applying foreign law in front of domestic courts. That is why the following second conclusion from our above-mentioned comparison is more important: Whenever there is not enough trust in the foreign legal system in order to allow for the recognition of foreign verdicts, the application of foreign public law by domestic courts or authorities might remain possible. Since the domestic state would stay in control of the application process, domestic authorities or courts would still be able

38 Germany. § 48 ff. Gesetz über die internationale Rechtshilfe in Strafsachen (IRG).

39 Judgment of the Higher Regional Court Stuttgart (Oberlandesgericht Stuttgart), Germany of 25. 4. 2018, Case No. 1 Ws 23/18.

to secure procedural justice without having to ignore non-compliance with foreign public law.

Just like every other application of foreign law, the application of foreign public law would, of course, remain subject to the public policy exception. Hence, foreign public law that violated fundamental principles (e.g., by prescribing capital punishment) would not be accepted.

3.2 Cases

Given that the CoL is governed by the autonomy principle, the state is generally free to choose in which fields of public law it permits foreign states to appear in front of domestic courts and enforce their public laws. However, as a starting point, we can safely assume that most states do not want to turn a blind eye to any non-compliance with foreign public law. They might choose to do so for selfish or political reasons in particular legal fields (e.g., in so-called tax havens), but the widespread acceptance of legal assistance mechanisms proves that most states usually aim to foster compliance with foreign (public) law – even if they only choose to do so on the grounds of reciprocity.

Additionally, the state's willingness to improve compliance with foreign public law increases when the foreign law's policy goals match those of the domestic state (e.g., if both follow comparable objectives within environmental protection law).

Some of the most promising cases shall be discussed on the following pages.

3.2.1 Criminal Law

Within the EU, there are already some frameworks in place that allow for the recognition of financial penalties.[40] In the absence of a treaty framework, some states will still recognise and enforce foreign penal judgments, even in the case of non-monetary sanctions like imprisonment.[41]

40 Art. 6 Council Framework Decision 2005/214/JHA of 24. 2. 2005 on the application of the principle of mutual recognition to financial penalties.

41 Germany. § 48 ff. Gesetz über die internationale Rechtshilfe in Strafsachen (IRG); Switzerland. Art. 94 ff. Bundesgesetz über internationale Rechtshilfe in Strafsachen.

Since the recognition of foreign criminal verdicts requires more trust in the foreign legal system than the application of foreign criminal law, states that provide recognition mechanisms should not object to the application of foreign criminal law (see above).

If recognition mechanisms do not exist, the applicability of foreign criminal law seems to be particularly helpful concerning those crimes that are not already covered by the universality principle, i.e., all crimes that are not considered extremely serious (such as war crimes or crimes against humanity).[42] For example, a foreign state could request prosecution of a resident of the domestic state under foreign criminal law with regard to past conduct in the foreign state's territory (e.g., traffic-related crimes, theft, fraud).

The foreign state might favour applying foreign criminal law over legal assistance or the recognition of criminal judgments for several reasons, for example, if extradition appears disproportionate or if the facts are still uncertain. Here, the application of foreign criminal law would provide the domestic state with the ability to secure a fair trial in its courts while the culprit would still be held accountable.

In this respect, a newly emerging question concerning the public policy exception arises: To what extent shall the domestic state accept foreign criminal laws that punish behaviour that is legal under domestic law? For example, should a state where hate speech or denying the holocaust is legal nevertheless enforce German laws that partly criminalise such acts if the respective conduct had a significant connection to Germany? Or should the domestic state reject this due to concerns over the freedom of speech by employing the public policy exception?

42 According to the public international law principle of universality, the seriousness of certain crimes might justify the application of domestic penal law even without any significant connections to the adjudicating state. See also HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934, on the universality principle, how it relates to CoL and why the perpetual application of domestic penal law is not an option in all cases.

3.2.2 Tax Law

Contrary to criminal law, recognition mechanisms are sparse in the domain of tax law.[43] That is why the tax-collecting state might be unable to enforce its tax claim when it first arises after the tax debtor has already left the country (e.g., due to the realisation of capital gains[44]).

This is particularly problematic if there are no assets of the tax debtor left in the tax-collecting state. In these cases, tax collection assistance might only help substantiate a tax claim. Effective enforcement, however, will only be possible where the debtor's foreign assets are. Here, the application of foreign tax law by domestic tax authorities might, once again, strike an attractive balance between legal assistance and recognition: Why should the foreign state not be able to request enforcement of a justified tax claim, in particular, if the respective tax type is familiar to the domestic state?

3.2.3 Environmental Protection Laws and Cross-Border Pollution

Another auspicious overlap of policy goals can be found in the domain of environmental protection law.

Imagine, for example, a short-lived subsidiary of a domestic corporation violates foreign environmental protection law by dumping chemicals into a river of a foreign state. Since the recognition of an administrative fine issued by the foreign state might be unlikely, it appears, once again, reasonable to let the foreign state sue the domestic corporation responsible in front of domestic courts under its own (foreign) environmental protection laws.

The inversion of this case is equally fascinating, in particular in cases where domestic private actors are responsible for cross-border pollution (or other hazards). Here, a state is generally justified to endow its environmental

43 Cf. Art. 27 para. 8 letter b) Organisation for Economic Co-operation and Development ("OECD") Model Tax Convention 2003; Council Directive (EC) 2001/44/EC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties.

44 BAKER, P. Changing the Norm on Cross-border Enforcement of Tax Debts. *Intertax*. 2002, Vol. 30, no. 6–7, p. 217.

protection laws with an extraterritorial scope of application that might, for example, oblige private actors in bordering states to reduce cross-border pollution or contain cross-border hazards.[45] In this case, the domestic state could try to enforce its environmental protection laws against foreign private actors in front of the bordering state's (administrative) courts.

3.2.4 Cultural Heritage Law

Given that the protection of cultural heritage is another widely accepted policy goal, we might also consider letting a foreign state appear in front of domestic courts to enforce its public laws on cultural heritage. While this issue already plays a significant role in private party litigation, it would undoubtedly strengthen the practical enforcement of cultural heritage law if a foreign state could, for example, request the return of culturally significant artefacts that had been unlawfully exported from the country of origin.[46]

4 Summary

The public-private law divide describes a methodological and practical rift within the Conflict of Laws, according to which foreign public law is inapplicable. However, the doctrinal reasons for the inapplicability thesis cannot hold up to scrutiny: The application of foreign law is neither conditioned by a "neutral" perspective of the domestic state toward the applicable foreign law nor can the application of foreign public law be understood as an intrusion into domestic sovereignty. Additionally, the application of foreign public law already happens in practice.

Therefore, it is time to extend the CoL's all-sided methodology to the public law domain and embrace the application of foreign public law as a valuable tool to solve cross-border public law disputes. This relates not only to private

45 HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934.

46 Cf. Judgment of the House of Lords, UK, of 21. 4. 1983, *Attorney-General of New Zealand vs. Ortiz* [1984] AC 1 (HL), [1984] 2 WLR 809; SIEHR, K. Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property. *Uniform Law Review*. 2015, Vol. 20, pp. 503 ff.

law consequences of foreign public law but also to cases where the foreign state is a plaintiff. In the latter case, the applicability of foreign public law seems to provide an attractive middle ground between legal assistance and the recognition of foreign verdicts.

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