Prof. Dr. Thomas Schmitz[1] ICILS 2020, 01/07/2020

Towards a globalisation of law? Comments from the European perspective in view of the experiences with the Europeanisation of law

I. Introduction

1. What is globalisation of law?
   - definition: the *profound transformation or replacement of national (domestic) law* by legal standards and other legal norms of global public international law; a form of *internationalisation of law*
2. Two decades of discussion about the globalisation of law
   - a heterogeneous, sometimes blurred discussion, often rather from a political/social science than legal science perspective
   - a discussion backed by hard facts, in line with the fundamentals of law on this planet - or wishful thinking?
3. The unaffected sovereignty of the state - even in times of geo-regionalisation and globalisation
   - the *uncontested world order of sovereign territorial states*
   - the control of the sovereign state over all law which is valid on its territory
4. The still very limited replacement of national law by global international law
   - global international treaties usually need to be implemented into the domestic law but do not replace it
   - exception: the *United Nations Convention on Contracts for the International Sale of Goods (CISG)* - an autonomous global sales law, optionally replacing the sales law of the states of the contracting parties
5. The growing influence of global standards and regulations on the national law
   - binding rules and standards that need to be implemented into or achieved by the national law
   - examples: *WTO-Agreements, UN environmental and climate protection agreements, global human rights treaties*
   - a development still at an early stage, often rather concerning details than basic concepts of the law
6. Prospects: From economic globalisation to globalisation of law or on the way to de-globalisation?
   - doubts given the ongoing emphasis of the sovereignty of the state
   - the threat to globalisation from nationalist populism - "make my country great again"?
   - the impact of the coronavirus crisis on the globalisation

II. A historical precedent: the Europeanisation of law

1. Geo-regionalisation and globalisation as different forms of internationalisation of law
   - the national law under the influence of geo-regional and global international law
2. The integration of Europe in a *supranational union*
   - a non-state but state-like supranational organisation of integration which performs on a large scale public missions by the exercise of *supranational public power* in its member states, in particular through legislation and regulation
   - an organisation with an *own legal order* - not like an ordinary international organisation but like a state
   - the debate about the legal nature of the European Union: "compound of states" ["Staatenverbund"], "compound of states and constitutions" or "supranational union"?
3. The European basic concept of *integration through law*
   a) Integration based on law and the respect for law
      - Union generally confined to pass legal acts that the member states must implement, execute and enforce
      - compliance essential - even small irregularities may cause serious distortions in the internal market jeopardizing the whole integration process
   b) No coercive powers of the Union to enforce its law in the member states
   c) Strong emphasis on the *rule of law*
      - a fundamental value of the Union (art. 2 EU Treaty)
   d) A powerful *own court of justice*, to "ensure that ... the law is observed" (art. 19 EU Treaty)
      - *European Court of Justice (ECJ)* in Luxembourg virtually functions as constitutional court and supreme court
      - national courts may ask for preliminary rulings on the validity and interpretation of Union law (art. 267 FEU Treaty)
4. The characteristic features of European Union law
   a) The *autonomy* of Union law
      - a distinct, autonomous legal order of its own, not an annex to national law (→ ECJ, case 26/62, van Gend & Loos)
   b) The *direct effect* of Union law in the member states
      - all public authorities directly bound without intermediate national legislation or regulation (except for directives)
      - in particular direct application of primary law (→ ECJ, case 26/62, van Gend & Loos)

[1] DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; www.thomas-schmitz-yogyakarta.id, www.jura.uni-goettingen.de/schmitz; E-Mail: tschmit1@gwdg.de.

c) The *unity* of Union law
- essential for the functioning of the Union
- uniform validity and application in all member states without regard to the specific features of national law

d) The *primacy* of Union law over national law
- in case of conflict, authorities in the member states must not apply the national law (→ ECJ, case 6/64, Costa/ENEL)
- conflicts may be avoided by *interpreting the national law in conformity with Union law* (→ ECJ, case 79/83, Harz)
- primacy in application, not in validity
- primacy *even over national constitutional law* (→ ECJ, case 11/70, Intern. Handelsgesellschaft), as long as the constitutional identity of the member state (fundamental values and ideas constituting the core of its constitution) is not affected

5. Factors stimulating the Europeanisation of law

a) Far-reaching, abstractly formulated commitments of the member states in the Treaties (and reform treaties), the full scope of wich only became clear over time
- notably the duty to respect, implement, execute and enforce Union law and the commitments in the internal market

b) The prominent role of the European Court of Justice as defender of Union law and motor of integration
- extensive *judicial further development of law*, often by the "discovery" of unwritten general principles of Union law, since many essential rules for the functioning of the Union were not expressly regulated in the Treaties but needed to be worked out by jurisprudence
- numerous references of national courts for preliminary rulings enabled ECJ to adjudicate in detail on the duties of the member states and the Union's requirements for national law
- jurisprudence broadly accepted by the member states who rarely overruled it by amending the Treaties

c) The obligation to interpret national law in conformity with Union law (see infra, II.4.c)

d) The focus of the European Court of Justice on the effectiveness *("effet utile")* of Union law
- practical effectiveness as dominant criterion - basically just a consistent pursuit of the rule of law...

e) The growing impact of the growing sectoral legislation of the Union in more and more fields of law
- an effect intended in the advancing process of integration

6. Fields and examples of the Europeanisation of law

a) Europeanisation of administrative law

aa) The story
- Not the most radical but the most striking example of Europeanisation of law: Union law is generally executed by the member states on the basis of their national administrative law but this law has been *heavily transformed by demanding European standards* which often forced member states to *alter or give up traditional concepts* of their law. These standards were developed by the European Court of Justice in the way of judicial further development of law, just concretising consistently and with a comparative approach the requirements of a strict commitment to the rule of law.
- In the 90s, this development led to an *outcry of prominent scholars* who considered the specific concepts and traditions of the national admin. law as elements of national identity, but most experts did not share this view.

bb) Examples for jurisprudence with a europeanising effect
- note that most of them were ***triggered by dirty tricks of the member states to avoid compliance*** with the European law in order to achieve an unjust advantage for their citizens and businesses!
- autonomy, direct applicability and primacy of Community law [today: Union law] (ECJ, case 26/62, van Gend & Loos; case 6/64, Costa/ENEL; see supra, II.4)
- obligation to interpret national law in conformity with Community law law (ECJ, case 79/83, Harz; see supra, II.4)
- implementation of Community law by the member states pursuant to *national law*, which *must not*, however, *affect the scope and effectiveness of Community law* (ECJ, joint cases 205-215/82, Deutscher Milchkontor)
- obligation of the member states to take, where necessary, ***coercive measures*** *against their citizens* to enforce Community law (ECJ, case C-217/88, vin de table)
- obligation of national courts to grant ***interim relief*** if necessary to enforce Community law - regardless of any adverse provisions of national law (ECJ, case C-213/89, Factortame)
  - this forced the UK to introduce interim relief against acts of Parliament
- *restrictive conditions for interim relief against implementation of Community law*: only in case of serious doubts as to the validity of a Community act, if the question is referred to the ECJ for preliminary ruling, the applicant is threatened with serious and irreparable damage and there is taken due account of the interest of the Community that its legal acts have full effect (ECJ, joint cases C-143/88 a.o, Zuckerfabrik Süderdithmarschen)
- principles for the recovery of unduly paid Community aids (subsidies): national provisions excluding the recovery (with regard to such considerations as protection of legitimate expectation, loss of unjustified enrichment, passing of time-limits etc.) may be applied but the interests of the Community must be "taken fully into account" (ECJ, joint cases 205-215/82, Deutscher Milchkontor)
- principles for the recovery of illegitimate state aids (state subsidies to local businesses which may distort competition in the internal market):
  - no protection of legitimate expectations of the benificiary if the state aid has not been notified to the European Commission (as required in art. 108(3) FEU Treaty)
  - national authorities must recover without own discretion if Commission orders it (ECJ, case C-24/95, Alcan)
- direct effect of EU decisions addressed to the member states in favour of the citizen if the decision is unconditional and sufficiently precise (ECJ, case case 9/70, Leberpfennig)
- jurisprudence on the access to legal protection in matters concerning the execution of Union law
  - this forced Germany to extend the right of action before the administrative courts

- ***state liability*** *for violations of union law*, even for violations by the legislator or the national supreme court (cf. ECJ, joint cases C-6/90 and 9/90, Francovich; joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame; case C-224/01, Köbler)
- precautions to ensure ***the correct implementation of directives***
  - background: directives (art. 288 sub-sect. 3 FEU Treaty) are general rules of Union law that do not apply directly but have to be transposed into the law of the member states
  - obligation of the member states to implement directives by law, not by administrative practice or administrative provisions (ECJ, case C-361/88, TA-Luft)
  - obligation of the member states to refrain during the implementation period from taking any measures liable to compromise the directive's effect (ECJ, case C-129/96, Inter-Environnement Wallonie)
  - obligation to *interpret national law in conformity with the directive* (ECJ, case 79/83, Harz)
  - *direct application of the directive in favour of the citizen* in case of late or inadequate implementation, if the directive is unconditional and sufficiently precise (ECJ, case 148/78, Ratti)
  - state liability in case of late or inadequate implementation (ECJ, joint cases C-6/90 and 9/90, Francovich; case C-392 93, British Telecommunications)

b) Europeanisation of constitutional law
- by *constitutional amendments* necessary to join the European Union (delegation of sovereign rights, acceptance of direct applicability and primacy of Union law etc.)
- by constitutional amendments necessary to participate in new integration steps (allowing to join the monetary union or to extradite own citizens to other member states, recognising the role and independence of the European Central Bank, establishing constitutional limits for budgetary deficits etc.)
- by constitutional amendments necessary to adapt the constitution to requirements under Union law whose consequences only become apparent in time (e.g. abolishing the prohibition under the German Basic Law to employ women in the armed military service, which was incompatible with the equal treatment of men and women under Union law, cf. ECJ, case C-285/98, Tanja Kreil)
- last but not least: by the *strong influence of the jurisprudence of the European Court of Human Rights* in Strasbourg *on the interpretation of fundamental rights and rule of law principles in the national constitutions*

c) Europeanisation of other fields of law
- e.g. of monetary law (national law completely replaced by Union law
- e.g. of customs law (national law almost completely replaced by Union law)
- e.g. of economic law (comprehensive harmonisation of national law)
- e.g. of agricultural law, environmental law, asylum and refugee law, consumer protection law, public procurement law, data protection law (→ GDPR), (strong transformation or even predetermination of national law)
- elements of Europeanisation in several fields of civil law (e.g. contract law, international private law) and even of criminal law (→ European arrest warrant)

III. Lessons on the globalisation of law drawn from the experiences with the Europeanisation of law

1. No globalisation of law without commitment to the rule of law
   - it cannot happen in a world of populist and totalitarian regimes
2. No globalisation of law without multilateralism
   - universal standards in universal treaties - not a cacophony of heterogeneous bilateral agreements, which would often be imposed on the weaker partners by hegemonial powers
3. No globalisation of law without demanding requirements for the effective domestic implementation and enforcement of the global rules and standards
   - without such requirements it would be just symbolic
4. No globalisation of law without sophisticated conceptional precautions to ensure compliance with the global rules and standards
   - without such precautions the effectivenes and, thus, the practical impact of the global law is not guaranteed
   - the precautions may include binding global requirements for an effective fight against corruption
5. No globalisation of law without global courts of justice
   - the need for ▸ *independent, impartial, unpoliticised and highly respected international judicial bodies* ▸ *for the authoritative interpretation, intrinsic further development and effective enforcement of the global law* in transparent, formalised legal proceedings
     - private arbitration panels, expert treaty bodies and other soft solutions are not sufficient
     - national courts must have option to ask global courts for preliminary rulings on difficult questions of the global law
   - the need for special instruments (court orders, penalty payments, international sanctions etc.) to enforce the judgements of the global courts

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Important decisions of the European Court of Justice

on the basic concepts, the implementation and the enforcement of Community/Union law[2]

Preliminary remark: Since European Union law is a continental European and not a common law system, there is *no "case-law"* in the proper sense *but only jurisprudence of the European Court of Justice.* The doctrine of precedent (stare decisis) does not apply. However, the ECJ often refers to dogmatic statements in previous judgements. Therefore, the practical effect of its jurisprudence can be rather similar.

name	year	substance	reference
Van Gend & Loos (case 26/62)	1963	• Community law as an independent (distinct) legal order • direct applicability of primary Community law	[1963] ECR 1
Costa/ENEL (case 6/64)	1964	• primacy of Community law - also over *later* national law	[1964] ECR 585
Internationale Handelsgesellschaft (case 11/70)	1970	• primacy of Community law also over national constitutional law[3]	[1970] ECR 1125
Leberpfennig (Franz Grad) (case 9/70)	1970	• direct applicability of decisions addressed to the member states in favour of the citizen - if the decision is unconditional and sufficiently precise	[1970] ECR 825 HV, 7
Ratti (case 148/78)	1979	• direct applicability of directives in favour of the citizen[4] after expiration of the implementation period - if the directive is unconditional and sufficiently precise	[1979] ECR 1629
Deutscher Milchkontor (joint cases 205-215/82)	1983	• obligation of member states to implement Community law - application in accordance to national law; this must not, however, affect the scope and effectiveness of Community law • when recovering unduly paid Community aids, exceptions (with regard to the protection of legitimate expectation etc.) may be applied, but the Community's interests must be "taken fully into account"	[1983] ECR 2633
Harz (case 79/83)	1984	• national law to be interpreted in the light of the directives	[1984] ECR 1921
Foto-Frost (case 314/85)	1987	• national courts have no jurisdiction to declare community acts invalid	[1987] ECR 4199
vin de table (case C-217/88)	1990	• If necessary, the member states have to take coercive measures to enforce Community law	[1990] ECR I-2879
Factortame (case C-213/89)	1990	• national courts must grant interim relief to enforce Community law - regardless of adverse provisions of national law	[1990] ECR I-2433

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[1] DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; www.thomas-schmitz-yogyakarta.id, www.jura.uni-goettingen.de/schmitz; E-Mail: tschmit1@gwdg.de.

[2] See also the more extensive compilation at http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-1.htm with links to publications of the decisions in the internet.

[3] Since this judgement and its acceptance by the then member states, the primacy over national constitutional law constitutes a central *component of the acquis communautaire*. Only its limits (the identity of the national constitution) are disputed. All later joining states recognized it in the accession treaties as a legal condition for their membership. Nevertheless, it is challenged in the constit. jurisprudence in Greece, Spain, Poland and Lithuania.

[4] No direct application of directives *against* the citizen, cf. ECJ, case 152/84, Maarshall I; case C-91/92, Faccini Dori.

Zuckerfabrik Süderdithmarschen (joint cases C-143/88 a.o.)	1991	• interim relief also against the implementation of Community law - restrictive conditions: • serious doubts as to the validity of the Community act, • question referred to the ECJ, • applicant threatened with serious and irreparable damage, • due account of the interest of the Community that its acts have full effect	[1991] ECR I-415
TA-Luft (case C-361/88)	1991	• strictly no implementation of directives through administrative practice or administrative provisions	[1991] ECR I-2567
Francovich[5] (joint cases C-6/90 and 9/90)	1991	• state liability pursuant to Community law for non-implementation of directives[6]	[1991] ECR I-5357
Alcan (case C-24/95)	1997	• Restricted protection of legitimate expectations in case of illegitimate state aids - no protection in case of failure to notify European Commission compliant to art. 93 EC Treaty (later: 88 EC Treaty, today: 108 FEU Treaty) - national authorities must give effect without discretion if Commission orders recovery	[1997] ECR I-1591 HV, 727
Inter-Environnement Wallonie case C-129/96	1997	• precursory effect of directives: during implementation period member states must refrain from taking measures liable seriously to compromise the result prescribed[7]	[1997] ECR I-7411

[5] Confirmed and developed in ECJ, joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame, [1991] ECR I-5357.

[6] Also for incorrect implementation of directives, ECJ, case C-392/93, British Telecommunications, and for violation of directly applicable Union law, ECJ, joint cases C-46/93 and 48/93, Brasserie du Pêcheur/Factortame.

[7] See also ECJ, case C-422/05, airport noise, [2007] ECR I-4749.