The idea of a three-dimensional conflicts law as constitutional form of transnational governance*

CHRISTIAN JOERGES

The elaboration of a systematic evaluative framework of conflicts law, which should be probed and refined in further study is the central juristic aim of the third phase of the project on *Trade Liberalisation and Social Regulation*. It is at the same time a reference point in the Subproject on Transnational Governance, Deliberative Supranationalism and Constitutionalism of WP 9 of the RECON project. We have described our approach as a „three-dimensional conflicts law". The development of this idea started with the first presentation the work of this project (Joerges & Godt 2006) and was continuously elaborated further (see Joerges & Rödl 2009a and the contributions in the RECON Report 7/2009 (Nickel 2009 and also Joerges and Falke forthcoming).

Our approach is by no means idiosyncratic. There are more or less closely related legal analyses and theoretical constructs. In Germany above all, but also beyond its borders, there are academic legal and interdisciplinary debates and projects which are in many respects akin to our considerations and in relation to which we would like precisely to orientate and situate our work (in particular Fischer-Lescano & Teubner 2006; Howse & Nicolaïdis 2008). We also will have to consider thoroughly the debates on the constitutionalisation of international law including the fragmentation controversies, which are important for a conflicts law approach (see, on the one hand, Koskenniemi & Leino 2002; Koskenniemi 2006; Fischer-Lescano & Teubner 2006; and on the other Benvenisti & Downs 2007; Bast 2009). Further important reference points are the projects on international and transnational administrative law (Kingsbury, Krisch & Stewart 2007; Schmidt-Aßmann 2006 und 2008; Möllers, Voßkuhle & Walter 2007); but also the interdisciplinary discussions in respect of the theory of international relations (Herborth & Niesen 2007; Kreide & Niederberger 2008; Brunkhorst 2009; Deitelhoff & Steffek 2009).

Two terminological distinctions are important. The first concerns the term conflicts law. At issue is neither the choice between legal orders according to the tailored rules of the continental IPR nor Anglo-Saxon „conflict of laws", nor the law of international civil procedure (*internationales Zivilprozessrecht*). In the European multilevel system, particularly in the area of social regulation, multiple levels must work together with none governing autonomously. The same applies

* This text is an extract from the grant application of the Bremen Project on "Trade Liberalisation and Social Regulation" as submitted by Josef Falke and Christian Joerges. It is addressed to our so far unknown evaluators. It summarise the current state of discussions within the Bremen project, but also, albeit with less precision, the state of the RECON Work Package [0]9-2 on "Transnational Governance, Deliberative Supranationalism and Constitutionalism**" -** It was translated by Rory Steven Brown, London

on the international plane. If we use the term conflicts law, this is to express first that in European and international law will be concerned with the management of conflicts and second that this management should take place in a legal framework. Naturally, at the same time, our conceptual terminology envisages that, in the postnational constellation, there will still be horizontal conflicts. Finally, the fact that dealing with legal divergences is the core problem of conflicts law jurisprudence meaning that there is a rich seam of theory into which we can bore, recommends a resort to conflicts law categories and methodologies.

The second observation refers to the three dimensionality of our approach. We want with this term, formally to account for the rationality of a differentiation of modalities of conflicts law, but at the same time wish to express that we envisage a systematic order. In fact, at base we are concerned with the same transformational processes, which, in law can be generally observed according to the typologically pointed constellation of the DRIS**,** a matter of particular pertinence to our field of research in social regulation: first with the intrusion of regulatory objectives into the legal system, then with the turn to governance

This is the penetration of law with purposive regulative programmes, („*Zweckprogramme*“ in the Luhmannian parlance 1972: 227 ff.; 1993: 195-204) and the turn to governance, pursuant to which the law must adjust to forms of self-regulation, namely the inclusion of non-governmental actors in regulatory policy, and the increased need for and work with expert knowledge. In Europe, these transformations have been validated on a large scale. Majone (1994) responded to them with his well-regarded conceptualisation of Europe as a „regulatory state“. The turn to governance has been considerably and visibly extended by the European Commission with its White Paper of 2001 (on the legal *problematique*, see, Braams & Everson 2007). For international law, Weiler (2004: 552) has described “international law as regulation“ as a new “geological“ formation of international law with specific normativity and legitimacy. The new grand project of Global Administrative Law and as to international public law reacts to these developments. Our differentiation of three dimensions seeks to take acccount of these transformations. We therefore assume that one can really distinguish between the „geological layers“ of law and that after the transformations of national law, European and international law layers form layers with specific normative functions.

Normative departure point: We are therefore not merely concerned with legal-sociological analyses and legal dogmatic stances. We are far more interested in coming to terms with the normative implications of these developments and wish to perceive here what the status of three dimensional conflicts law might be. Thus, the central normative argument of our project proceeds from a well-situated observation: The processes of Europeanisation and globalisation with their interdependencies have a normatively relevant threefold effect: First, no state can avoid that a rule it enacts to deal with problems has effects beyond its borders. Often enough, this has the effect that the affected jurisdictions and states can no longer deal with problems autonomously but must approach them in cooperation. Luhman (1991) included this phenomenon in his sociology of risk through the

distinction between responsibility for a decision and being interested in a decision. Our normative argumentation relies on Habermas (1991), who reconstructed it as a problem of democracy, that the principle was eroding, that citizens are authors of the rules to which they are subject.

From this we derive our core normative propositions, which form the basis for our treatment of conflicts law as a constitutional form with democratically grounded validity claims (Joerges & Neyer 1997; Howse & Nicolaïdis 2008; Rödl 2010). Those propositions are: Europeanisation and Globalisation lead to a structural democratic deficit, if and because those affected by decisions have no influence on their formation. Thus, constitutional states must acknowledge or establish a law which compensates for this deficit in that it provides a forum for „foreign" demands and manifests deference through international contractual rules. This point of departure opens perspectives on a democratic juridification on European and international level, in which the much lamented democratic deficit of European law and international law can be rectified. Therefore, constitutional states must make allowances for these juridical dynamics. The extension of these perspectives is made in the three dimensions of our conflicts law conception.

Conflicts law of the first dimension. Not only the normative basis of the conflicts approach, but also its tendency to the creation of conflict constellations appears to us in European law particularly palpable (see Joerges 2007a). These starting premises can become valid in the European multilevel system in the European multilevel system characterised by constellations of conflicts. We differentiate here between vertical conflicts between the various levels of European governance, horizontal conflicts which are produced in the interactions between member states and diagonal conflicts which result from the fact that the regulatory competences of the national and European level cover only one aspect of the problem. Here, it is particularly apparent why the conflicts law approach cannot be reduced to the choice of a particular legal order. In horizontal conflict constellations, as the jurisprudence of the ECJ on reciprocal recognition substantially attests, „autonomy securing and contractually communal" comparison of interests is often possible (Scharpf 1993). With the help of the conflicts law approach we can also in the law of the WTO qualify and structure anfallende Entscheidungsaufgaben (Howse & Nicolaïdis 2008; Joerges 2009e). It can also be used for clashes between WTO rules and European Union Law.

Conflicts law of the second dimension concerns the redemption of national through transnational solutions. This goes beyond the harmonising function that conflicts law of the first dimension can produce. With the ordering of conflicts law, we align ourselves with the thesis developed very early by Ernst Steindorff (1958), that there is a class of „international material conduct", which would be impervious to „nationalisation" through the application of a particular law, in which case international substantive norms must take the place of the referential norm of the IPR.

We justify this substitution imperative with the interdependence of problem scenarios, the erosion of national regulatory potential and the concomitant

necessity of and duty of cooperation. In the fields of social regulation we have researched, we were led by this construction of complex transnational regimes. The best known example is European Comitology (Joerges & Falke 2000). However, the irrefutable need for transnational, socially regulative policy alone encouraged the cooperation of bureaucracies, the establishment of agencies and the passing of decision-making tasks (or their preparation) to epistemic communities. Here too, we are concerned with the preservation of constitutional democratic interpretive motifs, that is with a defence of the idea of legally transmitted legitimacy and legitimate governance also in relation to the conceptualisation of Europe as a „regulatory state" with „technocratic" legitimation concepts. In conflicts law, the second Dimension is correspondingly concerned with the elaboration of these decision-making processes, the organisation of the decision-maker, and the recognition and delimitation of exit options for the participating jurisdictions – in short, a constitutionalisation of transnational forms of cooperation. In this vein, we can rely on earlier work (Joerges & Falke 2000), but also on current analyses of the constitutionalisation of administrative action (e.g., Fisher 2007) and executive power in the Union (esp. Curtin 2009) as well as leaning on the afore-mentioned project of international administrative or global administrative law.

The *third dimension of conflicts law* reacts to the „privatisation" of regulative tasks and the development of new „governance arrangements", which can be observed at all levels of governance. A sharp differentiation (primarily) of all the administratively anchored regulative forms with which the conflicts law of the second dimension is concerned, appears neither possible nor necessary. At the international level, the name of th game is not to discredit or to block inevitable developments. The conflicts law approach should not however relinquish its normative claims and can be deployed against interpretations involving a self-justifying ruling power, which no longer distinguishes between the facticity of transnational governing infrastructure and the recognisable worth of transnational governance. With respect to the conflicts law ordering, the conflicts approach can be interwoven with international civil procedural law and the recognition of judgments and arbitration.

It must, however, above all, develop techniques and criteria for dealing with non-statal institutions and/or para-legal regimes. For such supervisions and indirect forms of control, there are templates in European law (see, e.g., Falke & Joerges 1995; or Joerges, Schepel & Vos 1999). In the international arena, reference can principally be made to the example of international norm-formation (Schepel 2005). In all the research fields of the third phase, focal markers will have to be put down.

Bibliography

Bast, Jürgen (2009) Das Demokratiedefizit fragmentierter Internationalisierung, in: Hauke Brunkhorst, Ed., Demokratie in der Weltgesellschaft, *Soziale Welt, Sonderband* **19**: 185-194

Benvenisti, Eyal & George W. Downs (2007) The Empire's New Clothes: Political

Economy and the Fragmentation of International Law, *Stanford Law Review* **60**, 595-631.

Brunkhorst, Hauke, Ed. (2009) *Demokratie in der Weltgesellschaft*, Soziale Welt, Sonderband 178, Baden-Baden: Nomos

Curtin, Deirdre (2009) *Executive power of the European Union: law, practice and living constitution*, Oxford: Oxford University Press

Deitelhoff, Nicole & Jens Steffek, Eds. (2009) *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter*, Frankfurt a.M., New York: Campus

European Commission 2001, "European Governance. A White Paper, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5, http://europa.eu.int/comm/governance/index_en.htm.

Falke, Josef & Christian Joerges (1995) *Rechtliche Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung*. Gutachten, erstellt im Auftrag des Technikfolgen-Abschätzungsbüros des Deutschen Bundestages, Typoskript, ZERP Bremen

Fischer-Lescano, Andreas & Gunther Teubner (2006) *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, Frankfurt a.M.: Suhrkamp

Fisher, Elizabeth (2007) Risk Regulation and Administrative Constitutionalism, Oxford & Portland: Hart Publishing

Fisher, Elizabeth (2007) Risk Regulation and Administrative Constitutionalism, Oxford & Portland: Hart Publishing

Habermas, Jürgen (1991) *Staatsbürgerschaft und nationale Identität*, Zürich: Erker (reprinted as Annex II to *Between Facts and Norms. . Contributions to a Discourse Theory of Law and Democracy* [1992], (Cambridge MA: The MIT Press, 1999).

Herborth, Benjamin & Peter Niesen, Eds. (2007) *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt a.M.: Suhrkamp

Howse, Robert & Kalypso Nicolaïdis 2008, Domocracy without Sovereignty: The Global Vocation of Politicak Ethics, in: Tomer Brousde & Yaval Shany (Eds.), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity. Essays in honour of Profesor Ruth Lapidoth*, Oxford and Portland., Orgon: Hart, 162-191

Joerges, Christian & Josef Falke, Eds. (2000) *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, Baden-Baden: Nomos

Joerges, Christian & Christine Godt (2006) Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens, in: Stephan Leibfried & Michael Zürn, Eds., *Transformation des Staates*, Frankfurt a.M.: Suhrkamp, 151-193

Joerges, Christian & Josef Falke, Eds. (2010) Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets, Oxford & Portland: Hart Publishing, forthcoming

Joerges, Ch. & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal*, pp. 273-299.

Joerges, Christian & Florian Rödl (2009b) Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der postnationalen Konstellation, in: Gralf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch & Peer Zum-bansen, Eds., *Soziologische Jurisprudenz, Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin: de Gruyter, 765-778

Joerges, Christian (2009e) Judicialization and Transnational Governance: The Example of WTO Law and the GMO Dispute, in: Bogdan Iancu, Hg., *The Law/Politics*

Distinc-tion in Contemporary Public Law Adjudication, Utrecht: Eleven International Publish-ing, 57-84

Joerges, Christian (2007a) Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws, in: Beate Kohler Koch & Berthold Rittberger, Eds., *Debating the Democratic Legitimacy of the European Union*, Lanham, MD: Rowman & Littlefield, 311-327

Joerges, Christian, Beate Braams & Michelle Everson (2007) Die Europäische Wende zu ‚Neuen Formen des Regierens' (new modes of governance) – Rechtsprobleme eines politischen Konzepts, TranState Working Paper No. 55, Bremen)

Joerges, Christian, Harm Schepel & Ellen Vos (1999) *'Delegation' and the European Polity: The Law's Problems with the Role of Standardisation Organisations in European Legislation*, EUI Working Paper in Law 9-1999, http://www.iue.it /LAW/WP-Texts/law99-9.pdf

Kingsbury, Benedict, Nico Krisch & Richard B. Stewart (2005) The Emergence of Global Admi-nistrative Law, in: *Law and Contemporary Problems* **68**:3/4, 15-61

Koskenniemi, Martti (2007) The Fate of Public International Law: Between Technique and Politics, in: *Modern Law Review* **70**:1, 1-30

Koskenniemi, Martti (2006) *Fragmentation of International Law. Difficulties Arising from the Diver-sification and Expansion of International Law*, United Nations, A/CN.4/L.68

Koskenniemi, Martti & Päivi Leino (2002) Fragmentation of the International Law? Postmodern Anxi-eties, in: *Leiden Journal of International Law* **15**:3, 553-579

Kreide, Regina & Andreas Niederberger, Eds. (2008) *Transnationale Verrechtlichung. Nationale Demo-kratie im Kontext globaler Politik*, Frankfurt a.M., New York: Campus

Luhmann (1993) *Das Recht der Gesellschaft*, Frankfurt a.M.: Suhrkamp

Luhmann, Niklas (1991) *Soziologie des Risikos*, Berlin: de Gruyter

Luhmann, Niklas (1972) *Rechtssoziologie*, 2 Bände, Reinbek: Rowohlt

Majone, Giandomenico (1994) The Rise of the Regulatory State in Europe, in: *West European Politics* **17**:3, 77-101

Möllers, Christoph, Andreas Vosskuhle & Christian Walter, Eds. (2007) *Internationales Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten*, Tübingen: Mohr & Siebeck

Nickel, Rainer, Ed. (2009) *Conflict of Laws and Laws of Conflict in Europe and Beyond*, ARENA Report No. 1/2009, RECON Report No. 7

Rödl, Florian (2010) Demokratische Verrechtlichung ohne Verstaatlichung: Kollisionsrecht statt Globalstaat, in: Oliver Eberl, Ed., Transnationalisierung der Volksouveränität, Festschrift für Ingeborg Maus, Stuttgart: Franz Steiner Verlag [forthcoming]

Schepel, Harm (2005) *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford & Portland: Hart Publishing

Schmidt-Aßmann, Eberhard (2006) Die Herausforderung des Verwaltungsrechts durch die Internatio-nalisierung der Verwaltungsbeziehungen, in: *Der Staat* **45**, 315-338

Schmidt-Aßmann, Eberhard (2008) The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship, in: *German Law Journal* **9**:11, 2061-2080

Steindorff, Ernst (1958) *Sachnormen im internationalen Privatrecht*, Frankfurt a.M.: Klostermann

Weiler, Joseph H.H. (2004) The Geology of International Law – Governance, Democracy and Legiti-macy, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* **64**: 547-562