Self-Sufficiency of European (Regulatory) Private Law: a Discussion Paper

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A SELF-SUFFICIENT EUROPEAN PRIVATE LAW –
A VIABLE CONCEPT?

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3) Self-Sufficiency

SELF-SUFFICIENCY OF EUROPEAN (REGULATORY) PRIVATE LAW:
A DISCUSSION PAPER

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1. Introduction

The aim of this exploratory paper is to discuss the idea of a ‘self-sufficient European private law.’ As is rightly set out in the writings of Hans Micklitz,1 and in the project in the context of which this workshop takes place, there is a clear need to address the question of how the large body of European rules with relevance for private actors relates to the traditional national private laws. This paper aims to provoke discussion about the idea of a self-sufficient European private law itself. To this end, a provisional answer is offered to the question whether ‘a self-sufficient European private law’ is indeed a viable concept.

Section 2 sets out the relevant background, largely providing my own understanding of the problems at stake in the present project. This will make readily clear that there is a need to better define some of the concepts used in the discussion, including the ambiguous term ‘(European) private law’ itself. Once we have more clarity on this, we are able to explore three types of interaction between the European and the national private law order (section 3). In my view it is only possible to make progress on whether self-sufficiency is a viable concept if we identify the function of self-sufficiency and subsequently distinguish between different ways in which it can be achieved at the national and the European level (section 4).

2. Framing the Question and Making Assumptions Explicit

My starting point is formed by the claims underlying the present project.2 I paraphrase these claims as follows. While traditional national private legal orders are largely guided by autonomy and freedom of contract, continuing European influence has transformed private law into a field that is increasingly characterised by ‘functionalism in competition and regulation.’ The result is a growing tension between the nation state private laws (still different from one country to another, but united in their aim to provide a particular type of ‘justice’: see below) and the ‘market state’ European private law. This tension is mainly due to the fundamentally contradictory aims of national and European private law: while national private laws would aim to realise some national view of justice, European private law reflects a more instrumental view. This could be qualified as a development from social justice to ‘access justice’: the European Union grants ‘access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules

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2 As apparent from the literature mentioned in footnote 1.
have to make sure that the weaker parties have and maintain access to the market – and to the European society in so far as this exists.\(^3\)

It seems useful to distinguish two aspects of this important and insightful account. First, it describes the emergence of a large set of rules and policies at the European level and indicates that these rules have remained largely separate from traditional private law, prompting a tension that is apparent in a variety of ways.\(^5\) In fields such as telecom, energy, finance, insurance, transport, health, food, intellectual property, public procurement, non-discrimination and consumer law, a large number of rules with relevance for private actors has emerged. This account fits in with previous work on the rise of the European ‘regulatory state’ in general: since the 1985 Commission White Paper on the completion of the internal market, European policymakers have focused on guaranteeing access of actors to the market in order to further develop it.\(^5\)

Second, the account is normative by claiming that it is wrong to keep this large regulatory framework on access justice separate from the traditional national private laws: a fundamental re-orientation of structures and methods of European private law is needed in order to keep our ideas of private law in sync with a 21\(^{st}\) century society. I could not agree more,\(^6\) but it is important to point at two assumptions underlying this claim that can provide the necessary perspective.

The first implicit assumption is a view on what is actually ‘private law.’ If one looks at the way in which this field is usually understood (e.g. taught and written about), it is clear that also at the national level, many rules with relevance for private parties are not seen as part of ‘classic’ private law and are not related to the ‘core’ areas of contracts, torts and property. In the fields just mentioned, there are often specific national law rules as well (to a greater or lesser extent curtailed by European law), but they mostly are separately studied. I believe this is wrong, but this does imply the need to better define what the field of ‘private law’ is exactly about and how it should be studied. This is even more urgent in view of the unclear concept of ‘European private law’ itself: there is no common understanding of what this field exactly includes. In the above I formulated it as providing rules with relevance for private actors, but this is of course a rather vague formulation that is in need of further refinement. And all this is not just a matter of definition: the question of what is the ‘true’ (European) private law sets the agenda for how many different rules and policies are to be part of the same system (see below).

The second assumption is that traditional national private law is not primarily about access to the market (or in any event in a different way than European private law). However, also at the national level the main aim of private law is arguably to provide all citizens with the possibility to enter into transactions and to enjoy property on a national market and in a national society. The expression of the Civil Code being the true constitution of a country\(^7\) is in this respect telling.\(^8\) Seen from this perspective, it could be argued that the rise of access justice in the European Union is ‘only’ the next logical next step in a development towards Europeanisation of the market. If this is true, there is only a

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\(^8\) Put differently: ‘autonomy’ also has a function, namely to allow people to make use of the market, making the development from freedom to functionalism only a gradual one (which does not mean it is less important).
gradual difference between European and national access justice: while at the national level all kinds of mechanisms have developed over time to enable parties to operate on the national market, such mechanisms are now put into place to also allow access to the European market. If this alternative reading of the present situation makes sense, it is of course still urgent to redefine the relationship between the national and the European level (and between the different conceptions of justice operating at these levels), but the challenge may not be to aim for a complete re-orientation of present-day private law. This calls for a clear definition of what is access justice. 9

With these two caveats in mind, it is possible to frame the main question. It can be defined as how the European and the national level private legal order should interact. Three types of interaction are to be considered.

3. Three Types of Interaction between the European and the National Private Law Order

The question of interaction between different legal orders is of course not new, but it has received new impetus in the last decade as a result of the accelerating pace of European integration. The question is also certainly not restricted to the field of private law, to the contrary: most of the debate on pluralism and multilevel law making takes place in the field of constitutional law. 10 In the context of the present workshop, I distinguish between three ways in which one can deal with the interaction between the national and the European private legal order.

The first possibility is not to consider European regulatory private law as private law, or even as law, at all. This is not as strange as it may seem. If ‘the purpose of private law is to be private law’, as Weinrib has famously claimed, 11 there is no need to integrate any regulatory aims in this field. To some extent, this is even the present situation, caused by the compartmentation of sub-disciplines (including different scholars publishing in different journals and being active in different academic circles). It also fits in with the claim that the European Union is moving from integration through law to integration without law. This perspective is one of denial and for me there is no question that it is therefore the wrong perspective. It is exactly this view that leads to ‘surprises’ caused by the tension between national and European conceptions of justice, as apparent in for example the cases of Viking and Laval 12 and Kücükdeveci. 13

The second possible way to deal with the interaction between national and European private legal orders is to consider European regulatory private law as law, but to look at it through the national lens. This assumes that the national private law is still the starting point of any meaningful analysis and that the European norms are to be studied as influencing national law. The emergence of rules emanating from the European legislature and courts is then considered as a phenomenon that stands next to the ‘normal’ production of norms at the national level. This view prevails in present-day academia. 14 It must however be discarded for being too one-sided: it does not take European private law seriously by not looking at it as a separate field of study. Even if the outcome of such study would be that European

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9 For Rawls, Justice as Fairness: A Restatement, 2001, social justice seems to be about assuring the ‘protection of equal access to liberties, rights, and opportunities.’


12 C-438/05; C-341/05.

13 C-555/07.

private law cannot be seen as a separate field in its own right, the second perspective does not even allow an attempt to consider it in this way.

The third possibility is to look at European private law as an autonomous field. This view of European private law as a ‘self-sufficient’ system implies that the substantive body of European private law norms can be looked at from the ‘European’ perspective. This is, however, not enough. If a truly autonomous European private law does exist (or can be developed), one also needs to establish how this body of law relates to the national private laws, either through hierarchy, coordination or competition. In the following section, an attempt is made to show what such a self-sufficient European private law could look like and how it could relate to national laws.

4. A ‘Self-sufficient’ European Private Law

4.1 What is a ‘Self-Sufficient’ Legal Order?

It makes sense to ask first what we must understand by a ‘self-sufficient’ order of private law and why we would need it. Self-sufficiency in general refers to a state of not requiring any support or interaction for survival, thus reflecting collective or personal autonomy. I see this concept as a gradual one: one side of the spectrum is formed by autarky, meaning that a system or a person is completely independent and does not need to interact with any other system or person to survive. On the other side of the spectrum, self-sufficiency also exists if a system or a person enjoys at least some autonomy in the broader scheme of things. While complete autonomy of a person (meaning: without any interaction with the outside world) seems very difficult in today’s world, complete independence of a societal system (such as law) seems even impossible: legal systems will always interact in some way.

The main reason why we are in need of a sufficiently autonomous law is that it creates a ‘stable practice’: it allows people to rely on a set of norms that is publicly recognised as binding on the collectivity. Elements of this self-sufficiency at the national level consist in my view of common values inherent in the products of national legislatures and courts, a common legal system and a common discussion by way of a shared frame of reference of all legal actors (legislatures, courts, practitioners and academics). This shapes the legal process from the making of law to its enforcement.

4.2 What Shall We Do With European Private Law? Searching for European Self-Sufficiency by Mimicking National Law

Is it possible to find a self-sufficient European private law that consists of the same elements just described for the national level? This is partly suggested in the present project, in which the hypothesis is that a self-sufficient private law could consist of three different layers: ‘(1) the sectorial substance of ERPL, (2) general principles – provisionally termed competitive contract law – and (3) common principles of civil law.’

If we ask what these elements would look like at the European level, some problems may emerge. Systematisation of the sectorial substance of regulatory private law is of course possible, but if all the areas mentioned in section 2 have to be part of this system, its informative value may not be very high. An additional problem is that regulatory law tends to change rather quickly. When it comes to an area such as European consumer law, the development of a system is of course easier to achieve. I

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16 And even less if the system is to consist of not only the six or so fields of regulatory private law, but also of the national materials. If all these materials have to be brought under the same heading, this would require a reformulation of existing national private laws in regulatory (functional) terms.
understand the second element (‘competitive contract law’) to be about the conditions under which choice by private actors is possible within the European private law system, which is indeed important (see also below). The third element (common principles of civil law) would in my view require a different perspective than the one apparent in the present case law of the Court of Justice, that only seems to repeat the principles already accepted at the national level or laid down in the DCFR. However, to say that a contract has binding force is not very informative. The real challenge is to develop principles on basis of the existing acquis, that might actually speak in favour of a strong mitigation of the binding force of consumer contracts.

The general elements needed for self-sufficiency at the level of the member-states may also be difficult to achieve at the European level. Naturally, in a Union of 27 member-states there is much more debate about the common values than within one country, necessarily leading to a type of minimum justice. More importantly, a common discussion on basis of a shared frame of reference used by all legal actors is still largely missing. I believe this element to be the most important one of a self-sufficient system because it allows discussion among all relevant actors. In the last twenty years, we have made huge progress towards in particular a European legal science, but we must accept that the other legal actors are not yet sufficiently part of this debate. This makes it difficult to adopt a similar conception of self-sufficiency at the European level as at the national level.

4.3 Self-Sufficiency at the European Level: Ensuring Stable Practices through Private Actors

Must we then find the self-sufficiency of the European private law order in something else than we are used to at the national level? I believe this is indeed the case. My point is that the degree of self-sufficiency of a legal system that is required to make it function is also influenced by Europeanisation. We should not transplant our idea of what is a self-sufficient legal system at the national level to the European one. In each national private law system, there is some idea of the role that private actors should play within the system and of how the legal system should therefore be designed. But the different European conception of ‘access justice’ does not only influence the law substantively, it also affects the search for what makes European private law a system. In my view (and despite the differences among them) national private laws have in common that primarily the State institutions provide the ‘stable practice’ that allows people to rely on a set of norms (see above, section 4.1). This is impossible at the European level for the simple reason that the EU is (for various reasons, among them the already mentioned lack of a common European discussion, a lack of competences and a lack of a highest European civil court deciding upon the facts of the case) not able to provide coherence and legal certainty through law. This means that European private law simply has to give much greater importance to the role of private actors in setting and ensuring their rights: what the European Union cannot provide in the same way as national institutions must be remedied by giving private actors a more important role. This explains not only the conception of the consumer as a ‘reasonably well informed and reasonably observant and circumspect’ actor, but also the emphasis put on empowerment of consumers, on ADR and on optional legal regimes such as the proposed CESL.

What this means for the self-sufficiency of European private law is obvious. While national jurisdictions can be self-sufficient through emphasising their own values, principles and coherent system (providing parties with legal certainty and justice), the European Union has to put the responsibility for ensuring these goods in the hands of private actors. They need to undertake action

17 Cf. Masdar (47/07); Hamilton (412/06); Société thermale d’Eugénie- les- Bains (277/05).
themselves in order to get what they want. This also makes the need to develop common values less urgent: minimum level protection is sufficient. Put differently: self-sufficient actors can replace a self-sufficient legal system.

Also when it comes to the aspect of interaction between the European and national legal orders, an essential (if not the essential) element consists of a theory on the choices that private actors should be allowed to make. This is consistent with the view that if we take pluralism of (national and European) sources seriously, this is incompatible with the idea of one coherent system. Hans Kelsen wrote that a system cannot serve two masters at the same time.21

5. A Provisional Answer

It was announced in the introduction of this discussion paper that I would provide a provisional answer to the question whether a self-sufficient European private law is a viable concept. It was shown that the answer depends on a number of variables. Apart from the exact definition of what is (European) private law and what is access justice, it has become clear that it is vital from which perspective one looks at the interaction between the European and the national private law order. If one adopts the perspective of a self-sufficient European private law, it is important to ask why one would need such self-sufficiency. The answer is found in the ‘stable practice’ it provides: it allows people to rely on a set of norms that is publicly recognised as binding on the collectivity. While national jurisdictions can be self-sufficient through emphasising their own values, principles and a coherent system through the State institutions, the European Union has to put the responsibility for ensuring these goods to a greater extent in the hands of private actors.