Global Law for Private Law

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Abstract
The standard concept of law, consisting of legislation and case law, provides authority and legitimacy to law, as well as a methodology. Transnationalisation of law has necessitated the recognition of non-state influences. Although this should lead to an updated concept of law, authority and legitimacy are not actually problematic as these are in practice derived from the authority and legitimacy of national courts which decide most cases, albeit using new sources of law. The main problem of global law is methodology.

Keywords
transnational law; global law; legal knowledge; methodology; authority; legitimacy

1. Introduction

The debate on global law or transnational law turns effectively on the question of what law actually is. Somewhat surprisingly, this question is rarely touched upon in the extensive literature on global law. Exceptions are in particular D von Daniels, The Concept of Law from a Transnational Perspective (Ashgate 2010) and P Zumbansen and GP Callies, Rough Consensus And Running Code (Hart Publishing 2010).
statutes and case law. This concept explains two functions of law, namely to provide decisive arguments regarding the applicable rules (hence we need no longer rethink these) and thereby provide coordination (because we know the state of the law). However, this concept is limited as it does not encompass what actually occurs in legal practice.

In a broader view of legal practice, law is anything we use to decide legal issues. This means that we should possibly not speak of law but rather of legal knowledge. This is broader than law in the classic positivistic sense: knowledge may lack 'hard' authority, but may still have argumentative force or 'normal' legal authority. This is, in effect, the route along which precedential force has come to be accepted in most countries. It also involves the debate between judges, which may be informed by doctrine and case law even if in their official pronouncements the courts refer only to the code. In private law in particular we have effectively always used a broader notion of 'soft' legal authority.

This does not mean that the notion of binding, 'hard' authority is useless. Complying with official authority serves the purpose of providing a clear methodology, in which statute stands above case law, after which doctrine and other sources may play their role. Without a core of more or less binding authority, law would lose its basis. Furthermore, this methodology provides legitimation of legal practice, as formally we respect the decisions of the democratic legislator and the independent courts. This legitimation is in effect based on state sovereignty.

3. The Decline of Sovereignty

The root causes of the receding prominence of sovereignty are twofold. First, the rise of supranational law (European Union, fundamental rights – particularly the ECHR –, and treaties such as CISG and WIPO) and the growing recognition of what is called 'soft law'.

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3 The service conception of law (Raz).
4 Very provisionally I would define law as a system to allow rational discussion of our basic intuitions on justice, guided by our sense of justice. But the following argument does not turn on this definition.
7 In particular, norms created (and possibly enforced) by non-state actors; a broader definition might include state norms that are not enforced.