juridikum

zeitschrift im rechtsstaat · · · · · · · · · · · · · · nr 1.2000

thema

Go West! Die Amerikanisierung des Rechts

recht & gesellschaft

Regierungsprogramm und Verfassung

Wege zur Europäischen Verfassung

Kosovo: Der klinische Beugekrieg

Sicherheitsüberprüfung für unzuverlässige Subjekte

Interne Fluchtalternative und Vertreibung

P. b. b. · Verlagspostamt 1140 · 19674W91E · öS 90,– · ISSN 1019-5394

Für Context herausgegeben von
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rubriken

The Americanization of International Law

August Reinisch

The editor of this special issue of **juridikum** invited me to contribute a few remarks on the Americanization of the law from an international lawyer's perspective. Much was left vague anyway. So how could I refuse, except by pretending to be overly busy with grading exams, writing other papers, reviewing books, preparing lectures and classes or researching for legal opinions, not to mention university committees, consulting hours, evaluation business, etc. When the deadline approached I had almost forgotten that I had agreed to do the job. Thus, I seriously had to start thinking about the assignment. Didn't the editor say something about the perception that US law – of course we are talking about US law when we say American law (you can't really justify it as a convenient shorthand for the former; take it as an example of the Coca-Cola-, McDonalds-, etc. Imperialism we have already effectively internalized!) – . . . about the perception that US law is increasingly accepted as the law chosen to govern international transactions which in turn could be viewed as evidence for an increasing Americanization. Sounds serious, but is it sexy enough for **juridikum**, this cutting edge pamphlet of legal scholarship? Let's try a little variation: There is my subject! Forget the clash of civilizations,[1] it's the war of laws we have to address. I have already written on various examples of transatlantic legal battles, from the fight over export controls, the controversy over the final containment of Cuba through the Helms-Burton Act to the endless Banana and Hormones disputes between the USA and the EU/EC.[2] Why shouldn't I add a few conceptual thoughts on these issues?

Would that mean that I was considered to provide from a bird's-eye view a rather distant and probably detached account of what happens down there in the "real world" of various national systems of law, to analyze the struggles of competing systems and, at best, to attempt a provisional stock-taking whether a progressive state of Americanization could indeed be ascertained? Sounds attractive, though it doesn't really touch upon my proper field of expertise. Thus, the required aloofness of the scholar from his subject is probably guaranteed – quite apart from the fact that our colleagues consider us internationalists to be residents of the ivory tower anyway.

But is this distance real? Are we truly removed far enough to be secure from an attempt of creeping nationalization of our supra-national and international law? What about the danger of an Americanization of international law? – By the way, who said "danger"? – I am not talking about the old hermeneutic problems of understanding international law, not about the wisdom of aesthetics of perception according to which international law would lie in the eye of the beholder, nor about the simple fact of life that international law may mean different things to different legal systems once they have decided to incorporate it.

I am thinking of a more fundamental problem of whether the substance of international law may be subject to fundamental changes. – Don't worry, no *clausula rebus sic stantibus* discussion here! – I am not speaking about the usual differences of interpretation, the national lenses becoming relevant when focusing on international rules. Rather, I am concerned about the process of constituting my own subject-field. Just imagine the legions of US law journal articles, notes and comments eager to be recognized as "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of [international] law."[3] European snobbism – prevailing in some circles of the Old Continent – which regards much of what is published in US journals as of inferior quality certainly is no answer. The challenge is out there. The sheer mass of published views on international law issues is likely to resound somewhere. There are currently more than hundred American international law journals mostly affiliated with US law schools compared to a few dozen European, Asian, African, and others. What is even more irritating: a brief glimpse at such renowned summaries of international law as the Restatement of International Law "adopted and promulgated" by the American Law Institute[4] shows that non-US publications are hardly noticed when construing this semi-official account of international law. The same analysis holds true when glancing through the American Journal of International Law. Do American international lawyers realize that there is scholarly life beyond Maine and Louisiana? Who am I to tell them anyway? Hasn't the US Supreme Court, a far more authoritative source, done this job with admirable eloquence when cautioning against legal „introspection" or outright parochialism? And is not criticism more appropriate when coming from within? – for instance, from the U.S Supreme Court criticizing the „the parochial concept that all disputes must be resolved under our laws and in our courts."[5]

Here we are even back to the initial theme advanced by the editor: the application of US law to international transactions. The *Bremen* case is generally considered a leading authority on the idea of permitting individual parties to opt for a set of substantive rules as well as for the types of dispute settlement (including arbitration) they consider most suitable for their purposes. But what's so new about accepting

1 Samuel Huntington, The Clash of Civilizations. New York Simon & Schuster (1996).
2 August Reinisch, US-Exportkontrollrecht in Österreich, Wien Manz-Verlag (1991); idem., Widening the US Embargo Against Cuba Extraterritorially. A few public international law comments on the „Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996", 7 European Journal of International Law (1996), 545–562,
3 Art. 38 Statute of the International Court of Justice. Art 38, primarily listing international agreements, customary law and general principles, is commonly regarded as reflecting the sources of international law.
4 American Law Institute (ed.), Restatement (Third) of the Foreign Relations Law of the United States (1986).
5 *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 24 (1972).

choice of law and choice of forum clauses? The apparent anger of the Supreme Court Justices inspiring their rather strong language must have deeper roots.

Indeed, when we try to look at the degree and willingness of US lawyers and judges to apply their own law vs. to allow for the application of foreign law, we realize that there is a multitude of contemporary American schools of thought on these issues. On the one hand there are those who are struggling with the perceived parochialism, recognizing that not everything has to be governed by US law to produce acceptable results, on the other hand, there are those who – often with missionary zeal – try to spread the gospel of American law, of the US Constitution, of the SEC (Security and Exchange Commission) Rules, of products liability law, of class action devices, of anti-discrimination legislation, etc. Just think of the legions of US lawyers who – frequently with the best intentions – travel throughout the world and in particular to the former Communist Countries, for instance, as part of the American Bar Association's CEELI (Central and Eastern European Law Initiative)[6] in order to help shaping new legal systems apt to lead those societies into the Western World. Why should we expect them to export anything but US law? However, it seems legitimate to ask whether it really always makes sense to install brand new insider trading rules where stock markets are not yet effectively functioning or to enact class action remedies where basic problems of access to justice remain unresolved? Thus, it should not come as a surprise that a certain suspicion has grown that the Pax Americana might be accompanied by a wave of Americanizing the legal systems of the rest of the world.[7] It would be too simplistic to suspect an evil conspiracy of the last remaining hegemon; equally it would be too facile an explanation to consider a naive belief in the superiority of US law or in the lack of alternatives to lie at the root of this expansionism.

International law itself provides an apt vehicle for the further Americanization of foreign domestic law via treaty making. This is true not only for the classical private international law or commercial law unification attempts carried out through the Hague Conference or UNCITRAL codification efforts, but also for the fields of international economic law like GATT/WTO law, wherein the traditional enterprise of reducing tariffs has been broadened into a fairly comprehensive scheme of eliminating non-tariff barriers which – if taken seriously – will require a high degree of harmonization of national law (as can be learned from the EC experience in the field). It is thus no imposition of external interests but rather the internal logic of modern GATT/WTO trade law to venture into broader areas from intellectual property to environmental rules, from labor standards to health restrictions. Of course, unification does not necessarily mean Americanization. However, when approximating different national rules through treaty-making, i.e. via a consent based method of law making, the negotiating power of a country whose consent is frequently crucial to the viability of the resulting agreement can hardly be overestimated. Thus, what may be formally an internationalization or for that purpose globalization of law, is in fact frequently an Americanization of the rules approximated, harmonized or even unified through international agreements.

Let us return to my proper subject: How Americanized is international law really? Or is it really Americanized? Here, we have to differentiate between one form of Americanization of international law that could be adequately described as unilateralism vs. multilateralism, on the one hand, and the more sophisticated and for our purposes more relevant issue of how far international law itself has been (re-)shaped by the influence of US law, on the other.

The former problem has recently produced a number of illustrative incidents which show that it is not always easy for the last remaining superpower to conform to rules created by purportedly equally sovereign states. Whether we are talking about the bypassing of bilateral treaties by kidnapping foreign nationals abroad in order to bring them before American courts as in the case of Dr. Alvarez-Machain[8] or whether we are dealing with the prosecution and execution of a foreign citizen without even considering to inform his home state authorities in order to enable them to exercise their consultation rights under the Vienna Convention on Consular Relations and without respecting an interim order of the International Court of Justice as it happened in the Breard case,[9] examples abound. This is not the place to discuss the American refusal to sign the Rome Treaty on the Establishment of an International Criminal Court,[10] etc. in a detailed manner.

What is probably more troubling from a conceptual point of view than the recent surge of unilateralism is the degree of Americanization of international law itself. Take as an example the rules of procedure of various international criminal tribunals established by the Security Council such as the Yugoslav and Rwanda War Crimes Tribunals. They are generally considered to be a blend of the Anglo-American adversarial and the Continental European criminal law system. (In how far this simplification in itself holds true may also be questioned.) Much was also intentionally left to actual practice and the multinational staff assigned to the Tribunals. In fact, the resulting procedure has been regarded to reflect a very strong American influence.[11]

Of course it is – even methodologically – legitimate to consider national law as a potential source of international

6 According to the American Bar Association's own description „CEELI, a public service project of the American Bar Association, advances the rule of law in the world by supporting the legal reform process in Central and Eastern Europe and the New Independent States of the former Soviet Union. With the assistance of lawyers, judges, and law professors, CEELI helps to build the legal infrastructure that is indispensable to strong, self-supporting, democratic, free market systems." <http://www.abanet.org/ceeli/home.html> visited 28 December 1999.

7 Cf. Laura Nader asserting that „globalization is not new. What is new is a globalization that is mainly American. The international Americanization of law, for example, pressures China to have courts like us or, in the Middle East, to use corporate psychological models of dispute resolution rather than law." Laura Nader, Symposium: Comment, 46 American Journal of Comparative Law (1998) 751, at 754.

8 *United States v. Alvarez-Machain*, 504 U.S. 655, 668, 670 (1992) (holding that the abduction of a criminal defendant from Mexico, although it „may be in violation of general international law principles, ... does not ... prohibit his trial in a court in the United States for violations of the criminal laws of the United States").

9 Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures – Order of 9 April 1998; Cf. Agora: Breard, 92 American Journal of International Law (1998), 666–712.

10 Cf. David J. Scheffer, The United States and the International Criminal Court, 93 American Journal of International Law (1999), 12–22.

11 Cf. Minna Schrag, Prosecuting International Crimes: An Inside View: The Yugoslav War Crimes Tribunal: An Interim Assessment, 7 Transnational Law and Contemporary Problems (1997), 15.

law. Art 38 para 1 c) explicitly mentions "general principles of law" which are generally regarded as shared principles of various national legal systems. Thus, consideration of rules of US law forms part of construing an accepted source of international law. Still, it only forms part and should not serve as a blank check to present one particular set of national rules as expression of general principles.

However, it is not necessarily a hidden agenda by American international lawyers to Americanize international law, a malicious assault on the inter- or supra-, but at least decidedly non-national body of law to conform to ideas of a specific national law. Rather, it seems that much of the Americanization of law results from an unreflected (self-)perception of international law by those decision-makers who are in a position to shape the content of international law. Under the present circumstances it should be no surprise that it is mainly American government officials, lawyers, academics, NGO activists, and the like who are in position to exert decisive influence. Thus, it is their „American" view of international law which in turn re-flows into determining international law.

What are the deeper reasons for this development? Let's take a closer look at the factors determining the legal education of American international lawyers: – Who says that education does not matter? – What constitutes an American international law class? There is conflicts of law, international litigation/arbitration, external trade law, foreign relations law (the War Powers Resolution, the International Emergency Economic Powers Act, the "political questions" doctrine, etc.) and, yes, there is some public international law.

From my own legal training at NYU, an American Law school nowadays boasting to create a global law faculty, I remember quite well the difficulties some of us Europeans had in recognizing international law in the subject we were studying as part of the specialized LL.M. program in International Legal Studies. Certainly, we were better off than our colleagues who went for an M.C.J. (Master of Comparative Jurisprudence) or M.C.L. (Master of Comparative Law) – as it is called in some other law schools – since this had nothing at all to do with comparative law, but rather provided a one-year crash course in American law (which, of course, explained why it was easier for them to take the bar exam). But still, there we were, eager to study international law and we had such a hard time recognizing it. "International Business Transactions" largely was about tailoring the optimal contract for a US firm willing to engage in foreign direct investment abroad, "International Litigation" basically meant finding out how to sue a foreigner before US courts – or if that proved impossible because it violated principles of comity or of constitutional due process guarantees (mind you: not of international law rules on the limits of a state's jurisdiction) how to enforce a foreign arbitral or judicial decision in the US, and the "Constitutional Law of the United Nations" essentially provided for an opportunity to read the UN Charter in the light of the experience of interpreting the US Constitution. All these subjects were fascinating intellectual exercises and excellent teachers aroused my continuous interests in such issues at a crossroads between public international law and national law. The common "international" denominator of these classes was that they were to a greater or lesser extent not only concerned about American law or inter-state conflicts but went beyond that to include problems that transgressed the US border.

Only my return to Europe and my subsequent efforts to "re-construct" international law – a not wholly unintended by-product of an academic career – helped me to truly understand the relationship between international and national law.

This very broad American view of international law may have been inspired by scholarly concepts relating to transnational law[12] or a modern law of nations[13] which have rightly emphasized the interrelationship between international law proper and various fields of national law. However, there is an inherent danger that a vulgarized version of this rather sophisticated approach may lead to a confusion between US domestic law and international law proper.

Let us take the Restatement – to some extent the "bible" of international law for Americans – as an example. Although it is properly entitled "Restatement of the Foreign Relations Law of the United States" and although it clearly distinguishes between "international law as it applies to the United States" and "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences",[14] the actual use made of the black-letter rules contained in the Restatement – which is even colloquially referred to as the International Law Restatement – is one of demonstrating the existence of rules of public international law. As I have already pointed out there is – methodologically – nothing wrong with a strong reliance upon the "teachings of the most highly qualified publicists"[15] in order to determine rules of international law. However, the Statute of the ICJ rightly emphasizes the need of a comparative perspective by referring to "publicists of the various nations". If the assertion of rules of international law is made by relying on the scholarly expression found in just one national interpretation of international law which itself – if properly read – does not claim to be limited to international law but rather extends to domestic law that has "substantial international consequences" then the result may well be "nationalization" and if we are talking about American legal scholarship an "Americanization" of international law. Against this background it almost sounds ironic when one of the Associate Reporters of the Restatement titles his essay in honor of the Chief Reporter of the Restatement "Nationalizing International Law".[16]

"Honni soit qui mal y pense".

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12 Philip C. Jessup, Transnational Law, New Haven (1956). See also Steiner/Vagts/Koh, Transnational Legal Problems. Materials and Text, Westbury, New York (4th ed., 1994).

13 Philip C. Jessup, A Modern Law of Nations, New York (1956).

14 American Law Institute (ed.), Restatement (Third) of the Foreign Relations Law of the United States (1986) § 1 according to which „the foreign relations law of the United States, as dealt with in this Restatement, consists of" the two above cited elements.

15 Article 38 Statute of the International Court of Justice.

16 Andreas F. Lowenfeld, Nationalizing International Law: Essay in Honor of Louis Henkin, 36 Columbia Journal of Transnational Law (1997), 121.