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**Ralf Michaels**

**EU Law as Private International Law?**

**Re-conceptualising the Country-of-Origin Principle  
as Vested Rights Theory**

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## I. EU Law and Private International Law<sup>1</sup>

If private international law is widely considered too technical to stir passions in the wider population, such considerations may have to be rethought. Recently, people all over Europe took to the streets to protest against a proposed norm of private international law – the “country-of-origin” principle stated in Article 16 of the proposed Services Directive.<sup>2</sup> Had the proposal become law, providers

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- 1 In this article, I use “private international law” rather than “conflict of laws” or “choice of law” for two reasons. First, this is in accordance with European usage. Second, it brings out the focus on private interest that characterizes the country of origin principle better than “conflict of laws” or “choice of law”, both of which suggest that the relevant question goes to which of several laws is applicable.
  - 2 Proposal for a Directive of the European Parliament and of the Council on services in the internal market (by the Commission), 5 March 2004, COM(2004) 2 final/3, Article 16, “Country of origin principle”:
    - (1) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field. Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability.
    - (2) The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State.
    - (3) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide services in the case of a provider established in another Member State, in particular, by imposing any of the following requirements:
      - (a) an obligation on the provider to have an establishment in their territory;
      - (b) an obligation on the provider to make a declaration or notification to, or to obtain an authorisation from, their competent authorities, including entry in a register or registration with a professional body or association in their territory;
      - (c) an obligation on the provider to have an address or representative in their territory or to have an address for service at the address of a person authorized in that territory;
      - (d) a ban on the provider setting up a certain *infra* structure in their territory, including an office or chambers, which the provider needs to supply the services in question;
      - (e) an obligation on the provider to comply with requirements, relating to the exercise of a service activity, applicable in their territory;
      - (f) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
      - (g) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
      - (h) requirements which affect the use of equipment which is an integral part of the

of services would now be governed largely by the laws of their countries of origin alone, and the application of rules of the country of destination would be severely restricted. Protests against this norm were an important reason why the EU Constitutional Treaty failed in referenda in France and in the Netherlands, and why the Commission has replaced the country-of-origin principle with a much milder principle of mutual recognition.<sup>3</sup>

But is the country-of-origin principle a private international law norm at all? It is hard to say, since the relationship between private international law and EU law is still somewhat undefined. Indeed, for a long time, scholars in both areas worked in splendid isolation from each other. To private international lawyers, EU law sometimes appeared on the periphery as a minor nuisance, but it could mostly be ignored.<sup>4</sup> The new EU competence for private international law expressed in Articles 61, 65 of the EU Treaty<sup>5</sup> has not changed much in this re-

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service provided;

(i) restrictions on the freedom to provide the services referred to in Article 20, the first subparagraph of Article 23(1) or Article 25(1).

3 Amended Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market (presented by the Commission), 4 April 2006, COM(2006) 160 final, Article 16 with comments at pp. 10-12.

4 But see, for some early analyses, René Savatier, « Le Marché Commun au regard du droit international privé » (1959) *Rev crit* 237; id., « Les aspects du droit international privé de la Communauté Économique », in: *Travaux du Comité Français de droit international privé 1960-1962*, 17; Konrad Zweigert, « Einige Auswirkungen des Gemeinsamen Marktes auf das internationale Privatrecht der der Mitgliedstaaten », in: Ernst von Cammerer et al. (eds.), *Probleme des europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag* (1966) 555. For two recent accounts of the history, see Jannet A. Pontier, *Europees conflictenrecht – Een complexe geschiedenis in vogelvlucht* (Amsterdam, Vossiuspers, 2005); Karl Kreuzer, „Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts – Wie europäisch soll das Europäische Internationale Privatrecht sein?“ 70 (2006) *RabelsZ* 1, 8-30 (2006). For an argument to treat all EU law as conflict of laws, see Christian Joerges, “The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline” (2004) 14 *Duke International and Comparative Law Journal* 149; Andreas Furrer, *Zivilrecht im gemeinschaftsrechtlichen Kontext – Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in das europäische Wirtschaftsrecht* (2001); Christoph Schmid, *Die Instrumentalisierung des Privatrechts durch die EU* (Baden-Baden, Nomos, forthcoming).

5 Arts 61, 65 Treaty establishing the European Community, 2002 OC C-325/59 (24 December 2002); see Jürgen Basedow, “The Communitarization of the Conflict of Laws under the Treaty of Amsterdam” (2000) 37 *Common Market Law Review* 687; Oliver Remien, “European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice” (2001) 38 *Common Market Law Review* 53.

spect, since what the EU legislates in this realm is, in shape and approach, widely compatible with traditional private international law.<sup>6</sup> For EU lawyers, by contrast, private international law, with all its expertise, was no more than a small and negligible field of technical niceties that was not expected to, and mostly did not, stand in the way of the common market and its law.

If such happy co-existence (or rather: mutual ignorance) was ever possible, it no longer is. Traditional private international law and EU law clash with ever-increasing frequency. The infamous “country-of-origin principle” does not pose the only challenge to traditional private international law; other challenges come from the rules on non-discrimination.<sup>7</sup> Yet, private international lawyers have not found an adequate response; they still struggle, even at a conceptual level, with the need to make sense of EU law. Many conflicts scholars react in one of two ways. Some complain that European law develops in ignorance of private international law. While this complaint is not entirely unjustified, the consequence that they often draw – to leave private international law unaltered – seems both unrealistic and unattractive. Other private international lawyers concede defeat and suggest (or deplore) a reformulation of private international law in the face of EU law, replacing the traditional conflicts norm with a principle of mutual recognition.<sup>8</sup> In doing this, they seem too willing to concede that after centuries their own discipline has lost its relevance.

Both reactions are equally unsatisfactory. Since both fail to make the country-of-origin principle and private international law commensurable, they yield the opportunity for private international law to contribute its disciplinary knowledge and expertise to debates about the common market. As a consequence, EU law has been able to develop in this area, largely unchallenged by

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6 But see Jürgen Basedow, « Spécificité et coordination du droit international privé communautaire », in *Travaux du comité français de droit international privé 2002-2004* (Paris, Pédone, 2005), 275 (arguing that federalized codification of private international law is a novelty).

7 E.g. for the private law of names in case of double nationality: Case C-148/02 Garcia Avello, decision of October 2, 2003, [2003] ECR-I 11613; Case C-96/04 Stadt Niebüll, Opinion of the Advocate General of June 30, 2005, paras 56-7. (The Court of Justice decided on April 27, 2006 it had no jurisdiction over the case.) Avello is interpreted as a return to Savignyan private international law by Tito Ballarino & Benedetta Ubertaini, “On Avello and Other Judgments: A New Departure in the Conflict of Laws?” (2004) *Yearbook of Private International Law* 85, 124-9.

8 See Erik Jayme & Kohler, „Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?“ (2001) *IPRax* 501; Paul Lagarde, „Développements futures du droit international privé dans une Europe en voie d’unification: quelques conjectures“ (2004) 68 *RabelsZ* 225; Dagmar Coester-Waltjen, „Das Anerkennungsprinzip im Dornröschenschlaf?“; in: H. P. Mansel (ed.), *Festschrift für Erik Jayme I* (2004) 121.

private international lawyers; in the “contest of legal disciplines”,<sup>9</sup> EU law so far holds the upper hand. I suggest instead that private international lawyers should recognize the debate about EU law as one that plays out in the heart of their own discipline, as one to which they have much to contribute because of their own specific experience. However, this requires them to broaden their view. Ironically, some of the fully justified criticism against EU scholars – they do not understand private international law – falls back on private-international-law scholars themselves. Many of them are too quick to equate their discipline with a specific approach, the post-Savignyan approach that is currently prevailing.<sup>10</sup>

Once we take a broader perspective we find that the country-of-origin principle displays a remarkable degree of similarities to an old approach that has almost been forgotten. This approach is known as the vested rights theory. Private international lawyers can be excused for not thinking of that theory when they look at the country-of-origin principle. After all, the vested rights theory has been as thoroughly discarded as any theory ever has, while the country-of-origin principle, despite its recent setback in the Services Directive, seems alive and well. However, this difference does not suggest that both are incomparable; it suggests only how the force of any criticism is contingent upon the framework within which a theory works. Indeed, comparing both the theories and the respective criticism against it teaches us a lot about both the vested rights theory and about the country-of-origin principle, and it helps us towards a fuller understanding of European private international law.

This paper makes these three claims:

- (1) The country-of-origin principle in EU law is best understood by analogizing it to the vested rights theory in private international law.
- (2) The country-of-origin principle can counter most of the challenges that brought the vested rights theory down.
- (3) Contemporary European private international law is characterized by the lasting tension between traditional private international law and the country-of-origin principle. This tension creates the flexibility that is both appropriate and necessary for private international law to play its

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9 Joerges, *supra* n. 4, 154. For the origin of the quote, see Immanuel Kant, “The Contest of Faculties”, in: H. S. Reiss (ed.), *Kant – Political Writings* (2<sup>nd</sup> ed. 1991) (Der Streit der Fakultäten [1798]).

10 For Savigny’s continued (or renewed) importance, see Matthias Reimann, “Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century” (1999) 39 *Virginia Journal of International Law* 571; Ralf Michaels, “Globalizing Savigny?”, <http://ssrn.com/abstract=796228>.



role in the evolving common market.

These claims are addressed in turn. Part II substantiates the first claim, the similarity between the vested rights theory and the country-of-origin principle. This Part first presents different variants of vested rights theories before pointing out the numerous similarities with the country-of-origin principle and these theories. Part III substantiates the second claim, the resilience of the country-of-origin principle against the criticism brought forward against the vested rights theory. It first shows the different arguments brought forward against the vested rights theory and shows how they are rehashed in the debate about the country-of-origin principle, before demonstrating that they all fail, more or less, with regard to the country-of-origin principle. Part IV, the conclusion, is devoted to the third claim, regarding the lasting tension in European private international law between different methods and policies. Instead of rejecting these tensions, that Part argues that we should embrace them as fertile for a developing area of the law. First, however, the remainder of this Part I presents the conflict between the country-of-origin principle and traditional private international law, as well as the different proposals that have been made to conceptualize the relationship before concluding that a broader concept of private international law is needed for this conceptualization.

## **A. Practical Conflicts**

That private international law and the country-of-origin principle indeed conflict can be seen from either side of the disciplinary divide – from the side of European private international law, and from the side of secondary and primary EU law.

### *1. Private-International-Law Regulations*

Within private international law, the potential clash with EU law was slow to emerge. The Rome Convention of 1980 on the law applicable to contractual obligations contains only a provision in its Article 20 that gives priority to choice-of-law rules in EU legislation.<sup>11</sup> Conflicts with norms of EU law not

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11 Convention on the Law Applicable to Contractual Obligations (Consolidated Version), O.J. C 27, 26/1/1998, p. 34. Article 20 reads: “This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.”

shaped as private-international-law rules were apparently not considered. Since 1980, the possibility of such conflicts has become clearer to the Commission, but not easier to solve. The Green Paper on the conversion of the Rome Convention of 2002 still tried to shirk the issue:

The present document does not intend to examine the relationship between a possible future instrument and the Internal Market rules. For the Commission it is clear, however, that such an instrument should leave intact the principles of the Internal Market laid down in the Treaty or in secondary legislation.<sup>12</sup>

By contrast, the 2003 preliminary draft proposal for a Regulation on the law applicable to non-contractual obligations (“Rome II”) includes an explicit provision regarding the conflict in its Article 23(2):

This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.<sup>13</sup>

Finally, in the most recent versions, Article 22(c) of the Rome I Proposal<sup>14</sup> and Article 3(d) of the Rome II Proposal<sup>15</sup> both read,

This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which ... lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.

Several developments are observable. First, the problem of a potential conflict between private international law norms and principles of the internal market,

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12 Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, 14 January 2003, p. 5. The French version is more strict and uses the word *devra* (“will have to”), this stricter use can also be found in the draft proposal for the Services Directive (*supra* n. 2) at p 17, which, when quoting the Green Paper, replaces “should” with “must”.

13 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), 22 July 2003, COM(2003) 427 final.

14 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) (presented by the Commission), 15 December 2005, COM(2005) 650 final.

15 Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”), 21 Feb 2006, COM(2006) 83 final.

including the country-of-origin principle has been recognized and acknowledged only gradually. Second, the scope of the exception from private international law has grown over time. Whereas the Rome Convention makes such an exception only for explicit private international law, and the 2003 Rome II proposal was aimed only at specific directives, the current texts are apparently not limited in scope. Third, the expansion of scope coincides with a diminution of clarity. Whereas the Rome Convention is clear in its focus on explicit private-international-law norms, and the 2003 Rome II proposal was clear at least in its focus on specific instruments,<sup>16</sup> the current text gives no guidelines as to how exactly the exception should be delimited. Do not nearly all acts of EU law “lay down rules to promote the smooth operation of the internal market”? How can it be the case that “such rules cannot apply at the same time as the law designated by the rules of private international law”? After all, the private-international-law regulations themselves must be “necessary for the proper functioning of the internal market” if the EU wants to claim competence under Article 65 of the EC Treaty.<sup>17</sup> Indeed, the regulations are repeatedly justified as necessary for the functioning of the internal market.<sup>18</sup> How can they at the same time be in conflict with this market?

## 2. *The Country-of-Origin Principle in Directives*

If EU legislation on private international law is unclear regarding its relationship with the country-of-origin principle, EU legislation providing for such a principle is hardly clearer regarding its relationship to traditional private international law. Some older directives, like the television-without-frontiers directive of

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16 But see, for criticism, Hamburg Group for Private International Law, “Comments on the European Commission’s Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations”, (2003) 67 *RabelsZ* 1, 54-55.

17 Whether Article 65 is an appropriate basis for private international law legislation or whether such legislation must be based on Articles 94, 95 of the Treaty, is irrelevant for purposes of this argument, since both make it a condition that private international law regulations are in fact necessary for the functioning of the internal market. This is not the subject of this article; see, for two recent critical views, Paul R. Beaumont, “Private international law of the European Union: competence questions arising from the proposed Rome II regulation on choice of law in non-contractual obligations”, in *Private Law, Private International Law and Judicial Cooperation in the EU-US Relationship* (CILE Studies Vol 2, 2005), 15; Andrew Dickinson, “European Private International Law: Embracing New Horizons or Mourning the Past?” (2005) 1 *Journal of Private International Law* 197.

18 See Rome I Proposal, *supra* n. 14, Recitals 1, 4; Amended Rome II Proposal, *supra* n. 15, Recitals 1, 4.

1989, include provisions restricting the country of destination from applying its own law to service providers from other Member States, but the relationship to private international law is not addressed.<sup>19</sup> The E-Commerce Directive of 2000<sup>20</sup> revealed that the Commission was aware of the problem but utterly unable to resolve it. Article 3 of the directive provides that, within the coordinated field, information service providers need comply only with the provisions of the member state where they are established (Article 3(1)), while other Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information services from another Member State (Article 3(2)), and the destination country may derogate from this only for purposes of public policy, public health, public security, and the protection of consumers and investors (Article 13(4)). This looks like a private-international-law norm that declares the laws of the country of establishment applicable and the laws of the country of destination inapplicable except when these conflict with specific public policy. Yet mysteriously, Article 1(4) of the Directive proclaims that “[t]his Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.”<sup>21</sup> This apparent internal inconsistency has led to an intense (and largely inconclusive) debate about whether the country-of-origin principle in Article 3 “really” is a private-international-law rule or not.<sup>22</sup> Regardless of such doctrinal debates, the country-of-origin princi-

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19 Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (O.J. 1989 L 298/23); amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, (1997) O.J. L 202/60. On the scope of the country-of-origin principle, see ECJ 9 July 1997, Joined cases C-34/95, C-35/95, and C-36/95; Konsumentombudsmannen KO v. De Agostini (Svenska) Forlag AB; Konsumentbodsmannen v. TV Shop i Sverige AB. For characterization as a private international law norm, see Alexander Thünken, “Multistate Advertising over the Internet and the Private International Law of Unfair Competition” (2002) 51 *International and Comparative Law Quarterly* 909, 939.

20 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. L 178/1.

21 See also recital 23: “This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide services as established in this Directive.”

22 See only Peter Mankowski, „Das Herkunftslandprinzip als Internationales Privatrecht der E-Commerce-Richtlinie“, 100 *Zeitschrift für vergleichende Rechtswissenschaft* 137 (2001); Stefan Grundmann, „Das Internationale Privatrecht der E-Commerce-Richtlinie – was ist kategorial anders im Kollisionsrecht des Binnenmarkts und warum?“ (2003) 67 *RabelsZ* 246; Gert de Baere, „Is this a Conflict Rule which I see Be-

ple in the directive has real implications for private international law: In 2003, the Court of Justice decided, regarding a private litigation, that German courts cannot apply certain German rules against the sale and advertising of non-prescription medicines, even though these rules would be applicable under a normal choice-of-law analysis.<sup>23</sup>

The proposed Services Directive finally has moved the problem to the centre of attention. In Article 16(1) of its 2004 proposal, the Commission went beyond adopting a country-of-origin principle only for a coordinated area and required that service providers generally should have to comply only with the rules of their countries of origin.<sup>24</sup> Article 19 includes an exception clause for matters of safety, health profession, and public policy. Had this become law, it would have created an unavoidable clash with traditional private-international-law norms, which regularly designate laws other than that of the country of origin as applicable: the law of the affected market,<sup>25</sup> of the consumer's habitual residence,<sup>26</sup> or of the place of the injury.<sup>27</sup> Would these rules, or the results of their application, constitute restrictions of the freedom to provide services? The Commission seemed to assume that these rules would play only a residual role.<sup>28</sup> Largely, private-international-law rules for contracts entered into, and

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fore Me?' Looking for a Hidden Conflict Rule in the Principle of Origin as Implemented in Primary European Community Law and in the 'Directive on Electronic Commerce', (2004) 11 *Maastricht Journal of European and Comparative Law* 287, 305-317; Olivier Cachard, "Le domaine coordonné par la directive sur le commerce électronique et le droit international privé", (2004) *International Business Law Journal* 161; all with further references.

23 Case C-322/01, *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval*, [2003] ECR I-14887; English case note by Richard Lang at (2005) 42 *Common Market Law Review* 189; see also Christofer Lenz, « Warenverkehrsfreiheit nach der DocMorris-Entscheidung zum Versand von Arzneimitteln » 2004 *Neue Juristische Wochenschrift* 332; Elmar Mand, „E-Commerce mit Arzneimitteln – Auswirkungen des Herkunftslandprinzips auf das Internationale Wettbewerbsrecht“ 2003 *Multimediarrecht* 77.

24 *Supra* n. 2.

25 See Dieter Martiny, „Die Anknüpfung an den Markt“, in: *Festschrift für Ulrich Drob-nig zum siebzigsten Geburtstag* (1998) 389.

26 Rome I Proposal, *supra* n. 14, Article 5(1).

27 Amended Rome II Proposal, *supra* n. 15, Article 5(1).

28 See Services Directive Proposal, *supra* n. 2, p. 17 (under the slightly ironic heading of "Coherence with other Community Policies"): "they could, however, play an important role not only for the activities which are not covered by this Directive but also for the questions which are the object of derogations to the country-of-origin principle, notably the derogation in relation to contracts concluded by consumers, as well as the derogation relating to the non-contractual liability of the provider in the case of an accident occurring in the context of his activity which affects a person in a Member

torts committed by, services providers would remain inapplicable.<sup>29</sup>

After stark protest from numerous sides, including the European Parliament, the Commission has now replaced the country-of-origin principles in Article 16 with a milder provision requiring Member States to grant the freedom to provide services, a provision that looks much less like a private-international-law norm.<sup>30</sup> Furthermore, Article 17(20) now provides an explicit exception for “provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law.” A similar change took place between the first proposal and the final version of the Unfair Commercial Practices Directive. Whereas the 2003 proposal included a country-of-origin rule very similar to Article 16 of the Services Directive,<sup>31</sup> the final directive states a mere internal market rule.<sup>32</sup> The scope for traditional private law is therefore widened, but the relationship remains unclear.

### 3. *Primary Law and the Law of Corporations*

These questions are not restricted to secondary instruments. A third, well-known example concerns the impact of primary law on the private international law of corporations. The Court of Justice addressed these issues in its case trilogy in *Centros*, *Überseering*, and *Inspire Art*.<sup>33</sup> In *Centros*, the Court of

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State which a provider visits.”

29 See also Jürgen Basedow, „Herkunftslandsprinzip und Internationales Privatrecht im europäischen Binnenmarkt für Dienstleistungen“, in: *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana* (Zakamycze 2005), 29, 41-42.

30 *Supra* n. 3; for criticism, see Editorial Comment, (2006) 43 *Common Market Law Review* 307.

31 Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (the unfair commercial practices Directive), 17 June 2003, COM(2003) Article 4.

32 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), (2005) O.J. L 149/22 (11 June 2005; see Jules Stuyck, Evelyne Terryn, Tom van Dyck, “Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market” (2006) 43 *Common Market Law Review* 107, 117-120.

33 Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, decision of 3/9/1999, (1999) ECR I-1459; Case C-208/00, *Überseering B.V. v. Nordic Construction Company Baumanagement GmbH (NCC)*, decision of 11/5/2002, 2000, ECR I-9919; Case

Justice ordered Denmark to register the subsidiary of a corporation that two Danish citizens had registered under English law, although their only reason for using UK law had been to avoid the registration fees for Danish companies under Danish law. In *Überseering*, the Court held that Germany could not deny a corporation registered under Dutch law the capacity to sue in Germany, even if the company lacked legal capacity under German law, since it did not comply with the German laws applicable under German private international law. Finally, in *Inspire Art*, the Court made clear that the Netherlands could not impose additional requirements on a corporation registered under UK law on the basis that it was a “pseudo foreign corporation”, although that was exactly what the corporation in question was, never having conducted any business outside the Netherlands.

This case law makes it possible to register a company in country A even if that company conducts its entire business in country B, although the private-international-law rules of many Member States require a more genuine link to the country of registration for recognition of a corporation’s full legal capacity. Although this case law therefore creates an obvious tension with private international law, its precise impact on private international law is not clear. The Court of Justice never addressed the questions posed as question of choice of law, but instead resolved them under Arts. 43 and 48 of the EC Treaty. Indeed, some have argued that this case law applies only on the level of substantive law and leaves private-international-law norms intact. Nonetheless, for the highest courts in Austria and in Germany these decisions became the impetus to shift their private-international-law norms from a real-seat principle to a registration principle.<sup>34</sup>

Whether such a modification was required by the case law is far from clear. Still unresolved, at least from a private international law perspective, is the relevance of the earlier decision in *Daily Mail*, where the Court had held, sweepingly, that “companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and function-

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C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, decision of 9/30/2003, 2003 ECR I-10155.

34 Oberster Gerichtshof (Austria), decision of 7/15/1999, (1999) *Österreichisches Recht der Wirtschaft* 719; Bundesgerichtshof (Germany), decision of 13 March 2003 – VII ZR 370/98, 154 *BGHZ* 185; Bundesgerichtshof (Germany), decision of 14 March 2005 – II ZR 5/03, (2005) *Zeitschrift für Wirtschaftsrecht* 805; see also the contribution by Federal Court judge Wulf Goette, „Zu den Folgen der Anerkennung ausländischer Gesellschaften mit tatsächlichem Sitz im Inland für die Haftung ihrer Gesellschafter und Organe“, (2006) 27 *Zeitschrift für Wirtschaftsrecht* (ZIP) 541.

ing.”<sup>35</sup> In the case this meant that English law could determine that an English company could lose its legal personality if it transferred its administrative seat away from England. That *Daily Mail* has never been overruled<sup>36</sup> leads to an apparent inconsistency: The freedoms of the EU Treaty allow a company founded under the law of Member State A to transfer its seat to Member State B regardless of the law of State B, but not regardless of the law of Member State A. It seems as though the law of State B has to comply with rigid requirements from EU law, while Member State A is free to do as it pleases. What looks like an inconsistency for EU law is also a problem for private international law.<sup>37</sup> *Daily Mail* seemed to suggest that EU law has no impact on the conflict of laws because it explicitly made the recognition of companies contingent on the applicable national law. The *Centros* trilogy, on the other hand, seems to suggest a significant impact.

#### 4. *Three Kinds of Conflict*

The conflict between the country-of-origin principle and traditional private international law has three dimensions: a substantive, an institutional, and a methodological dimension.

The substantive conflict is a conflict between different sets of connecting factors.<sup>38</sup> The country-of-origin principle, regardless of whether it “is” a private-international-law rule or not, conflicts with the application of traditional private international law simply because the latter often designate the law of the country of destination as applicable. Consumer contracts, for example, are governed by the law of the passive consumer’s habitual residence, which is not the country of origin for a foreign provider. In tort law, in the proposed Rome II Regulation, as in the vast majority of national legal systems, the applicable

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35 Case No. 81/87, *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483, no. 19; similarly *Lea Brilmayer, Conflict of Laws* (2<sup>nd</sup> ed. 1995) 242.

36 But see now Case No C-446/03, 13 December 2005, *Marks & Spencer Plc v. Halsey (Inspector of Taxes)* [2006] Ch. 184 (ECJ), [2006] CMLR 18; Case No C-411-03, *SEVIC Systems AG*, 13 December 2005 [2006] 1 CMLR 45 no. 18. These newer decisions seem to suggest that the Court considers a discrimination between corporations acting within the founding state and corporations acting transnationally can constitute a violation of Articles 43, 48.

37 Wulf-Henning Roth, „Internationales Gesellschaftsrecht nach Überseering“ 2003 *IPRax* 117, 121.

38 Miguel Virgós Soriano/Francisco J. Garcimartín Alférez, « Estado de origen v. estado de destino – Las diferentes lógicas del Derecho internacional privado » *InDret* 4/2004 (No 251) 2, available at [http://www.indret.com/pdf/251\\_es.pdf](http://www.indret.com/pdf/251_es.pdf).



law is the law of the place of the injury. Again, if, for example, a provider of TV reports sitting in Member State A defames a prominent person in State B, the country-of-origin (State A) and the place of the injury (State B) do not coincide. In general, for regulatory laws like laws of commercial advertising, etc., the typical approach is to apply the law of the country whose market has been targeted, while a country-of-origin principle restricts that country's law. And in private international law for companies, where many countries apply the law of the place of the administrative seat, a similar disconnect occurs. A country-of-origin principle will therefore often clash with choice-of-law rules because both designate the rules of different legal systems as applicable. The European legislator tries to address this problem by carving out exceptions. Thus, on the one hand, consumer contracts were excepted from the proposed Services Directive,<sup>39</sup> on the other hand, media liability was excepted from the Rome II Regulation.<sup>40</sup> Such an issue by issue approach cannot resolve the fundamental conflict; in fact, because it is unprincipled, it may rather serve to exacerbate it.

This substantive conflict is enhanced by three institutional conflicts. Within the European Commission, it reflects the infamous dispute between the Directorate General Internal Market on the one hand, favouring a country-of-origin principle, and the Directorate General Justice and Home Affairs on the other, defending traditional private international law.<sup>41</sup> At the same time, it reflects a more general institutional conflict between the Commission and the Member States. The Commission favours an approach that enhances legislative competition and restricts the Member States' ability to discriminate against non-nationals, while the Member States favour private-international-law rules that allow them to maintain their regulatory competences. Finally, a quasi-institutional conflict should not be neglected – that between scholars of private international law and scholars of European Union law. The methodological approach of those writers who are influential will influence, in turn, how the relationship between the fields develops in the future.

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39 Services Directive Proposal, *supra* n. 3, Article 3(2). This means that Art. 5 EC Convention on the Law Applicable to Contractual Obligations should prevail over the directive. The fate of the choice of law provisions in EC directives on consumer law is less clear.

40 Amended Rome II Proposal, *supra* n. 15, Article 1(2)(h).

41 Christian Kohler, „Verständigungsschwierigkeiten zwischen europäischem Gemeinschaftsrecht und internationalem Privatrecht“, in: *Festschrift für Erik Jayme I* (2004) 445, 457-9; Jürgen Basedow, „EC Conflict of Laws – A Matter of Coordination“, in: *Seminário Internacional sobre a Comunitarização do Direito Internacional Privado* (Almedina 2005) 17, 26.

This quasi-institutional, disciplinary conflict translates easily into the third conflict, with which this paper deals primarily: the methodological conflict between European law on the one hand and private international law on the other. Is the country-of-origin principle chiefly a rule of European law that leaves private international law intact? Or does it rather replace private international law entirely? Does it force private international law to adopt new rules? Or even a new methodology? And can private international law, in turn, be influential in any way on the country-of-origin principle itself? To answer these questions, it is first necessary to analyze what the relationship between the two fields actually is.

## **B. Theoretical Accounts of the Relationship**

What, then, is the relationship between the country-of-origin principle on the one hand, and private international law on the other? The literature provides essentially five different concepts.

### *1. Country-of-Origin Principle as a Rule Designating the Applicable Law*

First is the view that the country-of-origin principle represents an actual private-international-law rule that designates the applicable law. The most obvious problem this vies must overcome is that the principle does not look like a private-international-law rule that designates an applicable law; it only prohibits the application of restrictive host country norms in addition to those of the country-of-origin.<sup>42</sup> As a consequence, a certain degree of translation is required.

A first problem with such a translation concerns the structure of the resulting rule. The country-of-origin principle does not simply designate the applicable law. Rather, it restricts applicability of the law designated by traditional private international law rules if they are more restrictive than those of the country of origin. If the law of the country of destination places restrictions in addition to those of the country-of-origin, then it is inapplicable as a violation of the country-of-origin principle. If, on the other hand, the law of the country of destination is less restrictive than that of the country-of-origin, it is not inhibited from applying its less restrictive law. If the rules are less restrictive, the

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42 Cf. Julio D. González Campos, « La Cour de Justice des Communautés Européennes et le non-Droit international privé », in : *Festschrift für Erik Jayme I* (2004) 263 (2004).

principle is not violated. To translate this into a private international norm requires a special kind of norm, a *Günstigkeitsprinzip*, whereby the less restrictive of the laws of origin and those of destination applies.<sup>43</sup>

The bigger challenge for such a translation is the fact that the connecting factors used in the principle are different from those in traditional private international law. Thus, it has been suggested that the principle departs from the territorial approach dominant in contemporary private international law and follows rather a personalised approach, congenial to medieval private international law.<sup>44</sup> “Origin” in country-of-origin would then come to equal “origo”, the traditional connecting factor dismissed by Savigny.<sup>45</sup> This is not unusual; it would be a challenge only for strictly territorial conceptions of private international law. The bigger problem is that the connecting factor used by the principle – the country-of-origin – frequently does not represent the closest connection and thus does not fulfil the general requirement of traditional private-international-law norms, territorial or otherwise.<sup>46</sup> In other words: translated into a private-international-law rule, the content of the country-of-origin principle is hard to justify in the light of general values held within the field.

## 2. *No Impact at all on Private International Law*

The opposite view is that the country-of-origin principle has no impact on private international law at all. This view, expressed in Article 1(4) of the E-Commerce Directive,<sup>47</sup> was once nearly unanimously held and is still widespread.<sup>48</sup> According to this view, the country-of-origin principle works on the level of substantive law only; it leaves the determination of the applicable law

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43 Jürgen Basedow, „Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favour offerentis“ (1995) 59 *RebelsZ* 1, 16-17; Wolfgang Drasch, *Das Herkunftslandprinzip im Internationalen Privatrecht* (1997), 344-49.

44 Michael Hellner, “The Country-of-origin Principles in the E-commerce Directive: A Conflict with Conflict of Laws?”, in: Angelika Fuchs, Horatia Muir Watt, Étienne Pataut (eds.), *Les conflits de lois et le système juridique communautaire* (2004) 205, 217-224, who suggests a similarity between the country-of-origin principle and the medieval system of personal laws.

45 See the debate in Friedrich Carl von Savigny, *A treatise on the conflict of laws, and the limits of their operation in respect of place and time* 147 (William Guthrie transl, Edinburgh 1869), §§ 350-359.

46 But see Marc Fallon, « Le principe de proximité dans le droit de l’Union européenne », in *Le droit international privé: esprit et methodes. Mélanges en l’honneur de Paul Lagarde* (2005) 241, 246 ff.

47 *Supra* n. 21 and accompanying text.

48 E.g. de Baere, *supra* n. 22, 297 and *passim*.

to private international law, and only subsequently controls the application of the law so determined. The law of the country-of-origin is relevant, but not as applicable law. Some argue that EU law requires the country of destination to create a domestic rule that copies the result of the foreign rule.<sup>49</sup> Others denigrate the law of the country-of-origin: “The fact that the trans-border economic activity conforms to the country-of-origin’s law is a factual element which has to be taken into account in the application of the host country’s law. The application of the principle of origin or the principle of mutual recognition does not change the normal functioning of the conflict rules.”<sup>50</sup> The purity of private international law is saved, but through something of a trick: The undeniable influence that the principle has on the application of private international law is merely shifted from a question of applicable law to a question of relevant facts.

### 3. *EU Law as Side-Constraint*

Others find middle solutions. According to a third view, developed in particular with regard to primary EU law, the country-of-origin principle lacks the specificity of a private-international-law norm, but poses constraints on choice of law.<sup>51</sup> The country-of-origin principle provides an outer framework that allows for several different private-international-law rules.<sup>52</sup> EU law does not require Member States to adopt a specific private-international-law rule using the country of origin as connecting factor. If they use other connecting factors, however, the resulting private-international-law norms are restricted in their applicability by EU law.

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49 Holger Altmeppen, „Schutz vor „europäischen“ Kapitalgesellschaften“ (2004) *Neue Juristische Wochenschrift* 97, 100.

50 de Baere, *supra* n. 22, 301 (internal footnote omitted); Michael Wilderspin & Xavier Lewis « Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres » (2002) 91 *Rev crit* 1, 21.

51 Erich Schanze & Andreas Jüttner, „Die Entscheidung für Pluralität: Kollisionsrecht und Gesellschaftsrecht nach der EuGH-Entscheidung ‘Inspire Art’“ 2003 *Die Aktiengesellschaft* (AG) 661, 665-6; Christiane Wendehorst, „Kollisionsnormen im primären Europarecht?“, in: Stefan Lorenz et al. (eds.), *Festschrift für Andreas Heldrich zum 70. Geburtstag* (Munich, Beck 2005) 1071; see also Basedow, *supra* n. 29, 40-44.

52 E.g. Kurt Lipstein, “The Law relating to the movement of companies in the European Community”, in: *Festschrift für Erik Jayme I*, 527, 529. See also Ansgar Ohly, “Herkunftslandprinzip und Kollisionsrecht“ 2001 *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* (GRUR Int.) 899, 901-2 (arguing for a “kollisionsrechtlicher Mindestgehalt”, a minimal core of private international law).

#### 4. *EU Law as Internationally Mandatory Law*

According to a fourth view, we should not focus so much at all on whether the country-of-origin principle is a private-international-law rule. Rather, we should focus on the coordinated field of harmonized law and conceptualize this field as a group of internationally mandatory norms. Since internationally mandatory norms apply irrespective of private-international-law norms (at least according to one view), these norms would be applicable not through the designation of a rule of private international law, but rather because of their self-determined territorial scope of application.<sup>53</sup> Although the proponent of this point of view, seems to have doubts, admitting it to be “stretching the line of argument beyond what existing case law would support”<sup>54</sup> and calling it “pharisaic”,<sup>55</sup> it has found at least one follower.<sup>56</sup>

#### 5. *EU Law as Functional Equivalent of Private International Law*

The fifth and final suggestion is to think of the country-of-origin principle as the functional equivalent of private international law.<sup>57</sup> This view makes use of the fact that functional equivalence combines sameness and difference – functionally equivalent institutions fulfil the same tasks by different means.<sup>58</sup> Indeed, the country-of-origin principle fulfils the same function like private international law, namely the resolution of problems arising from discrepancies between legal systems, in particular, discrepancies between the laws of the country of destination and the country-of-origin. It does so, however, with differently. The clash between traditional private international law and the country-of-origin principle could thus be described as the choice between functionally equivalent tools – though functional equivalence could neither determine

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53 Michael Hellner, *supra* n. 44.

54 *Ibid* at 222.

55 *Ibid* at 223.

56 Nina Höning, “The European Directive on e-Commerce (2000/31/EC) and its Consequences on the Conflict of Laws” (2005) *Global Jurist Topics* Vol. 2, Issue 2, Article 2, <http://www.bepress.com/gj/topics/vol5/iss2/art2/>, 27-28, 34-36.

57 Peter Bernard, „Cassis de Dijon und Kollisionsrecht – am Beispiel des unlauteren Wettbewerbs“, (1992) 3 *Europäische Zeitschrift für Wirtschaftsrecht* 437 (for a brief exposition in English, see de Baere, *supra* n. 22, 291-2); Marc Fallon & Johan Meusen, „Private International Law in the European Union and the Exception of Mutual Recognition“ (2002) 4 *Yearbook of Private International Law* 37, 40, 52.

58 Ralf Michaels, “The Functional Method of Comparative Law”, in: Reinhard Zimmermann & Mathias Reimann (eds.), *Oxford Handbook of Comparative Law* (forthcoming), part III.3.

which of them is more appropriate than the other<sup>59</sup> nor lay out the practical relationship between the two.

### **C. The Need for a Broader Concept of Private International Law**

These views do not predict or prescribe certain outcomes. Conceptual theories are not right or wrong (and thus cannot be falsified), nor are they necessarily mutually exclusive. Rather, they represent different attempts to conceptualize certain realities; they are more or less adequate conceptualizations of the relationship between EU law and private international law. Indeed, all views struggle with the same problem. On the one hand, the country-of-origin principle deals with the same problems as private international law – the conflict between norms from different legal systems – and it has an undeniable impact on the process of traditional private law. In this sense, it is clearly part of private international law understood broadly. On the other hand, the country-of-origin principle has a structure different from that of traditional private-international-law norms. In this sense, it can certainly not itself be called a private-international-law norm.

The way to resolve this tension is to broaden the concept of private international law. Scholars who see a difference between the country-of-origin principle and private international law all have a particular view of private international law in the traditional European sense – a system of rules designating the applicable law. This view is unduly narrow, it substitutes one approach for a whole discipline. Obviously, the country-of-origin principle is not private international law in the sense of the currently predominant approach which determines the applicable law according to the closest connection. But private international law as a discipline is broader than its current practice, and the field's history has shown a remarkable set of approaches that have fallen in and out of fashion. Indeed, because of this variety of approaches, private international law as a discipline cannot be defined other than by its function, the function to resolve the conflicts that may exist between different private law systems. And since the country-of-origin principle fulfils this very same function, the country-of-origin principle is undeniably itself a part of species of private international law, understood functionally.

Once we broaden our understanding of private international law, we can see the different attempts to conceptualize the relationship between the country-of-

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59 *Ibid*, part III.5.

origin principle and private international law discussed before in a new light. In fact, all have their predecessors in the field's doctrinal history. The country-of-origin principle acts only on the level of substantive law and requires the judge to incorporate rules of the foreign law into his own law or adapt his own law to the content of foreign law?<sup>60</sup> This is congruent with Roberto Ago's theory of naturalization of foreign legal rules,<sup>61</sup> as well as with Walter Wheeler Cook's local law theory.<sup>62</sup> Such approaches have been considered unhelpful for reasons that are still valid today. It would be artificial to distinguish such an approach in principle from private international law,<sup>63</sup> and the approach is not helpful in practice, as it gives no guidelines for how the foreign rules should be reconstructed.<sup>64</sup> Foreign law enters the analysis only as a fact?<sup>65</sup> This is not different from what Cook argued and what Ehrenzweig later developed into an entire private-international-law theory, the so-called datum theory, in which foreign law enters the analysis as datum, as fact.<sup>66</sup> Again, criticism against this approach is valid today. The distinction between fact and law is artificial and not helpful; every legal norm is both fact and law.<sup>67</sup>

The country-of-origin principle is only a side-restraint on private-international-law rules rather than a proper norm of private international law?<sup>68</sup> This is congruent with the idea of constitutional limitations on private international law as acknowledged, for example, by the German Constitutional Court in 1971<sup>69</sup> or by the US Supreme Court.<sup>70</sup> Indeed, the development of US Con-

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60 *Supra*, part I.B.2.

61 Roberto Ago, « Règles des conflits de lois » (1936-IV) *Rec des Cours* 243, 302-08.

62 Walter Wheeler Cook, "The Logical and Legal Bases of Conflict of Laws", (1924) 23 *Yale Law Journal* 457, 469: "The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected..."; *Guinness v. Miller*, 291 Fed. 769, 770 (SD NY): "A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." (per J. Holmes).

63 Wendehorst, *supra* n. 51, 1084.

64 Hessel Yntema, "The Historical Bases of Conflict of Laws" (1953) 2 *Am J Comp L* 297, 316 ("a theory which contains neither truth nor virtue").

65 *Supra*, part I.B.2.

66 See Eugene F. Scoles et al., *Conflict of Laws* (4th ed. 2004) 38-43.

67 Nils Jansen & Ralf Michaels, „Die Auslegung und Fortbildung ausländischen Rechts“, (2003) 116 *Zeitschrift für Zivilprozeß* 3, 8-16 and passim.

68 *Supra*, part I.B.3.

69 Bundesverfassungsgericht (May 4, 1971), 31 *Entscheidungen des Bundesverfassungsgerichts* (BverfGE) 58; for a discussion in English see Friedrich K. Juenger, "The Ger-

stitutional law in the area of private international law shows that this conceptualization alone does not determine the importance of the principle vis-à-vis traditional choice of law.<sup>71</sup> Whereas the US Constitution today has virtually no influence on private international law,<sup>72</sup> there were times when it could be expected to determine virtually the entire field.<sup>73</sup> The argument that the country-of-origin principle is not sufficiently specific to qualify as a private international law<sup>74</sup> norm is not more decisive. Open-ended concepts of modern private international law like “governmental interests”, “party expectations”, and the like are hardly more specific.

And the last view to be discussed can be treated the same way. The country-of-origin principle is not a norm of private international law because the coordinated field functions as a set of internationally mandatory norms that are outside the ordinary scope of private international law?<sup>75</sup> This presumes a narrow understanding of private international law. Not only can so-called internationally mandatory norms be accommodated within private international law, as especially Klaus Schurig has shown.<sup>76</sup> Even more importantly, they are part of existing private international law litigation, as the example of Article 7 of the Rome Contracts Convention shows.<sup>77</sup>

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man Constitutional Court and the Conflict of Laws”, (1972) 20 *Am J Comp L* 290; for a French translation see (1974) *Rev.crit.* 57 with the article by Catherine Labrusse, “Droit constitutionnel et droit international privé en Allemagne fédérale”, *ibid.* at 1-46.

70 For debate, see *infra* part II.4.

71 For an impressive attempt to translate the US debate to the Common Market see Holger Spamann, “Choice of Law in a Federal System and an Integrated Market”, *Harvard Jean Monnet Working Paper* 8/01, <http://www.jeanmonnetprogram.org/papers/01/012601.html>.

72 *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *SunOil Co. v. Wortman*, 486 U.S. 717 (1988).

73 For debate, see *infra* part II.4.

74 *Supra* I.B.3.

75 *Supra* I.B.4.

76 Klaus Schurig, *Lois d'application immédiate und Sonderanknüpfung zwingenden Rechts: Erkenntnisfortschritt oder Mystifikation?*, in: Holl/Klinke (eds.), *Internationales Privatrecht, internationales Wirtschaftsrecht*, 55-76 (1985).

77 Hellner, who advocates the analogy to mandatory norms, sees the basis for applicability of such internationally mandatory norms not in their own determination, but rather in Arts. 7(2) and 7(1) of the Rome I Convention. Even if the intended Rome I Regulation does not contain a rule on the applicability of foreign mandatory norms, Hellner argues “that a general obligation to apply foreign mandatory rules already exists at least to the extent that these rules are made mandatory by EU law for the purpose of facilitating one of the fundamental freedoms, viz. the freedom to provide services.” (*supra* n. 53, 221 f.). Such a general obligation would be a private international law



## II. The Country-of-Origin Principle as Vested Rights Theory

If all existing conceptualizations of the country-of-origin principle already relate to private international theories, it appears plausible to argue that we should openly do the same and conceptualize the principle as private international law. But what kind of private international law? To be adequate, the approach must share those traits that are characteristic for the country-of-origin principle. It should achieve universality – the law it designates must be applicable everywhere. It should leave the traditional process of designating the applicable law intact and only restrict the scope of the otherwise applicable law, not simply designate the applicable law on its own. The approach should not be based on the closest connection, since even merely formal connections like the place of registration suffice for the country-of-origin principle. The approach should restrict the regulatory power of states and strengthen the rights of individuals. Such an approach exists: the theory of vested rights.

### A. Theories of Vested rights

When we think of vested rights today, we usually think of Dicey in England and Beale in the United States, and we think of their vested rights theory as thoroughly refuted. But this is a limited picture in two regards. First, just as there is not one country-of-origin principle but many, there is not one vested rights theory but many.<sup>78</sup> Second, the reasons for the decline of different variants of the theory are sufficiently complex to deserve a closer analysis.

#### 1. *Dicey and Beale: The Separation of Law and Rights*

The first to formulate a full-fledged theory of vested rights was A.V. Dicey, the master of both English constitutional law and English private international law.<sup>79</sup> Dicey held that “the Courts, e.g. of England, never in strictness enforce

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norm; an independent category of internationally mandatory norms would not be necessary.

<sup>78</sup> Max Gutzwiller, Book Review (1936) 10 *RebelsZ* 1056, 1064-65

<sup>79</sup> A V Dicey, “On Private International Law as a Branch of the Law of England”, (1890) 6 *Law Quarterly Review* 1-21 and 113-127. This article found its way, almost unchanged, as introduction into A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896). For the history of the idea in England see Kurt H. Nadelmann, “Some Historical Notes on the Doctrinal Sources of American Conflict of Laws”, in: id., *Conflict of Laws: International and Interstate*, 1, 14-20 (o-

foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws.”<sup>80</sup> Sovereignty precludes courts from applying foreign law; justified individual interests require them to recognize foreign rights. This separation between the applicable law of the forum and reference to the country of origin can already be found in a court opinion from 1775: “Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances ... the law of the country where the cause of action arose shall govern”.<sup>81</sup> Thus, Dicey promulgates the following General Principle No. I. – Every right which has been acquired under the law of any civilized country is recognized and (in general) enforced by English courts.<sup>82</sup>

This general principle is then subject to four exceptions, two of which are relevant here.<sup>83</sup> First is the somewhat dubious requirement that rights be “duly” acquired.<sup>84</sup> Then there is the important Exception II. – English Courts will not enforce a right otherwise duly acquired under the law of a foreign country, where the enforcement of such right

- (1) is inconsistent with the moral rules upheld by English law;
- (2) involves the recognition, as regards transactions taking place in England, of any penal status arising under foreign law, or of any institution or status unknown to the law of England;
- (3) is inconsistent with the policy of English law, or with the maintenance of English political institutions.<sup>85</sup>

Dicey’s approach therefore has three relevant elements. First, the applicable law in English courts is always English law. Second, within English law,

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originally in *Ius et Lex. Festgabe zum 70. Geburtstag von Max Gutzwiller* (1959) 263, 276-81). Nadelmann (*ibid* 17) points out that Dicey himself mentioned the principle earlier in a book review in (1885) 1 *Law Quarterly Review* 246, 248. He borrowed the idea from his colleague and friend Thomas Erskine Holland, *Elements of Jurisprudence* (1880) 288 n 1; for a glowing review of Holland’s book, see already A V Dicey, “The Study of Jurisprudence” (1880) 5 *Law Magazine and Review; A Quarterly Review of Jurisprudence and Quarterly Digest of All Reported Cases 5<sup>th</sup> Series* 382.

80 Dicey, *supra* n. 79, 10: Similarly *In re Askew*, [1930] 2 Ch. 259, 267-68; G.C. Cheshire, *Private International Law* (1935) 6.

81 *Holman v Johnson*, 1 Cowp 341, 98 ER 1120, [1775-1802] All ER Rep 98 (1775) per Lord Mansfield.

82 Dicey, *supra* n. 79, 113.

83 The other two concern the supremacy of acts of the English parliament, and the interference with the authority of a foreign sovereign within the country whereof he is sovereign. See *ibid* 123-24.

84 *Ibid* at 118.

85 *Ibid* at 120-121.

courts will enforce rights acquired under foreign law, provided these rights were duly acquired. Notably, this principle extends to the enforcement of foreign judgments).<sup>86</sup> Third, enforcement of such rights will be refused even though they have been duly acquired if such enforcement would be immoral, would enforce foreign penal or tax laws, or would violate British public policy.

Since this theory seemed at the same time to present a welcome more rational alternative to the traditional idea of comity as the ground for private international law,<sup>87</sup> Joseph Beale adopted it enthusiastically into the United States.<sup>88</sup> Prima facie, Beale's own formulation of the doctrine sounds quite similar to that of Dicey: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere."<sup>89</sup> Beale, however, added a stronger emphasis on territoriality in the application of the vested rights theory. For Dicey, his theory had been a structure rather than a generator of rules: courts enforced rights acquired under foreign law, but which law created those rights was not part of the theory. For Beale, on the other hand, vested rights and territoriality went hand in hand: rights could be acquired only under the law of the sovereign on whose territory the relevant act took place, and other sovereigns had to enforce the rights created by that sovereign.

Although Beale is often said to be no more than a successor to Dicey, his vested rights theory is therefore significantly different from Dicey's. First, unlike Dicey, Beale thought that the vested rights theory could actually designate the law granting the rights that were to be enforced. The reason was that, for him, unlike for Dicey, territoriality was a necessary element of the theory.<sup>90</sup> Second, unlike Dicey, Beale had a solution to the problem of which law one should look to when a situation involved contacts with more than one state. Under his theory, the relevant legal order was that in which the last act necessary for the creation of a right took place. This element leads to a third difference to Dicey, which becomes clear already in Beale's early review of Dicey's treatise:<sup>91</sup> Whereas Dicey was interested in determining the "proper"

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86 *Ibid* at 114-5.

87 See *Hessel Yntema*, „The Comity Doctrine“, in: Ernst von Caemmerer, Arthur Nikisch, Konrad Zweigert (eds.), *Festschrift für Hans Dölle* I (1962) 65; reprinted with an introduction by Kurt Nadelmann in (1966) 65 *Michigan Law Review* 1; see also Alan Watson, *The Comity of Errors* (1992). Both Dicey and Beale were critical of comity; see Dicey, *supra* n 79, 9-10; Joseph Beale, *A Treatise on the Conflict of Laws* I (1935) § 6, pp 53-55; similarly Cheshire, *supra* n 80, 6.

88 Beale wrote a very favourable review of Dicey's treatise. See Beale, "Dicey's 'Conflict of Laws'" (1896) 10 *Harvard Law Review* 168.

89 Joseph H. Beale, 3 *Cases on the Conflict of Laws* 517 (1901).

90 Beale, *supra* n. 87, § 5.2, p. 52.

91 *Supra* n. 88, 169-71.

law, Beale did not think such a value-driven analysis was either appropriate or actually what the courts were doing. The “last-in-time” approach solved the question with a formal criterion. Altogether, Beale’s theory was both thicker and more dogmatic than that of Beale.

However, these differences are outweighed by the similarities between both approaches. Both authors argued that the conflict of laws does not deal with applying foreign law, but rather with enforcing rights acquired under foreign law, and both authors saw room for a limited exception for the public policy of the forum.

## 2. *Pillet and Niboyet: Choice of Law and Enforcement of Rights*

This idea of vested rights was not confined to England. Not long after Holland had introduced it to English conflict of laws (and a translation of his text had appeared in France<sup>92</sup>), Antoine Pillet and J.-P. Niboyet developed a French version of the theory that was distinct in important ways.<sup>93</sup> In Pillet’s view, private international law deals with three discreet questions: the rights of foreigners, the designation of the applicable law, and determination of the effect of rights acquired abroad – *droits acquis*.<sup>94</sup> For the second question, designation of the applicable law, he developed an early version of interest analysis that predated similar developments in the US by several decades.<sup>95</sup> The third

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92 M T E Holland, « De l’application de la loi », 12 *Revue de droit international et de législation comparée* 565 (1880); for his embrace of vested rights see *ibid* 574 n. 2.

93 For a comparison between Dicey’s vested rights theory and Pillets theory of *droits acquis*, see Horatia Muir Watt, « Quelques remarques sur la théorie anglo-américaine des droits acquis » (1986) *Rev crit* 425. The first mention of *droits acquis* as the basis of private international law appears to be in Comte de Vareilles-Sommières, *La synthèse du droit international privé I* (1897) 31. For this reason, Beale considered him particularly relevant; see Beale, *supra* n. 87, 1.

94 Antoine Pillet, *Traité pratique de droit international privé I* (1923) 5 (no. 2). The rights of foreigners and nationality law are still sometimes considered part of private international law in France.

95 Pillet, *ibid* 106: “The way to resolve conflicts is to give preference to the law of the state which has the greatest interest that the goal pursued by the law in question be attained ..., that its law regulate the litigation. If a sacrifice must be made, it should be as small as possible.” For the “comparative impairment” approach in the United States, see William Baxter, *Choice of Law and the Federal System*, (1963) 16 *Stanford Law Review* 1; for a recent assessment, see Erin A. O’Hara, William H. Allen, “Second Generation Law and Economics of Conflict of Laws: Baxter’s Comparative Impairment and Beyond” 51 (1999) *Stanford Law Review* 1011. The similarity between Pillet and Baxter is occasionally recognized; see, e.g., William Tetley, “A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of

question, the enforcement of rights acquired abroad, is not only a separate inquiry; in fact, both areas are diametrically opposed:<sup>96</sup> The designation of the applicable law describes a possible conflict of laws, or at least a doubt about which of two or more laws is applicable. By contrast, the enforcement of vested rights addresses not a conflict between legal orders as to which can create a right, but merely the question as to the effect of a right in a country other than that which created it.<sup>97</sup> The question is not, in other words, which of two legal orders is entitled to create (or not create) rights, but rather whether one country has to recognize rights that already exist because they have already been created, albeit under the law of another country. Like Dicey, Pillet argued that the enforcement of foreign rights is different from the question of applicable law.<sup>98</sup> Like Dicey, Pillet restricted the duty to enforce foreign rights to duly acquired rights, “droits acquis régulièrement”. And like Dicey, he extended his theory to the recognition and enforcement of foreign judgments.<sup>99</sup> The important difference from Dicey (and Beale) is that Pillet created a full system of designating the applicable law *in addition* to his theory of vested rights. In fact, Pillet considered a right duly acquired only under the law applicable according to general private international law.

Pillet’s disciples continued adherence to his theory, but with important modifications. Thus, Niboyet renamed the approach, less elegantly, “the problem of international effectiveness of definitely constituted rights,<sup>100</sup> to avoid the impression that rights could somehow exist prior to the law. Even more importantly, he rejected Pillet’s concept of international law as basis for a duty to enforce. For him, the theory was much more modest: a sovereign should know the effectiveness of a right under foreign law in order to draw, under his own law, the appropriate consequences.<sup>101</sup> The duty to enforce foreign rights was no longer a legal duty, but only a moral duty.<sup>102</sup> Although Niboyet was one of the firmest defenders of the vested rights theory, at the same time took away its purely legal character.

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the American Legal and Social Systems” (2000) 38 *Columbia Journal of Transnational Law* 299, 314 n. 47; Joel Trachtman, “Economic Analysis of Prescriptive Jurisdiction” (2001) 42 *Virginia Journal of International Law* 1, 26 n. 91.

96 J.P. Niboyet, *Traité de droit international privé I* (1938) 284-85.

97 *Ibid* 284-93; on the avoidance of conflict, see Muir Watt, *supra* n. 93, 430.

98 Similarly J-P Niboyet, “Territoriality and Universal Recognition of Rules of Conflict of Laws” (1952) 65 *Harvard Law Review* 582, 594-95.

99 Pillet, *supra* n. 94, 536-44.

100 Niboyet, *supra* n. 96, 287 : « le problème de l’efficacité internationale des droits définitivement constitués ». Niboyet also translated the First Restatement into French Law.

101 *Ibid*.

102 *Ibid* 294.

### 3. *Cocceji and Tittmann: Rights and Sovereigns in Ius Gentium*

If the theory of vested rights may appear to have been created around the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century.<sup>103</sup> this impression is wrong. In fact, theories of vested rights, of *iura quaesita*, are much older.<sup>104</sup> One example can be found in the work of the German Scholar Heinrich Cocceji. Generally, Cocceji defended a conception of private international law close to that of Ulrich Huber, based on considerations of territoriality and sovereignty.<sup>105</sup> However, embedded within this theory is a formulation of a theory of vested rights:

For just as it follows from both divine law and the law of peoples that everyone must obey [the sovereign] to whom he is a subject, and must observe his laws in his acts; so it follows from that same law of peoples that a right acquired from that observation is valid everywhere, and can be taken away by no one.<sup>106</sup>

The formulation closely mirrors the third of Ulrich Huber's famous three axioms.<sup>107</sup> Yet, while Huber, speaking of "iura", probably refers to laws,<sup>108</sup>

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103 Thus indeed Horst Müller, *Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht. Geschichte und Kritik* (1935) 176 and passim; for criticism, see Gutzwiller, *supra* n. 78.

104 The first author using the concept was Baldus, according to EM Meijers, „L’histoire des principes fondamentaux du droit international privé“ (1934-III) 49 *Rec des Cours* 543, 607 (1934) ; see also Gutzwiller, *supra* n. 78, 1058.

105 Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* (Praelectiones iuris Romani et hodierni, Vol. II, Book 1, Title iii, 1689). On Huber see now Nikitas Hatzimihail, *Pre-Classical Conflict of Laws* (SJD. Thesis Harvard, 2002), chapter 5; on his importance for Dicey, see Llewellyn Davies, “The Influence of Huber’s De Conflictu Legum on English Private International Law” (1937) 18 *British Yearbook of International Law* 49, 59.

106 Heinrich Freiherr v. Cocceji, *Exercitationum curiosarum, Palatinarum, Trajectinarum et Viadrinarum, volumen primum, Disp 54 Tit 7 no 5*, in: Christian von Bar & Peter Dopffel (eds.), *Deutsches Internationales Privatrecht im 16. und 17. Jahrhundert* (2001) 528: “Ut enim Divini ac Gentium Juris est ut quisque pareat ei, cui subjectus est, ejusque leges in suis actibus observet, ita ejusdem Gentium juri est, ut jus ex illa observatione natum ubique valeat, et a nullo auferri possit. Igitur extra territorium jus dici non potest; at contra in territorio rite actum ubique valet, ita ut Jure Naturae nemo, ac ne Princeps quidem jus quaesitum inde auferre queat.” (my translation).

107 Huber’s original text is: “Rectores imperiorum id comiter agunt, ut jura cuiusque populi intra terminus ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur. (“Those who exercise sovereign authority so act from comity that the laws (iura) of each nation having been applied within each own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another government or its subjects.”; translation after Ernest Lorenzen, “Huber’s De Conflictu Legum” 13 *Illinois Law Review* 401, reprinted in id., *Selected Articles on the conflict of laws* 162 (1947). The first English

Cocceji clearly speaks about individual rights.<sup>109</sup> The core of Cocceji's approach is the same as that for Dicey and Pillet: rights granted by the law of one country are valid and enforceable in every other country. Again, the question is not one of what law applies, but rather one of the enforcement of rights. Cocceji, however, brings a new justification for his theory. The first step in this justification is vertical reciprocity between the individual and the ruler: Because individuals must shoulder the burdens of their rulers' laws, they should also enjoy the benefits from these laws. What looks like a purely domestic argument describing the reciprocal relationship between one sovereign and its subjects becomes an argument for private international law by means of a second step: the *quid pro quo* exists not only between the individual and his own ruler but between the individual and all sovereigns. In other words, there is a link between the facts that an individual is regulated by his ruler, and that another sovereign cannot subject the individual to additional regulation if this implies taking away rights granted by his ruler. And why should a foreign sovereign be bound to respect a right he has not granted? For Cocceji, this obligation follows from *ius gentium*, understood not as the law between nations but as the law common to all nations.<sup>110</sup> The acquired right is binding on all sovereigns not because the sovereign who granted it had power over other sovereigns in any way, but because *ius gentium* requires the general protection of rights.

Cocceji may not yet have formulated a full theory of vested rights.<sup>111</sup> Such a theory appeared later in a dissertation by Friedrich Wilhelm Tittmann.<sup>112</sup> Tittmann's argument, in essence, is as follows: States must recognize acquired rights, including rights acquired under foreign laws. This does not create sovereignty concerns because rights are facts, so sovereignty concerns are irrelevant. Only as a consequence of this duty to enforce rights acquired under foreign law is there a duty to apply these foreign laws. Indeed, the basis for enforcement is respect not for the foreign legal order, but rather for the individual

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translation of Huber's text is in *Emory v. Grenough*, 3 U.S. 369, 370 (1797); for another translation, see Davies, *supra* n. 105, 64-78.

108 Müller, *supra* n. 103, 125-128; *contra* Davies, *supra* n. 105, 59; Meijers, *supra* n. 104, 670; R. D. Kollewijn, *Geschiedenis van de nderlandse wetenschap van het international privaatrecht tot 1880*, 145 f (1937).

109 Peter Dopffel, „Einführung“, in: von Bar & Dopffel, *supra* n. 106, 1, 4.

110 *Ius gentium* is a global common law rather than a law between nation states. See, most recently, Jeremy Waldron, “Foreign Law and the Modern *Ius Gentium*” (2005) 119 *Harvard Law Review* 129, 132 ff.

111 Müller, *supra* n. 103, 149-51.

112 Friedrich Wilhelm Tittmann, *De competentia legum externarum et domesticarum in defiendis potissimum iuribus coniugum* (Halle 1822); for analysis see Müller, *supra* n. 103, 180-7.

that has acquired this right. Although Tittmann's book was not influential, the ideas he formulated must have been in tune with scholarly thinking of his time. The idea that to deny a person the enforcement of rights she has acquired under foreign law would be a violation of her personality rights reappears in the work of other authors proposing theories of vested rights, including Georg Puchta and Ferdinand Lassalle.<sup>113</sup>

#### 4. *US Constitution: Full Faith and Credit and Due Process*

Such considerations – that of an obligation to recognize private rights and that of a superior law like *ius gentium* as basis for this obligation – are mirrored centuries later in case law of the US Supreme Court on the limits set by the US Constitution on private international law. Of particular relevance is the due process clause, which mandates, in essence, that certain rights (vested rights) may not be taken away without due process of law.<sup>114</sup> For some time, the Court seemed all but willing to constitutionalize the vested rights theory based on the due process clause. For example, the Court held in 1930 that a Texas state court was barred from applying Texas law to a contract entered into in Mexico because Texas could not affect “the rights of parties beyond its borders having no relation to anything done or to be done within them.”<sup>115</sup> Clearly this was about the protection of rights rather than about the duty to apply foreign law. This duty to apply foreign law was inferred from another provision of the Constitution, the full faith and credit clause.<sup>116</sup> In the 1930s, therefore, constitutional constraints on private international law in the US consisted of two separate strands – one regarding the enforcement of rights acquired abroad, the other regarding the application of foreign law.

Later developments severely weakened both the clarity and the scope of these constitutional bases for a conflict of laws principle in the US. First, the

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113 Georg Friedrich Puchta, *Pandekten* (11<sup>th</sup> ed., Leipzig 1872) § 113, p. 173: „... daß ein Staat, indem er den Fremden als Rechtssubjekt anerkennt, ihm auch die schon erworbenen Rechte (vorausgesetzt solche, deren Möglichkeit er überhaupt anerkennt) zugesteht, mit anderen Worten, daß er dessen Wirksamkeit als Person nicht erst von dem Augenblick datirt, wo derselbe mit seinem Recht und den es schützenden Anstalten in Berührung kommt“; Ferdinand Lassalle, *Das System der wohl erworbenen Rechte* (Leipzig, 1880) 303; cf. Müller, *supra* n. 103, 191-201.

114 U.S. CONST. amend. XIV, § 1.

115 *Home Insurance v. Dick*, 281 U.S. 397, 410 (1930).

116 U.S. CONST. art. IV, § 1. See, e.g., *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932); *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935); *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939).



due process clause cases were reinterpreted. Their *ratio decidendi* was no longer seen to be in the enforcement of rights, but rather in a required connection between the facts and the law applied.<sup>117</sup> Since such a connection was also the relevant element for the full faith and credit clause, both approaches were combined into one, requiring, eclectically, “a significant contact or significant aggregation of contacts, creating state interests, such that choice of [that forum’s] law is neither arbitrary nor fundamentally unfair.”<sup>118</sup> Second, the Court severely reduced the threshold for such contacts, all but abandoning any constitutional limitation on choice of law.<sup>119</sup> This reinterpretation of the due process clause thus led to the demise of a constitutional vested rights theory.<sup>120</sup>

## B. Similarities With the Country-of-Origin Principle

Vested rights theories may thus be varied, but they all share certain core elements. Importantly, these core elements can all be shown to exist in the country-of-origin principle as well.

### 1. Terminology

The first parallel between these theories of vested rights and the country-of-origin principle is linguistic. Notably, the first occurrence of a country-of-origin principle takes place in an important English decision on private international law: “Being entertained in an English Court, [the question] must be adjudicated according to the principles of English law, applicable to such a case. But the only principle applicable to such a case by the laws of England is, that the validity of Miss Gordon’s marriage rights must be tried by reference to *the law of the country, where, if they exist at all, they had their origin.*”<sup>121</sup> Even if great weight should not be assigned to this linguistic parallel between private international law and the country-of-origin principle, it suggests at least that the thought patterns underlying jurisprudence about vested rights and the country-of-origin principle are not altogether dissimilar. The idea that the rights

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117 *Watson v. Employers Liability Assurance Corp., Limited*, 348 U.S. 66 (1954); *Clay v. Sun Ins. Office, Limited*, 377 U.S. 179 (1964).

118 *Allstate Insurance Co v Hague* 449 U.S. 302, 313 (1981); see also *Phillips Petroleum Co v Shutts* 472 U.S. 797 (1985); *Sun Oil Co v Wortman* 486 U.S. 717 (1988).

119 *Ibid.*

120 For a recent attempt to “resuscitate a few key concepts that Beale got right” see Kermit Roosevelt, “The Myth of Choice of Law: Rethinking Conflicts” (1999) 97 *Michigan Law Review* 2448, quote at 2458 n. 48.

121 *Dalrymple v. Dalrymple* (1811) 2 Hagg Const 54, 58, 59, emphasis added.

have an origin distinct from their enforcement in the courts is a centrepiece of both the vested rights theory and the country of origin principle.

## 2. *Universality*

Another similarity between the country-of-origin principle and vested rights is relevant – universality. Under the vested rights theory, a right acquired (and valid) under one law must be considered valid in all other countries.<sup>122</sup> This parallels the policy behind the country-of-origin principle to subject a provider to only one set of norms, regardless of where he becomes active. Of course, many approaches to private international law aim at such universality, including the traditional Savignyan approach that underlies the European regulations. However, not every conflict of laws theory aims at universality in this sense. Currie’s interest analysis with its strong preference for the application of forum law, for example, is not such a theory.

## 3. *Separation from Applicable Law*

In another regard, the country-of-origin principle is more similar to the vested rights theory than to a Savignyan system. The country-of-origin principle does not determine an applicable law. It operates separately from the designation of the applicable law, intervening only once the applicable law has been determined through a traditional choice-of-law analysis. It is hard to conceptualize within Savignyan private international law; it has led many to conclude that EU law is different from choice of law altogether.<sup>123</sup>

Yet, exactly the same separation is apparent in the vested rights theory. Frequently, foreign rights are deemed facts, not law, so they do not interfere with the determination of the applicable law.<sup>124</sup> Pillet designed his system of acquired rights alongside and even in opposition to a general system of conflict of laws. Even Dicey’s claim that English courts will always apply English law is, in fact, the result of a (very simple) conflicts rule that designates the law of the forum as the generally applicable law. The vested rights theory then, for Dicey, operates outside this general rule, as it does for Pillet. Similarly, for Cocceji, the concept that one sovereign has to respect the rights granted by another sovereign is only one part of his approach to private international law;

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122 This is the main element of “vestedness” as used by Perry Dane, “Vested Rights, “Vestedness” and Choice of Law” (1987) 96 *Yale Law Journal* 1191.

123 *Supra* I.B.1.

124 Tittmann, *supra* n. 112, 7.

the other part covers the relationship between sovereigns.<sup>125</sup> At least for some authors, then, the vested rights theory leaves intact a system that designates the applicable laws. This makes the vested rights theory a better candidate for a reconceptualization of the country-of-origin principle than Savignyan private international law.

#### 4. *Regulations, Rights and Privileges*

One apparent difference lies in the fact that the country-of-origin principle focuses not on rights but rather on freedom from restrictions. Is the country-of-origin principle really about rights? Does it not, rather, encompass a multitude of possible legal positions, many of which are in fact better characterized as privileges and liberties than as rights – the privilege to provide services, for example? In fact, the apparent difference highlights a similarity. On the one hand, early predecessor theories of the country-of-origin principle also focused, not surprisingly, on privileges rather than rights. Cities often granted merchant privileges to foreign merchants; since these privileges grew into acquired rights, they could not be withdrawn.<sup>126</sup> On the other hand, the 19<sup>th</sup> century notion of rights that underlies Holland's work on jurisprudence and thereby also, if indirectly, Dicey's and Beale's work on private international law, is broader than the current notion would be. All law was thought to consist of rights; privileges and liberties (in Hohfeldian terminology) were thereby included.

At the same time, this distinction between rights and privileges suggests a weakness, and indeed the history of the vested rights theory illustrates the limits of a country-of-origin principle. The theory worked well regarding clearly defined privileges that were explicitly granted by a sovereign. It still works well in the area of enforcement of foreign judgments, which both Dicey and Pillet included in their theories of vested rights. It works far less well, however, as a general theory of private international law because of the question when and what rights are actually granted in the first place. Similar problems arise with the country-of-origin principle in the realm of private law. The principle is created predominantly with administrative (sovereign) processes in mind that can easily be compared to the granting of privileges in city states. The principle works far less well, at least for the solution of specific problems, in the area of private international law, where no formal "granting" process can

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125 Hans Jürgen Hilling, *Das kollisionsrechtliche Werk Heinrich Freiherr v. Coccejis (1644-1719)* (2002) 16.

126 Johann Marquard, *Tractatus de iure mercatorum* (Frankfurt 1662), lib 1 cap. 6 de confirmatione privilegiorum mercantiliū; cited after Gutzwiller, *supra* n. 78, 1060.

be observed, and thus both existence and scope of liberties are unclear.

## 5. „*Günstigkeitsprinzip*“

One problem of conceptualizing the country-of-origin principle as a traditional private-international-law rule is that the country of destination is not obliged to apply the laws of the country-of-origin, but only prohibited from posing additional barriers. If an activity is illegal under the law of the country of origin, the country of destination is free to validate the activity under its own, more liberal law. This is what led Basedow to conceptualize the country-of-origin principle as a *Günstigkeitsprinzip*, the application of the more favourable of the two laws.<sup>127</sup> The vested rights theory provides a more elegant conceptualization.<sup>128</sup> This is not true for its stronger version, which submits both the creation and the denial of rights to a certain legal order. For Beale, the country in whose territory the last act took place had the exclusive power to determine whether a right had been acquired. The US Supreme Court has held similarly.<sup>129</sup> Even Cocceji seems to argue this in his example of a testator who writes a will in the form prescribed by the law of his domicile, but not admissible under the law of the place where he writes the will.<sup>130</sup> This will is invalid not only under the *lex loci* but also under the *lex domicilii*, because the domicile cannot create rights outside its boundaries. But insofar as these theories deal also with the non-creation of rights, they lose their character of “pure” vested rights theories. This part must be explained by other factors, most importantly territoriality.

A vested rights theory confined to the enforcement of rights is in perfect congruence with a country-of-origin principle. Both ensure that positions acquired under one law cannot be taken away by another law. Both are silent regarding the opposite question whether restrictions imposed by one law must be enforced by another law. A *Günstigkeitsprinzip* is compatible with a vested rights theory that is confined to the creation of rights or privileges. Although states are required to recognize the rights already vested in a person, they are not prevented from assigning additional rights to that person.

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127 *Supra* I.B.1.

128 Antoine Pillet, "La théorie générale des droits acquis" (1925-III) *Rec des Cours* 485, 533: "la solution la plus libérale des deux".

129 *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (a Tennessee claim time-barred under Tennessee law cannot be enforced under Mississippi law). The case was virtually overruled by *Allstate Ins. Co. v. Hague*, *supra* n. , 308 n 11.

130 Cocceji, *supra* n. 106; cf. Hilling, *supra* n. 125, 51-54.

## 6. *Mandatory Requirements of Public Interest and Public Policy Exception*

The vested rights theory and the country-of-origin principle match perfectly regarding another aspect, the public policy exceptions. The Court of provided such an exception already in its Cassis de Dijon decision, excepting “mandatory requirements of public interest” from a country-of-origin principle.<sup>131</sup> Since then, the Court has developed an elaborate system of exceptions to the principle of mutual recognition. Similarly, the country-of-origin principle, as stated in directives, allows for exceptions for public policy not only outside the coordinated field, but even within it. This accords with the public policy exceptions formulated by proponents of vested rights theories. Dicey saw an exception for foreign rights inconsistent with the moral rules or the policy upheld by English law;<sup>132</sup> Beale’s theory provided for a (limited) public policy exception, and Pillet allowed for the non-enforcement of foreign rights that violated French public policy.

Critics consider these public policy exceptions incompatible with a private-international-law concept of the country-of-origin principle.<sup>133</sup> They are in good company with critics of the vested rights theory who considered the public policy exception an unwarranted denial of the vested rights theory. Both groups of critics ignore the particular structure of the theories they criticize. Even if the creation of rights is recognized, enforcement of these rights can be made subject to requirements of public policy just as the enforcement of domestic rights is. This is perfectly compatible with a public policy exception to the country-of-origin principle.

## 7. *The Common Market and the Circle of Civilized Nations*

A final similarity is illuminating. The country-of-origin principle is confined to EU Member States. There is no worldwide country-of-origin principle (although the proposal has been made to some extent the concept from the e-commerce directive to worldwide application).<sup>134</sup> The limitation has three connected reasons. First, the common market is a specific goal of the European

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131 Case C-120/78, *Rewe-Zentral-AG/Bundesmonopolverwaltung für Branntwein*, decision of 20 February 1979, [1979] ECR 649 para 8.

132 *Supra*, text accompanying n. 85.

133 de Baere, *supra* n. 22, 299-302.

134 Mark F. Kightlinger, “A Solution to the Yahoo! Problem? The E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law” (2003) 24 *Michigan Journal of International Law* 719.

Communities. There are no similar goals on a global level, at least to the same degree. Second, the member states of the EU share a common history and a common culture; their legal systems are not likely to be dramatically different from the start. Third, the similarity, or at least the equivalence, of different legal systems is actively pursued by the EU. This connection between equivalence and the country-of-origin principle can be seen most clearly in the area of the directives. Harmonization takes place within a “coordinated field”, and the country-of-origin principle is then confined to these coordinated fields.

The vested rights theory includes a similar restriction based on similar reasoning. Dicey limited his theory to rights acquired under the laws of “civilized countries”, with words that could come from a textbook on harmonization and mutual recognition in the EU: “the willingness of one State to give effect to rights gained under the laws of other States depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities.”<sup>135</sup> Similarly, Niboyet invoked the “circle of civilized nations”.<sup>136</sup> This community of civilized nations is replicated in the member states of the European Union. International law (which was likewise limited to “civilized nations”) provided a framework for the obligation to enforce foreign rights like the EU Treaty does today.

### **III. Criticism of Vested Rights Theories and the Country-of-Origin Principle**

That the country-of-origin principle is similar in significant respects to the vested rights theory is not only important for the heuristics of European law; in addition, it suggests a serious challenge. The vested rights theory in private international law has been thoroughly discarded. Does this make the country-of-origin principle untenable, too? If the arguments for its refutation applied similarly to the country-of-origin principle, this would be an important and far-reaching lesson for EU law from private international law. However, it can be shown that this is not the case – the country-of-origin principle can refute most of the criticism brought against the vested rights theory. This has implications for the contingency of arguments in private international law and for the peculiarities of private international law in the European Union.

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135 Dicey, *supra* n. 79, 116.

136 Niboyet, *supra* n. 96, no 937, p. 294.

## A. Criticism of the Country-of-Origin Principle and of Vested Rights

The vested rights theory has had to yield to devastating criticism in every country where it was once supported. The first crucial attack occurred as early as 1842 in Carl Georg Wächter's important article on private international law,<sup>137</sup> long before Dicey, Beale, and Pillet constructed their theories. Wächter's arguments and their subsequent approval by Savigny<sup>138</sup> ensured that the theory of vested rights never became strong in Germany. In the United States, where the vested rights theory had achieved canonic status as the basis for the first restatement of conflict of laws, a similarly devastating criticism was voiced especially by Walter Wheeler Cook.<sup>139</sup> In France, the vested rights theory is now all but dead<sup>140</sup> due to the forceful criticism by Arminjon.<sup>141</sup> In England, the theory's death was more peaceful but no less complete. After Dicey's death, one of the authors to replace him, Kurt Lipstein, changed General Principle I by replacing „duly acquired“ with „acquired ... according to the English rules of conflict of laws“.<sup>142</sup> This brought Dicey in line with Pillet while at the same time opening him to the same criticism voiced by Arminjon – namely, that the theory was superfluous.<sup>143</sup> Indeed, in 1971 Morris could

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137 Carl Georg von Wächter, „Ueber die Collision der Privatrechtsgesetze verschiedener Staaten (Fortsetzung), (1842) 25 *Archiv für die civilistische Praxis* 1, 1-9. A partial English translation of the relevant section on vested rights can be found in Nadelmann, *supra* n. 79, 16; a different part of this essay has been translated to English, together with an introductory note, as Kurt H. Nadelmann, “Wächter's Essay on the Collision of Private Laws of different States” (1964) 13 *Am J Comp L* 414.f.

138 Savigny, *supra* n. 45, 147.

139 Cook, *supra* n. 62; see also David Cavers, “A Critique of the Choice of Law Problem” (1933) 47 *Harvard Law Review* 173, 175-76.

140 E.g. Pierre Mayer & V Heuzé, *Droit international privé* (8<sup>th</sup> ed., 2004) nos 110-112, pp 81-82; Bernard Audit, *Droit international privé* (4th ed. 2006) no 233, p. 192.

141 Pierre Arminjon, « La notion des droits acquis en droit international privé » (1933-II) 44 *Rec des Cours* 1. See also Hermann Weiller, *Der Schutz der wohl erworbenen Rechte im internationalen Privatrecht* (Diss Frankfurt/M. 1934).

142 Dicey, *Conflict of Laws* LXV (6<sup>th</sup> ed. By Morris and others, 1949). Cf. F. A. Mann, Book Review (1949) 12 *Modern Law Review* 518, 520: “he has greatly improved the formulation of the vested rights theory”; the change was criticized as insufficient by Cavers, Book review, (1950) 63 *Harvard Law Review* 1278, 1280 (“Clarification here is needed”) and Max Rheinstein, Book Review (1950) 25 *New York University Law Review* 180, 182 (“What good beyond the avoidance of too radical a break with the tradition of the master's language can possibly be achieved with the preservation of a terminology reminiscent of the vested rights theory?”).

143 See *infra* 1.

safely proclaim that „the vested rights theory is dead“.<sup>144</sup> Conflict of laws as conflict of norms had effectively won the day.

The country-of-origin principle, by contrast, is extant – and vitally so. Its deletion from the services directive was owed to the political climate of the moment and is unlikely to be permanent. This survival is *prima facie* surprising, since the principle has engendered an amount of criticism nearly equaling that brought earlier against the vested rights theory. Moreover, *nolens volens*, the criticism that private-international-law scholars voice today against the country-of-origin principle mirrors the criticism brought earlier against the vested rights theory.

### 1. *The Need to Determine the Applicable Law*

One criticism of the country-of-origin principle is its unclear relationship with private international law. Regardless of Article 1(4) of the e-commerce Directive, authors state that the vested rights theory “really” is a conflicts rule, regardless of what it sets out to be.<sup>145</sup> Although the country-of-origin principle is presented as an alternative to a system designating the applicable law, it necessary both to determine the relevant legal order, through the connecting factor of “origin”, and to look to its legal provisions in order to determine whether a provider complies with the rules.

Similar criticism has been voiced against the claim of the vested rights theory, challenging the claim that the enforcement of rights avoids the need to apply foreign law. Both Dicey and Pillet had conceived theories of vested rights as an alternative to a system designating the applicable law. Dicey thought he could avoid the problem of applying foreign law altogether; Pillet thought he could do the same for at least some situations. Critics have pointed out that both hopes were illusory, for determining whether a right had been “duly acquired”, “régulièrement acquis” requires determining the legal order that allegedly created it. For Dicey’s theory this meant that, despite his argument to the contrary, the enforcement of foreign rights implied, necessarily, the designation and ap-

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144 J. H. Morris, *The Conflict of Laws* (1971) 523. Similarly Nicholas de Belleville Katzenbach, “Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law” (1956) 65 *Yale Law Journal* 1087, 1087-88 (“the theory of vested rights has been brutally murdered by Cook, Lorenzen and others, though it still flits ghostlike through many decisions.”); R. D. Carswell, *The Doctrine of Vested Rights in Private International Law*, (1959) 8 *International and Comparative Law Quarterly* 268.

145 Peter Mankowski, „Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt“ (2004) *IPRax* 385.



plication of foreign law.<sup>146</sup> Pillet's theory, it has been argued, works well only when, at the time when the right is created, contacts to only one country exist.<sup>147</sup> At the same time, the theory is unnecessary for such situations because their resolution is obvious.<sup>148</sup> If, however, contacts to more than one country exist, one has to decide which of these countries' laws should govern the creation of the right; then the process of enforcing foreign rights is no longer distinct from the process of designating the applicable law.<sup>149</sup> In short, the vested rights theory is nothing more than a misnomer for a theory that, like other theories, seeks to determine the law applicable to a transaction. The focus on rights is wrong, because rights are a fiction.<sup>150</sup> In reality, the enforcement of foreign rights necessarily implies the application of foreign law.<sup>151</sup>

## 2. *Circularity*

In *Centros*, the Court of Justice held that a company that has been validly created under the rule of one member state must be recognized by other member states. Critics have pointed to the circularity of this argument. Whether a company has been created validly under a certain law cannot be determined before that law has been found to be applicable in the first place. It is for the private international law norms of other countries, not for the country of origin itself, to determine the scope of its laws.

This circularity argument is well-known from the debate over the vested rights theory, pointing to its circularity.<sup>152</sup> A U.S. District Court formulated this criticism accurately in 1950: „It is of no great help to say that the rights cannot be changed because they are ‚vested‘, for by ‚vested‘ we mean essentially that we will not allow them to be changed.“<sup>153</sup> This criticism is more than one hundred years older. Frequently, Savigny is credited with its first formulation: „This principle leads into a complete circle; for we can only know what are vested rights if we know beforehand by what local law we are to de-

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146 Carswell, *supra* n. 144, 275.

147 Mayer & Heuzé, *supra* n. 140, no. 112.

148 Arminjon, *supra* n. 141, 58: „La nature d'une question ne change pas parce que sa solution est évidente.“

149 Arminjon, *supra* n. 141, 59 ff.

150 Lea Brilmayer, *Conflict of Laws* (2<sup>nd</sup> ed. 1995) 31, 37-41.

151 Elliott E Cheatham, „American Theories of Conflict of Laws: Their Role and Utility“ 58 *Harvard Law Review* 361, 380-1 (1945).

152 Carswell, *supra* n. 144, 279.

153 *Horwitt v. Horwitt*, 90 F.Supp. 528, 530 (D. Conn. 1950).

cide as to their complete acquisition.<sup>154</sup> But the first author to formulate the criticism was Wächter: „Anyway to decide the question whether our judge must decide, in certain cases, according to foreign laws, on the basis that he must protect duly acquired rights, probably rests on a *petitio principii*. If, in the matter of a legal relation established abroad, one wishes to claim for a right acquired under foreign law absolute protection also within one’s own country, one argues from a premise that has still to be proved, namely, that this legal relation is to be judged according to foreign, and not domestic, laws.”<sup>155</sup>

Another way to put the argument is that the theory is inconclusive. It is a plausible liberal argument against the retroactive application of laws that if state A has granted a right, state A cannot take the right away again. In fact, this was the political basis for a domestic version of the vested rights approach. But it simply does not follow that state B is under a similar obligation with regard to rights granted by state A. Translated into the EU context, England may be bound by its liberal rules for the creation of companies, but it does not follow that Denmark is similarly bound by them.

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154 Savigny, *supra* n. 45, 147 (William Guthrie, transl., Edinburgh 1869) “Dieser Grundsatz führt auf einen bloßen Zirkel. Denn welche Rechte wohl erworben sind, können wir nur erfahren, wenn wir zuvor wissen, nach welchem örtlichen Rechte wir den vollzogenen Erwerb zu beurteilen haben.”

155 Wächter, *supra* n. 137, 4 f (translation partly mine, partly following Nadelmann, *supra* n. 79, 16). The original German text is: “Überhaupt dürfte es auf einer *petitio principii* beruhen, wenn man die Frage, ob unser Richter nach fremden Gesetzen in gewissen Fällen zu sprechen habe, nach dem Grundsatz entscheiden will, daß er wohl erworbenene Rechte schützen müsse. Will man bei einem im Auslande begründeten Rechtsverhältnisse für das nach fremden Gesetzen erworbene Recht unbedingten Schutz auch im Inlande in Anspruch nehmen: so argumentiert man aus einer Prämisse, die noch gar nicht erwiesen ist, und setzt etwas voraus, was erst zu erweisen wäre, nämlich, daß jenes Rechtsverhältnis nach fremden und nicht nach einheimischen Gesetzen zu beurtheilen sei.” Wächter himself cites for his insight to August Siegmund Kori, *Erörterungen praktischer Rechtsfragen aus dem gemeinen und Sächsischen Civilrechte und Civilprocesse* III (Dresden, 1929) 3 note (Dresden 1929), who argues as follows against Tittmann (*supra* n. 112): “ob Jemand aus einer im Auslande vorgenommenen Handlung ein Recht erworben habe? bestimmt sich allererst darnach: ist die Handlung nach ausländischen oder inländischen Gesetzen zu beurtheilen?” (“Whether someone has acquired a right due to an act committed abroad, is determined primarily by whether foreign or domestic law must be applied to the act.”). Kori in turn responded to other aspects of Wächter’s essay; see Kori, „Ein Beitrag zu der Theorie über Collision der Gesetze verschiedener Staaten, vornehmlich zur Beleuchtung der Wächter’schen Ansicht“, (1844) 27 *Archiv für die civilistische Praxis* 309 (1844). On Kori’s approach see (briefly) Müller, *supra* n. 103, 216-7.

### 3. *Indeterminacy*

There is another problem with the country-of-origin principle. It is all good and well to give the country of origin exclusive regulatory competence, but this principle cannot determine which country qualifies as country of origin in the first place. This question is easy to answer when administrative actions, like registration, take place. It becomes much harder in the area of private law, in which mere factual connections matter.

The vested rights theory had to deal with a similar criticism: it cannot determine which legal order grants rights because laws cannot determine their own applicability.<sup>156</sup> To be complete, the vested rights theory requires an addition – namely, a criterion to determine which legal order is competent to grant rights. Two responses can be given. The first is Dicey's. Dicey admitted that his theory could not deliver this criterion.<sup>157</sup> At the same time, however, he did not think that this was a grave shortcoming. Whenever a legal system grants a right, he argued, there should be an assumption that this right was “duly” acquired and is therefore enforceable. This suggests a shift to a unilateral method.<sup>158</sup> The second response is to combine the vested rights concept with a criterion that determines the competent legal order. Beale and Pillet both chose this second response, albeit in different ways. For Beale, the necessary criterion was territoriality, based on his preference for a territorial understanding of the law in general. For Pillet, the necessary criterion followed from the application of general rules of private international law. We see that territoriality, which critics have often deemed a necessary element of vested rights theories,<sup>159</sup> is but one of various connecting factors compatible with the theory.

Both responses have weaknesses. The unilateral approach advocated by Dicey works well when the creation of rights is based on a formal act that is clearly recognizable – for example, the rendering of a judicial decision. Yet, whether a legal order creates a right without such a formal act is often hard to determine. Coupling the vested rights theory to an additional criterion as Beale and Pillet do weakens its explanatory power. Beale's strong emphasis on territoriality has given way to much criticism because this criterion was considered simplistic.<sup>160</sup> Pillet's idea to determine the legal order competent to create

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156 E.g. Savigny, *supra* n 45, 147 (“merely formal”). See, generally, H. L. A. Hart, “Self-referring Laws”, in: id., *Essays in Jurisprudence and Philosophy* (1983) 170-8.

157 Cf. Arminjon, *supra* n. 141, 37 ff.

158 Similarly Roosevelt, *supra* n. 120. 2467,

159 E.g. Carswell, *supra* n. 144, 271.

160 See already Ernest G. Lorenzen, “Territoriality, Public Policy and the Conflict of Laws” (1923-4) 33 *Yale Law Journal* 736.

rights with regard to the generally applicable law makes his vested rights theory redundant: since that order's law is applicable anyway, the notion of vested rights does not yield any additional analytical purchase.<sup>161</sup> However, this criticism only points to the theory's inconclusiveness without proving it wrong.

#### 4. *Insufficiency*

Another criticism of the country-of-origin principle points to its insufficiency. As a general approach, the principle would designate the country-of-origin's law as exclusively applicable. Since this is not the scope of the principle, regulatory gaps may occur. In its stricter version, the principle requires the institutions of the country of origin to regulate exclusively. For various reasons, these institutions may be disinclined to regulate, so underregulation is not unlikely.<sup>162</sup> If the principle is non-exclusive, this leaves the question of the otherwise applicable law open, if such a restriction is found to exist.<sup>163</sup>

Again, this criticism mirrors one voiced earlier against the vested rights theory. In fact, we find an early version already in Wächter's 1842 article: The theory of vested rights is insufficient. Even if it can explain why a court must refer to foreign law regarding the creation of a right, it cannot explain why a court must do the same regarding the non-creation of a right.<sup>164</sup> Like with the country-of-origin principle, there are two kinds of vested rights theories in this respect – one exclusive, the other non-exclusive –, and the criticism applies differently to each of them. Those theories that refer to foreign law for the non-creation of rights as well as for the creation of rights cannot be based only on a theory of vested rights; rather, they replace ordinary private-international-law methods with some other method – for example, Beale's territoriality method. However, those theories that refer to foreign law only for the creation of rights are necessarily incomplete. They require an additional set of norms to determine the law applicable to issues other than the creation of rights – be it forum law, as in Dicey's theory, or a law determined otherwise, as in Pillet's theory.

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161 E. Bartin, *Principles de droit international privé* I (1930) § 78, p. 195 ; Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* (9th ed. 2004) § 1 VI, p 25.

162 Mankowski, *supra* n. 145, 388-9.

163 See Horatia Muir Watt, « Aspects économiques du droit international privé » (2004) 307 *Rec des Cours* (2005) 25, 191-3.

164 Wächter, *supra* n. 137, 8-9.

## 5. *Formalism*

The country-of-origin principle, critics hold, emphasizes merely formal connecting factors over substantive connections. For example, the Court of Justice in *Centros* obliged Denmark to recognize a company as English although, undisputably, all relevant connections pointed to Denmark: the company had been set up by two Danes for their Danish business, the only contact to England, apart from the registration, was the formal address for the company at a friend's place. Similarly, the country-of-origin principle in the Services Directive might enable providers to establish a formal home in a member state with low regulation, although his economic interest would lie entirely in the country of destination.

Obviously, this mirrors the criticism against the vested rights theory. In a classic American casebook opinion,<sup>165</sup> an Alabama court applied the law of Tennessee to a tort claim following a railway accident, although all connections except for the place of the accident – plaintiff's and defendant's domicile, their employment contract, the defendant's alleged negligence – all led to Alabama. Thus, although Alabama had both the much greater regulatory interest and the closer connection, Tennessee law was applied on the purely formal basis that the plaintiff's right, if any, had been vested in Tennessee when the last event necessary for its creation, the injury, had occurred there.

## 6. *Policies*

The final argument may be the most important one. This is the policy argument, directed against the requirement of both the vested rights theory and the country-of-origin principle that states must give up part of their sovereignty to private rights and private parties. Mankowski makes exactly this argument against restrictions of regulatory laws of the country of destination when he argues, against the country-of-origin principle for competition law: "This is an eminently political decision. Every state must take this decision for itself and for its own market".<sup>166</sup> Wächter expressly invoked the same argument against the vested rights theory: „In any event, the legislator of a foreign state can easily recognize rights which are completely opposed to the moral and religious principles, the notions of law and justice and the requirements of public policy, the security of transactions and the care for the citizens' economic well being,

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165 *Alabama Great Southern R.R. Co. v. Carroll*, 97 Ala. 126 (S. Ct. Ala., 1892). Although the decision predates formulation of the vested rights theory in the US, its reasoning is fully compatible.

166 Mankowski, *supra* n. 145, 387.

on which our state's legislation is founded. Shall now our state have to recognize and protect such rights, e.g. slavery, right to usurious interest rates, to debts from gaming etc., if and because they were duly acquired in that foreign state under *its* laws?"<sup>167</sup>

The criticism based on policy rests on three different considerations. The first goes to the relationship between two countries and the allocation of regulatory power between them. Should a rule point to the affected legal order or to the country of origin? The affected legal order may, of course, be determined in different ways. For Mankowski, it is the affected market; for Wächter, it was always the forum; for. Nonetheless, all critics agree that the country of origin, or the country under whose law a right is created, is frequently not necessarily the country with the closest connection or the country that is otherwise the most appropriate for regulation.

The second consideration in the policy-based criticism concerns not the relationship between countries so much as the relationship between the state and the individual. Critics of the country-of-origin principle point to a vital state interest in protecting the (social) welfare of its own citizens against the individual interests of suppliers; the oppose what they see as an undue emphasis on market liberalism over the social welfare state. This creates a notable parallel to the vested rights theory which was born as a classical liberal theory of private international law – it protects rights that have been granted by one state against all other states. This is obvious in the due process clause of the US Constitution, but similar considerations can be found in other formulations of the theory. One of Pillet's disciples, Bernard, justified the theory of *droits acquis* not with the mutual respect between sovereigns, but rather with the respect due to private rights.<sup>168</sup> The heyday of vested rights theories in the 19<sup>th</sup> century coincides with the heyday of political liberalism.<sup>169</sup> Likewise, their demise in the 20<sup>th</sup> century coincides with the rise of the welfare state. 20<sup>th</sup> century critics of the vested rights theory see the judge's task as finding a good solution for the common good, rather than protecting individual rights and thereby overlooking the common good.

The third policy consideration concerns the relationship between the parties. Both the vested rights theory and the country-of-origin principle favour one party over the other on the basis of abstract criteria. This has spurred criti-

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167 Wächter, *supra* n. 137, 6 (my translation).

168 Bernard, « Principes du droit international privé » 1906 *Journal du droit international (Clunet)* 1068 f.

169 Müller, *supra* n. 103, 298-307; Werner R. Wichser, *Der Begriff des wohlverworbenen Rechts im internationalen Privatrecht* (Polygraphischer Verlag AG Zurich, 1955) 18.

cism against both. As regards the country-of-origin principle, critics ask why suppliers should be preferred to consumers.<sup>170</sup> As regards the vested rights theory, Kropholler asks a structurally similar question: Why should the creditor (who invokes his right) should be preferred to the debtor (who can only invoke his liberty).<sup>171</sup> Indeed, this criticism of both is particularly apt in consumer law (to which currently no country-of-origin principle is applied). Traditional private international law protects the passive consumer against the active supplier – if a consumer is contacted in his home state by an out-of-state supplier, he can rely on the application of his home law. The country-of-origin principle, like the vested rights theory, would rather protect the supplier, although – thus the criticism – it should be easier for the supplier, as the moving party, than for the consumer to comply with foreign law.

## **B. The Country-of-Origin Principle Can Refute the Criticism**

These five bases for criticism were enough to bring the vested rights theory down. The theory was rejected because it did not dispense of the need to determine the applicable law, it was circular, indeterminate and insufficient, and its underlying policy was rejected. However, although the same bases have been brought forward against the country-of-origin principle, they have not had similar success. Indeed, it can be shown one by one how the country-of-origin principle can refute the criticism. The main structural reason lies in the differences between the international legal scene of the vested rights theory and that of the EU with its country-of-origin principle. The main policy reason lies in the returned force of liberal positions.

### *1. The Need to Determine the Applicable Law*

What, first, of the criticism that the vested rights theory does not make irrelevant the determination of the applicable law? The criticism is weak even against the vested rights theory when the creation of a right can clearly be established. If a right has been created and need only be enforced, this enforcement can be separated from the creation of the right. The same is true, and perhaps more forcefully so, for the country-of-origin principle, which is not designed as a method to determine the applicable law. The principle leaves the normal process of determination intact; it only provides constraints, alterations

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170 Wilderspin & Lewis, *supra* n. 50, 33 ; de Baere, *supra* n. 22, 303-05; Mankowski, *supra* n. 145, 386-88.

171 Jan Kropholler, *Internationales Privatrecht* (4<sup>th</sup> ed.) § 21 I 2 b, pp. 143-44.

regarding this process. This does not dispense with the need for the judge to first determine what the country-of-origin is, and then to examine whether the relevant party has complied with that country's law. However, this is indeed a process more akin to the determination of a preliminary question than to an actual application of that law.

## 2. *Circularity*

The argument of circularity rests on the assumption that states retain mutual sovereignty and that the enforcement of foreign rights is a matter for sovereignty. If a superior set of norms can be found that restricts sovereignty and that requires states to recognize vested rights, the circularity claim falls apart, since then the duty to enforce these rights no longer arises from the foreign law that created them but rather from this superior norm whose binding force is beyond doubt. Critics have been all too ready to adopt Wächter's criticism of circularity without realizing that, unlike Wächter, most authors proposing a more elaborate version of a vested rights theory assume the existence of such a higher set of norms:<sup>172</sup> natural law,<sup>173</sup> *ius gentium*,<sup>174</sup> general common law,<sup>175</sup> customary international law,<sup>176</sup> or simply a legally relevant principle of justice.<sup>177</sup> Within a federal system like the US – or a Treaty based community of states like the EU – a constitution or a Treaty can easily furnish this set of norms. It is widely ignored that even Wächter himself admitted as much. Normally presented as the staunchest opponent of the vested rights theory, he accepted the theory's validity regarding the relationship as between the different states within the German empire.<sup>178</sup>

This suggests that the circularity argument is intrinsically linked to an idea about state sovereignty. This is why the criticism of circularity, so fatal with regard to the vested rights theory in private international law, loses its force with regard to the country-of-origin principle of European law. There is no doubt that EU law, both as primary law (in particular, the basic freedoms) and as secondary law (in particular, the directives based on the country-of-origin

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172 See Müller, *supra* n. 103, 309-10.

173 See Müller, *supra* n. 103, 185-86 (discussing Tittmann).

174 Cocceji, *supra* n. 106.

175 Restatement (First) § 311, comment d; cf Brilmayer, *supra* n. 150, 40 f.

176 Gutzwiller, *supra* n. 78, 1065.

177 Romeo Maurenbrecher, *Lehrbuch des gesamten heutigen deutschen Privatrechts I* (Bonn, 1840) 312.

178 Karl Georg von Wächter, *Pandekten I* (Leipzig, 1880) 152-3.



principle) is a superior set of norms.<sup>179</sup> The country of origin provides only the laws with which a provided must comply; the obligation for all other states to recognize the results of such compliance rests not on those laws but rather on a superior set of norms. The restriction of sovereignty within the European Union weakens the circularity argument.

### 3. *Indeterminacy*

The indeterminacy criticism – that the vested rights theory cannot provide criteria for determining the applicable law – is harder to refute; it has some force against the country-of-origin principle, as well. That principle alone cannot determine what counts as the country of origin; other criteria must be found. Indeed, if the word “origin” is meant to conceal the fact that the choice of what counts as the country of origin is an actual *political* choice, the criticism is as strong here as against the vested rights theory. Why, for example, is the supplier’s rather than the consumer’s state considered as the “country of origin”? Basedow’s own argument for favouring the supplier is that suppliers act as motors of European integration.<sup>180</sup> The counterargument brought by others is that the costs saved by suppliers are merely shifted to consumers, so no efficiency gain is achieved.<sup>181</sup> Both positions are different proposals for what should count as a connecting factor—their both being based on considerations of the European market. None of them is deduced from the notion of country of origin alone.

This suggests that the country-of-origin principle, like the vested rights theory, requires an additional method to determine which country should count as the country of origin. However, it suggests that such a method can be developed on the basis of the idea of the common market. Like the vested rights theory, the country-of-origin principle is indeterminate, but not intrinsically incoherent.

### 4. *Insufficiency*

What about the insufficiency argument that the country-of-origin principle cannot answer all questions as to what is the applicable law? It is indeed the case that the country-of-origin principle makes only rights, not liabilities and other restrictions binding. However, the reason for this limitation is that the

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179 ECJ (15 July 1964), case 6/64, *Costa v. ENEL*, 1964 ECR 585.

180 Basedow, *supra* n. 43, 18-19.

181 Mankowski, *supra* n. 145, 387.

impetus behind the principle is to restrict barriers to trade in the form of legal relations, not to create legal regimes. Just as rights function as trumps over the objective law, to use Ronald Dworkin's language, so the country of origin acts functions as a trump over the objective law, while leaving it intact in general.

Properly understood, the country-of-origin principle enables a slight but important reformulation of the *Günstigkeitsprinzip*. The relationship between the country-of-origin law and the otherwise applicable law is not the relation between two different legal systems, where the law's applicability is alternative: that of one system or the other. Rather, the relationship is a combination of a right, granted by the law of the country of origin, and a set of laws – those of the country of destination. The country-of-origin principle and traditional private international law together determine both the applicable law and its treatment of certain rights. Substituting the principle for traditional private international law would thus go beyond what the common market requires and in fact beyond what makes sense in a common market. The restriction of the country-of-origin principle to limited questions of rights to provide services is an advantage rather than a disadvantage.

## 5. *Formalism*

The characterization of the country-of-origin principle as formal is apt. However, as criticism this characterization is less strong than it was against the vested rights theory. There are several reasons for this. First, we are currently observing a revived preference for formal over substantive connecting factors in the law. The reason is that formal rules are easier for parties to predict, and party expectations are considered more important than the regulatory interests of states. As a matter of fact, ignoring these regulatory interests prevents regulatory monopolies of the most-affected states. Second, formal factors, because they are easier to manipulate, enable parties to choose the laws applicable to them and may thereby further regulatory competition between member state laws as a desirable path towards more efficient laws. One may oppose these policies that are used to justify the formalism of the country-of-origin principle, but such criticism shifts the debate from one over form to one over substance.

However, just as with the vested rights theory before, the alleged predictability and ease of administration have limits. Where the county of origin can be determined easily, as with the registration of a company, predictability both as to that country and to the scope of applicable law can indeed be achieved. Where on the other hand no such formal act takes place, predictability is much harder to achieve. The Services Directive, to use one example, would have left a huge scope for debate as to the scope of its country-or-origin principle.

## 6. *Policies*

Discussion of the formal character has already suggested that, since the logical and structural arguments are ultimately not fatal for the country-of-origin principle, the policy arguments become the most important ones. Here we can see how the clash between traditional private international law and the European country-of-origin principle is transformed from a mere methodological clash to a clash of principle. Indeed, the central criticism brought forward *against* the vested rights theory reappears as the main justification *for* the country-of-origin principle. If the vested rights theory is said to yield insufficiently to the policies of sovereign states, then this is a reason for the European Union to adopt it, or the equivalent country-of-origin principle. After all, to disregard certain policies of member states is a goal of the common market. Overcoming such policies is considered necessary for the benefit of the market participants.

Such policy differences can account for the different connecting factors used by traditional private international law and the country-of-origin principle respectively. The country-of-origin principle, based as it is on a formal connecting factor, frequently designates a law different from the law with the closest connection, which traditional private international law would designate. This is not an accident, and it can therefore not be remedied by simple assimilation of the factors in both approaches. Traditional private international law, in designating the applicable law, will frequently designate the legal order with the greatest regulatory interest, especially in the area of economic law, where most clashes occur. The country-of-origin principle, by contrast, will frequently designate a legal order that is relatively uninterested in strong regulation, especially of its exporters. Whereas traditional private international law may tend towards overregulation, the country-of-origin principle may counter this effect because it encourages underregulation.<sup>182</sup> The combination of both may be most likely to achieve an efficient equilibrium.

Similarly, the criticism that individuals are preferred over states can be turned into a supporting argument. If the assumption is correct that the member states are regulating more than what is good for its individual citizens, then the country-of-origin principle could also be justified in favouring the interests of individuals over the interests of states, especially those of the country of destination. This is in tune with Christian Joerges' interpretation of the *Centros* decision as one that gives citizens a right to hold their governments accountable

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182 Ralf Michaels, "Two Economists, Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example", in: *An Economic Analysis of Private International Law* (Jürgen Basdow & Toshiyuki Tono eds. 2006) 143, 178-9.

for their laws.<sup>183</sup> Provided each member state complies with certain minimum requirements (a provision fulfilled through harmonization), it can be considered an undue burden for a supplier to have to comply with more than one law.

Finally, the criticism that the vested rights theory and the country-of-origin principle favour one class of individuals over another without sufficient justification can be countered, at least from a particular perspective. Take, for example, a consumer contract. To critics, the passive consumer should be protected against the active supplier. His reliance on applicability on his home law must be protected, because he has not left his home. To proponents of the country-of-origin principle, the active supplier must be protected against the passive consumer for the sake of the common market. The supplier is furthering the common market by his transnational conduct; this is worthy of support from a European perspective. The passive consumer must be turned into an active consumer, and the best way to do this is by taking away the legal advantages of passivity. Obviously, this policy clash cannot be resolved on the basis of abstract and neutral principle. But it seems plausible to think that the consumer protection of traditional private international law is well balanced with a counterweight.

#### **IV. Some Broader Insights**

We have seen that the country-of-origin principles is indeed best understood as a reinvigoration of the vested rights theory, and that both structural reasons of the European Union and current policy preferences protect the country-of-origin principle against the criticism that brought the vested rights theory down. Now we can put these findings into a broader perspective. Four broader insights emerge.

A first insight from the comparison with the vested rights theory suggests the limits of a country-of-origin principle. The vested rights theory was successful as long as it was not used as the exclusive approach to private international law. Only when it was expanded, by Dicey and Beale, to cover all questions of private international law, the creation and non-creation of rights, it failed – first because it was badly suited for questions of non-creation of rights, second, because it functioned badly in situations where, absent a formal granting procedure, it was not clear whether a right had been granted or not. The country-of-origin principle would benefit from a similar restriction. First, it

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<sup>183</sup> Joerges, *supra* n. 4, 178-9.

should remain applicable only to the granting of rights or privileges, not the imposition of requirements. It is as badly suited for the general determination of the applicable law as the vested rights theory. Second, the principle works best where a clear formal act of granting takes place, like in the incorporation of a company, or the issuance of a licence. The informal creation of rights is better achieved through traditional private international law.

A second insight goes the other way: Despite their similarity, the country-of-origin principle and vested rights theory differ in important ways. The two share a common structure and fulfil similar functions, but the justifications for those structures and functions are quite different. The vested rights theory was justified by reference to a higher set of principles thought beyond political control – *ius gentium*, general international law, principles of justice. By contrast, EU law is based on economic and political considerations; while EU law is also a higher set of rules and principles, it is by no means beyond human control. The difference is important: Acceptance of the vested rights theory presupposed only the conviction that a higher set of principles exist. Acceptance and scope of the country-of-origin principle, by contrast, presuppose a prior discussion of the appropriate economic and political goals to be served by the law. In consequence, discourse about private international law and its methods must become a discourse about economics and politics in order to remain meaningful. Because private international lawyers know the vested rights theory, they should be well equipped for such debates, but they must be ready to lead them. The return of vested rights provides an excellent opportunity for such renewed debates.

Third, the comparison with the country-of-origin principle with its openly political justification highlights the role that politics has played for the rise as for the fall of the vested rights theory. At the same time, in focusing on the rise and fall, the study should also have shown the value of historical analysis. The vested rights theory emerged from ideas of early liberalism: Individuals should have rights that the government cannot take away from them; in times of emerging commerce this protection could not be confined to innate rights, but had to be extended to acquired rights. By extension, in international trade such rights had to be protected against foreign governments. At its heart, the vested rights theory was thus a liberal theory that sought to protect a space of private ordering against the policies of the state, very much like the country-of-origin principle is based on liberal ideas of the predominance of the Common Market over the member states. This idea of protection of spaces against the state is still visible in reconceptions of rights theories of private international law, like

Lea Brilmayer's theory of political rights.<sup>184</sup> The theory predates the 19<sup>th</sup> century; it is, rather, contemporaneous to the justification of subjective rights in post-medieval political thought. Nonetheless, it was in the 19<sup>th</sup> century that vested rights were first thought to be the exclusive basis for private international law. These attempts failed like the underlying jurisprudential idea conceiving of legal systems as mere regimes for the protection of rights: rights as the creation of state laws cannot simultaneously trump these laws. However, the rejection of the vested rights theory went beyond this point and now had an equally political flavor. The legal realists' critique of rights came hand-in-hand with a rejection of the public / private distinction and an emphasis on state policies, finding its high point in the New Deal. The realists' perspective that law was „really“ not about rights, but about state policies replaced one kind of essentialism with another. In short, the vested rights theory was a pre-national theory that broke down in the heyday of nationalism. Now that the European Union has brought about a post-national constellation in which states' sovereignty is restricted again, it is not surprising that an equivalent of the vested rights theory is being reborn as well.

More generally, history shows that both theories and their restrictions are rarely abstract truths but rather are contingent upon broader concepts – here concepts of law and sovereignty. In a model of international relations in which the state's sovereignty determines everything, there is no place for a theory of vested rights. If no higher set of values exists that can bind the state, and if private rights are considered entirely subject to the states' determination, then all questions are questions of allocation of prescriptive sovereignty; vested rights that restrict this sovereignty have no role to play. Yet the common market is not such a world. There is a superior set of rules in EU law, and the restriction of state sovereignty is one of its declared goals for the benefit of the common market.

A final, normative insight to be drawn from the history of these theories and from their criticism and its rebuttal applies to the future of private international law in general. Arguably, neither a pure focus on individual interests nor a pure focus on collective interests appears appropriate for private international law (or for any area of the law). This pluralism of interests is best served by a pluralism of methods. To base all private international law within the European Union on a country-of-origin principle would be folly. So would a total disregard of the principle. Private international law in the European Union will remain a two-track endeavour,<sup>185</sup> but this is its asset rather than its burden. The

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184 Brilmayer, *supra* n. 150, 221 ff.

185 It is a three track endeavor if we distinguish, within “traditional” private international

country-of-origin principle and traditional, state-based, private international law are different techniques with different policies – one cannot be translated into the other. This is a blow for those who hope for a coherent system of private international law. But it is encouraging for those who believe that internal tensions within a legal system are necessary for development. A two-track concept of conflict of laws can bring these tensions to the fore and thus enable us to formulate and address them.

This lets us see the protests against the country-of-origin principle in France and the Netherlands in a new light. If private international lawyers recognize these protests as the struggles over the country-of-origin principles as elements in a debate that is central to the methods and the politics of their very own discipline, they may well use this as an opportunity for renewal in their very own field. This should be good news for European law, but it should be particularly good news for private international law.

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law, the Savignyan multilateral approach from the unilateral approach of governmental interest analysis.





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