

**Improving Cross-Border Compliance by Applying Foreign Public Law  
in State-As-Party Cases**

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## Abstract

In both common and civil law countries, the so-called “public law taboo” prohibits the applicability of foreign public law in cases where a foreign state is a party whenever this involves an exercise or assertion of a prerogative state-right. The central assumption of this view is the belief that the application of foreign public law in domestic courts must be understood as an exercise of foreign state power, which is believed to undermine the domestic state’s sovereignty. *Hemler* rejects this view by focusing on the doctrinal consequences of applying foreign law. Following the principle of autonomy, according to which the Conflict of Laws is a national matter, *Hemler* argues that the foreign state’s sovereign directive of applicability (“imperative element”) is always ignored whenever the domestic state applies foreign law. *Hemler* continues to reject several other popular counter-arguments against the applicability of foreign public law and explains why, nevertheless, the application of foreign public law will remain a comparably rare occurrence. *Hemler* finishes with a study of two cases in the fields of tax and criminal law, proposing the application of foreign public law as an alternative to legal assistance and recognition of foreign judgements to improve cross-border accountability of private individuals and multinational corporations.

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## A. The “Public Law Taboo”

It is well known that Private International Law provides extensive possibilities to apply foreign private law. However, this openness ceases to exist regarding public law. It seems like domestic courts or other government authorities only apply their public law. This principle is commonly called “public law taboo”<sup>1</sup> in common law countries. It also exists in civil law countries, albeit to a varying degree and under different names.<sup>2</sup>

Given that a universally accepted definition of “public law”<sup>3</sup> does not exist (at least in common law countries), the public law taboo’s scope cannot be derived from its name alone. If one defines “public law” as “law that is concerned with the exercise of power within a state”<sup>4</sup>, then it becomes evident that the applicability of foreign public law so understood is already firmly established.<sup>5</sup> Let us consider three examples.

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<sup>1</sup> Lowenfeld, Andreas F, ‘Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction’ in *Collected Courses of the Hague Academy of International Law* (Brill 1979), 322 ff; Strebel, Felix D, ‘The Enforcement of Foreign Judgements and Foreign Public Law’ (1999) 21 *Loy. L.A. Int'l & Comp. L.J.* 55; Dodge, William S, ‘Breaking the Public Law Taboo’ (2002) 43 *Harv.Int'l L.J.* 161, 165 ff; Lowenfeld, Andreas F, *International litigation and the quest for reasonableness: Essays in private international law* (Repr. Clarendon Press), 4 f.

<sup>2</sup> Philip, Allan, ‘Mandatory Rules, Public Law (political rules) and choice of law in the E.E.C. Convention on the law applicable to contractual obligations’ in P. M North and UK National Committee of Comparative Law (eds), *Contract conflicts: the EC Convention on the Law Applicable to Contractual Obligations, a comparative study* (North-Holland Pub. Co. 1982), 91 f; Ohler, Christoph, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts* (Mohr Siebeck), 33 ff; Bureau, Dominique and Muir Watt, Horatia, *Droit international privé - Partie générale* (3<sup>rd</sup> edn, PUF), 135 f.

<sup>3</sup> The public-private distinction is a controversial subject in both common and civil law countries. However, the existence of a clear-cut distinction is even more doubtful in common law countries (Harlow, Carol, ‘“Public” and “Private” Law: Definition without Distinction’ (1980) 43 *MLR* 241; Dodge, William S, ‘The public-private distinction in the conflict of laws’ (2008) 18 *Duke J. Comp. & Int'l L.* 371, 385 f.; MacConnaughay, Philip J, ‘Reviving the “public law taboo” in international conflict of laws’ (1999) 35 *Stan.J.Int'l L.* 255, 273; Peuter, Stanislas de, ‘The application of foreign public law in conflict of laws: an outline’ (1990) 1 *I.B.L.J.* 79, 87).

<sup>4</sup> On this leading definition of public law: Elliott, Mark and Feldman, David, ‘Introduction’ in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015), 1; Stanton, John and Prescott, Craig, *Public law* (2<sup>nd</sup> edn, OUP), 1.

<sup>5</sup> Dodge (n 1), 164 f; Dodge (n 3), 391; Decroos, Matthieu J, ‘Criminal Jurisdiction over Transnational Speech Offenses: From Unilateralism to the Application of Foreign Public Law by the National Courts’ (2005) 13 *Eur.J.Crime Cr.L.Cr.J.* 365, 395; Baade, Hans W, ‘The operation of foreign public law’ (1995) 30 *Tex.Int'l L.J.* 429, 480; Kegel, Gerhard and Seidl-Hohenveldern, Ignaz, ‘On the Territoriality Principle in Public International Law’ (1982) 5 *Hastings Int'l & Comp.L.Rev.* 245, 252; Lehmann, Matthias, ‘Regulation, global governance and private international law: squaring the triangle’ (2020) 16 *J Priv Int L* 1, 29; Watt, Horatia M, ‘Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy’ (2002) 9 *Colum. J. Eur. L.* 383, 404. See also Institut de Droit International, *Session of Wiesbaden: The Application of Foreign Public Law* .

(1) Foreign public law is applied as an integral part of the foreign *lex causae*.<sup>6</sup>

(2) Foreign public law is applied as a so-called preliminary question.<sup>7</sup>

For example, if a Conflict of Laws rule refers to a person's nationality, and a party claims to be a national of Ruritania, English courts determine the party's nationality under Ruritanian (public) citizenship law.<sup>8</sup>

(3) Foreign public law is applied as an overriding mandatory provision of the foreign place of performance.<sup>9</sup>

### *1. Scope and Examples*

An analysis of the cases where courts referred to the "public law taboo" shows that its scope is less extensive than the name might suggest: In fact, the public law taboo only aims to ban the applicability of foreign public law in cases where a foreign state is a party and if an exercise or assertion of a prerogative (foreign) state-right is involved.<sup>10</sup> Hence, the public law

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<sup>6</sup> Baade (n 5), 478 ff.; Dicey, Albert V, Collins, Lawrence and Morris, John H C, *Dicey, Morris and Collins on the conflict of laws* (15. ed. Sweet & Maxwell), [5-031]; Philip (n 2), 106; Dodge (n 1), 176 ff. (albeit with lacking conciseness); van Hecke, George, 'Foreign Public Law in the Courts' [1969] 5 R.B.D.I. 62, 64 (regarding foreign income tax law). A classification as foreign overriding mandatory provisions (see example (3)) is unnecessary in these cases since the respective provisions already form part of the *lex causae*.

<sup>7</sup> Dicey, Collins and Morris (n 6), [18R-063]; Strebel (n 1), 62; Weller, Matthias, 'Iran v. Barakat: Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective' (2007) KunstRSp 172, 180; Baade (n 5), 459 ff. The same is true concerning the incidental application of foreign public law, e.g., when foreign road and safety rules are applied according to Art 17 Rome II Regulation (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40).

<sup>8</sup> *Stoeck v Public Trustee* [1921] 2 Ch 67; Dicey, Collins and Morris (n 6), [1-085].

<sup>9</sup> *Eurobank Ergasias SA v Kalliroi Navigation Co Ltd* [2015] EWHC 2377 (Comm), [2015] 8 WLUK 112, [36]; Dicey, Collins and Morris (n 6), [1-053] ff. This rule is codified in Art 9(3) Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6), cf. Case C-135/15 *Republik Griechenland v Grigorios Nikiforidis* [2016] ECLI:EU:C:2016:774, [50].

<sup>10</sup> See Mann, Frederick A, 'Prerogative Rights of Foreign States and the Conflict of Laws' [1954] 40 *Transactions of the Grotius Society* 25, 34 regarding the term "prerogative right". See also *Iran v Barakat Galleries Ltd* [2009] QB 22; [2008] 1 All ER 1177, [113]. *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* [1988] 165 CLR 30, [24] (Australian High Court).

taboo generally applies to foreign tax<sup>11</sup> and criminal<sup>12</sup> law. Three examples might serve to illustrate these cases further (in all of them, the respective claims have been rejected by reference to the public law taboo):

(1) In *Government of India v Taylor*<sup>13</sup>, the state of India tried to recover taxes from a UK-registered company with past trading activities in India.

(2) In *QRS 1 ApS v Frandsen*<sup>14</sup>, a Danish liquidator sued the defendant for restitution and damages due to alleged asset stripping in Denmark. Since Danish tax authorities were the only creditors, any recovered sum would have been passed on to the Danish state.

(3) In *Schemmer v Property Resources Ltd*<sup>15</sup>, a US court appointed the plaintiff as receiver of the defendant's London-based assets. The US court order was founded on alleged fraudulent practices of several people who controlled the defendant's holding company, which the US court found to be a violation of the US Securities Exchange Act 1934.

There is a more recent tendency to extend the public law taboo to other public laws, most noticeably in cultural heritage and national security law.<sup>16</sup> For example, in *Attorney-General*

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<sup>11</sup> *Holmann v. Johnson* [1775] 98 ER 1120 (KB), 1121; *Government of India v Taylor* [1955] AC 491 (HL), [1955] 1 All ER 292, 506; *Peter Buchanan Ltd. v McVey* [1955] AC 516 (HL), [1954] IR 89, 529; *QRS 1 ApS v Frandsen* [1999] 1 WLR 2169. For a fuller discussion of the revenue rule: Briggs, Adrian, 'The Revenue Rule in the Conflict of Laws: Time for a Makeover' (2001) Sing. J. Legal Stud 280, 285 ff.; Mallinak, Brenda, 'The Revenue Rule: A Common Law doctrine for the twenty-first century' (2006) 16 Duke J. Comp. & Int'l Law & Pol. 125, 147; Cheshire, Geoffrey C and others, *Private international law* (15<sup>th</sup> edn, OUP), 116. This rule is also accepted in other common law countries, albeit with some exceptions in the US and Canada (*Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964), 375 f.; *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* 597 F.2d 1161 (9th Cir. 1979), [6] ff.; MacConnaughay (n 3), 276; Collins (n 11), 133.). It has not been applied where a foreign state asked for the taking of evidence in England for the purpose of tax prosecution (*Re State of Norway's Application* [1990] 1 AC 723, [1989] 2 WLR 458).

<sup>12</sup> *Ogden v Folliott* [1790] 3 TR 726 (KB), 100 ER 825, 733; *Schemmer v Property Resources Ltd* [1975] Ch 273, [1974] 3 All ER 451, 288; *Iran v Barakat Galleries Ltd* (n 10), [111] For a fuller discussion: Dicey, Collins and Morris (n 6), [5-027] f. The principle is equally accepted in other common law countries: United States: *The Antelope* 23 US 66 (1825), 123; *Banco Nacional de Cuba v. Sabbatino* (n 11), 375 f.; *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (n 11), [6]. Canada: *Huntington v. Attrill* [1893] AC 150 (Privy Council Canada), 156 (Watson).

<sup>13</sup> *Government of India v Taylor* (n 11), 506.

<sup>14</sup> *QRS 1 ApS v Frandsen* (n 11). The case shows that the foreign state does not have to be a party itself, as long as it is the main beneficiary. See also *Peter Buchanan Ltd. v McVey* (n 11), 529.

<sup>15</sup> *Schemmer v Property Resources Ltd* (n 12), 288.

<sup>16</sup> *Attorney-General of New Zealand v Ortiz* [1984] AC 1 (HL), [1984] 2 WLR 809; *Iran v Barakat Galleries Ltd* (n 10), [128]; *Mbasogo v Logo Ltd* [2007] QB 846, [2006] EWCA Civ 1370, [42] ff.; *Williams & Humbert Ltd. v W. & H. Trade Marks (Jersey) Ltd.* [1986] AC 368 (HL), [1986] 1 All ER 129 (regarding expropriatory decrees in Spain); *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [22] ff. See the *Spycatcher* case regarding national security law: The British government tried to prevent the publication of a book written by former MI5 Assistant Director Peter Wright. Based on UK law, the sale was banned in the UK. Since the book was still available in other states, among others Australia, the UK tried to ban the

of *New Zealand v Ortiz*, the state of New Zealand tried to recover a Maori carving that had been unlawfully exported to the UK. According to the law of New Zealand, the ownership of any object exported without permission was automatically transferred to the state. However, due to the public law taboo, the House of Lords denied New Zealand's property claim.<sup>17</sup>

## ***2. The Public Law Taboo's Nature and the Foreign State's Role***

The public law taboo's legal nature remains unclear: On the one hand, it could be classified as a rule on domestic or international jurisdiction according to which English courts are incompetent to deal with claims involving an exercise or assertion of a sovereign right.<sup>18</sup> On the other hand, the principle might be understood as a Conflict of Laws rule that blocks the application of foreign public law<sup>19</sup> or the recognition of foreign claims based on foreign public law<sup>20</sup>.

It also remains uncertain to what degree the foreign state must be involved to classify as an "exercise or assertion of a sovereign right". As *QRS I ApS v Frandsen* and other cases show, the foreign state does not have to be a party itself as long as it is the main beneficiary.<sup>21</sup> However, the applicability of foreign public law in private party cases is apparently not considered an "exercise or assertion of a sovereign right".<sup>22</sup> Therefore, it seems like the public

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sale in Australia as well. The Australian High Court dismissed the UK's application (*Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [22] ff.).

<sup>17</sup> *Attorney-General of New Zealand v Ortiz* (n 16), 20 f. For a fuller discussion of the case see Collier, J. G, 'Conflict of Laws and Enforcement of Foreign Public Laws: Antipodean Attitudes' (1989) 48 C.L.J. 33.

<sup>18</sup> See *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [22]; Weller (n 7), 180; Briggs (n 11), 296.

<sup>19</sup> Baade (n 5), 482.

<sup>20</sup> Cf. Art 1(2)(b) of the UK Foreign Judgements (Reciprocal Enforcement) Act 1933, according to which foreign judgements regarding "a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty" are denied recognition. Apart from that, explicit statutory provisions regarding the inapplicability of foreign public law do not exist. Art 14(3)(a)(ii) UK Private International Law Act 1995 deliberately circumvented the problem by stating that the UK provisions concerning the choice of law in tort and delict do not authorize the application of foreign law insofar as to do so "would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum."

<sup>21</sup> See also *Peter Buchanan Ltd. v McVey* (n 11), 529.

<sup>22</sup> See the introductory examples. The Australian High Court tried to clarify the role of the foreign state by equating the public law taboo with "claims [...] which arise from the exercise of certain powers peculiar to government." (*Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [24]).

law taboo does not want to prevent the coincidental advancement of the foreign state's public law but only its purposeful enforcement as a prerogative right of the foreign state.<sup>23</sup>

### 3. *Justifications*

In the past, the courts seemed to consider the non-applicability of foreign tax and penal law self-evident to a degree that made any in-depth justification superfluous. However, courts and scholars spent significant doctrinal efforts justifying any extension of the principle to other public laws, which elucidated the critical reason for its existence: It is the belief that an application of foreign public law might encroach on the sovereignty of the domestic state;<sup>24</sup> in other words, the enforcement of a foreign state's public law "would in effect involve the performance of acts of sovereignty in foreign states in derogation of their territorial authority."<sup>25</sup>

Another popular reason for rejecting foreign public law, usually mentioned in conjunction with the notion of sovereignty, is the equation of foreign public law with foreign "acts of state".<sup>26</sup> While it is uncertain whether the foreign act of state doctrine is a public international law or common law principle itself,<sup>27</sup> it is clear that it prohibits domestic courts from adjudicating on the validity and legality of a foreign government's act done within its jurisdiction.<sup>28</sup>

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<sup>23</sup> See Mann (n 10), 34 on the term "prerogative right". See also *Iran v Barakat Galleries Ltd* (n 10), [113].

<sup>24</sup> *Government of India v Taylor* (n 11), 511; *Buttes Gas & Oil Co v Hammer* [1982] AC 888 (HL) [1981] 3 All ER 616, 933; *Mbasogo v Logo Ltd* (n 16), [41] ff.; *Attorney-General of New Zealand v Ortiz* (n 16), 24; Dicey, Collins and Morris (n 6), [5-020]; Mann, Frederick A, 'The International Enforcement of Public Rights' (1968-1987) 19 N.Y.U.J.Int'l Law & Pol. 603, 608; Jennings, Robert and Watts, Arthur, *Oppenheim's International law* (9<sup>th</sup> edn, OUP), 491; Strebel (n 1), 115; Baade (n 5), 441. See also: Collins (n 11), 137 ff.; Dicey, Collins and Morris (n 6), [5-032]; Briggs (n 11), 289 ff.; Mallinak (n 11), 92, 121 f.; Strebel (n 1), 115.

<sup>25</sup> Jennings and Watts (n 24), 491.

<sup>26</sup> *Buttes Gas & Oil Co v Hammer* (n 24), 931; *Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7, [26]; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [20]; *United States v Pasquantino* 336 F.3d 321 (4th Cir. 2003), 327; Silver, Barbara A, 'Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments' (1992) 22 Ga.J.Int'l.& Comp.L. 609, 622.

<sup>27</sup> Teo, Marcus, 'Public law adjudication, international uniformity and the foreign act of state doctrine' (2020) 16 J Priv Int L 361, 362, 369. See also *Belhaj v Straw* [2017] UKSC 3, where the principle has been classified as a rule of domestic Private International Law.

<sup>28</sup> Dicey, Collins and Morris (n 6), [5-046] ff.; Mallinak (n 11), 92, 106. The act of state doctrine is justified with the protection of diplomatic relations between states, comity, the risk of "embarrassment" and the separation of powers (*Equatorial Guinea v Royal Bank of Scotland International* (n 26), [26]; *Oetjen v Central Leather Co.* 246 US 297 (1918), 304; *Moore v. Mitchell* 30 F.2d 600 (2d Cir. 1929), 604; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (n 10), [29] ff.); *Belhaj v Straw* (n 27); Teo (n 27). The

Further arguments against the applicability of foreign public law, which are not related to concerns regarding sovereignty, are:

- (1) A reciprocal application in the respective foreign state is not ensured.<sup>29</sup>
- (2) Not applying domestic public law may lower regulatory standards.<sup>30</sup>
- (3) Interpreting and applying foreign public law is difficult.<sup>31</sup>
- (4) International uniformity cannot be achieved given that public law adjudication favours “fact-specificity and flexibility rather than certainty and coherence”, which renders a loyal application of foreign public law impossible.<sup>32</sup>

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following example helps to illustrate the scope of the foreign act of state doctrine: “The Sheikh of Araby promulgates a decree which has the effect of depriving X of the right to exploit an oil-rich area and of giving that right to A. X says the decree was “cooked up” by A. A’s action for slander is met by a defence of justification and a counterclaim for conspiracy. The claim and the counterclaim will be stayed because the pleadings involve the adjudication of the transactions of foreign States and the issues raised are non-justiciable” (Dicey, Collins and Morris (n 6), [5-057]).

<sup>29</sup> *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (n 11), [6], [14]–[17] (regarding the non-enforcement of foreign tax law).

<sup>30</sup> MacConnaughay (n 3), 284 f. See also Teo (n 27), 362 f.

<sup>31</sup> Mallinak (n 11), 92, 121 f. 124; Baade (n 5), 483.

<sup>32</sup> Teo (n 27), 377.

## B. Application of Foreign (Public) Law and Domestic Sovereignty

The public law taboo has not remained without criticism: Among other things, it has been claimed it would obstruct international cooperation<sup>33</sup> and, as *Lowenfeld* argued, “lend comfort to swindlers, organisers of cartels, tax evaders, and others whom the law ought not to stretch its principles to protect”<sup>34</sup>. However, these counter-arguments only addressed unwanted ramifications of the public law taboo. There has been no substantial challenge to its critical assumption, i.e., the belief that the application of foreign public law in domestic courts must be understood as an exercise of foreign state power. In the following paragraphs, it will be shown that this assumption is false since it is rooted in an insufficient understanding of the legal consequences of applying foreign law of any nature.

### 1. *The Principle of Autonomy*

To properly understand the legal consequences of applying foreign law, it is necessary to take a step back and stress the national origin of Conflict of Laws rules. Such a national perspective is not self-evident: In the latter half of the 19<sup>th</sup> century, many scholars considered the Conflict of Laws to be a “supranational” or “universalist” matter.<sup>35</sup> The Conflict of Laws was considered a subject of Public International Law, i.e., a system concerned with the detailed allocation of limits to the exercise of state power (“internationalist approach”). Consequently, a state trying to issue national Conflict of Laws rules would at least be considered incompetent in such a system.<sup>36</sup>

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<sup>33</sup> Dodge (n 1), 163; Dodge (n 3), 391; Lowenfeld, Andreas F and Collins, Lawrence, ‘Conflict of Laws English Style’ (1989) 37 Am J Comp Law 353, 393.

<sup>34</sup> Lowenfeld and Collins (n 33), 394. Regarding the alleged protection of “organizers of cartels” it should be noted that, nowadays, Art 6 Rome II Regulation (n 7) permits the application of private non-contractual antitrust remedies under foreign law.

<sup>35</sup> Mann, Frederick A, *Further studies in international law* (Clarendon), 15.

<sup>36</sup> Let us consider the following example: Dicey’s Rule 239(3) states that a contract between a bank and its customer is governed by the law of the country where the bank has his habitual residence at the time of the contract’s conclusion (Dicey, Collins and Morris (n 6), [33R-299]). If we were to interpret this rule according to the internationalist approach, each state would only be allowed to exercise its sovereign power concerning

The internationalist approach is no longer advocated today. Even in the 19<sup>th</sup> century, it never existed in practice. Instead, it is firmly established that states can decide freely if and to which extent they wish to apply domestic and/or foreign law (“principle of autonomy”).<sup>37</sup> In civil law countries, the diversity of national Conflict of Laws codifications illustrates that the states do not consider their Conflict of Laws rules a sole reiteration of international principles. The case law of the common law countries follows an identical perspective.<sup>38</sup> The principle of autonomy is also expressed by numerous general instruments that modify or block the application of foreign law to the extent that the domestic state sees fit.<sup>39</sup> Finally, the (relatively) high degree of international harmonisation of Conflict of Laws rules does not question the principle of autonomy. Leaving aside the fact that one can only harmonise a matter that is genuinely domestic in the first place, states mainly harmonise Conflict of Laws provisions because it is a remedy for the problem of contradictory, overlapping or multiple obligations, not because they consider it a matter of Public International Law.

## ***2. Conclusions from the Principle of Autonomy***

### *a. First Conclusion: Persistence of the Domestic State’s Imperative Element During Any Application of Foreign Law*

Since states decide for themselves which foreign and domestic rules are to be applied in our country (principle of autonomy), the domestic state does not yield to another state’s sovereign will when applying foreign law. The fact that states decide autonomously when and to which extent foreign law is to be applied is only explicable by the continued existence of the domestic state’s sovereign will.

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respective contracts if the bank’s habitual residence at the time of the conclusion of the contract was in its territory. The “application” of foreign contract law would need to be understood as a withdrawal of the domestic state’s sovereign power in favour of the foreign sovereign, justified by public international law.

<sup>37</sup> Mann (n 35), 15; Jennings and Watts (n 24), 6 f.; Dodge, William S, ‘Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism’ (1998) 39 Harv. Int’l. L. J. 101, 114. It is important to note that the international acceptance of the principle of autonomy is only of comparative significance; it does not amount to it being a principle of customary international law itself since there does not seem to be *opino juris* in this regard.

<sup>38</sup> See n. 37.

<sup>39</sup> Two important examples are the non-application of foreign Conflict of Laws rules (“problem of renvoi”) and the public policy exception.

This first conclusion from the principle of autonomy can be illustrated best by dissecting legal rules into an “imperative” and a “rational” element.<sup>40</sup> The rational element describes a normative statement necessary for resolving a legal conflict, such as the written form requirement for some contracts. The imperative element describes the state’s directive of local validity, i.e. the sovereign legislative intent concerning the implementation of the written form requirement within the area where the state may exercise power. In other words, the imperative element is the state’s sovereign will to implement a rational element.<sup>41</sup> While the rational element is a potentially universal legal idea, the imperative element is only conceivable in relative terms, as it orders the sovereign applicability of a rational element within the area where the domestic state may exercise sovereign power.

Hence, whenever the domestic state applies foreign law, it issues its own imperative element with respect to the applicability of a foreign rational element. The foreign imperative element remains precluded. In other words, when we apply foreign law, we only use the foreign “idea of what should be” without any elements of the foreign sovereign will.

If we disagreed with the underlying assumption that a state’s sovereign directive of validity forms part of what we consider “law”, then there would be no foreign imperative element to ignore. Since, in this case, sovereignty would not play a role regarding our understanding of “law”, we would all the more be bound to subscribe to the conclusion that the application of foreign law can never be conceptualised as an import of foreign state sovereignty.

Hence, the application of foreign law – rightly understood as the application of foreign rational elements – does not amount to an exercise of foreign state power within domestic territory since the foreign imperative element is ignored anyway. We do not import a piece

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<sup>40</sup> Schurig, Klaus, *Kollisionsnorm und Sachrecht: zu Struktur, Standort und Methode des internationalen Privatrechts* (Duncker & Humblot), 70 ff., in German; Schinkels, Boris, *Normsatzstruktur des IPR: Zur rechtstheoretischen Einordnung des Befehls der "Anwendung" ausländischem Recht entnommener Normsätze im autonomen deutschen IPR* (Mohr Siebeck), 134, in German. See also Hemler, Adrian, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht* (Mohr Siebeck), in German.

<sup>41</sup> Schinkels (n 40), 79 ff.

of foreign sovereignty into domestic territory if we apply foreign law. In other words: Domestic sovereignty is not superseded by foreign state power.<sup>42</sup>

This explains why the established applicability of foreign private law is no illegitimate encroachment on domestic sovereignty. It also elucidates why it is superfluous to search for other (alleged) peculiarities of foreign private law to explain its applicability.<sup>43</sup>

*b. Second Conclusion: The Hybrid Law Theory*

Understanding the application of foreign law as the merger of a domestic imperative and a foreign rational element leads to another consequence: Given that Conflict of Laws theory must understand legal rules as a union of an imperative and rational element, endowing a foreign rational element with a domestic imperative element creates a hybrid legal norm.<sup>44</sup> In other words, by ordering the domestic sovereign validity of a foreign legal idea, the respective court or authority which applies foreign law creates new (hybrid) law. Notwithstanding the rational element's foreign origin, the hybrid rules belong to the domestic law, as the link to a particular state is only embodied by the imperative element. Since only the application of foreign law triggers the creation of a hybrid rule (not the legislative enactment of the Conflict of Laws rules themselves), the domestic court or authority which applies foreign law acts as an interstitial legislator.

Example: Suppose that, according to Art 4(1)(a) Rome I Regulation,<sup>45</sup> an English court applies French law to a contract for the sale of goods because the seller has his habitual residence in France. In this case, English courts only apply French contract law as a legal idea (rational element) without any French sovereign directive of validity (imperative element). By endowing the French rational element with an English imperative element, English hybrid contract law is created.

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<sup>42</sup> On the contrary, domestic sovereignty seems to be the foundation of the state's capacity to decide freely to which extent domestic law and foreign rational elements shall be applied.

<sup>43</sup> This refers to (mainly continental) approaches focusing on certain alleged peculiarities – such as its “pre-state” nature – in order to explain why only the application of foreign private law does not pose a challenge to domestic sovereignty. For a fuller discussion in this regard see Hemler (n 40), in German.

<sup>44</sup> Schinkels (n 40), 111 ff.

<sup>45</sup> The provision continues to be applicable post-Brexit as part of domestic UK law.

The hybrid law theory is consistent with the common law principle whereby foreign law must be treated as a matter of fact to be proved.<sup>46</sup> The same is true for the antagonistic civil law approach, according to which foreign law is generally considered a question of law.<sup>47</sup> Both rules are different solutions to one common problem: Since we cannot expect domestic judges to know anything about foreign law, the judicial responsibility to independently ascertain domestic law cannot exist in the same manner concerning questions of foreign law.<sup>48</sup> However, due to the procedural nature of this rule, there is no reason to assume any immediate significance regarding the doctrinal consequences of applying foreign law. Additionally, both questions refer to different points in time: The question of fact doctrine is concerned only with the determination of foreign law *prior to its application*. The hybrid law theory, however, refers to the legal consequences of applying foreign law.

It might be argued that the hybrid law theory must be rejected because it has neither been endorsed nor rejected by common or civil law courts. While the latter is true, it does not appear to be a valid counter-argument given that there was simply no need to address this issue in private law adjudication because the established internationalist grounds for the applicability of foreign private law (e.g. comity, vested rights) allowed to accommodate views that tacitly (but falsely, see above) understood the application of foreign private law as an import of foreign sovereignty. After all, the internationalist approach considered Private International Law to be a system of Public International Law aimed at the mitigation of the reach of sovereign state power; understanding the applicability of foreign law as a courteous deference towards foreign state power was, therefore, a vital element of the internationalist

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<sup>46</sup> Fentiman, Richard, *Foreign law in English courts: Pleading, proof and choice of law* (Clarendon Press), 3, 60; Nishitani, Yuko, 'Treatment of Foreign Law: Dynamics towards Convergence? - General Report' in Yuko Nishitani (ed), *Treatment of Foreign Law – Dynamics towards Convergence?* (Springer 2017), 18 f.; Cheshire and others (n 11), 105 ff. However, even in English law it is undisputed that "what is involved is at bottom a question of law", which has led to many court-recognized exceptions (see Cheshire and others (n 11), 107 f.).

<sup>47</sup> Nishitani (n 46), 17 f.

<sup>48</sup> Cook, Walter W, 'The Logical and Legal Bases of the Conflict of Laws' (1924) 33 Yale L.J. 457, 469; Green, Michael, 'Legal Realism, Lex Fori, and the Choice-of-Law Revolution' [1995] 104 Yale Law Journal; Cheshire and others (n 11), 23.

approach. Sadly, these internationalist justifications stuck around even when it became apparent that the Conflict of Laws was a national matter.<sup>49</sup> Hence, even if courts did not just shrug off the applicability of foreign private law as a matter of established legal reality, they had no reason to discuss the role of foreign sovereignty because comity or other approaches<sup>50</sup> already appeared to solve the problem. The problem of the foreign imperative element's role only arose in those areas of foreign law whose applicability had not yet been firmly established, i.e., within the domain of public law.

*c. The Hybrid Law Theory and Cook's Local Law Theory*

One might ask if the hybrid law theory is not just a renaissance of *Cook's* local law theory. According to the latter, a judge can only take foreign law into account; a "real" application is considered impossible.<sup>51</sup> However, I think both theories must be treated separately.

First, it is important to note that the local law theory is derived from legal realism, meaning it claims that "law" only represents the past judicial attitude, which can be used to predict possible future outcomes.<sup>52</sup> If the law really were only what the domestic judges say it is, then foreign legal statements would not be law. Hence, the local law theory rests on a subscription to legal realism.

Contrary to this, the hybrid law theory neither wants nor needs to accept legal realism to reach its conclusions. It does not take a stand on whether rights are only "real" when they are applied and enforced by domestic courts. The hybrid law theory also does not question the authority of Conflict of Laws rules or the judge's duty to apply foreign legal ideas just like

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<sup>49</sup> I think we must reject internationalist justifications in favour of other approaches such as the *suum cuique* principle (see C.3.).

<sup>50</sup> In civil law countries, this has mainly been the belief in the „pre-state“ nature of private law (n. 43).

<sup>51</sup> Cheshire and others (n 11), 23.

<sup>52</sup> *Ibid.*

the foreign court would. Instead, the hybrid law theory merely argues that, due to the autonomy principle, any foreign directive of sovereign validity is ignored whenever foreign law is applied, and, therefore, new domestic hybrid law is created in the process.

In opposition to the local law theory, which has been criticised as a technical quibble that solves nothing,<sup>53</sup> the hybrid law theory also creates tangible ramifications: Given that the public law taboo rests on the belief that the application of foreign public law amounts to an extension of foreign sovereignty into domestic territory, the hybrid law theory convincingly explains why this belief is mistaken and what actually happens whenever we apply foreign law.

*d. Third Conclusion: Imperative Element ≠ Conflict of Laws Rules*

The principle of autonomy also calls for a strict differentiation between rules on the imperative element on the one hand and Conflict of Laws rules on the other hand. This is particularly important when a domestic or foreign state extends its law's scope of application to circumstances outside of the area where it can legitimately exercise sovereign power.<sup>54</sup> In these cases, it is essential to note that such an extraterritorial scope of application does not imply any extraterritorial exercise of sovereign power: The issuing state's sovereign will to implement and enforce the respective substantive law *as such* – i.e. the imperative element – remains within the area where it may exercise sovereign power (which is usually the state's territory).<sup>55</sup>

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<sup>53</sup> Ibid. 24.

<sup>54</sup> However, even if the imperative element's scope aligns with the law's scope of application, both are still distinguishable.

<sup>55</sup> A rudimentary formulation of this rare distinction can be found in *Alaska Packers Association v Industrial Accident Commission* 294 US 532 (1935), 540: "The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals [...]. The statute assumes only to provide a remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur." This principle can be traced back to the PCIJ's *Lotus* verdict, where the court established two dimensions of "jurisdiction". The first dimension identified jurisdiction with the exercise of state power within the domestic territory. The second dimension addressed jurisdiction as a matter of the court's competence to adjudicate on the case at hand (*S.S. Lotus (Fr. v. Turk.)* 1927 PCIJ (ser. A) No. 10 (Sept. 7), 45 f.).

Example: Art 6 Rome II Regulation<sup>56</sup> states: “The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.” Broken down into a Conflict of Laws rule on domestic law,<sup>57</sup> it might sound as follows: “UK law concerning a non-contractual obligation arising out of an act of unfair competition shall be applied if UK-related competitive relations or the collective interests of UK consumers are, or are likely to be, affected.” Hence, the scope of application concerning UK antitrust law is extended to acts of unfair competition in foreign territories insofar as they affect UK-related competitive relations or UK consumers’ collective interests. However, this does not amount to an extraterritorial exercise of the domestic state’s power in the field of antitrust law.

### ***3. Application of Foreign Law and Public International Law***

Finally, it becomes apparent that we must not apply Public International Law principles regarding the exercise of state power to Conflict of Laws provisions. If we did so, we would identify either the application of foreign law with deference to foreign state power or the domestic law’s scope of application with the domestic imperative element’s reach. Both positions would fail to understand the ramifications of the principle of autonomy.

Some further clarifications regarding the relationship between Public International Law and Conflict of Laws might be helpful: Even though the application of foreign public law does not touch domestic sovereignty, the Conflict of Laws is still a matter of inter-state importance. This is particularly evident if domestic and foreign law is endowed with an extraterritorial scope of application, as this might cause situations where a unique set of facts is subjected to contradictory, overlapping or multiple obligations by several states. Given that Public International Law is not only concerned with the exercise of state sovereignty but with all matters of inter-state importance,<sup>58</sup> it is sensible that these issues have been addressed by international provisions on the extraterritorial “jurisdiction to legislate”.<sup>59</sup> For example, it is firmly accepted that a state may establish extraterritorial

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<sup>56</sup> The provision continues to be applicable post-Brexit as part of domestic UK law.

<sup>57</sup> This explication of a so-called one-sided part of a Conflict of Laws rule can be called „fragmentation“. By definition, a “one-sided” Conflict of Laws rule sets the conditions for the applicability of one or many substantive rules of only the domestic state or only one foreign state. Contrary to this, Art 6 Rome II Regulation is a so-called “all-sided” Conflict of Laws rule. „All-sided“ Conflict of Laws rules set the conditions for the applicability of one or many substantive rules of the domestic and all foreign states. For more details see Hemler (n 40), 121 ff. and Schurig (n 40), both in German.

<sup>58</sup> Jennings and Watts (n 24), 4 ff.

<sup>59</sup> Ibid. 456 f.

“jurisdiction to legislate” over nationals abroad (“principle of personality”); furthermore, it is a subject of ongoing debate to which extent foreign cases with effects on the domestic territory are sufficient to allow for extraterritorial legislation.<sup>60</sup>

#### ***4. Summary and Conclusion***

Due to the principle of autonomy, the application of foreign law must be understood as the endowment of foreign legal ideas (rational element) with a domestic sovereign will of implementation (imperative element). Since the foreign imperative element is always disregarded, we never apply foreign law *as such*. Instead, combining a foreign rational and domestic imperative element enables the creation of a hybrid legal norm of the domestic state. Therefore, contrary to the public law taboo’s central premise, applying foreign law can never be understood as an import of foreign state power. Hence, concerns regarding domestic sovereignty cannot be brought forward to prevent the application of foreign public law.

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<sup>60</sup> International Law Commission, ‘United Nations Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records, Supplement No. 10 (A/61/10), Annex E. Extraterritorial Jurisdiction’; Jennings and Watts (n 24), 462 f.

## C. Other Counter-Arguments

### 1. *The “Foreign Act of State” Doctrine*

Whenever courts employed the “foreign act of state” doctrine, it was always only about the belief that the validity or legality of foreign acts of state was not supposed to be questioned.<sup>61</sup> However, if we apply foreign public law, we do not scrutinise its validity or legality. On the contrary, we presume its validity or legality just as the foreign act of state doctrine demands by classifying it as applicable foreign law.<sup>62</sup> Hence, the foreign act of state doctrine does not prohibit the application of foreign public law.

It should be noted that the foreign act of state doctrine is also distinct from the scope of the public policy exception. While the latter permits scrutinising foreign law regarding its compatibility with fundamental domestic values, the foreign act of state doctrine only aims to prohibit an inquiry into the foreign state act’s validity under foreign law.

### 2. *International Uniformity and Loyal Applicability of Foreign Public Law*

We generally try to apply foreign law “loyally”, i.e., just like the foreign court would.<sup>63</sup> In light of this goal, we might argue that we can never apply foreign public law loyally because public law adjudication generally favours “fact-specificity and flexibility over legal certainty and coherence” (*Teo*)<sup>64</sup>. This might render a loyal application of foreign public law impossible.<sup>65</sup>

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<sup>61</sup> *Teo* (n 27), 362.

<sup>62</sup> *Ibid.* 364 f.

<sup>63</sup> This pursuit for international uniformity does not result from a desire for meta or conflicts justice (contra: *ibid.* 372 f.), but from the Conflict of Law’s function to fulfil distributive justice (see C.3. for more details).

<sup>64</sup> *Ibid.* 375.

<sup>65</sup> *Ibid.* 374.

However, even if we only classify administrative and constitutional law as “public law”, it can hardly be said that modern administrative law does not value legal certainty and coherence. On the contrary, modern states aim to make their actions as foreseeable as possible in order to increase equal treatment of their citizens, for example, concerning the distribution of welfare benefits or the exercise of physical force and coercion. This is true in particular if constitutional rights are affected; here, too, modern public law tends to prescribe detailed prerequisites for many forms of state actions.<sup>66</sup>

Example: In many states, the law of the police forces typically provides detailed requirements for several types of actions, such as the use of force. This might be why the Schengen agreement<sup>67</sup> prescribes the applicability of foreign public law to domestic police force members: According to its Art 40, officers must comply with the foreign police force’s law while operating in the foreign member state (e.g. due to cross-border surveillance activities).<sup>68</sup>

While the foreseeability of public law adjudication is, of course, weakened by specific legal instruments such as the principle of proportionality, the same is true concerning general principles of private law adjudication (e.g., good faith, clean hands). Even though it may be correct that politics influences public law to a greater degree, it cannot be said that private law is autonomous in this regard,<sup>69</sup> given that it is used as an instrument of societal (political) change as well.<sup>70</sup>

While it is hard to answer the gradual question of whether public law adjudication is less committed to legal certainty and coherence, the above-mentioned examples certainly show that those values play an essential role in public law, too. Hence, while it might be more

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<sup>66</sup> Contra *ibid.* 378, who claims that public law adjudication merely relies on „open-ended reasoning frameworks“.

<sup>67</sup> The Schengen acquis, Official Journal (EC) L 239, 22/09/2000, p. 0019 – 0062.

<sup>68</sup> Art 40(1): “Officers of one of the Contracting Parties who [...] are keeping under surveillance in their country a person who is presumed to have participated in an extraditable criminal offence shall be authorised to continue their surveillance in the territory of another Contracting Party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance.” Art 40(3)(a): “The officers carrying out the surveillance must comply with the provisions of this Article and with the law of the Contracting Party in whose territory they are operating”.

<sup>69</sup> Contra: Teo (n 27), 377.

<sup>70</sup> It should suffice to point out that the political, ethical and religious system of a society governs private law in a multitude of ways (e.g. the scope of property rights or consumer protection laws).

challenging to apply foreign public law loyally, there are no convincing reasons why one should consider it absolutely impossible.

### ***3. Reciprocity; Lower Regulatory Standards***

A lack of reciprocity does not preclude the application of foreign public law,<sup>71</sup> given that courts are not primarily concerned with the question of whether they should secure bargaining power of their governments by withholding the application of foreign public law. Domestic courts apply foreign law as a matter of domestic justice since they acknowledge that significant connections to other states must be respected.<sup>72</sup> This thought is founded in the basic principle of equality and distributive justice, which demands to treat similar cases similarly and different cases differently (“*suum cuique tribue*”). Given that cases with foreign elements are different from purely domestic ones, we can fulfil this demand of distributive justice by applying foreign law.

Since the application of non-domestic law embodies a different treatment of a different case (i.e., a formally just treatment), a better or worse legal situation than under domestic law is, therefore, something we actively want to enable. Hence, lower regulatory standards (or privileges) are no counter-argument against the applicability of foreign public law but the natural consequence of our decision to further domestic justice by applying foreign, diverging law.

It is important to note that these two counter-arguments must be considered invalid only insofar as they are brought forward to justify an alleged doctrinal impossibility to apply foreign public law. The notions of reciprocity or lower regulatory standards might still play a

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<sup>71</sup> Contra: *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson* (n 11), [14] - [17]; Dodge (n 1), 163 ff; Dodge (n 3), 392. See also: Posner, Eric A and Sunstein, Cass R, ‘Chevronizing Foreign Relations Law’ [2006] 116 Yale L.J. 1170, 1190, note 52.

<sup>72</sup> Hence, the popular notion of „comity“ must be rejected – we do not apply foreign law as a courteous favour to other states, nor do we fulfil „meta justice“ by applying foreign law. These thoughts can ultimately be traced back to the „internationalist approach“ to Private International Law, i.e., the wrong equation of Private International Law with a hypothetical system of Public International Law concerned with the allocation of limits concerning the exercise of state power (see above).

role in determining whether specific foreign public or private provisions should be applied in a specific case or legal framework; however, in this case, their methodological role does not differ from any other policy goal or interest that we consider whenever we interpret and apply the law.

#### *4. Difficulty*

It is true that the application of foreign public law is difficult. However, the same applies to foreign private law, where difficulty does not seem to be an insurmountable obstacle. The question of why a loyal application of foreign public law remains possible has already been addressed. Besides this, there are no other reasons why foreign public law is inherently more difficult to apply than foreign private law. One should also remember that the difficulty of applying foreign private law is mitigated by procedural law.<sup>73</sup> Procedural reliefs – like the question of fact doctrine mentioned above – should, of course, be extended to any application of foreign public law.

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<sup>73</sup> E.g., by the above-mentioned question of fact doctrine.

## **D. Ramifications**

Since there are no doctrinal reasons to exclude the application of foreign public law altogether, we can engage in a new approach that carefully considers all relevant substantive interests in order to decide when the application of foreign public law is appropriate. On the following pages, it will be shown when and why the application of foreign public law might either remain off-limits (1.) or turn out to be beneficial (2.). It should be noted that this discussion is necessarily fragmentary and incomplete since we are talking about a sizeable and tremendously underdeveloped area of Conflict of Laws.

### ***1. Internal and International Jurisdictional Limitations***

A rather obvious reason for the existing stigma around the applicability of foreign public law is the false belief in its doctrinal impossibility. However, even if it were recognised that there are no doctrinal obstacles to the applicability of foreign public law, it would currently remain a comparably rare occurrence. The main reason for this seems to be the limited jurisdiction of domestic authorities and courts.

#### ***a. State Agents Abroad***

The jurisdiction of state agents is typically confined to the domestic territory, where they will usually only apply their own law due to mostly unwritten Conflict of Laws rules that order the applicability of domestic law to domestic activities.

Example: According to Art 31 f. UK Railways and Transport Safety Act 2003, the jurisdiction of the British Transport Police is limited to England, Scotland and Wales. We can explicate the corresponding Conflict of Laws rule as follows: “Domestic police law is applicable if the case at hand happens on domestic territory.”

Such Conflict of Laws rules, in conjunction with a jurisdictional limitation to the domestic territory, eliminate any situation where one might even consider the applicability of foreign law.

However, the picture changes considerably if a state agent is endowed with extraterritorial jurisdiction: Assume, following a bilateral agreement, France was to permit the presence of British police officers in trains from London to Paris on French territory. In this case, ambiguity concerning the applicable law would arise. This scenario is not as far-fetched as it may seem, as the above-mentioned example regarding the cross-border surveillance activities of police force members of Schengen states shows.

If state agents assert extraterritorial jurisdiction by crossing the border, they also exercise sovereign state power extraterritorially. According to public international law, the exercise of state power on foreign territory is only legitimate if the foreign state gives its consent.<sup>74</sup> This might be another reason why state agents with extraterritorial jurisdiction are rare.

#### *b. Subjects of Domestic Public Law*

Contrary to state agents, individuals and private subjects are usually engaged in a multitude of cross-border relations. Hence, if the law concerns the relationship between the state and individuals, domestic authorities and courts regularly assert jurisdiction even though the case at hand contains extraterritorial elements. However, this assertion of extraterritorial jurisdiction is frequently accompanied by a matching extraterritorial extension of the law's scope of application, which again precludes foreign public law from application.

Example: A UK resident uses a California-based social network to send racist and discriminatory messages to British politicians. Due to the perpetrator's residence in the UK, UK prosecuting authorities assert jurisdiction.

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<sup>74</sup> Jennings and Watts (n 24), 458; American Society of International Law, 'Jurisdictional, Preliminary, and Procedural Concerns' in Diane Marie Amann (ed), *Benchbook on International Law* (American Society of International Law 2014), II.A-6.

In this case, the domestic law's scope of application is partly extraterritorial since the British Malicious Communications Act 1988 and the Criminal Justice and Courts Act 2015 apply even though the social network and its IT infrastructure are located in the US.

### *c. Foreign State as Party Cases*

So far, it has become evident that questions concerning the applicability of foreign public law rarely arise if the domestic state is a party, as the domestic law's scope of application typically matches the domestic jurisdiction. While the applicability of foreign public law remains doctrinally possible in these cases, it seldom seems to be necessary in practice. However, the picture changes considerably in the cases that lead to the creation of the "public law taboo", i.e., whenever a foreign state seeks to enforce its own public law in front of domestic courts. While the domestic court can assert domestic jurisdiction (even though a foreign state appears as plaintiff)<sup>75</sup>, there will often be considerable ambiguity regarding the applicable foreign law since the case at hand often contains predominantly foreign elements, e.g., due to taxable conduct in the foreign state. Here, a meaningful possibility to resolve this ambiguity by applying the public law of the foreign plaintiff state arises.

## ***2. Possibilities in State-as-Party Cases***

Since the public law taboo historically focused on state-as-party cases in the field of tax and criminal law, these two legal fields will be considered in greater detail.

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<sup>75</sup> We cannot understand the public law taboo as a prohibition to assert domestic judicial jurisdiction in cases where a foreign state seeks to "exercise or assert a sovereign right": Even if the public law taboo were a rule on jurisdiction, its rationale would still be the belief in the inapplicability of foreign public law. As shown above, this is wrong. The respective concerns – especially the fear that the application of foreign public law might violate domestic sovereignty – are irreconcilable with the autonomy principle. Apart from this, there are no additional reasons to deny judicial jurisdiction if a foreign state appears as a party in domestic public law litigation. The foreign state's presence in front of a domestic court must not be considered an exercise of foreign state power on domestic territory – on the contrary, the state accepts the domestic state's sovereignty by subordinating to its courts. Consequently, it does not matter if the foreign state tries to enforce a "prerogative" state right. Any verdict by the domestic court remains an exercise of domestic state power, given that the court will only apply domestic (hybrid) legal norms to the extent that it considers appropriate. The domestic court, therefore, does not become a medium of foreign state power (cf. Strebel (n 1), 118).

### *a. Applying Foreign Tax Law*

The application of foreign tax law appears to be a meaningful alternative to cross-border tax collection, particularly if bilateral treaties do not regulate alternative methods of tax collection assistance.

Bilateral tax treaties or EU law often provide for several methods of tax collection assistance.<sup>76</sup> The most far-reaching instrument of tax collection assistance is the recognition of foreign tax claims. In this case, the domestic state does not apply foreign tax law itself but instead recognises the result of its application as brought forward by the foreign state. Certain safeguards – like the public policy exception – persist.<sup>77</sup>

Example: Art 27(3) OECD Model Tax Convention 2003 states: “When a revenue claim of a Contracting State is enforceable under the laws of that state and is owed by a person who, at that time, cannot, under the laws of that state, prevent its collection, that revenue claim shall, at the request of the competent authority of that state, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other state in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other state.”

The recognition of foreign administrative decisions or judgements is an established instrument in the Conflict of Laws. It shares a fundamental similarity with the application of foreign public law: Given that the domestic state may decide autonomously if and to which extent it recognises foreign decisions, it is once again only the domestic state’s imperative will which endows the foreign verdict with sovereign power within domestic borders. Hence, in this respect, it does not matter if the applicable foreign legal content is an abstract legal norm or a

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<sup>76</sup> Dodge (n 1), 202; Silver (n 26), 623. Regarding EU member states: Council Directive (EC) 2001/44/EC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties [2001] OJ L 175.

<sup>77</sup> Cf. Art 27(8)(b) OECD Model Tax Convention 2003.

case-specific result of (foreign) legal application. Therefore, recognising foreign tax judgments without any underlying treaty framework would certainly be possible.<sup>78</sup> However, it does not seem to happen in practice.

In the absence of bilateral treaties and outside the EU, states normally do not provide tax collection assistance through recognition. If a taxpayer leaves the limited – usually territorial – reach of the taxing state’s sovereign power, tax claims may, therefore, be rendered unenforceable.<sup>79</sup>

*Baker* gives the following examples: “Taxation of capital gains by individuals who have left the country and have disposed of assets after giving up residence”<sup>80</sup>; “Stock options that have been granted while an employee was working in one country, but realised when the employee lives in another country.”<sup>81</sup>

Due to the doctrinal possibility of applying foreign public law, the taxing state could now try to enforce its tax claim by suing its tax subject in the courts of another state (e.g. the state of residence) under its own tax law. A significant benefit of this option is the fact that – according to the principle of autonomy – the extent to which foreign tax law is considered applicable remains in the hands of the domestic state. Of course, the public policy exception<sup>82</sup> and procedural safeguards are also applicable. Hence, this method appears suitable in cases where a successful recognition of a foreign tax decision is unlikely, e.g., if substantial differences exist between the domestic and foreign tax regimes. It might also be an interesting option if recognising foreign tax claims is legally impossible, e.g., if a treaty framework does not exist.

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<sup>78</sup> See also Silver (n 26), 629. In this regard, we would certainly need to discuss to which extent mechanisms and constraints regarding the recognition of foreign private decisions are sufficient. In particular, it might be necessary to permit a more extensive assessment (“révision au fond”) of foreign tax decisions or judgements.

<sup>79</sup> Timokhov, Vitaly S, ‘Enforcing tax judgments across borders: How Collection Assistance Can Overcome Limitations of the Revenue Rule (Part 1)’ (2003) 14 J. Int'l Tax'n 34, 36 f.; Silver (n 26), 632 f.

<sup>80</sup> Baker, Philip, ‘Changing the Norm on Cross-border Enforcement of Debts’ (2002) 30 Intertax 216, 217.

<sup>81</sup> *Ibid.*

<sup>82</sup> We will generally not apply foreign (public) law if its application “would be inconsistent with the fundamental public policy of English law” (Dicey, Collins and Morris (n 6), [5R-001]) It should be noted that, in Conflict of Laws, we consider a derogation from certain standards and principles of domestic law not only possible but even just (see C.3.). This must be reflected by the reach and strictness to which the public policy exception is applied. It would be incorrect to employ fundamental principles to the same rigorous extent as in purely domestic cases. This is why the public policy exception focuses on the notion of “relativity” to a great extent (Dicey, Collins and Morris (n 6), [5-006]).

Example: In *Government of India v Taylor*<sup>83</sup>, the state of India tried to recover taxes from a UK-registered company with past trading activities in India. Given the indefensibility of the public law taboo, UK courts cannot reject jurisdiction or the applicability of foreign tax law merely due to the claim's public nature. Since UK law is familiar with corporation or value-added taxes, we can safely assume that the respective Indian tax rules do not violate UK public policy. Hence, UK courts could apply Indian tax law and order payment to the Indian state. Of course, just like in private party cases, domestic courts should be able to charge fees for these kinds of services.

### *b. Applying Foreign Criminal Law*

In a similar manner, the application of foreign criminal law might serve as an alternative to traditional methods of legal assistance.

There are already provisions in place that facilitate the recognition or enforcement of foreign judgements in the field of criminal law. For example, EU member states widely recognise and enforce financial penalties “without any further formality being required [...] unless the competent authority decides to invoke one of the grounds for non-recognition or non-execution” (Art 6 Council Framework Decision on the application of the principle of mutual recognition to financial penalties).<sup>84</sup> The same is true for members of the Schengen Area.<sup>85</sup> In the absence of a treaty framework, some states still recognise and enforce foreign criminal verdicts, even in the case of non-monetary sanctions like imprisonment.<sup>86</sup> However, many states – including the UK – prefer extradition or other means of mutual legal assistance over the enforcement of a foreign criminal decision.

The reluctance to enforce foreign judgements in the field of criminal law is understandable: Fundamental human rights are at stake, a fair trial is of utmost importance, and the severity of sanctions may vary substantially between different states. Therefore, one might argue that

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<sup>83</sup> See *Government of India v Taylor* (n 11).

<sup>84</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 076. This provision has been implemented in sections 80 to 92 and Schedules 18 and 19 of the UK Criminal Justice and Immigration Act 2008; the post-Brexit status still seems to be uncertain.

<sup>85</sup> Art 68 convention implementing the Schengen agreement (n 67).

<sup>86</sup> Germany: §§ 48 ff. Gesetz über die internationale Rechtshilfe in Strafsachen. Switzerland: Art 94 ff. Bundesgesetz über internationale Rechtshilfe in Strafsachen.

the cross-border enforcement of criminal law can be solved by a perpetual application of domestic criminal law to predominantly foreign cases. However, this is not convincing: While it is true that the seriousness of certain crimes might justify the application of domestic criminal law even without any significant connections to the adjudicating state (“principle of universality”<sup>87</sup>), this is merely an exception to the general rule of Public International Law according to which the law’s extraterritorial scope of application is limited. These restrictions exist for good reasons since an expansive extraterritorial scope of application regarding domestic law will cause the above-mentioned problems of overlapping or contradicting legal duties. Furthermore, it might violate the principle of distributive justice<sup>88</sup> to apply domestic criminal law even if the case at hand is more closely connected to foreign law.

The application of foreign criminal law in domestic courts would once again provide an attractive middle ground between the recognition and enforcement of foreign penal judgements on the one hand and mutual legal assistance, e.g., by means of extradition, on the other hand. The domestic state would retain the ability to secure a fair trial in its courts, while the perpetrator would still be held responsible for violating foreign criminal law. Of course, it remains a matter of domestic policy to which degree residents should be held accountable for crimes in other states. However, the widespread existence of legal assistance mechanisms shows that many states consider compliance with foreign criminal law a reasonable policy goal. Apparently, states do not aim to be a safe haven for people who commit crimes abroad.

The application of foreign criminal law seems particularly beneficial if the universality principle does not warrant the application of domestic criminal law, i.e., regarding all crimes that are not considered extremely serious. In these cases, a significant risk of non-prosecution exists, especially if the domestic state does not want to extradite or if the recognition of foreign criminal judgements is impossible, e.g., due to concerns over a fair trial.

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<sup>87</sup> See n. 60.

<sup>88</sup> See C.3.

Example: In *Schemmer v Property Resources Ltd*, a US court appointed the plaintiff as receiver of the defendant's London-based assets. The US court order was founded on alleged fraudulent practices of several people controlling the defendant's holding company, which the US court found to be a violation of the US Securities Exchange Act 1934. As an alternative to the recognition of the US court order, the plaintiff could sue for restitution in UK courts under the US Act of 1934. UK courts would not be able to reject jurisdiction or the applicability of US criminal law merely due to the claim's public nature. Once again, a violation of UK public policy seems unlikely,<sup>89</sup> as fraudulent corporate practices are punishable under UK law as well. Hence, UK courts could apply US criminal law and enforce the sanction by ordering the transfer of the London-based assets to the plaintiff.

### ***3. Summary and Outlook***

The public law taboo's central premise is the belief that the application of foreign public law in domestic courts must be understood as an exercise of foreign state power, which undermines the domestic state's sovereignty. However, this view is incompatible with the principle of autonomy. Due to the latter, any application of foreign law must be understood as the endowment of foreign legal ideas (rational element) with a domestic sovereign will of implementation (imperative element). Hence, the application of foreign law – be it public or private – can never be understood as an import of foreign state power.

The application of foreign public law is also distinctly separable from the scope of the “foreign act of state” doctrine. Furthermore, while the loyal application of foreign public law might be more complex, it is certainly not impossible since legal certainty and coherence also play a vital role in public law adjudication.

Due to limitations on domestic jurisdiction, the application of foreign public law might still remain a comparably rare occurrence. Additionally, if domestic law is applicable extraterritorially, there is no ambiguity regarding the applicable law as well. However, these two issues

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<sup>89</sup> However, if foreign criminal law was discriminatory, e.g., because it only applies to a certain race, it would have to be rejected in domestic courts by reference to the public policy exception (On the rejection of discriminatory private law see Dicey, Collins and Morris (n 6), [5-005]).

do not play a role in cases where the foreign state is a party: Here, the applicability of foreign public law provides an attractive middle ground between recognition and legal assistance.

Since this paper focused on the doctrinal possibility of applying foreign public law in cases where the foreign state is a party, the way forward is a careful analysis of other domains of public law where we might want to improve the cross-border compliance of individuals and corporations. There are several more potential fields where one can easily assume that the domestic state does not want to be a safe haven for noncompliance abroad, such as data protection law, product safety standards, environmental protection law, labour law or cultural heritage law. While it is true that those can also be subject to private litigation, it would undoubtedly strengthen their practical enforcement if a foreign state could appear in front of domestic courts in order to request their application and enforcement through a domestic court order.