

Wächter, Carl Georg von

Carl Georg von Wächter (1797-1880) was once considered ‘one of the greatest German jurists of all times’ (Ernst Landsberg, *Geschichte der Deutschen Rechtswissenschaft*, vol 3/2 (Verl Oldenbourg 1910) 386), but was all but forgotten in the 20th century, despite an excellent dissertation on his work in private international law (Nikolaus Sandmann, *Grundlagen und Einfluss der internationalprivatrechtlichen Lehre Carl Georg von Wächters (1797-1880)* (Diss Münster 1979)). In private international law, he is known mainly for his critique of earlier theories, in particular the theory of statutes. Positively, *Wächter* is mainly (and not accurately) known as a proponent of a strong preference for the *lex fori* and as such mainly presented in opposition to *Friedrich Carl von Savigny’s* theory (Savigny, Friedrich Carl von). Only recently has there been renewed interest in him. And in rereading, *Wächter* proves to be prescient for today’s state of the discipline.

I. *Wächter’s* life and *oeuvre*

1. Life

Wächter was born in 1797 in Württemberg, where his father worked in the state administration. He would have liked to study medicine or theology, but the king ordered him to study law. *Wächter* mostly studied in Tübingen, then the only University available to citizens of Württemberg, but was able to spend one semester abroad in Heidelberg, which had a far better University. Here, he was influenced especially by *Carl Theodor Welcker* (1790-1869), a proponent of the historical school, and *Anton Friedrich Justus Thibaut* (1772-1840), an early proponent of legislative codification. In September 1818 *Wächter* passed his University exam in Tübingen; in March 1819 he became a judge, and in the same year he was, at age 21, appointed a professor at

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

Tübingen – all consequences not just of his brilliance but also the political turmoil in Württemberg and the dire needs of the struggling University. As soon as 1825, he became rector of the University but left after five years, because his loyalty to the government and opposition against greater autonomy of the University did not find enough support. *Wächter* accepted a chair at Leipzig for three years (1833-1836) before returning to Tübingen, where he became chancellor, extraordinary government representative, and ‘First Professor of Law’. As such, he was also a member, and from 1839 the President, of the second chamber of the Württemberg parliament. After the 1848 revolution led to a more liberal government, *Wächter* refused both his post in the newly established second chamber and, in 1851, his office as University chancellor. To escape the new political environment he adopted a post as president of the Supreme Appellate Court of the For Free Cities in Lübeck. However, he stayed for less than a year before taking up a chair again at the University of Leipzig in 1852, where he remained until his death. During this time, he was instrumental in the establishment of the German Lawyers Association in 1860, and presided over its inaugural session in Berlin as well as four other sessions. After a breakdown in 1872, *Wächter* reduced his academic obligations but kept working until his death in 1880. Numerous necrologies, including three of book length (by his Leipzig successor *Bernhard Windscheid* (1817-1892), his son *Oskar von Wächter* (1825-1902), and by *Heinrich Dernburg* (1829-1907)) demonstrate the high esteem in which he had been held.

2. *Oeuvre*

Wächter’s oeuvre is broad, and private international law only concerns a small element in it; in fact, most biographies devote very little space to it. *Wächter* was in many ways

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

a conservative: his work is characterized by legal positivism, informed by his loyalty to the state with its monarchy and its laws and distrust in popular democracy. At the same time, he supported constitutional principles of separation and power, positions that have more affinity with liberal principles. Moreover, he cannot be neatly placed in the virulent dispute between Germanists and Romanists. What is clear is that he was a nationalist and had little interest in comparative law beyond German borders. Similarly, although, as a positivist, he was clearly influenced by *Thibaut*, he nonetheless shared with *Savigny* an interest in law as it has developed historically. All in all, his interest was more in actual law than in its theories. His use of legal sources was more thorough than that of many others, while he largely ignored philosophical and theoretical literature as well as theories of natural law. Despite his interest in legal history he insisted on separating both the history of law and the law as it should be from the law currently in force.

All of this may explain both the high esteem for him during his lifetime and the relative lack of interest in him after his death. Almost all of *Wächter's* publications were written also with practical interests in mind: to help practitioners in their daily work, but also in with a view to potential or actual legislation. In this sense, *Wächter's* significant involvement in legislation and his academic work were closely interrelated, more so than for other scholars of his time. *Windscheid's* assessment is instructive: 'There have been more erudite jurists than *Wächter*. There have been more profound jurists than *Wächter*. But there has not been, among the great German jurists, a more juridical jurist – a jurist in whom everything is combined that is necessary for the practice of law.' (Bernhard Windscheid, *Carl Georg von Wächter* (Duncker & Humblot 1880) 79).

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

Although *Wächter* always read widely, he began his scholarly career with a specific emphasis on criminal law. In 1825 and 1826 he published a treatise on Roman-German criminal law, later a number of articles in this area. A second edition of the treatise, entitled 'Common Law of Germany' (1842) included also private law and signalled a shift to that field; between 1838 and 1842 he published his important Handbook of Private Law in Württemberg (Carl Georg von Wächter, *Handbuch des im Königreiche Württemberg geltenden Privatrechts*, vols 1 and 2 (Metzler 1839-1842)). His declared goal was to describe the actual law valid in Württemberg as a whole, without distinction between local and imported (Roman) law; it was meant as a preparation for a possible codification. *Wächter* continued his interests in both criminal and private law after his move to Leipzig. During that time, he wrote a critique of the Saxon draft civil code (Carl Georg von Wächter, *Der Entwurf eines bürgerlichen Gesetzbuches für das Königreich Sachsen: ein Beitrag zur Beurtheilung desselben* (Tauchnitz 1853)). He also published parts towards a Handbook on the Criminal Law of Saxony and Thuringia (Carl Georg von Wächter, *Das Königlich Sächsische und das Thüringische Strafrecht: Ein Handbuch – Einleitung und Allgemeiner Teil* (Metzler 1857)), which has been considered the founding text for an emerging scientific approach to criminal law (see Lars Jungemann, *Carl Georg von Wächter (1797-1880) und das Strafrecht des 19. Jahrhunderts. Strafrechtliche Lehre und Wirkungsgeschichte* (Duncker & Humblot 1999)). He continued to publish widely, often in close relation to his teaching; important among his later publications is a treatise on the Pandects (Carl Georg von Wächter, *Pandekten Vol 1: Allgemeine Lehren* (Breitkopf und Härtel 1880)).

Wächter's scholarly interests went further than the doctrine of criminal law and private law, however: he published several texts in favour of a codification and of

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

German legal unification. In 1847 he received a royal mandate to negotiate with several German governments the possibility of unified codifications in criminal law, private law, and procedure – a project brought to its end by the 1848 revolutions. In addition, *Wächter's oeuvre* includes several articles dedicated to issues of legislation.

Wächter's most important contribution to private international law lies in a treatise-like article of 238 pages published in several instalments in the *Archiv für die civilistische Praxis* in 1841 and 1842 (Carl Georg von Wächter, 'Ueber die Collision der Privatrechtsgesetze verschiedener Staaten' (1841) 24 AcP 230, (1842) 25 AcP 1, 161, 361). The article emerged from his research towards his handbook of Wurttembergian private law (but was published separately, perhaps because *Wächter* rightly felt it could be of broader interest. A summary of the findings is found in the handbook (Carl Georg von Wächter, *Handbuch des im Königreiche Württemberg geltenden Privatrechts*, vol 2 (Metzler 1842) 79-119). Shortly before his death, in his treatise on the Pandects, *Wächter* addressed responses to his article, especially by *Savigny* and *von Bar*; he saw no reason to alter his views from forty years earlier (Carl Georg von Wächter, *Pandekten Vol 1: Allgemeine Lehren* (Breitkopf und Härtel 1880) 146-7). *Wächter* also applied his findings on the territorial scope of criminal law (Carl Georg von Wächter, *Das Königlich Sächsische und das Thüringische Strafrecht: Ein Handbuch – Einleitung und Allgemeiner Teil* (Metzler 1857) 125-175).

II. Contribution to private international law

1. Background

Wächter's fame in private international rests entirely on that aforementioned article from 1841 and 1842. The article was the first comprehensive modern German treatise-

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

size in over one hundred years and thus can well be viewed as the founding text of a modern academic approach to German private international law. This is so although (or maybe because) *Wächter* mostly did not set out to establish a theoretical approach – much of the quality of his article lies in the extent to which it established existing private international law on the basis of existing materials.

Wächter's contribution is often presented as largely negative – he helped overcome the theory of statutes and the vested rights theory. His positive contribution is often limited to a *lex fori* principle, which is viewed as unattractive (*Lex fori*). This presentation overestimates *Wächter's* role in overcoming old theories (which had already lost in influence). On the other hand, and perhaps more importantly, it underestimates his constructive contribution.

The novelty of *Wächter's* approach is best understood in comparison with other approaches of his time. A first approach, the strict *lex fori* approach, held that the only valid law in a state was the law of that state, and so a judge would never apply foreign law. A second theory was the Italian theory of statutes, which suggested that each statute designates its own scope of application (which can be found through statutory interpretation) (Unilateralism) and the closely related theory of vested rights, which suggested that a right acquired under one legal system is binding everywhere else (Vested rights theory). A third approach, building on the first, was the theory of comity, developed in the Netherlands and adopted in the United States (USA), whereby each state would have exclusive sovereignty over its territory, and foreign law would be applied only on the basis of extralegal considerations of courtesy and comity. A fourth approach, made famous by *Savigny* but to be found already in earlier authors, suggested that the applicable law could be determined on the basis of the nature of things (*Natur*

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

der Sache). (A fifth approach, the suggestion of public international law as a source for private international law, emerged after *Wächter's* article with *Mancini* (Mancini, Pasquale Stanislao)).

Wächter combined elements from all of these approaches. He agreed with the strict *lex fori* theory that a judge was bound only by his home law – but disagreed that this would mean the exclusive application of the *lex fori*. Instead, he suggested, domestic law might be interpreted so as to designate foreign law to apply. He rejected the idea of the theory of statutes that a foreign legislator could, by defining the scope of a legislation, bind another state – but he agreed with the method of statutory interpretation to answer questions of private international law. He disagreed with comity as a basis for applying foreign law, but he agreed that it was up to each state's sovereign designation whether and when to apply foreign law. Similarly, he agreed that 'the nature of things' was an important criterion to determine the applicable law, but he thought that this nature had to be determined not in the abstract but from the perspective of the *lex fori*.

Wächter's own approach, then, was novel. He treated questions of private international law as questions of law. However, that law was neither the statute whose application was in question, nor was it public international law. Instead, it was the *lex fori*. Where the *lex fori* had an explicit private international law rule, that rule was to be applied. Where the *lex fori* had no such explicit private international law rule, such a rule had to be developed by analogy to existing substantive law. Only where neither path led to a result would the substantive law of the *lex fori* be applied as a residual solution. This approach, though deficient in some ways, was instrumental for the development of our modern understanding of private international law as a national law different from substantive law.

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

2. Refutations: Theory of Statutes and Theory of Vested Rights

Often, *Wächter's* main contribution is seen in his refutation of the theory of statutes ((1841) 24 AcP, 270 ff, § 11). That theory held, essentially, that statutes themselves designate the scope of their application and can therefore be distinguished in three types – real statutes that have a territorial application, personal statutes that go with a person, and mixed statutes that are treated in diverse ways. Indeed, after *Wächter's* article was published, the theory of statutes was virtually dead in Germany, but *Wächter* himself acknowledged that such a theory had already lost most support when he wrote ((1841) 24 AcP 298 note 138). What makes *Wächter's* refutation relevant is that he based it not just on the numerous exceptions that the theory required, but on a foundational argument that one country cannot bind others with regard to the scope of application of its laws ((1841) 24 AcP 288-289).

In the context of these arguments, *Wächter* also rejected the vested rights theory (*Theorie der wohlerworbenen Rechte*). That theory suggests, in essence, that rights acquired anywhere under local law are enforceable elsewhere. *Wächter* pointed out that such a theory is circular: we cannot say whether a right has been acquired under a certain law until we know whether that law is applicable in the first place ((1842) 25 AcP 1-9, § 14; the relevant passage is translated in Kurt H Nadelmann, 'Some Historical Notes on the Doctrinal Sources of American Conflict' in Kurt H Nadelmann (ed), *Conflict of Laws: International and Interstate. Selected Essays* (Nijhoff 1972) 1, 16). Again, the refusal is linked to *Wächter's* general suggestion that it is up to the forum to determine whether foreign law is applicable. It is therefore consequential (though often overlooked) that *Wächter* in fact defended a vested rights theory as between states within a federal state, because a state is required to make sure that rights

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

established within one of its subunits are recognized everywhere within the state (Carl Georg von Wächter, *Pandekten Vol 1: Allgemeine Lehren* (Breitkopf und Härtel 1880) 152-153; see already (1842) 25 AcP 3 note 170, § 14).

3. Foundation: positivism

For his own approach, *Wächter* suggested that the question as to what law applies requires a prior question: 'From what sources shall the judge take the answer to this question?' *Wächter's* response was unreserved: 'Without any doubt from the laws to which he is subject, that is, from the laws in force in his state.' ((1841) 24 AcP 237, § 2). Because of this, *Wächter* is often viewed as a proponent of a *lex fori* approach to private international law, but his approach is better called a positivist one. In reality, *Wächter* agreed with many other authors' suggestions on principles guiding private international law: international comity, the protection of vested rights, etc. However, unlike other authors, he viewed these as guidelines only for the legislator, and he asked to balance them against interests in ensuring the enforcement of the forum's policies. The judge, by contrast, had to rest his decisions on the basis of the *lex fori* ((1841) 24 AcP 240, § 2; (1842) 25 AcP 12-15, § 16).

Wächter's theory for judges has three elements. First and foremost, a judge must apply explicit choice-of-law rules of the forum ((1841) 24 AcP 239-240, § 2; 261, § 9). *Wächter* postulated that a legislator, in drafting such rules, would have two considerations: on the one hand protection of its own substantive law, on the other international relations and deference. Such a priority for existing choice-of-law rules was the common view of the time. However, explicit rules were rare at the time. To fill the gap, many authors sought to develop an extensive system of common law rules of private international law. *Wächter* expresses doubts that such rules could be found.

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

Roman law itself had very little to say about private international law. Germanic law was not uniform after the decline of personal (tribal) laws. And *Wächter* was sceptical about attempts to claim existence of a contemporary German customary law.

Given that a common law of conflicts did not exist, what did a judge have to do outside the forum's existing positive choice-of-law rules? *Wächter's* second principle, his most ingenious contribution, remained a positivist one: the judge 'must seek the solution in the meaning and the spirit of those special laws in force in his state which as such cover the relationship put before him' ((1841) 24 AcP 261, § 9). 'This means in particular that the judge must first determine for every statute of his state dealing with the legal relationship brought before him whether it accords with the meaning of the statute that it be applied absolutely even if the relation was created abroad or a foreigner is involved, or that the statute need not.' ((1841) 24 AcP 263, § 9). This is, however, not an explicit priority for the substantive *lex fori*. *Wächter's* own examples make it clear that what he was thinking of were mainly mandatory laws of the *lex fori*. And he criticized those who regularly postulated application of the *lex fori* ((1841) 24 AcP 265, § 9). In fact, the really interesting aspect of the second principle was *Wächter's* suggestion to derive actual choice-of-law rules that designate foreign law from the forum's own substantive law: 'our judge ... has to apply foreign law where ... the contents, spirit, and direction of the specific [substantive] law covering the legal issue in question ... lead to application and recognition of foreign law' ((1841) 24 AcP 230, 268, § 10). Later, *Wächter* reformulated slightly: the judge must find the applicable law from the spirit of our law and its general principles and the nature of the legal relation (*Pandekten Vol 1, at 147*).

Wächter's preference for the substantive *lex fori* can be found only in his third principle: 'If, however, no definite decision can be reached for the question derived from the aim, the sense, and the spirit of the specific statute involved, the judge must in case of doubt apply the law of his state.' The importance of this third principle is not great. Although *Wächter* does suggest that application of foreign law remains an exception ((1842) 25 AcP 267, § 10), his examples demonstrate that he gives, in practice, rather wide scope for foreign law. He formulated this principle mainly for mandatory law ('*leges cogentes*') and, as his explanation makes clear, rules of *ordre public* (Public policy (*ordre public*)) and as a description of the (very real) tendency of judges to get to the application of their own law (see the discussion in Nikolaus Sandmann, *Grundlagen und Einfluss der internationalprivatrechtlichen Lehre Carl Georg von Wächters (1797-1880)* (Diss Münster 1979) 110-114).

All in all, viewing *Wächter* as a proponent of the *lex fori* is in many ways a misunderstanding. For *Wächter*, the *lex fori* was not the primarily applicable substantive law. Instead, the *lex fori* was the basis for the applicable choice-of-law rules. Where those choice-of-law rules were not explicit, they had to be developed from the policies underlying existing substantive rules of the *lex fori*.

4. Specific doctrines

The greater part of *Wächter's* text was dedicated not to questions of theory but to doctrines on the applicable law in specific areas, which he covered comprehensively. Here, his specific solutions often did not differ dramatically from those of other authors – another sign that his *lex fori* theory did not lead to significantly greater application of the forum's substantive law. What made his solutions novel is that he frequently justified them as emerging from interpretation of the forum's substantive laws. With

this approach, he also made distinctions between truly international conflicts on the one hand and interregional conflicts on the other. And what makes his contribution path breaking is that he is the first, in Germany, to treat almost all areas of conflict of laws comprehensively.

Although *Wächter's* solutions for specific questions were often in accordance with existing views, he sometimes proposed novelties, some of which were influential. Thus, he proposed to distinguish the existence of a personal status (eg minor age) and its consequences. Similarly, he proposed a more flexible approach to questions of statutes of limitations than exclusive application of either *lex fori* or *lex obligationis*. In property law, his solution was application of the *lex rei sitae* for both land and chattel. *Wächter's* solutions in family law were dominated by domicile (frequently that of the husband) and party autonomy (for matters of marital property). In the law of succession, *Wächter* focused on the deceased's domicile, but allowed for exceptions for special assets. Finally, *Wächter* treated (briefly) the recognition of foreign judgments. He viewed (consistently with his general approach) no duty to enforce such decisions, and emphasized, in addition to the requirements of reciprocity and indirect jurisdiction of the rendering court (jurisdiction, foundations), a basic compatibility with the enforcing court's own laws ((1842) 25 AcP 417-419, § 32).

One of *Wächter's* most important contributions was his detailed treatment of choice of law for delicts, which had before usually been treated together with criminal law. This analytical distinction was an important novelty, although *Wächter's* solution, in practice was largely not novel: he suggested that the applicable law should usually be the *lex fori*, but proposed a double actionability rule for certain situations. His extensive treatment of international criminal law, which remained a standard reference for

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

decades to come, also emphasized the *lex fori* (Carl Georg von Wächter, *Das Königlich Sächsische und das Thüringische Strafrecht: Ein Handbuch – Einleitung und Allgemeiner Teil* (Metzler 1857) 125-175).

Another important (and underappreciated) contribution was *Wächter's* defence of the parties' power to designate the applicable law in contracts and beyond (for marital property). That designation was, for him, limited to non-mandatory laws and in this sense a mere extension of contractual freedom. Nonetheless, *Wächter* laid the foundations for the rise of party autonomy in private international law of contracts and beyond.

III. *Wächter's* influence

1. Influence at the time

Wächter's article proved to be a turning point in German private international law. His most important influence at the time was that he, together with *Schaeffner* (whose treatise was published concurrently), (re-)established private international law as an academic field, after it had lain dormant in Germany for more than a century. Further, *Wächter's* comprehensive (though sometimes questionable) refutation of older theories proved fatal to these, and they were no longer defended in Germany. Moreover, this creation of a blank slate helped pave the way for new theoretical approaches, including approaches that differed from his (like those of more famous authors like *Savigny* and *Ludwig von Bar*).

Today, *Wächter* is often juxtaposed with *Savigny*. A common judgment is that *Wächter's* contribution was merely that of critique, and that *Savigny's* formulation of a positive theory carried the day. This judgment appears inexact in more than one way.

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

First, it underestimates the great influence that *Wächter's* article had on *Savigny's* treatment of the topic, which closely follows *Wächter's* structure and many of his findings. Both were, in fact, friends. Second, it underestimates the degree to which *Wächter* and *Savigny* come to identical results on concrete questions (as *Wächter* himself later pointed out: Carl Georg von Wächter, *Pandekten Vol 1: Allgemeine Lehren* (Breitkopf und Härtel 1880) 146). Third, it ignores that *Wächter* and *Savigny* agreed, actually, on the role of the seat of the legal relation and the importance of comity and decisional harmony for private international law. Where they differed, most importantly, was in their assessment whether the judge is entitled to make such considerations or whether they are the exclusive domain of the legislator. *Savigny*, in the spirit of 19th century liberalism, took the former position and posited a (weak) internationalist super-law of private international law (while conceding that explicit state rules on private international law would trump). *Wächter*, as a sovereigntist, held the latter view.

Fourth, it is not actually clear that *Savigny* was, in the long run, more influential than *Wächter*, the 'source of the second mainstream in modern conflict of laws theories' (Frank Vischer, 'General Course on Private International Law' (1992) 232 *Rec. des Cours* 9, 34). Although *Savigny's* formulation of the 'seat' of a legal relation received, over time, near universal scholarly acceptance, his transnationalized and depoliticized view of private international law fell out of favour, effectively, already towards the end of the 19th century. Instead, what emerged were (i) a tendency towards legislation in private international law, and (ii) the emergence of the idea that private-international-law rules actually incorporate domestic policies, to be established by the legislator. Not surprisingly, therefore, *Wächter* found favour in the nationalist school of private

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

international law, which emerged in Germany towards the end of the 19th century; he has also been influential on the legislation of the German codification of private international law (see Nikolaus Sandmann, *Grundlagen und Einfluss der internationalprivatrechtlichen Lehre Carl Georg von Wächters (1797-1880)* (Diss Münster 1979) 296-306).

2. Influence abroad

Wächter's influence on foreign legal discussions was less pronounced – although he was read and discussed in several countries, in the long run he remained less influential than *Savigny* and *von Bar*. (Curiously, in the common law he was long viewed as a proponent of the vested rights theory, due to a misattribution in Thomas Erskine Holland, *The Elements of Jurisprudence* (Clarendon Press 1880) 188 no 1; see Kurt H Nadelmann, 'Some Historical Notes on the Doctrinal Sources of American Conflict' in Kurt H Nadelmann (ed), *Conflict of Laws: International and Interstate. Selected Essays* (Nijhoff 1972) 1, 15-18). There may be two reasons for the relative lack of attention: first, publication in a journal made his work less accessible abroad. Second, *Wächter's* insistence on a positivist approach, and his refusal to use foreign sources, may have made his work seem less relevant abroad. Nonetheless, he is often discussed at least in historical treatments of private international law.

What has enabled reception are translations. The greater part of the original essay (up until § 25) was translated, by *Quintín Alfonsín*, into Spanish ((1951) 2 *Revista de la Facultad de Derecho y Ciencias Sociales Montevideo* 949-1020, and (1954) 5 *Revista de la Facultad de Derecho y Ciencias Sociales Montevideo* 39-104, 907-950). This led to a significant interest in *Wächter* in Latin American discussions. The sections of

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

Wächter's article on theory and on obligation (§§ 2 (in part), 9, 10, 28), as well as the passage from the Pandects treatise, were translated into English by *Kurt Nadelmann* (Kurt H Nadelmann, 'Wächter's Essay on the Collision of Private Laws of Different States' (1964) 13 Am.J.Comp.L. 414, 417-428), together with an excellent brief foreword by the same author (Kurt H Nadelmann, 'Wächter's Essay on the Collision of Private Laws of Different States' (1964) 13 Am.J.Comp.L. 414-417).

3. Importance in the long run

In the long run, *Wächter's* importance has been overshadowed by *Savigny's* fame. *Savigny's* conception of private international law, in promoting a priority of the legal relation over its regulation by the state, was a good fit for the emerging liberal order of the 19th century with its strict separation of a private and a public sphere, and with its emphasis to limit the state's ability to regulate, actively, private relations. It is not, however, in many ways such a good fit for contemporary understanding of private international law as emerging from sovereignty (nationalization) and as instrumental in the promotion of certain values (politicization). For our time, *Wächter's* formulations provide us with a model of current private international law that is in many ways more adequate – even where a direct influence is doubtful.

Wächter's most important legacy is the priority of the *lex fori* as the starting point of private international law thinking. This implies not only the priority of explicit choice-of-law rules, which was never seriously in doubt. It implies especially the suggestion that choice-of-law decisions are allocated with the legislator and thus deserve legislative treatment. The emergence of national private international law codifications worldwide is evidence of this.

Ralf Michaels

Forthcoming in Elgar Encyclopedia of Private International Law

Related to this is *Wächter's* insight into the absence of truly universal rules of private international law, be they derived from the nature of things or public international law. Although scholars have long deplored the absence of uniformity, most of the doctrine today agrees with *Wächter* that such uniformity is only one of several policies (see, eg American Law Institute, Restatement of the Law, Second: Conflict of Laws, St. Paul 1971, section 6).

Positing private international law within a state's own law made possible another development of contemporary private international law, namely its politicization. Here, *Wächter's* approach has some affinity with US legal thought. It is related in particular to *Brainerd Currie's* governmental interest theory (Currie, Brainerd; Interest and policy analysis in Private International Law), which likewise derives application from underlying policies (Hans Baade, 'Foreword' (1963) 28 LCP 673, 675 note 9). Later, *Albert Ehrenzweig* explicitly invoked *Wächter* as an ancestor for his own *lex fori* theory (Ehrenzweig, Albert A), according to which a judge should, ordinarily, apply his own law (Albert A Ehrenzweig, 'Lex Fori – Basic Rule in the Conflict of Laws' (1959-60) 58 Mich.L.Rev. 637, 659-660; see Kurt Lipstein, 'The General Principles of Private International Law' (1972) 135 Rec. des Cours 97, 144-147; Kurt Siehr, 'Die lex-fori-Theorie heute' in Rolf Serick and others (eds), *Albert A Ehrenzweig und das internationale Privatrecht* (Winter 1986) 35, 57-58).

Wächter's suggestion to derive choice-of-law policies from substantive law policies still finds much application in legislation and occasionally in case law. The protection of weaker parties in substantive law, for example, is naturally extended into private international law. Otherwise, however, modern interest and policy analysis in private international law has developed new and specific choice-of-law-related policies.

Ralf Michaels
Forthcoming in Elgar Encyclopedia of Private International Law

Wächter's defence of the substantive *lex fori* as the residual law has met with a lot of opposition, especially in continental Europe. It did and does, however, describe an actual judicial tendency to apply one's own law where possible (the so-called homeward trend). And it exists occasionally in doctrine, for example when the content of foreign law cannot be ascertained, and as generally residually applicable law (eg art 10 of the Rome III Regulation (Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343/10)).

Wächter's most important contribution was, arguably, one he made in passing, namely his distinction between interlocal and international conflicts. His suggestion that a vested rights theory could be justified for conflicts within one sovereignty proved prescient for the country-of-origin principle in the European Union (Country of origin rule), which is best understood as such a reborn vested rights theory (Ralf Michaels, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested Rights Theory' (2006) 2 J Priv Int L 195-242).

Ralf Michaels

Literature

Bernd Rüdiger Kern (ed), *Zwischen Romanistik und Germanistik. Carl Georg von Wächter (1797-1880)* (Duncker & Humblot 2000); Christoph Mauntel, *Carl Georg von Wächter (1797-1880). Rechtswissenschaft im Frühkonstitutionalismus* (Schöningh 2004); Kurt H Nadelmann, 'Wächter's Essay on the Collision of Private Laws of Different States' (1964) 13 Am.J.Comp.L. 414; Kurt H Nadelmann, 'Some Historical

Ralf Michaels
Forthcoming in Elgar Encyclopedia of Private International Law

Notes on the Doctrinal Sources of American Conflict' in Kurt H Nadelmann (ed),
Conflict of Laws: International and Interstate. Selected Essays (Nijhoff 1972) 1;
Nikolaus Sandmann, *Grundlagen und Einfluss der internationalprivatrechtlichen Lehre
Carl Georg von Wächters (1797-1880)* (Diss Münster 1979); Paul Volken, 'Wenn
Wächter mit Story' in Jürgen Basedow and others (eds), *Private Law in the
International Arena. Liber amicorum Kurt Siehr* (TMC Asser Press 2000) 815; Carl
Georg von Wächter, 'Ueber die Collision der Privatrechtsgesetze verschiedener Staaten'
(1841) 24 AcP 230, (1842) 25 AcP 1, 161, 361 (also as Reprint Vico Verlag 2008); Carl
Georg von Wächter, *Handbuch des im Königreiche Württemberg geltenden
Privatrechts*, vols 1 and 2 (Metzler 1839-1842); Carl Georg von Wächter, *Das
Königlich Sächsische und das Thüringische Strafrecht: Ein Handbuch – Einleitung und
Allgemeiner Teil* (Metzler 1857); Carl Georg von Wächter, *Pandekten Vol 1:
Allgemeine Lehren* (Breitkopf und Härtel 1880); Oskar von Wächter, *Carl Georg von
Wächter. Leben eines deutschen Juristen* (Breitkopf und Härtel 1881); Bernhard
Windscheid, *Carl Georg von Wächter* (Duncker & Humblot 1880).

Keywords

Interlocal conflicts
lex fori
Party autonomy
Savigny
theory of statutes
vested rights
politicization of private international law
delict

List of sources cited

Rome III Regulation
Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced
cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ
L 343/10