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Melting law: Learning from practice in transboundary mountain regions



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ABSTRACT

Transboundary mountain regions in Europe emerge as normative spaces at the intersection of territorial and environmental governance. Constituting a meeting point of different national legal orders under the umbrella of international regimes, they have become natural laboratories for the development of cross-border law. The objective of this article is to examine the nature and normative dimension of such legal environments. To this end, we introduce the concept of ‘melting law’ as a means to assess the re-combination of different modes of conventional, national, international, supranational and/or interregional normativities. Hard (national) laws melt within the framework of transboundary mountain regions as a legal category, based on a mixture of national, international (or EU) and interregional norms, each combining with the other by softening their usual normative impact. Building on a review of legal approaches to mountains and cross-border cooperation practices, we trace the development of “melting law” and “melted law” through a discussion of the legal framework for and the impact of “working communities” and the “European Grouping for Territorial Cooperation” (EGTC). The discussion mobilizes a global approach with a view to generate new insights into the legal challenges facing transboundary mountain governance in Europe.

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1. Introduction

The equation with multiple variables [governance + transboundary mountain regions = melting law] schematically represents the legal stakes and effects of cross-border and environmental governance in mountain regions. Theories and models of continental drift propose a view of mountain formation based on mechanisms of movement with overlapping and folding. We observe the same phenomena in law. When in contact, the “continental plates” of national law

confront one another, overlap and interact, bringing about emergent legal reactions and concretions.

This association between three objects, governance, borders and mountains, leads to multiple consequences including the “melting” of laws. Governance of mountain regions illustrates, indeed, the phenomena of altering state legal orders and norms. This is due to the fact that these regions allow for new modalities of public action (the transboundary mountain regions require action of other actors than the State and, at the same time, tend to closely follow some examples of international maritime and river

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basins) that bring together actors from different national institutional systems. In addition, these regions represent emerging categories in the universe of law. The melting of “hard laws” must be understood, in the context of this article, as a “softening” of internal national laws, as much in respect to legal systems as to legal norms. This softening can potentially lead to a combination of these orders and therefore to the melting of laws into one other.

Independent states are traditionally organized within given borders that allow for the differentiation of legal orders and sovereign spheres along these territorial divisions, each separate entity forming a “milieu légal” (Rousseau, 1977, p. 16). By connecting several national systems of law, transboundary mountain regions disrupt this traditional organization: they are one class of spatial categories that illustrate general internormativities (Carbonnier, 1977; Belley, 1996; Arnaud and Fariñas Dulce, 1998) that occur at the gates of various legal cultures and disciplines. The effects that ensue from this interference feed into several reflections on the resilience capacity of law in general and on the specific elasticity of national laws, particularly those called “hard laws”. “Melting law” is the concept retained to take account of these reactions and interactions on the borders of state legal systems and mobilized for the sustainable development and governance of transboundary mountain regions. Melting law corresponds to a way of seeing and thinking about the connections between what are considered “hard laws.” This expression describes and defines a relatively ancient phenomenon that has been considerably renewed in the current era as a result of new legal instruments and increased interpenetration of laws. In terms of the subject of our article and in the context of a special issue of this journal, melting law appears when certain general conditions are brought together (an open legal system and a transboundary mountain region) and is a function of several specific legal instruments: international and cross-border agreements, cross-border organizations and multi-level management programs, in particular those developed by the European Union (EU).

This article will concern cross-border governance of mountain regions as such without focusing specifically on the environmental protection of these spaces or on their economic and social development. We do think, however, that an approach to the spatial conception of “mountains” contributes an added value to the environmental governance and sustainable development of these regions. Environmental law, “law of collectives, participation rights” (Prieur, 1999) can be adequately combined with the mechanics of governance that “arises from a pluralist and interactive approach to collective action” (Chevallier, 2005, p. 191) (author’s translation). We agree with the latter author for whom governance “is cast in the mold of existing law, and only modifies the conditions of its development and normative impact” (Chevallier, 2005, p. 207) (author’s translation).

At a time of legal flexibility and made-to-measure laws, the subject of this article is thus the following: transboundary mountain regions are both producers and products of melting law because they provide the stage for relationships between different legal orders that must take account of one another. Melting law is therefore a legal response that arises from the exchanges between these laws of distinct natures on separate levels at the same time as the occurrence of operational interpretations and constructions used to understand regional

and environmental governance of mountains and resulting effects. That a law can “melt with” and “melt itself into” another law is the assertion presented here. This approach is in accordance with the attenuation of the rigidity of legal borders that does not go so far as to break down the standards indispensable to legal rigor. Within the narrow confines of this article it will be possible to discuss a pathway toward a more general reflection and to present a few examples related to this subject. Here we should understand the expression of ‘cross-border governance’ as covering the organized set of dynamics and management processes relating to the convergence and divergence points existing on both sides of a border between States, based on the principle of differentiation of national legal orders, on the plurality and diversity of affected actors and on the prospect to coordinate preferences about issues involving the territories of several States (About the notion of Governance, see: European governance—A White Paper, European Commission, 2001; White Paper on Multilevel Governance, Committee of the Regions, 2009; Charter for Multilevel Governance (MLG), Committee of the Regions, 2014).

In law, two separate but related levers trigger governance of mountain regions that straddle borders: mountain law (Pineschi et al., 2002, 2004) and cooperation law (Dupuy, 1977; Levrat, 1994; Audit, 2002; Renti, 2005, 2006 and 2007). Mountain law concerns the mountain as object defined by the different legal categories mobilized (zones, regions, ecosystems, etc.) and according to related norms (such as in agriculture, land-use planning and biodiversity). Mountain law is focused on the mountain space as a historical division between political spaces that have become factors of integration and settings for arbitration. The spatial strategic dimension is of utmost importance here since it concerns a polyfunctional area that needs to be optimally managed by balancing public policies that are at times divergent. Cooperation law relates to actors in territorial governance and to the instruments that allow them to collaborate on mountain region issues. Cooperation law concerns those with competences at and between all levels and relates to the different forms and tools of cooperation that are available. The operational logistical dimension is important here since it is a question of implementing projects in a concrete manner in given practices.

This article on melting law is organized in three parts. The first part includes the notion of melting law in its theoretical and generic sense in terms of the general principles of national and international positive law, inspired by and transcending the notion of soft law. The second part explores the conditions favorable to melting law through legal, transboundary and mountain spaces. The third part analyzes melting law through the legal instruments of cooperation such as working communities. In summary, this article invites a questioning of the resilience of law and of its institutions through the methods of governance of mountain regions, particularly of the Alps, the Jura and the Pyrenees, these mountains being amongst the first ones in Europe to which cross-border mechanisms were added.

2. Melting law in regional cross-border governance

To understand the notion of “melting law”, one must rapidly differentiate “hard law” from “soft law” and illustrate the

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