Private International Law and European Society

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Can one speak of a European society without speaking about private relations? Recent scholarship on European society has largely approached the concept through the lens of public law. Yet societies are constituted at least as much by the horizontal relations between individuals and groups as by public institutions. In the absence of a comprehensive European private law, this blogpost turns to EU private international law (PIL), the principal framework for coordinating interactions between the diverse private laws of the Member States and structuring cross-border private life within the Union. I will argue that EU PIL brings into view the importance of coordination frameworks for organising a mode of integration based not on unification, but on interdependence.

Unity Through Interdependence

The Commission v Hungary judgment refers to “a society in which pluralism prevails” (paras. 551, 556). By placing that formula in the context of the Union and its common legal order (paras. 551, 556) and explicitly invoking European society (para. 554), the judgment leaves little room for doubt that it understands “a society in which pluralism prevails” as denoting a single European society. Yet this raises a fundamental question. If European society is constituted by pluralism – that is, by heterogeneity rather than homogeneity – what holds it together? Much like the Union’s own aspiration to be “united in diversity”, the notion of a single European society defined by pluralism appears almost oxymoronic. How is unity achieved under conditions of diversity?

A clue may lie in the particular mode through which European integration has proceeded in important domains. Read against the background of more than seventy-five years of integration, “a society in which pluralism prevails” appears as a fitting description of a European project in which integration has often advanced not by replacing the plurality of national legal orders with a single one, but by weaving them together into an increasingly dense web of legal, economic, and social interdependence. Rather than pursuing unification, integration in many domains has relied on ever closer cooperation between the diverse legal orders of the Member States. The resulting web of relations and interdependencies is sufficiently deep to sustain the idea of a single European society, while leaving intact the plurality of national legal orders. From this view, unity is achieved not through unification, but through interdependence.

I explore this mode of integration through the lens of EU PIL, a field particularly well suited to bringing into view both the horizontal relations between individuals and groups that have largely remained overlooked in accounts of European society and the coordinating structures through which interdependence is organised.

Mutual Trust and the Case for Private International Law

Mutual trust provides the normative foundation for cooperation between the

diverse legal orders of the Member States. Although criticised as a judicial construct lacking a clear legal and empirical basis, it has become a structural principle of EU constitutional law. Resting on the presumption that all Member States comply with the values enshrined in Art. 2 TEU, mutual trust is a precondition for the functioning of the Union's legal order. By requiring Member States to presume the adequacy of one another's legal systems, it enables them to enter into relations of growing mutual dependence. Its significance is particularly pronounced in areas that remain only marginally harmonised, where cooperation relies less on common substantive standards than on confidence in the adequacy of the legal solutions adopted by the Member States.

Mutual trust occupies a central place within the Area of Freedom, Security and Justice (AFSJ), a policy area based on cooperation rather than unification. Within the AFSJ, the following reflections turn to judicial cooperation in civil matters – better known outside the Treaties as PIL – to investigate more closely how integration through interdependence operates in practice.

Admittedly, one might hesitate before venturing deeper into a field of law famously disparaged as a "dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon". Yet, before the reader hastily retreats to firmer ground, two considerations make this "swamp" particularly worth exploring. First, accounts of European society, as developed most prominently by Armin von Bogdandy and Loïc Azoulai, have so far focused primarily on its public law dimension, leaving largely unexplored the horizontal relations between private individuals and groups – despite their centrality to any notion of society. Second, PIL brings into view the importance of coordination frameworks for a mode of integration based on interdependence rather than unification.

PIL deals with legal issues arising from private relations connected to more than one legal system and, in doing so, provides a framework for coordinating the interaction between diverse private legal orders. While substantive private law remains only marginally harmonised at the EU level – save for specific areas such as consumer protection, intellectual property, anti-discrimination law, and parts of labour and company law – PIL has been extensively harmonised. The result is a highly integrated coordination framework governing interactions between substantive laws that continue largely to be constituted by the diverse legal

orders of the Member States. To return to the “dismal swamp” metaphor, what was once dismissed as an obscure and largely technical discipline has become a framework of central importance for the everyday lives of individuals and businesses throughout the Union. The denser the web of cross-border relations, the more indispensable coordination frameworks become.

In the following two sections, I demonstrate that EU PIL performs a dual function: first, it renders growing social and economic interdependence compatible with the continued plurality of national private laws; second, through the design of conflict rules, it regulates the externalities generated by interdependence.

Mobility Across Private Legal Orders

By facilitating mobility, openness, and cooperation across diverse private legal orders, EU PIL renders the growing density of cross-border relations compatible with the continued plurality of national private laws.

The increasing free circulation of civil judgments provides a prominent illustration of this dynamic. Following the abolition of exequatur – an intermediary procedure under which a judgment rendered in one Member State first had to be declared enforceable by the courts of another in order to be enforced there – judgments rendered in one Member State are, in most cases, recognised and enforced in another under the same conditions as domestic judgments. By rendering the outputs of one national judicial system effective throughout the Union, this closer form of cooperation reduces the costs and uncertainties associated with cross-border litigation and, in doing so, lowers the barriers for individuals and businesses to enter into cross-border relationships.

The growing mobility of individuals within the EU is further reflected in the reconfiguration of the connecting techniques of classical continental PIL. EU instruments have shifted the principal connecting factor from nationality to habitual residence and expanded the scope for party autonomy. By relying on less static connecting factors, EU legislation adapts conflict rules to increasingly transnational patterns of life and facilitates engagement with the private legal orders of other Member States.

Where harmonised PIL rules are absent or prove insufficient to structure cross-border social life within the EU, recognition-based mechanisms grounded in EU

primary law have come to complement traditional PIL. Legal statuses validly established in one Member State increasingly circulate throughout the Union by virtue of fundamental freedoms, Union citizenship, and fundamental rights. These recognition-based mechanisms enable legal statuses created under one legal order to produce effects across borders irrespective of the law designated by traditional choice-of-law rules. Prominent examples can be found in both economic and family law: corporationsvalidly incorporated in one Member State must, on the basis of fundamental freedoms, be recognised throughout the Union; same-sex marriages or surnames lawfully established under the law of one Member State increasingly require recognition in other Member States on the basis of Union citizenship. Rather than replacing national private laws with a uniform European law, these recognition-based mechanisms render the private legal orders of the Member States progressively more interdependent by allowing individuals and businesses to carry their legal identities and relationships across borders.

Regulating Interdependence Through Conflict Rules

The growing interdependence of diverse legal orders gives rise not only to new forms of cooperation, but also to new governance challenges. A common concern is that private actors will exploit differences between legal regimes, circumventing regulation and triggering a race to the bottom. Yet, unlike mechanisms based solely on mutual recognition or the country-of-origin principle, which generally privilege the legal order of the Member State of origin, PIL is capable of employing more finely calibrated connecting factors that take account of the regulatory consequences of the applicable law. In this way, PIL does not merely accommodate legal diversity but also governs the externalities generated by interdependence, thereby assuming a regulatory function.

Art. 7 Rome II Regulation provides an instructive example of how conflict rules can be used to pursue substantive policy objectives. The provision allows claimants in environmental damage cases to choose between the law of the place of conduct and the law of the place of injury. Either connecting factor, if applied in isolation, would create opportunities for undertakings to exploit differences in national environmental standards. A pure place-of-conduct rule might encourage

undertakings to locate polluting activities in low-protection jurisdictions, while a pure place-of-injury rule could create incentives to establish operations in higher-protection Member States where natural conditions, e.g. downwinds, ensure that the harmful effects are realised elsewhere. By conferring the choice upon the injured party, who is likely to opt for the more favourable law, Art. 7 Rome II seeks to reduce incentives for regulatory arbitrage, thereby aligning the operation of PIL with the Union's objective of ensuring a high level of environmental protection.

Art. 7 Rome II thus demonstrates that conflict rules are not neutral techniques for allocating claims of regulatory authority. Their design can itself pursue substantive objectives and shape the conditions under which cross-border private relations unfold. More broadly, the extensive incorporation of PIL into the EU legal framework has transferred the design of conflict rules to a supranational level that stands above the legal systems whose interactions it seeks to organise.

I would like to thank Iris Canor, whose forthcoming contribution, "In Mutual Trust We Trust – A Structural Principle of a Diverse Union", in Bast/von Bogdandy (eds.), The Constitutional Core of the Union (OUP, forthcoming), articulated with particular force the idea of European integration as a process driven by interdependence rather than unification. This contribution has greatly benefited from her insights.

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