European Society without European Private Law?

Public and Private Law Closer Together

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Integration Through Law was and remains, in various forms, the major driver of European integration. Constitutional Pluralism arose out of constitutionalisation, counterbalancing the move to neoliberalism in the new millennium. In *Commission v Hungary*, the Court recognised European society "in which pluralism prevails" as a legal concept. The Court radiates judicial authority at a time when Europe is again in crisis, politically through populism, economically through competitiveness and sustainability, and technologically through dependence on US companies. Putting European society into the limelight of European constitutionalism recalls van Gend en Loos and Costa v ENEL (see Stein).

The Court does not provide much guidance on its understanding of European society in the singular, nor does it tell us whether it refers only to European citizens or also to residents (Gentile). All we learn is that European society is both a descriptive social fact and a normative claim (Feisel and Gerstenberg). Member States are legally obliged to respect the common values of Article 2 and to protect European society against "manifest and particularly serious breaches" of the common values shared by Member States. All three paradigms, Integration Through Law, Constitutional Pluralism and European society, deduce that the authority of EU law derives from rationalities constituted by EU law (Mendes, van de Beeten).

I will examine the potential impact of the concept of European society on private law relations in Europe. The Integration Through Law project included company, energy, environment, and consumer law. Constitutional Pluralism reached private law through legal pluralism and through the double constitutionalisation of private law via market freedoms and fundamental rights (Micklitz/Sieburgh). European society, as a descriptive and normative concept, allows greater weight to be given to private relations – the descriptive side – and to the particularities of European integration through private law and private law pluralism – the normative side. The revival of society after decades of economic efficiency and political governance is an opportunity to bring EU law closer to the people. Finally, society and sociology are back on the agenda. I will first demonstrate that sociological concepts of society and civil society leave room to integrate individuals, stakeholders, and networks, but that the pursuit of national interests prevails over European ones. In a second step, I will then show that EU private law is divided and corresponds to horizontally divided (civil) societies. Finally, the prevailing pluralism between codifications and common law is based on difference and recognition of diversity. The Court recognises pluralism and difference by setting a high benchmark for a European constitutional metastructure in private law relations.

Individuals and Stakeholders in European and Civil Society

Law is notoriously vague when it comes to formulating a normative understanding of society and civil society. Private law scholarship is inclined to focus on civil society, an even more controversial concept. *Zivilgesellschaft* – in German and civil society in English are not literal translations. One of the few exceptions clarifying the relationship between society, civil society, and private law is found in ordoliberalism and in "*Privatrechtsgesellschaft*" – private law society. The private law society includes self-organisation within private law through business and through business in combination with non-business (see here). Teubner argues in line with systems theory that non-state

sectors, business and non-business, develop their own internal constitutions in self-organised networks through autonomous and social discourse. Both concepts are hardly comparable to the definition provided by the European Commission: civil society means non-State, not-for-profit, independent of government and business, non-partisan and non-violent organisations through which people pursue and defend shared objectives and ideals, inspired by systems theory. However, both give private law and private relations more weight within the concepts of society, civil society, and constitutionalism, theoretically and empirically.

Von Bogdandy and his research team take a different strand. They refer to Georg Simmel's *Vergesellschaftung*, the process by which individuals become members of society through adaptation to social norms, values, and roles via interaction and interdependence. *Vergesellschaftung*, this is the argument, requires a stabilising framework, in their understanding EU law and institutions "embedded in a social field conceptualised as European society" (v. Bogdandy, Siegert). Individuals are those who participate in the European social process. In the better regulation approach, the EU has limited participation of civil society organisations, as an add-on to the decision-making power of the European Parliament and the Council, thereby drawing a line between society and civil society. Does a normative understanding of European society require and justify an upgrade of participation, even under inclusion of networks in the Teubnerian sense?

For Durkheim, intermediary organisations perform an indispensable function of social integration. But are the intermediaries only stakeholders in the European Commission's sense or business/non-business networks in the Teubnerian sense? Stakeholder organisations are intermediary organisations that exist in small and large businesses, in sectoral or horizontal organisations, outside businesses in trade unions, consumer and environmental organisations, and all sorts of citizen groups. European intermediary organisations are weaker and less influential than national ones (Höpner), both in EU law-making and in EU law-enforcement. Key actors, even before the CJEU, are national consumer, environmental, and data protection organisations that defend national interests, provided they overcome the hurdles established by the Court (Pagano). Cross-European societal impact is mainly a side effect. Closing the gap would require moving towards enhancing genuine European interests in law enforcement, even going beyond the European Commission's understanding of state-controlled civil society organisations and including the much broader and less stable European networks, which is not foreseen in the Treaty and cannot be achieved by transforming Article 2 into a competence rule.

Divided European Private Law and Divided European and Civil Societies

The Common Market and the Internal Market, as well as all the other markets, banking, finance, energy, and now the digital market, are relying on the operational capability of national private law orders. Private law proper stands outside the Treaty, from Rome until Lisbon, except for early conventions and later regulations on European private international law. The spirit behind the Treaty is one of mutual trust in national private law systems, their private laws and their private law courts (Siegert). However, the limited competence did not prevent the EU from using Article 114 TFEU for adopting a dense set of private law rules in the periphery about consumer law, consumer data protection law, non-discrimination law, about regulated markets – finance, energy, telecom, transport – and more recently about an EU digital private law (Domurath/Micklitz). EU private law is EU regulatory private law, merging the public and the private, by weaving national private law orders together into an increasingly dense web of legal, economic, and social interdependence (Tiede). More ambitious political attempts to elaborate a European Civil Code and a Common European Sales Law as an optional 28th legal order failed due to the resistance of the Member States. Can Article 2 contribute to overcoming the resistance against the elaboration and adoption of the European civil code? Probably not (von Bogdandy).

The impact of such dispersed EU private law on European society – or depending on the theoretical backing – the European civil society – is rather limited. In the business sector, the Europeanisation of international private law has affected jurisdiction but not applicable law. Much more important has been the pathway offered by the Court through the supremacy and direct effect of the market freedoms. Businesses invoked EU law to reject national public laws that limit contractual relations (Davies). Regulatory private law managed to build sectoral or subject-related European societies through a combination of public and private law rules (Heidenreich). *Commission v Hungary* fits perfectly well into such a scenario. Audiovisual media services and online services combine economic (contract-based) services with society through media as a form of communication and information. The directives have a strong private law bias – both are services, filling gaps in private law on services.

Integrating private law into a concept of European society requires both clarifying the normative implications and broadening the factual dimension. EU regulatory private law succeeded in shaping a European consumption society, however doubtful these achievements might be. Economically, consumption accounts for more than 50% of the EU's gross income. The opening of borders and cross-border mobility changed our behaviours and, in turn, society (Tagiuri). The transformation began in the aftermath of the Single Market and reached a new peak in digital policy legislation (von Bogdandy and Schorkopf). Is private law closer to the lived experience, or at least parts of it? Is this the European society we want to live in (Rawls, v. Parijs)?

Pluralism and Difference in Private Law

The normative content of pluralism in *Commission v Hungary* remains vague (Piep). European private law scholarship discusses constitutionalisation as a potential tool to overcome the diversity of national private law orders, alongside codification and common law. The Charter of Fundamental Rights would then function as a meta-structure, a kind of minimum standard Member States and their courts would have to respect (Mak, but Collins). Those who promote the constitutionalisation of private law through the Charter hope for a better and more just society, one that is closer to the needs of the people (critical Somek). In *Commission v Hungary,* the Court established a two-fold constitutionalisation of private law: two-fold because not only must the Charter have been infringed, but the Charter must also have been "manifestly and seriously infringed". The Court *protects European society against potential infringements of the EU's common values. According to AG Ćapeta, Article 2 reflects the founders' choice for a good society that respects these values (paras 155 and 157). Her interpretation would enable structural transformations in European society, which the Court rejected (*Steininger/Kim *and* Tomaselli*).*

Theoretically, two scenarios are conceivable where pluralism of national private law orders might clash with the common values under Article 2. In the GCC's guarantee ruling, the credit contract infringed the German Grundgesetz (Basic Law). In Aziz, the Court used a comparable scenario to raise the bar towards standards that come close to a "good society". Does this mean that the Court is ready to design such a meta-structure for a good society (for good private law relations), under reference to the Charter? A different scenario could arise if national legislatures or their courts apply particularly low standards. The high threshold for intervention under the principle of double constitutionalisation leaves Member States with broad discretion to adjust standards for "good" private law relations upwards or downwards, regardless of whether the national legislature or the courts are the acting authority (Micklitz).

The more relevant question at the time of writing seems to be whether Article 2 protects European society against the EU, as a legislator, from violating the standards imposed on Member States in its own legislation. Yet it is precisely here that the potentially greatest shortcomings lie. One need only think of the EU digital policy legislation and the lack of a Digital Fairness Act. Such a claim would be in line with the Court's decision in *Commission v Hungary*, but who could be the claimant? The outvoted Member State or the European Parliament?

Lessons from Private Law?

The difficulties and contingencies of EU private law-building demonstrate that both the descriptive and the normative dimensions of European society face serious barriers. The responses in the legal system depend on the social science to which legal scholarship refers (Zaleski). There is neither a European civil code approved by the Parliament and the Council nor a judge-made equivalent. There is no counterpart to the European Constitution. Member States defended "difference" politically by rejecting CESL and legally, with the Court holding that national private law orders are exempt from market freedoms (here and here). More recent attempts by the Court to develop "general principles of European civil law" have vanished into the haze (here, here, and here). Private law scholarship oscillates between reforms and revolution (here and here). Whatever solution is adopted, *Commission v Hungary* offers hope of a more extensive exchange between constitutional and private lawyers.

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