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The Rule of Law in a Multi-State Dimension: The Rule of Law and Private International Law

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ABSTRACT

In the legal literature, the rule of law has been often considered a public law phenomenon and little attention has been paid to the relationship between the rule of law and private international law. This article outlines how the rule of law has unfolded in private international law and how it influences the creation and application of private international law rules. Savigny's private law theory detached law from state power which led to the recognition of the equality of the legal systems from the point of view of the designation of the applicable law. The classic conflict of laws method focused on legal certainty in determining the governing law that corresponds to a formal conception of the rule of law of the eighteenth and nineteenth century. Today's private international law, however, also enables the infiltration of the material values of the rule of law into private international law, in particular through the public policy clause or as overriding mandatory norms. The development of European Union (EU) private international law illustrates this well. The public policy exception is suitable to prevent the application of the otherwise governing foreign law or the recognition and enforcement of a foreign decision that is contrary to the fundamental principles of the domestic legal order of the state of the forum, including human rights. Moreover, the lack of judicial independence in an EU Member State where a decision was rendered can result in the denial of recognition and enforcement of that decision in another Member State not only in criminal but also in civil matters. The requirements of the rule of law, and in particular the respect for human rights also influence the methodology of private international law. As the legal literature points out, the method of recognition, requiring the recognition of legal status acquired abroad irrespective of the law designated by the conflict of laws rules of the forum, coexists with the traditional conflict of laws method.

KEYWORDS

Private International Law; Rule of Law; Legal Certainty; Human Rights; Judicial Independence

EDITORIAL NOTE

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INTRODUCTION

Albert Venn Dicey, who was Vinerian Professor of English Law at Oxford University and who revived the concept of the rule of law in England, also wrote a monograph on private international law which – with subsequent revisions – is still one of the most significant English publications in this field.[1] But it is rare for a professor of public law to deal also with private international law, and even Dicey's volume did not touch on the relationship between what is now called the rule of law and private international law. Indeed, at first sight, the concept of the rule of law and private international law seem far apart. In the first place, the concept of the rule of law has traditionally been linked to sovereign states and their organs exercising public power. Most often, the question is whether a state's institutions comply with the requirements of the rule of law. In this sense, the rule of law appears to be an internal problem. Less attention is paid to the implementation of the rule of law at the international level. Representatives of public international law have sometimes examined the existence and operation of the international rule of law.[2] However, these investigations remain relevant to private international law to the extent that the international rule of law is construed not only in the relationships of subjects of public international law (states and international organisations) but also in terms of the impact of the rules of public international law, in particular human rights, on private persons. Secondly, private international law deals with private legal relations whereas the rule of law expresses the protection of citizens vertically against public power. The concept of the rule of law is more often conceived as a public law phenomenon.[3] It has been noted that there is a presumption that the rule of law is a doctrine of public law.[4] Even the works dealing with the relationship between private law and the rule of law pay little attention to private international law.

[1] Albert Venn Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (1896).

[2] Stéphane Beaulac, *The Rule of Law in International Law Today*, in Relocating the Rule of Law 197 (Gianluigi Palombella & Neil Walker eds., 2009); Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?* 65 Int'l & Compar. L. Q. 277 (2016); Societe Française pour le Droit International [French Society for International Law], L'Etat de Droit en Droit International: Colloque de Bruxelles [The Rule of Law in International Law: Brussels Symposium] (2009); André Moine, *L'État de Droit, un Instrument International au Service de la Paix [The Rule of Law, an International Instrument in the Service of Peace]*, 37 Civitas Europa, no. 2, 2016, at 65.

[3] Lisa M. Austin & Dennis Klimchuk, *Introduction, in* Private Law and the Rule of Law 1, 1 (Lisa M. Austin & Dennis Klimchuk eds., 2014); William Lucy, *The Rule of Law and Private Law, in* Private Law and the Rule of Law 41, 41-42 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

[4] *See* Austin & Klimchuk, *supra* note 3, at 1.

In this way, it is not surprising that even private international law literature has hardly addressed the relationship between the concept of rule of law and private international law.[5] Despite the absence of a more comprehensive analysis of the concept of the rule of law in the context of private international law, it cannot be denied that the rule of law also plays a role in the operation of private international law rules. Moreover, legal scholarship has discussed in depth specific private international instruments (for example, the public policy exception) which can convey various aspects of the rule of law.

The rule of law has been defined in various ways. Dicey highlighted three meanings of the rule of law in England: no penalty without a legal court procedure establishing a breach of the law; equality before the law; and the emergence of constitutional principles from judicial practice protecting individual rights.[6] Subsequent definitions of the rule of law specified further characteristics. Two aspects of the rule of law are often distinguished: formal and substantive.[7] The formal concept of the rule of law emphasises the way of adoption and application of rules (accessibility, clarity, consistency, no retroactivity, etc.).[8] The substantive aspect of the rule of law concerns the content of the rules and fills the concept of the rule of law with certain material values, including first of all human rights.[9] The two aspects of the rule of law – formal and substantive – are in fact complementary.[10] This is also demonstrated by our analysis of private international law. In private international law, the ideal of conflicts justice has always recognised demands for legal certainty. To not lose sight entirely of substantive justice, at the same time, private international law admits the infiltration of substantive values of the rule of law.

[5] Monique Hazelhorst, *Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law*, 65 Neth. Int'l L. Rev. 103 (2018) I; Vincent Heuzé, *D'Amsterdam à Lisbonne, l'État de droit à l'épreuve des compétences communautaires en matière de conflits de lois [From Amsterdam to Lisbon, the Rule of Law Put to the Test by the Community's Powers in the Area of Conflict of Laws]*, 30 La Semaine juridique – Édition générale 20 (2008); Vincent Heuzé, *Construction européenne, État de droit et droit international privé [European Integration, the Rule of Law and Private International Law], in* Construction europeenne et État de droit [European Integration and the Rule of Law] 123-134 (Vincent Heuzé & Jérôme Huet eds., 2012); David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 Vill. L. Rev. 607 (2011).

[6] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 183-205 (10th ed., 1979).

[7] Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 3 Pub. L. 467 (1997).

[8] Joseph Raz, *The Rule of Law and its Virtue, in*, The Authority of Law: Essays on Law and Morality 210 (1979).

[9] Thomas Bingham, The Rule of Law (2010).

[10] Naiade El-Khoury & Rüdiger Wolfrum, *Rule of Law, in* Max Planck Encyclopedia of Comparative Constitutional Law (Rainer Grote et al. eds., 2021).

In particular, the enforcement of human rights increasingly influences not only the outcome of private international law cases but also its methodology.[11]

With regard to an international private law situation, the assessment of the respect of the values of the rule of law may emerge in an international dimension. The assessment of jurisdiction, the content of the designated foreign law and the recognition and enforcement of a foreign decision may raise the evaluation of the situation of the rule of law in another country.[12] In deciding which is the proper forum, rule of law considerations may be crucial. The application of a foreign law may be ruled out if its application in the concrete case violated human rights, a component of the rule of law. The question also arises as to whether it is possible to recognise a foreign decision rendered in a country where judicial independence, an important element of the rule of law, is not observed. In such situations, the need to respect the rule of law undoubtedly influences the application of the rules of private international law.

The aim of this contribution is to examine how the elements of the rule of law have unfolded during the development of private international law and how the rule of law influences the application of private international law rules.

[11] Louwrens R. Kiestra, The Impact of the European Convention on Human Rights on Private International Law (2014); Pietro Franzina, *L'incidenza dei diritti umani sul diritto internazionale privato: il caso della protezione degli adulti vulnerabili [The Impact of Human Rights on Private International Law: The Case of the Protection of Vulnerable Adults]*, Federalismi.it, Dec. 2013, at 1; Silvia Marino, *Brevi considerazioni sulle interazioni fra diritto internazionale privato e diritti umani [Brief Considerations on the Interactions Between Private International Law and Human Rights]*, Cuadernos de Derecho Transnacional, Mar. 2015, at 112; Angelika Nußberger, *Internationales Privatrecht und die Europäische Menschenrechtskonvention [Private International Law and the European Convention on Human Rights]*, in IPR für eine bessere Welt [IPR for a Better World] 1 (Konrad Duden ed., 2022); Susanne Lilian Gössl, *Grundrechte und IPR [Fundamental Rights and IPR]*, 87 Rabels Zeitschrift fur auslandisches und internationales Privatrecht 728 (2023).

[12] King Fung Tsang, *China's Rule of Law from a Private International Law Perspective*, 47 Ga. J. Int'l & Compar. L. 93, 98 (2018).

The principle of the rule of law not only applies to the application of the private international law provisions, but also to their adoption. As to the creation of private international law rules, as they constitute part of the domestic legal order, they have to comply with domestic constitutional requirements, which include the principle of the rule of law.[13] In this respect, it may arise the question whether the regulatory approach (e.g., using unilateral conflict of laws rules)[14] or a given connecting factor is in accordance with the requirements of the rule of law, and in particular fundamental rights.[15]

Our analysis will focus in particular on the private international law of the European Union [hereinafter EU]. This is justified because the multi-state structure of the EU is based on a community of values that also includes the rule of law. As Article 2 of the Treaty on European Union [hereinafter T.E.U.] lays down:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[16]

The enforcement of the rule of law in private international law relationship does not remain only a theoretical issue. The insolvency case can be recalled in which a Bulgarian court referred questions to the Court of Justice of the European Union [hereinafter C.J.E.U.] for a preliminary ruling which, among other things, directly concerned the interpretation of the principle of the rule of law in the context of the area of freedom, security and justice by referring directly to Article 2 of the T.E.U.[17] The preliminary question was, however, not answered because the C.J.E.U. considered the reference manifestly inadmissible. Other cases exposed, perhaps less directly, the relationship between the rule of law and private international law. Such cases still demonstrate that

[13] Friedrich Becker, *Zur Geltung der Grundrechte im Internationalen Privatrecht [On the Validity of Fundamental Rights in Private International Law]*, 24 Neue Juristische Wochenschrift [NJW] 1491, 1491 (1971) (Ger.).

[14] In German literature, it was debated whether unilateral conflict of laws rules comply with the principle of rule of law having regard to the commitment of the *Grundgesetz* [Basic Law] in international cooperation. *See* Becker, *supra* note 13, at 1492.

[15] Günther Beitzke, Grundgesetz und Internationalprivatrecht [Basic Law and Private International Law] 11 (1961); Murad Ferid, *Wechselbeziehungen zwischen Verfassungsrecht und Kollisionsnormen, [Interrelationships Between Constitutional Law and Conflict-of-Law Rules] in* Vom deutschen zum europaischen Recht – Festschrift fur Hans Dolle [From German to European Law: Commemorative Publication for Hans Dolle] 121 (Ernst von Caemmerer et al. eds., 1963).

[16] Consolidated versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202/01).

[17] Case C-647/18, Corporate Commercial Bank v. Elit Petrol AD., ECLI:EU:C:2020:13 (Jan. 15, 2020).

the requirements of rule of law have not left intact the method and practice of private international law.

1. THE FORMAL CONCEPT OF THE RULE OF LAW AND PRIVATE INTERNATIONAL LAW

The impact of the rule of law on private international law is rarely examined in the literature. This is despite the fact that the classic method of modern private international law can be seen as a vivid manifestation of the formal concept of the rule of law of the eighteenth and nineteenth centuries. As is well known, Savigny, who is reputed to be the creator of modern private international law, in criticising the idea of natural law, took the position that the development of law rests on the spirit of the people (*Volksgeist*) and that jurists become the bearers of the legal conscience of the people.[18] In this way, Savigny detached the law from the power of the state, giving it an authority independent of the state. In this way, the idea of the rule of law emerged in Savigny's general conception of law.

In private international law, the emancipation of the law from the state also implies that the *comitas* doctrine based on territorial sovereignty and the exceptional application of foreign laws have been discarded and replaced by the equality of legal systems and the determination of the applicable law in such a way that the generosity and will of the public power play no role and where it makes no difference which law is applicable.[19] Savigny's private international law is deeply imbued with a specific element of the rule of law: legal certainty. Savigny departed from the legal relationship and examined its spatial placement by looking for the seat of the legal relationship in order to determine the applicable law.[20] For typical legal relationships, Savigny even determined the place of the seat by facilitating the designation of the applicable law: the domicile for questions of personal status; the location of a thing for questions related to rights *in rem*; and the place of performance for contracts, etc. In this way, a mechanical solution has been devised which at the same time guarantees predictability. What is more, Savigny sought to elevate these principles to the international level. He wanted

[18] Gábor Hamza & András Sajó, *Savigny a jogtudomány fejlődésének keresztútján [Savigny at the Crossroads of the Development of Jurisprudence]*, 23 Állam- es Jogtudomany 79, 85-86 (1980).

[19] Ulrike Seif, *Savigny und das Internationale Privatrecht des 19. Jahrhunderts [Savigny and the Private International Law of the 19th Century]*, 65 Rabels Zeitschrift fur auslandisches und internationales Privatrecht 492, 508-10 (2001).

[20] 8 Friedrich C. von Savigny, System des heutigen Römischen Rechts [System of the Modern Roman Law] 108 (1849).

every state to adopt and apply the same conflict of laws rules. In such a community of law, the international harmony of solutions can be achieved.

Legal certainty is important for the protection of private parties. Regarding private law relationships, the predictability of the applicable rules is necessary to plan transactions between the parties. This is even more true in an international dimension, and in particular in international trade. In this dimension, additional questions arise: which country's courts have jurisdiction to hear the case and what is the law applicable to the parties' legal relationship? Predictability must be ensured here, too. The approach of a legal system to legal certainty also has an impact on the methods of applying the law.[21] This also applies to private international law.

The mechanical nature of the conflict of laws rules undoubtedly ensured this predictability. Later, objective conflict of laws rules were supplemented by the recognition of party autonomy, which implied the possibility of prorogation of jurisdiction and choice of law. These changes increased legal certainty for the parties even before the emergence of the legal dispute. As Heuzé puts it, in private international law the parties' expectations and thus legal certainty, as a component of the rule of law, are safeguarded on the condition that the parties' expectations are legitimate, which is required by the authority of law, another component of private international law.[22]

Although we discussed above the issue of the determination of the governing law, it is to be noted that rule of law concerns can also arise in relation to jurisdictional rules.[23] The *forum non conveniens* doctrine was criticised as interfering with the principle of the rule of law due to the discretion enjoyed by the court.[24] In Case C-281/02, the C.J.E.U. lined up beside this opinion. It underlined that while potential defendants should be able to foresee at which states they can be sued, the wide discretion of the court undermines predictability and legal certainty, one of the objectives of the Brussels Convention.[25] The motivation was the same here: the rule of law presupposes predictability also in terms of the application of jurisdictional rules.

This traditional approach in fact corresponds to the formal conception of the rule of law and in particular to legal certainty. Thus, the idea of international harmony of solutions envisaged by Savigny and several generations of academics in private international law can well coexist with the concept of the rule of law. The goal of legal

[21] James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law,* 31 Hous. J. Int'l L. 27, 38 (2008).
[22] *See* Heuzé, *Construction européenne, supra* note 5, at 130.
[23] Andrew Bell, Forum Shopping and Venue in Transnational Litigation 121-23 (2003).
[24] *Id.* at 121.
[25] See Case C-281/02, Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, ECLI:EU:C:2005:120, ¶¶ 38, 40-41 (Mar. 1, 2005).

certainty has not even disappeared. Today, it is hoped that the international harmony of solutions and legal certainty will be achieved through the unification of private international law at both regional and global level. At regional level, the role of the EU should be highlighted, while at global level the Hague Conference on Private International Law is contributing to the creation of uniform conflict and procedural rules. In particular, the recitals of EU private international regulations often refer to the realisation of legal certainty as one of their objectives.[26]

Because of its mechanical nature, private international law is often described as neutral, or less euphemistically blind, as regards the content of the designated law and the outcome of the case. For this reason, the neutrality or, in other words, the insensitivity of private international law towards material values was criticised.

2. INFILTRATION OF MATERIAL VALUES INTO PRIVATE INTERNATIONAL LAW: THE EXAMPLE OF HUMAN RIGHTS

Nevertheless, it cannot be ignored that even the classic method of private international law has developed means that allow the infiltration of material values into private international law. These means, which will be discussed below, admit the material aspects of the rule of law despite the neutrality of the conflict of laws rules. This can be illustrated by the influence of human rights on the application of private international law rules.

Human rights are an important component of the substantive rule of law. Human rights can have an effect on the application of conflict of laws rules through the public policy exception or as overriding mandatory norms. These means of private international law represent a departure from the neutrality of private international law.[27] The public policy exception can prevent the application of foreign law or the recognition and enforcement of a foreign decision that is contrary to the fundamental

[26] *See* Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 276/6), recital (16). Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199/40), recital (14). Johannes Scheller, *Einleitung [Introduction]*, *in* Europaisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III [European Civil Procedure and Conflict of Laws EuZPR/EuIPR, Volume III] 591, 591-592 (Thomas Rauscher, ed., 2023).

[27] Friederike Pförtner, *Internationales Privatrecht und Menschenrechte: kollisionsrechtliche Fragen zur zivilrechtlichen Haftung für "Menschenrechtsverletzungen" [Private International Law and Human Rights: Conflict of Laws Issues on Civil Liability for "Human Rights Violations"]*, *in* Politik und Internationales Privatrecht [Politics and Private International Law] 93, 97 and 99 (Susanne L. Gössl ed., 2017).

principles of the domestic legal order of the state of the forum.[28] There is no doubt that the rule of law and, in particular, human rights can be included among these principles. Thus, the protection of human rights may justify obstructing the application of foreign law or the recognition and enforcement of a foreign decision.[29] Certain sources of private international law highlight the relationship between the protection of human rights and the public policy exception. Regulation (EU) 2015/848 (Insolvency Regulation) states that:

> Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[30]

Nevertheless, recourse to public policy remains exceptional.[31] It is also referred to as a safety valve.[32] The Court of Justice of the European Union seemed to accept a limited possibility of invoking public policy to protect human rights. With regard to the recognition of a foreign decision, the C.J.E.U. required the existence of a manifest breach of an essential rule of the legal order of the Member State addressed or of a fundamental right.[33] This presupposes that the recognition or enforcement of the decision is at variance to an unacceptable degree with the legal order of the state addressed.[34] Violation of the right of defence may have justified a refusal to recognise a foreign judgment where the court in the state of origin denied the defendant the right to defend himself without appearing in person.[35] The restrictive approach of the C.J.E.U. has been criticised in the literature for not allowing human rights to be fully enhanced. As Oster put it, private international law must operate within the framework of human rights, not

[28] Jan Oster, *Public Policy and Human Rights,* 11 J. Priv. Int'l L. 542 (2015). Mark Hirschboeck, *Conceptualizing the Relationship Between International Human Rights Law and Private International Law*, 60 Harv. Int'l L. J. 181 (2019).

[29] Gabriella Carella, Fondamenti di diritto internazionale privato [Fundamentals of Private International Law] 173 (2018).

[30] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141/19), at 19-72, art. 33; Gerald Mäsch, *Artikel 33: Öffentliche Ordnung [Article 33: Public Order], in* Europaisches Zivilprozess – und Kollisionsrecht EuZPR / EuIPR, Band 2/1 [European Civil Procedure and Conflict of Laws EuZPR / EuIPR, Volume 2/1] 1091 (Thomas Rauscher ed., 2022).

[31] See Case C-7/98, Dieter Krombach v. André Bamberski, ECLI:EU:C:2000:164, ¶ 44 (Mar. 28, 2000).

[32] Franco Mosconi, *Exceptions to the Operation of Choice of Law Rules*, 217 Collected Courses of the Hague Acad. of Int'l L. 9, 20 (1989).

[33] *Dieter Krombach*, C-7/98, ¶ 37; Case C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225, ¶ 30 (May 11, 2000).

[34] *See* Renault SA v. Maxicar SpA and Orazio Formento, *supra* note 32, at para 30.

[35] *Dieter Krombach*, C-7/98.

the other way round.[36] It is argued that any violation of human rights recognised in the legal order of the forum should be sanctioned, not just qualified violations.[37]

At the same time, we cannot ignore the fact that the application of the public policy exception must be consistent with the respect of human rights. The application or non-application of the public policy exception in Europe is subject to review by the C.J.E.U. and the European Court of Human Rights [hereinafter E.Ct.H.R.].[38] This is why, as one author has put it, this control constitutes a safety valve for the safety valve.[39] This can be illustrated by the Negrepontis-Giannisis decision of the E.Ct.H.R.[40] In this case, the Greek courts refused to recognise an American decision that had allowed the adoption of a nephew by his uncle, a monk. The refusal was justified by the protection of Greek public policy, which also included the ecclesiastical prohibition on adoption by monks. The E.Ct.H.R. did not accept the invocation of public policy in this case and found, among other things, a violation of the right to respect for private and family life, noting that the refusal had not responded to a pressing social need.

Private international law offers another way of safeguarding human rights, namely the application of overriding mandatory rules. In EU law, Article 9(1) of Regulation (EU) No 593/2008 (Rome I Regulation) defines the concept of overriding mandatory rules. Under this provision:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. [41]

Fundamental rights may fall under this definition, which can be relied on well beyond contract law.[42] However, more often fundamental rights are taken into account through the public policy exception and not as overriding mandatory norms.

The public policy exception and the applicability of overriding mandatory norms are means of private international law which contribute to mediating the values of the

[36] Oster, *supra* note 28, at 552-53.
[37] *See id.* at 553.
[38] *See* Carella, *supra* note 29, at 174-76.
[39] *See* Hirschboeck, *supra* note 28, at 194.
[40] Negrepontis-Giannisis v. Greece, App. no. 56759/08 (May 3, 2011), https://hudoc.echr.coe.int/eng?i=001-104680
[41] 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), Jul. 4, 2008, 2008 O.J. (L 177/6), art. 9 (1).
[42] *See* Case C-149/18, Agostinho da Silva Martins v. Dekra Claims Services Portugal SA, ECLI:EU:C:2019:84, ¶ 28 (Jan. 31, 2019).

rule of law in international private law disputes. This holds not only for the EU private international law regulations, but also for autonomous private international law which typically provides for these two safeguards.[43] The application of public policy clauses to protect human rights can motivate the global harmonisation of the protection of human rights.[44] The use of public policy clauses to protect human rights can lead to the creation of a common public policy on human rights. We might add that the protection of human rights as overriding mandatory norms has virtually the same effect. In this sense, the systematic protection of human rights through the public policy exception or as overriding mandatory rules can strengthen the rule of law in its international dimension.

3. JUDICIAL INDEPENDENCE AND THE JUDICIAL COOPERATION IN CIVIL MATTERS

Another component of the rule of law, the requirement of judicial independence, may also have an influence on the application of private international law rules through the public policy exception, particularly in relation to the recognition and enforcement of foreign judgments. This is important also because a court in an EU Member State cannot enjoin a party to bring or continue proceedings before the courts of another Member State even if it has concerns about the situation of the rule of law in that Member State.[45] According to Article 81(1) of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.]: "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases".[46] Mutual recognition of foreign decisions is therefore the cornerstone of judicial cooperation in civil matters. In the EU, mutual recognition of decisions can be linked to mutual trust between the Member

[43] For example, in Italian private international law Act No. 218/1995 (31 May 1995) provides for the public policy exception in its Article 16 and overriding mandatory provisions in Article 17. Legge 31 maggio 1995, n. 218, G.U. Giu. 03 1995, n.128 (It.) *See* concerning the public policy exception Bruno Barel & Stefano Armellini, Diritto internazionale privato [Private International Law] 84-90 (2018); Pietro Franzina, Introduzione al diritto internazionale privato [Introduction to Private International Law], 201-08 (2nd ed. 2023); Carella, *supra* note 29, at 169-72; concerning overriding mandatory norms Barel-Armellini, *supra*, at 90-95; Franzina, *supra*, at 207-11. For a comparative overview of the use of the public policy exception, Public policy and private international law (Olaf Meyer ed., 2022).

[44] *See* Oster, *supra* note 28, at 567.

[45] Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, ECLI:EU:C:2004:228 (Apr. 27, 2004); Case C-590/21, Charles Taylor Adjusting Limited and FD v Starlight Shipping Company and Overseas Marine Enterprises INC, ECLI:EU:C:2023:633 (Sept. 7, 2023).

[46] Consolidated version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), 47-390.

States.[47] Recognition means trust in another legal order. This trust also extends to the quality of the rule of law in the country where the decision was handed down.

Within the EU, from the perspective of judicial cooperation in civil and criminal matters, judicial independence as a constituting element of the rule of law has significance not only for individual states, but also for the implementation of the entire system of judicial cooperation based on mutual trust.[48] The C.J.E.U. has confirmed on several occasions that the lack of judicial independence may justify a refusal to recognise or enforce a judicial decision rendered in another Member State.[49] Although these rulings were made in relation to judicial cooperation in criminal matters, and in particular the execution of the European Arrest Warrant, the requirement of respect for judicial independence undoubtedly applies equally to judicial cooperation in civil matters.

In cases relating to the possibility of issuing a writ of execution by notaries in Croatia under the Regulation (EU) No 1215/2012 (Brussels I Regulation)[50] and Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims,[51] the C.J.E.U. noted that in order to qualify as a 'court' within the meaning of these regulations, the decisions to be enforced had to be given in a judicial procedure that provided guarantees of independence and impartiality as well as respect for the principle of *audi alteram partem*.[52] Such a requirement derives from the principle of mutual trust.

With regard to the execution of the European Arrest Warrant, the C.J.E.U. has found that execution may be refused where it is proved, firstly, that in the issuing Member State there is a real risk that the essential content of the fundamental right to a fair trial will be infringed as a result of systemic or generalised deficiencies concerning judicial independence and, secondly, that in the case in question there are serious and proven grounds for believing that the person concerned will run such a risk if surrendered to the issuing Member State.[53] It may be assumed that similarly the

[47] Matthias Weller, *"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?*, 423 Collected Courses Hague Acad. Int'l L., no. 1, 2022, at 37, 280-83.

[48] Hazelhorst, *supra* note 5, at 104.

[49] Case C-819/21, Staatsanwaltschaft Aachen v. M.D, ECLI:EU:C:2023:841, ¶¶ 23, 26-27 (Nov. 9, 2023); Joined Cases C-562/22 PPU and C-563/21 PPU, Openbaar Ministerie, ¶ 46; Case C-216/18, LM, ECLI:EU:C:2018:586, ¶ 59 (July 25, 2018); Joined cases C-354/20 PPU and C-412/20 PPU L and P, EU:C:2020:1033, ¶ 39.

[50] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Dec. 20, 2012, 2012 O.J. (L 351/1), recitals (1)-(32).

[51] *See* Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Apr. 30, 2004, 2004 O.J. (L 143), recitals (15)-(39).

[52] *See* Case C-551/15, Pula Parking d.o.o. v. Sven Klaus Tederahn, ECLI:EU:C:2017:193, ¶ 54 (Mar. 9, 2017). Case C-484/15, Ibrica Zulfikarpašić v. Slaven Gajer, ECLI:EU:C:2017:199,¶ 43 (Mar. 9, 2017).

[53] *See* Case C-216/18 PPU, LM, ECLI:EU:C:2018:586 (July 25, 2018); Joined cases C-354/20 PPU and C-412/20 PPU L and P, EU:C:2020:1033.

recognition and enforcement of decisions rendered in the EU in civil matters can be denied[54] and the same factors, i.e., general and concrete concerns, must be in place for the refusal of a foreign decision. Such a situation is conceivable when, generally speaking, there are serious concerns with regard to the Member State where the judgment was rendered as to respect for judicial independence and, in the specific case, the defendant's rights, including his right to be heard, have been violated. The public policy exception of the regulations on the recognition and enforcement of judgments in civil matters can be used to justify the refusal.[55] In the literature, the opinion has also emerged that the requirement relating to systemic or generalised deficiencies should be set aside in civil matters, because in contrast to criminal matters there is no need to assess prospectively the risk of violations of fundamental rights (as in the case of the surrender of a person to another Member State for the purpose of criminal prosecution or for the enforcement of a custodial sentence), but the court may establish retrospectively on the basis of evidence already available whether the decision whose recognition and enforcement is sought infringed fundamental rights.[56] However, it should be noted that no such distinction between criminal and civil matters has been made by the C.J.E.U.

4. METHODOLOGICAL CHANGE IN PRIVATE INTERNATIONAL LAW

We have seen how the substantive components of the rule of law appear in private international law, and above all how human rights are admitted into the system of private international law through the public policy exception or as overriding mandatory provisions. More generally, however, because of the impact of human rights on the application of the rules of private international law, several authors speak of a change in methodology in private international law. The Savignian model coexists with another method, the recognition method, which is based directly on an element of the rule of law, namely the respect for the human rights of the persons concerned.

[54] Armin von Bogdandy et al., *A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines*, in Defending Checks and Balances in EU Member States 385, 397-98 (Armin von Bogdandy et al. eds., 2021).

[55] *See* Brussels I Regulation, Dec. 12, 2012, 2012 O.J. (L 351), art. 45, ¶ 1 (a); Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), July 2, 2019, 2019 O.J. (L 178), at 1-115, artt. 38 (a), 39 ¶ 1 (a). *See* also Hazelhorst, *supra* note 5, at 109.

[56] *See* Hazelhorst, *supra* note 5, at 122-23.

What is not new is that private international law governs the recognition of personal status by determining the conditions and circumstances under which a status or right acquired abroad can be recognised or, on the contrary, may be refused. Indeed, private international law codes have contained provisions on the recognition of foreign decisions for a long time. Recognition of a foreign decision makes it possible to recognise the right or status established by the decision.

However, the more recent trend resulting from the judicial practice of the two major European courts, the C.J.E.U. and the E.Ct.H.R., requires recognition of legal status established abroad to a greater extent. In any event, this developing judicial practice does not leave private international law untouched. In EU law, the principle of mutual recognition has become firmly established in the law of the internal market, above all in relation to the free movement of goods, starting with the famous *Cassis de Dijon* ruling.[57] However, the requirement on recognition emerged later concerning the recognition of names acquired by Union citizens abroad[58] and the recognition of companies established in other Member States.[59] The E.Ct.H.R. confirmed in a number of decisions, particularly in relation to foreign adoption,[60] surrogate motherhood and the establishment of parental status,[61] that the recognition of foreign status is justified in order to protect, above all, the right to respect for private and family life.

For the well-known parallelity between the practices of the C.J.E.U. and the E.Ct.H.R., evidence can be found not only in the practice of the C.J.E.U., but even more so in the provisions of the Charter of Fundamental Rights of the European Union. Article 52(3) of the Charter states that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".[62] The Charter refers explicitly to the right to respect for private and family life and to the freedom of movement and residence, whereas in the case of legal persons it is the freedom of enterprise provided for in Article 16 that prevails. This makes it easy to exchange between the practices of the two Courts in areas that are also relevant for private international law.

[57] *See* Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42 (Feb. 20, 1979).
[58] *See* Case C-353/06, Stefan Grunkin and Dorothee Regina Paul, ECLI:EU:C:2008:559 (Oct. 14, 2008).
[59] *See* Case C-208/00, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), 2002 E.C.R. I-09919.
[60] *See* Wagner and J.M.W.L v. Luxembourg, App. no. 76240/01 (June 28, 2007), https://hudoc.echr.coe.int/eng?i=002-2645; Negrepontis-Giannisis v. Greece, App. no. 56759/08 (May 3, 2011), https://hudoc.echr.coe.int/eng?i=001-104680.
[61] *See* Mennesson v. France, App. no. 65192/11 (June 26, 2014), https://hudoc.echr.coe.int/fre?i=001-145389.
[62] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326/391), art. 52 (3).

The requirement of recognition is intended to guarantee the continuity of a legal status created in accordance with the law of a foreign state, as well as the exercise of related rights in another state to ensure the fundamental freedoms derived from EU law and the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter E.C.H.R. or Convention]. Such recognition is, of course, subject to certain conditions and limits. First and foremost, a certain connection is generally required between the person concerned and the state under whose law the status had been created. In addition, the recognition of a status established abroad may be refused for certain reasons, including the protection of public policy[63] and the prohibition of abuse of rights.[64]

As a result of the decisions of the C.J.E.U. and the E.Ct.H.R., the question has arisen as to whether the obligation of recognition, enshrined in the judgments, replaces the traditional method of private international law. This is because the principle of recognition does not depart from the question of whether the legal status was validly created under the substantive law designated by the conflict of laws rules of the forum, but rather whether this happened according to the rules of law (including the conflict of laws rules) of the foreign state. If so, the legal status validly created abroad must be recognised.[65] We can agree with the position that the C.J.E.U. and the E.Ct.H.R. require that a legal status created abroad be recognised in accordance with the provisions of the T.F.E.U. as well as the E.C.H.R. However, it is not essential how recognition is achieved and it is not determined either by EU law or the E.C.H.R.[66] This means that the traditional methods, including the conflict of laws method and the procedural recognition of foreign decisions remain applicable. What matters is the result, i.e., whether domestic law, including the conflict of laws rules and substantive rules in their interaction, renders recognition possible or not. Thus, the two approaches exist in parallel: the private international law technique based on conflict of laws rules and the recognition of foreign decisions, and the result-oriented practice of the C.J.E.U. and the E.Ct.H.R., which requires the recognition of status created abroad in order to safeguard

[63] *See* Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, ECLI:EU:C:2010:806 (Dec. 22, 2010).

[64] *See* Case C-438/14, Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, ECLI:EU:C:2016:401, ¶ 57 (June 2, 2016).

[65] Paul Lagarde, *Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures [Future Developments of Private International Law in a Unifying Europe: Some Conjectures]*, 68 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 225, 233 (2004).

[66] Christian Kohler, *Towards the Recognition of Civil Status in the European Union, in* VOLUME XV YEARBOOK OF PRIVATE INTERNATIONAL LAW 13, 21 (Petar Šarčevič et al. eds., 2014); Matthias Lehmann, *Recognition as a Substitute for Conflict of Laws?*, *in* GENERAL PRINCIPLES OF EUROPEAN PRIVATE INTERNATIONAL LAW (Stefan Leible ed., 2016); Heinz-Peter Mansel, *Anerkennung als Grundprinzip des Europäischen Rechtsraums [Recognition as a Fundamental Principle of the European Legal Space]*, 70 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 651, 678 (2006).

the fundamental freedoms of the EU, as well as the fundamental rights enshrined in the E.C.H.R. The requirement of recognition resulting from EU law and the Convention gives rise to a framework within which Member States and States Parties can shape their rules of private international law. In this way, the obligation to recognise can be fulfilled in various ways. It is a result-oriented concept.

Some of the literature considers the progressive development of the judicial practice based on the principle of recognition[67] or the establishment of a general rule of recognition in EU law[68] to be desirable, while other authors are critical of the broader application of the principle of recognition, primarily because of the lack of precise contours of the recognition.[69] In particular, it should be added that the opinion has emerged in the literature that criticises the country of origin principle, and therefore the method of recognition from the point of view of the rule of law, as undermining legal certainty.[70] From this point of view, the requirement of the rule of law related to legal certainty comes into conflict with the recognition method which sometimes derogates the traditional mechanical conflict of laws method, even if the requirement of recognition is envisaged just for the protection of fundamental rights, an essential element of the rule of law.

CONCLUSION

Although the legal literature does not pay much attention to the relationship between private international law and the rule of law, it is clear that the requirements of the rule of law have a significant impact on the method and application of private international law rules. At first glance, the mechanical approach of the classic conflict of laws method largely corresponds to the formal conception of the rule of law insofar as it emphasises legal certainty and predictability in the designation of the applicable law. However, even within the classic method, elements of the substantive rule of law can be asserted, especially through the public policy exception or overriding mandatory rules. Moreover, the requirements of the rule of law, and in particular respect for fundamental rights, also

[67] Lagarde, *supra* note 65, at 242.
[68] Lehmann, *supra* note 66, at 43.
[69] Dieter Heinrich, *Anerkennung statt IPR: Eine Grundsatzfrage [Recognition Instead of IPR: A Question of Principle]*, 25 Praxis des Internationalen Privat- und Verfahrensrechts 422 (2005).
[70] Heuzé, *Construction européenne, supra* note 5, at 130; Vincent Heuzé, *De la compétence de la loi du pays d'origine en matière contractuelle ou l'anti-droit européen [The Jurisdiction of the Law of the Country of Origin in Contractual Matters or the Anti-European Law], in* Le droit international prive: esprit et methodes [Private International Law: Spirit and Methods] 393 (2005).

influence the methodology of private international law. In addition to the classic conflict of laws method, thanks to the case law of the C.J.E.U. and the E.Ct.H.R. the method of recognition is gaining greater admission in private international law. It is not inconceivable that in the future more and more cases will arise where national courts or the C.J.E.U. will have to assess whether the application of private international law rules corresponds to the requirements of the rule of law.