

Private international law and the Internet – AI to the rescue?

For any given activity, that activity is regulated by a 'contextual legal system' comprised of norms from any applicable national legal system(s).

An era of “Hyper Regulation”:

- **Problems:**

1. Can't identify all applicable laws
2. Can't access all applicable laws
3. Can't understand all applicable laws
 - Plus considerable areas of uncertainty
4. Contradictions amongst applicable laws

- **What about *Ignorantia juris non excusat*?**

- **Focus on strictest rules as the solution? But:**

- Multiple sources
- What about rights?
 - Clashing duties (duty v duty)
 - Clashes of right and duties (right v duty)

The AI system of my dreams:

- Goal:
- An AI system capable of:
 1. Identifying the norms from multiple legal systems that together make up the relevant contextual legal system for a given activity; and (potentially)
 2. Reconciling – or at least balancing – those norms in a manner that makes for a coherent system even where individual norms clash.



AI to the
rescue?

- Model PrIL
- Access to data
- Appropriate AI

Why Internet? IT is not a fringe issue:

- **How big is the issue? LinkedIn=660m, FB=2.4b & YouTube=1.9b.**
- 10 of the listed companies are from the tech industry on Foreign Policy's list of "25 Companies Are More Powerful Than Many Countries"
- 6 of the top 10 companies on Forbes' list of the world's most valuable brands are tech companies (with the four top spots being Apple, Google, Microsoft and Facebook)

Structure:

- Briefly about Private International Law
- Modelling from a 'user perspective'
- Briefly about balancing/reconciling
- Very briefly about access to data
- Briefly about overarching problems
- Concluding remarks

Private international law:

- **Problems online:**

- Connecting factors too easily attach to online activity; and
- Location-focused connecting factors are too easily manipulated.

- **Addresses four matters:**

1. Jurisdiction;
2. Choice of law;
3. Declining jurisdiction; and
4. Recognition and enforcement.

- **Are unilaterally decided and therefore:**

- Uncoordinated; and
- Unharmonised.



Private international law:

- “**enables the coexistence of multiple normative systems**, having distinct and often contradictory rules, and the decision of cases involving persons connected to different legal systems, without imposing an additional overarching regulation, and without establishing priorities between the involved systems. **Conflicts between competences and between rules are avoided** by distributing the cases between the authorities of the different normative systems (jurisdiction), and by establishing what set of norms these authorities have to apply to each given case (choice of law).” (Dung & Sartor, 2011)

‘Court perspective’:

- **Scenario I:** *Person A who lives in country X sends an email to person B who lives in country Y. The text of the email is truthful, but reveals intimate personal dealings of person C who lives in country Z.*
- **‘Court perspective’:**
 - Person C sues person A. The court (whether it is in country X, Y or Z) will have to decide:
 - whether it can claim jurisdiction over the matter;
 - which country’s law applies; and
 - whether there are reasons to decline to exercise jurisdiction.

‘Court perspective’: Limited relevance

- “The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.” (Hart, 3rd Ed 2012)
- To this may arguably be added a third principal function, namely that of ‘expressing and communicating the values of the society that created the law’ (Svantesson, 2017), thus: The triple role of law is:
 1. A tool to decide legal disputes;
 2. A tool to control, to guide, and to plan life out of court; and
 3. A tool to express and communicate the values of society.

‘User perspective’:

- **Scenario I:** *Person A who lives in country X sends an email to person B who lives in country Y. The text of the email is truthful, but reveals intimate personal dealings of person C who lives in country Z.*
- **Scenario II:** *Person A posts information on a social media site on which the person making the posting has ‘friends’ in 100 different countries.*
- **(Too) simplistic ‘user perspective’ (Person A):**
 - Contextual legal system (*ConLS*)
 - Number of potential laws (n);
 - Scenario I $n = 3$ (X, Y and Z), [or potentially a higher number ($n \geq 3$)]. *ConLS₃ or ConLS_{X+Y+Z}*
 - Scenario II $n = 100$, [or potentially a higher number ($n \geq 100$)]. *ConLS₁₀₀ or ConLS _{≥ 100}*

‘User perspective’:

- **Scenario I:** *Person A who lives in country X sends an email to person B who lives in country Y. The text of the email is truthful, but reveals intimate personal dealings of person C who lives in country Z.*
- **Proper ‘user perspective’ (Person A):**
 - Contact Points (*CP*) in Scenario I $CP = 3$ (X, Y and Z), [or potentially a higher number ($CP \geq 3$)].
 - For each *CP*, we need to consider their rules of private international law that may either:
 1. allow or disallow the court to claim jurisdiction;
 2. if allowing jurisdiction, nominate the domestic law, or a foreign law as applicable; and
 3. even if allowing jurisdiction, instruct the court to decline to exercise.
 - Thus, *n* may typically be equal to or smaller than *CP*, but may only be higher than *CP* where we have encountered an unforeseeable claim of jurisdiction (or choice of law).

‘User perspective’:

- **Scenario I:** *Person A who lives in country X sends an email to person B who lives in country Y. The text of the email is truthful, but reveals intimate personal dealings of person C who lives in country Z.*
- **Proper ‘user perspective’ (Person A): Scenario I – Imagine that:**
 1. the rules of jurisdiction of X, Y and Z provide that the court can claim jurisdiction over a defamation matter only if the defendant or the plaintiff resides in the country;
 2. the choice of law rules of X, Y and Z point to the law of the forum; and
 3. the private international law rules of country X instruct that the court should decline to exercise jurisdiction if the defamatory content was not communicated to anyone in country X.
 4. Courts in country X do not recognize and enforce judgments from country Z.

Tools for reconciling or balancing: Jurisprudential framework for jurisdiction

- “In the absence of an obligation under international law to exercise jurisdiction, a State may only exercise jurisdiction where:
- (1) there is a **substantial connection** between the matter and the State seeking to exercise jurisdiction;
- (2) the State seeking to exercise jurisdiction has a **legitimate interest** in the matter; and
- (3) the exercise of jurisdiction is reasonable given the **balance** between the State’s legitimate **interests** and other interests.”
(Svantesson 2015)

Tools for reconciling or balancing: Jurisprudential framework for jurisdiction

- **Scenario III:** Company A from country A enters into a contract with natural person B from state B.
 - Application of country B's consumer protection laws = substantial connection + legitimate interest
 - Application of country B's corporate governance laws = weaker connection + weaker interest
 - Application of country B's marriage laws = no connection + no interest

Tools for reconciling or balancing: Other potential tools

- *Forum non conveniens*
- Comity
- International human rights standards
- Anti-competition law?
- Others?

Transparency of method is key!

Accessing data:

- *Free Access to Law Movement* (eg AustLI for Australia and CanLI for Canada)
- Digitalization and publication of law – significance for legitimacy of claims of jurisdiction and choice of law
- Language issues
- Adequacy of sub-sets of law
 - specific areas of law (e.g. consumer contracting, defamation, copyright); or
 - sectoral needs (e.g. the laws particularly affecting online news publishers).

Overarching problems:

1. “One thing that I think could be criticized though, is the format and the language of our judgments. They can hardly be said to be particularly reader-friendly. In fact, the operative part is not infrequently on the border of being incomprehensible.” (Fernlund of the CJEU)
2. Law is layered
3. Law is not just what is written on papers

1. Four types of situations, each showcasing the ambiguity of normative sentences

- (a) Sometimes a normative sentence *S* is ambiguous in the strict sense for either syntactic or semantic reasons: One wonders whether it expresses the rule *R1* or the rule *R2*.
- (b) Sometimes everyone agrees that the normative sentence *S* expresses the rule *R1*, but one wonders whether it also expresses the rule *R2* or not.
- (c) Sometimes everyone agrees that the normative sentence *S* expresses the rule *R1*, but one wonders whether such a rule entails, or not, the rule *R2*.
- (d) Sometimes everyone agrees that the normative sentence *S* expresses the rule *R1*, but one wonders whether such a rule is defeasible (i.e., subject to unexpressed exceptions) or not. (Guastini 2011)

2. Law is layered

- Eg every rule of the GDPR must be understood in the light of:
 - EU Charter of Fundamental Rights; and
 - All texts that regulate the operation of the EU
- Just a matter of interpretation?
 - What if a provision of the GDPR is invalidated by the Charter?

3. What is 'law'?

- Law L is $n(Norm +_{Norm}(Context))$
- n as used here represents the (unascertainable) number of legal norms that make up the law
- $Norm$ is a legal norm as announced (whether in legislation or in case law)
- $_{Norm}(Context)$ includes (at least):
 - the linguistic/terminology context
 - the historical context
 - the political context
 - the philosophical context
 - the systematic context
 - the economic context
 - the announcement context
 - the application context
 - the structural context

3. What is 'the law' on a given issue?

- **Traditional (simplistic) view:**
 - The equivalent of $L_x = 4.13$
(we pretend that law is precise)
- **Due to underdeterminacy, the law 'is' a more or less abstract range of options:**
 - $A < L_x < B$ where $A \approx 2$ and $B \approx 6$
- A judgment of $L_x < A$ or $L_x > B$ represent a mistake by the judge

Norm(Context) is unascertainable

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The law is indeterminate OR
'underdeterminate'

Thank you!



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