European Constitutionalism without Private Law

Private Law without Democracy

Christian Joerges and Tommi Ralli (eds)

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Cover picture: Joseph Beuys, 'Multiple überwindet endlich die Parteiendiktatur', 1972, photo from the action in the Grafenberg forest, Düsseldorf.

Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's Work Package 9 'Global Transnationalisation and Democratisation Compared', which examines the conditions and prospects of democratisation in European transnational legal and political arrangements, and in postnational constellations more generally. The report contains the proceedings of a colloquium held at the Centre of European Law and Politics (ZERP) in Bremen on 9 July 2010, on Christoph Schmid's critical evaluation of the Europeanisation of private law expressed in his monograph *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der europäischen Integrationsverfassung*.

Erik Oddvar Eriksen
RECON Scientific Coordinator

Acknowledgements

L'éssentiel est invisible pour les yeux[1]

We have, in our introduction, described in some detail the reasons for, and the structuration of, the colloquium that took place on 9 July 2010 on Christoph Schmid's monograph and his critical evaluation of the Europeanisation of private law. We need not summarise, in these acknowledgements, our observations and the perspectives that they have generated. What we need to do and want to do is to express our gratitude to the participants at the colloquium and the contributors to the present publication, to all those who helped to organise it, to the translators of the German texts and to Chris Engert, who has dealt patiently and sensitively with our use of his language and managed to harmonise seven cultures of citations.

Our work will be published in German in the Discussion Paper series of the Centre of European Law and Politics in Bremen.[2] Its parallel publication in English as a RECON Report is a more than a welcome opportunity to address a much wider audience. We have chosen our ambitious title deliberately because we hope to build a bridge between constitutionalism and private-law scholarship. Private law should *not* be perceived as a world apart. Our message and long-term perspective is, instead, that private law is in need of democratic credentials and should even contribute to the "Reconstitution of Democracy in Europe".

Christian Joerges and Tommi Ralli
Bremen, May 2011

[1] "Voici mon secret. Il est très simple: on ne voit bien qu'avec le Cœur. L'essentiel est invisible pour les yeux." ["And now here is my secret, a very simple secret: It is only with the heart that one can see rightly. What is essential is invisible to the eye"] *Le Petit Prince*, Antoine de Saint-Exupéry.

[2] Christian Joerges & Tobias Pinkel (eds), "Europäisches Verfassungsdenken ohne Privatrecht – Europäisches Privatrecht ohne Demokratie?", ZERP-DP 1/2011, available at: www.zerp.uni-bremen.de.

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Abbreviations

ABGB	*Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code)
AG	*Aktiengesellschaft* (Public limited company)
AktG	*Aktiengesetz* (Law on public limited companies)
BER	Block Exemption Regulation
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGHZ	*Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Case Reports of the Federal Court of Justice in Civil Matters)
CFR	Common Frame of Reference
CISG	United Nations Convention on Contracts for the International Sale of Goods
CoPECL	Common Principles of European Contract Law
CSR	Corporate Social Responsibility
DCFR	Draft Common Frame of Reference
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EFTA	European Free Trade Association
GG	*Grundgesetz* (Basic Law)
GmbH	*Gesellschaft mit beschränkter Haftung* (Limited liability company)
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
IMF	International Monetary Fund
NJA	National Judges Association
OMC	Open Method of Co-ordination
PECL	Principles of European Contract Law
SGECC	Study Group on a European Civil Code
SIEC	Significant Impediment of Effective Competition
SLC	Significant Lessening of Competition
STS	*Sentencia del Tribunal Supremo*
TFEU	Treaty on the Functioning of the European Union
UCC	Uniform Commercial Code
UKHL	United Kingdom House of Lords Decisions
WTO	World Trade Organisation
ZPO	*Zivilprozessordnung* (German Code of Civil Procedure)

Introduction

Christian Joerges and Tommi Ralli
University of Bremen

1. Private Law Scholarship in the European Constellation

A habilitation thesis is a sorrowful fruit in so many ways. Compiled during weary and often the most productive years of an academic career, it cannot ever guarantee a university future, but nonetheless remains a vital condition for it. As a result, the thesis must be grounded in comprehensive coverage of its subject matter, and it must be meticulous, leaving no stone unturned in its research ambition: in the field of law, legislation, jurisprudence, and, above all, the state of the art of academic research. When the thesis is finally printed in all its finery, it meets a sad and undeserved fate: a quick skim cannot suffice to reveal its qualities; yet, for even the most dedicated, the thesis is simply too long to be read.

The colloquium which we held on 9 July 2010, and to which German and, notably, foreign, commentators were invited, was an attempt to overcome this sorry fate and to honour a work that not only satisfies all the common demands made of its form, but also poses, in itself, exceptional challenges. More particularly, the thesis tackles an unimaginable mass of material in an effort to distinguish a "private European law", provides vital insights into the theoretical positioning of this law, and concomitantly positions itself by coming to conclusions which do not beg for clamorous approval, but which are,

instead, drawn in order to stimulate further debate. When planning the colloquium, we responded to this endeavour within a dual strategy. No commentator was subject to the impossible demand that they should furnish a comprehensive evaluation of Christoph Schmid's work. Instead, we apportioned manageable themes amongst the contributors in the hope that the overall interplay between the comments would encompass all of the varied and various facets of Schmid's conclusions. At the same time, we sought to overcome the national borders and the provincialism that characterises so much of the European private law debate. Certainly, the institution of the German habilitation is not amenable to export: the final thesis cannot be Europeanised. Similarly, nothing can change the fact that the language of the thesis and that of the courts[1] is German. Nevertheless, it is a truism that the national limitations that still impact so heavily upon the treatment of European law can no longer be simply accepted. The very fact that it proved so easy to gather contributors to the colloquium from seven countries readily demonstrates the vitality of the European project.

Christoph Schmid concludes his endeavours to capture European private law with the following remark: "I have now said everything."[2] Such irony is not a common feature among habilitation theses. Nevertheless, this irony has serious roots. The aim of his work is to capture the dynamism of European integration processes, to distinguish and characterise their developmental phases, and to elucidate the problems that European integration has bequeathed us, during its long passage from its modest beginnings to the current reality of impenetrable complexity – problems to which we must now urgently respond. The irony is revealing: after everything has been said, it only becomes clearer to us that we cannot rest, but must continue with our ever more pressing reflections.

This was our modest aim in apportioning themes to individual contributors, an aim that is intentionally reflected in the title of this collection of essays, albeit in a form that suggested itself, somewhat involuntarily, as the colloquium unfolded and we worked on the

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[1] "Die Gerichtssprache ist deutsch", provides Section 184 sentence 1 *Gerichtsverfassungsgesetz*.

[2] Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010), p. 834.

publication of the contributions. In his reconstruction of the Europeanisation process, Christoph Schmid critiques the insulation of private law from its social and constitutional contexts; at the same time, he enunciates the major problem within the European context. Schmid's "instrumentalisation" thesis – the essential element of which is the notion that integration has become its own aim – coincides with the diagnosis made by Giandomenico Majone, a constant companion to the integration process, who has now identified an "operational code" within Europe, according to which integration takes precedence "over all other competing values".[3] But this convergence between a legal position and a political-science analysis is not mirrored in substantive agreement. Majone rages against the ever more visible *inefficiency* of politically motivated integration processes in expanding areas of policy-making. Christoph Schmid, in contrast, is concerned with the *normative integrity* of European law in general, and European private law in particular. Nonetheless, the limited degree of concordance is illuminating. Majone has always justified his political analysis of integration with reference to the leading principle that Europe has no legitimacy for acts of redistribution, which, in their turn, can only be legitimated within the structures of the democratic constitutional state.

It is precisely this legitimating principle, together with the ethical concept of commutative justice, upon which Christoph Schmid founds his assertion of the normative dignity of national private law above and beyond the "*effet utile*" of European legal competence. With the assertion of a democratic foundation, though, the corollary challenge that both Majone and Schmid must address is revealed: How might we conceive of a process of European integration that is compatible with the democratic imperative? Majone urges modesty: "*Geht es nicht eine Nummer kleiner*" ("Can't we lower our sights")? Europe must find its way back to efficiency, even at the price of self-abnegation. Christoph Schmid, in contrast, is less concerned with efficiency, and chooses, instead, to tackle the question of how Europe can contribute to the maintenance of justice with and through private law. His answer is contained both within his pronouncements on the private law of constitutional states and within his methodological insights. It can also be found within the title of this publication:

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[3] Giandomenico Majone, *Europe as the Would-be World Power: The EU at Fifty*, (Cambridge: Cambridge University Press, 2010), p. 1.

reformulating the proposition made by his thesis in the light of our understanding of the European constellation and the "present state of the Union": justice in private law must, in the last instance, be expressed by, and generated in,[4] a democratic process. But the Union is not duplicating the experiences, failures, and accomplishment of national states. For this reason, legal justice in the integration project cannot rely on national models. The alternative, which Christian Joerges is defending, is a conflicts-law justice that seeks to legitimate the integration process by the normative quality of its operation. Christoph Schmid's quest for a "reflexive balancing"[5] of European commitments and national concerns seems very close to this vision.[6]

It is a vision submitted on various occasions in the project on "Reconstituting Democracy in Europe" (RECON).[7] Among the many parallels it has in the debates of political theorists, we just point to the recent work of Jürgen Neyer, who distinguishes categorically between the "democracy deficit" and the "justice deficit" of the European Union, in an attempt to find a standard which is not tied to the nation state and which the Union has a fair chance to fulfil.[8] The

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[4] See, for example, Christian Joerges, "The Idea of a Three-dimensional Conflicts Law as Constitutional Form", RECON Online Working Paper 2010/05, available at: http://www.reconproject.eu/main.php/RECON_wp_1005.pdf?fileitem=5456171, also in Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd ed. (Oxford-Portland OR: Hart Publishing, 2011), pp. 413-455; for applications to the realm of private law, see, for example, *idem*, "On the Legitimacy of Europeanising Europe's Private Law", Global Jurist Topics: Vol. 2: No. 2, Article 1, available at: http://www.bepress.com/gj/topics/vol2/iss2/art1; *idem*, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective", (1997) 3 *European Law Journal*, pp. 378-406.

[5] See Christoph U. Schmid, "From *Effet Utile* to *Effet Néolibéral*: A Critique of the New Methodological Expansionism of the European Court of Justice", in: Rainer Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp: Intersentia Publishing, 2010), pp. 295-314, at 297.

[6] See Christian Joerges & Christoph Schmid, "Towards Proceduralisation of Private Law in the European Multi-Level System," ZERP-Working Paper 3/2010, Bremen, available at: http://www.zerp.uni-bremen.de//publication.pl?user=_,1308137096,HZZmdVxewsNf,2xY8sH,4&area=1251445601_27136_0&item=1264496678_2431_0, also in A. Hartkamp *et al.* (eds), *Towards a European Civil Code*, 4th ed. (The Hague: Kluwer Law International, 2011), pp. 277-310.

[7] http://www.reconproject.eu.

[8] See, for example, Jürgen Neyer, "Justice, Not Democracy: Legitimacy in the

parallel to the idea of a procedural conflicts-law justice will be quite clear to those who are aware of the common background of these suggestions.[9] We continue to work within this context. Our colloquium took its presumptuous title from the logic underlying Christoph Schmid's work – yet, it also grounds itself in the diffident steps taken in each individual contribution.

2. The Contributions

Christoph Schmid's instrumentalisation thesis challenges the excessive submission of private law to the integration objectives of the European Union. Within the logic of the argument, the challenge must, in particular, cover the central objective of establishing the internal market, but, alongside it, it must also cover the objectives of consumer and environmental protection, non-discrimination, and others. The thesis applies, Schmid says, as far as the basic function of private law is to balance the interests of the parties to a legal relationship in a fair and just way, and this function is displaced by the commitment of the European states to the collective policy objectives of the Union. Schmid takes commutative justice — as developed in the Scholastic tradition — to be the basic ethical concept of private law, citing two versions of this concept in the private-law field: first, the equivalence of the parties' exchanges or of the compensation due and the harm caused (in short, reciprocity); second, the idea that private-law relationships are governed by criteria originating in the relationship between the parties themselves — instead of any external political, social, or economic goals.[10] Fundamentally, Schmid writes, "the concept of European private law is different, on account of its orientation towards collective policy goals under the umbrella of integration". He continues:

European Union", (2010) 48 *Journal of Common Market Studies*, pp. 903–921; also in Rainer Forst & Rainer Schmalz-Bruns (eds), *Political Legitimacy and Democracy in Transnational Perspective*, RECON Report No 13 (Oslo, 2011), pp. 13–35, available at: http://www.reconproject.eu/projectweb/portalproject/Report13_PoliticalLegitimacy.html

[9] See Christian Joerges & Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal*, pp. 273-299.

[10] For these two versions of the concept, see Schmid, Chapter 1 *infra*, Section 1 and the sources cited therein.

> Commutative justice may, perhaps, be included among the general principles of European law which EU law has abstracted from the legal systems of the Member States, but it is not an objective of integration that is pursued simultaneously and at equal rank with other political goals.[11]

Schmid illustrates his thesis with four examples, taken from the case law of the ECJ in the areas of information rights and duties, the enforcement of judgments in other Member States, and the interpretation of the Product Liability Directive. He argues that the guarantee of integration objectives beyond justice among the parties is a potent explanation for the inconsistencies and substantive problems in the rulings of the Court. Against the backdrop of placing the "*effet utile*" of integration above all other criteria, he concludes, the current European mission to harmonise private law can acquire an increased significance as a channel to advance private-law justice in the system of the Union. The establishment of a European Law Institute, on the model of The American Law Institute, might be a step towards the legitimate preparation of a common European private law.

Michelle Everson zeroes in on Schmid's remark on the increasing weight of market freedoms in ECJ case law during the first decade of the new century. She asks why the Court has become the agent of such "*effet néolibéral*", as Schmid put it.[12] She notes the change in the membership of the Court following the Eastern enlargement; but she points to a "broader attitude-altering movement" that has seen constitutional, trade, and human-rights courts worldwide evolve and apply an individualistic, rights-based jurisprudence. The demands of cosmopolitan classes of claimants, disadvantaged by processes of collective organisation, such as the workers outside the Nordic welfare states in the cases of *Viking Line* and *Laval*, are translated into the language of rights, as they inevitably must be, but in a too immediate fashion in this case. This action has the character of an individual, emotional instance of justice-giving. The right to strike of another largely disadvantaged group is curtailed. The question is age-old: balancing the interests of the individual against the interests of the community. As one would expect, requirements of justice and

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[11] *Ibid.*, p. 20.

[12] Schmid, note 5 *supra*.

rationality must follow any immediate response to individual claims in a judicial decision. Everson concludes similarly, echoing here Schmid's methodological concerns, that law, not itself a radical force, "must remain deeply conservative" if it is to have its own kind of socially-radical responsiveness.

"Interlegality", or the many different legal spaces that crisscross in one's mind and in human action (according to Boaventura de Sousa Santos' concept of the late 1980s),[13] is Marc Amstutz' focus in European private law. Amstutz argues that a "learning social model" is in place in Europe in a skeletal form. At the beginning of his argument, he delineates the problem: though pan-European private law is autonomous, it is also dependent for its effects on the legal order of each nation state, and any attempt to overcome the obstacles arising from cultural diversity by imposing a unified private-law system would necessitate abandoning the notion of socially-embedded law.[14] How to deal with a private law operating without hierarchy, Amstutz asks? He sees the ECJ, in its *Marleasing* case law that demands "directive-consistent interpretation", as stimulating "learning" social paradigms, rather than "normative" or deterministic social paradigms, in the legal orders of the Member States. What is learned in each case, Amstutz suggests, is a piece in a productive technique in which, it is hoped, normative procedures in the legal order will lead to "compatibilities" in the order of action.

In his defence of the famous ECJ rulings on the recognition of foreign Member-State companies, Erich Schanze rejects the thought of branding the case law "neo-liberal". While the entire single-market or freedoms logic of the Union could, of course, be called neo-liberal, such a reading might trade on nebulous terms or else refuse to acknowledge the progressive treaty policy since the 1950s. Instead, this case law, which Schanze reads as a break with the traditional private international law concepts and the endless debate on the "incorporation" and "real seat" theories, exemplifies a new, freedom-driven *comitas* in the European Union. The term "*comitas*", which

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[13] See, for example, Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (London, Butterworths, 2002), pp. 436-437.

[14] It would also, Amstutz adds, require abandoning "a certain conception of justice, the essence of which is, however, quite different from that adopted by Christoph Schmid in his habilitation thesis". Amstutz, Chapter 3 *infra*, Section 2, point 1.

resembles a *modus vivendi* or a practical arrangement because of its stress on workable solutions to conflicts, designates a conflict-of-laws scheme that endorses decisions which promote the least curtailment of the interests of each affected jurisdiction. Applied to the ECJ, the notion requires that the democratic processes of law-making in each Member State should be respected, and the refusal to tolerate an attribute of a legal subject, here a company existing in another Member State, must be justified — this is the methodology of the application of the fundamental freedoms.

Before two contributions which bridge various fields of law or policy, Jules Stuyck's chapter points out that, though seemingly close, European competition rules and private law are actually quite separate today. The Treaty rule that the prohibited agreements or decisions are to be null and void refers to private law, but the ECJ has only decided on the existence of the victim's right to damages, leaving the legal consequences mostly to national law (notwithstanding some very general rules, such as the victim's right to compensation for both actual damage, *damnum emergens*, and loss of profit, *lucrum cessans*, and the victim's right to interest). The impact of European competition law on contracts is limited also in the area of vertical restraints, where a generous block exemption regulation prioritises a more economic approach over the previously dominant objective of market integration. In the area of horizontal restraints, most Commission decisions imposing fines on the members of a cartel relate to concerted practices, rather than to formal agreements, and private law is hardly affected by these interventions. In sum, private law, so Stuyck concludes, is – to a surprising degree – untouched, and can, by no means, be said to be transformed, by European competition law.

In her exploration of the interdependence of markets and social concerns, Brigitta Lurger notes the unviability of divorcing an economic constitution from a social one. This is because, though separate rules are needed in fields such as education and political participation, many social concerns are, in fact, integral to both regulatory and traditional private law, while wealth increases the leeway for social policy and the institutions which realise it. Having admitted that the traditional contract law of national codifications and recent European projects is marginalised, even in comparison with regulatory private law, she finds one stepping-stone towards

reaching those consumers who are in particular need of protection in the European law and policy on "services of general economic interest". Her second stepping stone is an "external perspective", the tracing of global causal chains to individual contractual relations, which is required by an awareness of, for example, the close relationship of social and ecological questions (in matters such as the quality of living, access to good food and accommodation, and the building of cities worth living in). Accordingly, in consumer contracts, she suggests that the model of product safety law could be expanded to cover the dangers that products cause to the environment and to human rights, and she supports the use of private law for regulatory functions and the development of new regulatory approaches and instruments. In academic research, studies in the field of law should be based upon more than one legal discipline, both private and public law, and, in so far as the development and the evaluation of legal rules in the context of policy goals is concerned, interdisciplinary research is necessary.

Fundamental rights are, at present, applied between private parties in six paradigmatic areas in the national European legal systems: inequalities of power in contract law; compensation for personal interests, including privacy, in tort law; control of power by the media; unequal treatment of, for example, men and women, children born within wedlock and out of wedlock, as well as others; disputes between people exercising political rights and owners of shopping centres, sports stadiums, and airports; and environmental protection from harmful effects. According to Aurelia Colombi Ciacchi, who co-ordinated, together with Gert Brüggemeier and Giovanni Comandé, a project comparing the use of fundamental rights in nine European civil jurisdictions,[15] this protection of individuals "*erga omnes*" ("towards all") is topical in our "new medieval time", when private and public forms of regulation are growing in complex correlation with each other. Such protection need not mean that rights are instrumentalised, meaning that they would be justified with reference to a collective, such as the state or the economy. Instead, Colombi Ciacchi argues, fundamental-rights judgments can be justified, in the last instance, with reference to concrete, single concerned individuals.

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[15] The legal systems of England, Germany, France, Italy, the Netherlands, Poland, Portugal, Spain, and Sweden. See, on the project briefly, Colombi Ciacchi, Chapter 7 *infra*, Sections 1 & 2.

That seems, indeed, often to be the case. The national courts compared in the aforementioned study protected, for instance, individuals whose interests had not been fought for by a powerful lobby in the legislative phase. But this positive evaluation does not, of course, lend support to the application of fundamental rights between private parties at European level if, Colombi Ciacchi says, social rights are not equal to the freedom of enterprise.

"Private Law without Democracy?" — the second part of our title — receives a specific yes-and-no answer and a general denial in the last two contributions. Jan M. Smits asks what can legitimate an optional code for contract law in the European Union. He initially documents the existence of non-territorial, norm-generating communities which are independent of the state, in order to defend generally the need to find other sources of legitimacy than the nation state in many areas of private law, specifically the law of contract. Another fact, the ability of the parties to set aside facilitative or "dispositive" contract law, as opposed to mandatory rules, opens the possibility of founding the legitimacy of the facilitative rules on the choice by private parties to make these rules applicable to their relationship. Within the confines of the last approach, Smits distinguishes certain aspects of democracy: forms of accountability involving markets and professions, other than parliamentary forms of participation, and the idea of restricting deliberation to the groups most affected by the rules in question, such as specialists. Consequently, he argues, the legitimacy of a European code of non-mandatory contract law can lie in the fact that the parties in question choose to use it, and such a codification need not be legitimated through national parliaments.

While the democratisation of private law is seen by some as an achievement of the twentieth-century state, the way in which this has been accomplished is the first in a string of considerations presented by Florian Rödl. He notes, at the beginning of his chapter, the hesitancy felt even in the national setting when the legislature intervenes in private law. Rödl's main concern, though, lies with the recent European projects, in which legal scholars have seemed to be claiming substantive creative power for themselves. In view of future legislation, Rödl then distinguishes "formal democratic legitimation" — law-making institutions adopting prior work and serving merely the function of "notarial confirmation" — from what might be called matters of "content". In the case of the latter, he opposes any

association between a special normative basis of private law (be it corrective justice, commutative justice, or something else) and the question of whether the democratic legislature should take over the creation of private law. First of all, he says, the democratic legislature claims authority over even the most basic conceptual questions, passing laws that call for the answering of difficult conceptual problems. Second, even if private law had a special nature, only the democratic legislature should be deciding upon how far the unique private law ought to reach, for example, in the direction of energy and water supply, consumer protection, or labour relations. And third, deciding on the principles, the legislature should not be disqualified from deciding on the implementing remedies, either. According to Rödl, the need for experts in setting the scene, offering instruction, and clarifying the various possibilities of a decision does not set private law apart from any other area of law. In the end, nevertheless, Rödl contrasts the history of the nineteenth-century German private-law codification and the recent German "reform of the Law of Obligations" to extrapolate that private law must nowadays be developed incrementally by judges, legal scholars, and the legislature – with the first two of these actors being accompanied by an expert public, capable of explaining, illuminating, and critically assessing the lines taken in individual cases.

3. Perspectives

In private law as everywhere else, the Europeanisation process is a moving target. Neither Christoph Schmid's habilitation thesis nor, and even less so, our colloquium can be something like a concluding *summa*. Both need to be understood and evaluated in the light of the ideas and initiatives which they generate. The generated perspectives have been alluded to in the title of our publication. Needless to add, we must prepare to embark upon a long journey across a somewhat uncharted sea, and to cope with many challenges. There are not only thorny practical problems and political obstacles, but also complex theoretical issues. With the following final observations, we would like to sketch out, in three groups of brief remarks, this follow-up agenda. Work on the steps which we are sketching out here is, in some parts, already under way, in others it is only envisaged.

3.1. The Instrumentalisation and Disembedding of Private Law Relationships

Christoph Schmid himself is undertaking an important step. In his contribution to this collection, he has presented his instrumentalisation thesis with a view to substantiating and illustrating the tensions between the search for private-law justice and the pursuit of integration policies, the latter being guided by an equivocation of integration with the accomplishment of legal uniformity, and, hence, executing what Majone characterises as the hidden "operational code" of Europe.[16] Building upon comparative legal research undertaken at the European University Institute in Florence,[17] Christoph Schmid has developed a project on "Tenancy Law and Housing Policy in Multi-level Europe".[18] It promises to deepen his prior research methodologically, theoretically, and substantively. Tenancy law illustrates problems of exemplary importance. Even though this field of law has never been addressed in the discussion on the pros and cons of private-law harmonisation and codification, tenancy law is a subject that ranks high on the list of the difficulties that European citizens name in surveys documenting the practical obstacles which citizens experience in the organisation of their lives outside their home states. It is clear, however, that these hurdles cannot be overcome through legal harmonisation. The legal and social "embeddedness" of the private legal relationship between landlords and tenants is simply too complex to be accessible to private-law legislation. What is true for tenancy law can be observed in all private-law relationships of social and practical significance.

In his habilitation thesis, Christoph Schmid has "embedded" the instrumentalisation thesis in the conceptually broader dichotomy of a logic of market integration on the one hand, and a logic of materialising private-law developments on the other. Insulated harmonisation of legal provisions is bound to generate disintegrating side effects. These effects result from the internal fabric of legal systems, which legislative interventions cannot comprehensively take into account.[19] In Schmid's analysis of tenancy law, these

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[16] Majone, note 3 *supra*.

[17] http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectTenancyLaw.aspx

[18] "Tenancy Law and Housing Policy in Multi-level Europe" – collaborative project under PF 7 submitted in February 2011.

[19] Schmid, note 2 *supra*, in particular, p. 93 *et seq*.

"disintegrative" collateral effects of European market-integration policies gain clearer contours. The effects are deciphered as the potentially dis-embedding implications of European legislation affecting national housing policies which are outside the scope of the Union's competences. And, again, tenancy law is but one example of the in-built institutional tilt of the integration project.

3.2. Private-Law Justice and Social Justice

In his reconstruction of post-formalist private-law developments, Christoph Schmid has examined the impact of materialising tendencies on the understanding of private-law justice in considerable detail.[20] What becomes apparent in the case of tenancy law and other private-law relationships which concern the basic needs of citizens is their interdependence with other legal fields and their embeddedness in a host of policies that affect conditions which are external to a private contractual relationship, but nevertheless have an indirect impact on its substance. The case of tenancy law is again revealing. The provision of shelter concerns an irrefutable need to which welfare policies respond in various ways. What we observe here is a move of the law from justice among the parties to a broader notion of social justice. And it suffices to point to political concerns about the costs and the waste of energy in private households to realise that the landlord-tenant relationship is embedded in further policy fields and activities.

Such observations affect the evaluation of the impact of the integration process on private-law relationships in a fundamental sense. It has always been too simplistic to focus, in the discussion of European market-building activities, on efficiency gains and economic benefits. Such one-dimensional perceptions "under-estimate the profound political choice and cultural impact which the single market involves".[21] What become apparent, as one realises that private-law relationships are always socially embedded, are the more indirect, but nonetheless substantially important, effects of the integration project. European competition policy, including state aid controls, and environmental and other regulatory policies may either have disembedding implications or strive for a re-embedding of

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[20] *Ibid*., p. 25 *et seq*.

[21] J.H.H. Weiler, "Fin-de-Siècle Europe", in: Renaud Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union*, (Munich: C.H. Beck, 1994), pp. 203-216, at 215.

private-law relationships. In such perspectives, the quest for private-law justice needs to be redefined by notions of social justice, which preserve or reconstitute national accomplishments in a way that is compatible with the rights and interests of European citizens so that the citizens profit from the integration project.

3.3. Democratic Legitimacy of Private Law and the Democratisation of the Integration Process

The moves towards "materialisation" of private law as well as the ordo-liberal and "neo-liberal-plural" paradigms that Christoph Schmid discusses in his reconstruction of private-law developments in (the German) constitutional democracy[22] cannot simply be copied and pasted to the European level. So many advocates of a European private-law code not only underestimate the resilience of legal systems and their institutions, but also, and more importantly, the legal and social embeddedness of private-law relationships. Since it is factually impossible to replace the variety of European social models, traditions, and practices by some integrated European scheme,[23] legal policies should take these varieties into account. Instead of defining models of a European state, state-like entity, or federation and more or less comprehensive pan-European systems of private law, our attention should focus on integration processes, on their potential risks and benefits.

This is not the proper place to discuss, in any systematic way, the tensions between the democratic embeddedness of private-law systems in constitutional states and the European integration project, to which we have alluded at the end of Section 1 of this introduction. What should have become apparent, though, is the categorical discrepancy between the recourse to democratic processes as the final arbiter on what "deserves recognition" in a constitutional state, on the one hand, and the search for a democracy-compatible formation of the integration process, on the other. However, the last-mentioned process cannot replicate the national constellation at European level. It should instead be committed to the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty, namely, a search for unity in diversity,[24] and the fairness of responses to the positive

[22] See Schmid, note 2 *supra*, p. 41 *et seq.*
[23] See Majone, note 3 *supra*, p. 144.
[24] Article I-8 of the Draft Treaty establishing a Constitution for Europe, OJ C 310/1

and negative effects of that diversity. As Christian Joerges and Christoph Schmid have put it in a recent essay:

> European law is "best" when it recognises the difference between uniformity and justice, when it teaches us how to live with diversity […]. European integration must not abandon the project of integration through law […]. However, the complexity and the dynamics of the integration process require the institutionalization of continuous law-production (*Recht-Fertigung/justum facere*) rather than the elaboration of some comprehensive substantive *corpus juris*. "Procedura-lisation" is the mode of law production which has to ensure the normative quality of the law, which, in turn, has to build upon the inter-actions among the law-producing actors, the intensity of societal scrutiny, and the capability of courts and other legal fora to examine whether such law production "deserves recognition". This type of incremental efforts to settle the tensions inherent in the diversity of Europe, the discovery of fair solutions, the detection of failures and their subsequent correction, is, maybe, both a challenge and a chance.[25]

We do not, of course, insinuate that we are the first to explore the triad of private law, Europeanisation and democracy. There are precursors and we know about competing and converging projects.[26] It is good not to be alone with our concerns.

(December 16, 2004).

[25] Joerges & Schmid, note 6 *supra*, p. 307.

[26] Suffice it to mention here, Michael Faure & André van der Walt (eds), *Globalisation and Private Law: The Way Forward*, (Cheltenham: Edward Elgar Publishing, 2010) and the research of the Centre of Excellence on "The Foundations of European Law and Polity" at the University of Helsinki; see Kaarlo Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law*, (Farnham: Ashgate Publishing, 2010), in particular, p. 283 *et seq.*; *idem*, "The Economic Constitution among European Constitutions", (unpublished paper, Helsinki 2011, on file with the editors); see, also, Hans-W. Micklitz, "Failures or Ideological Preconceptions? Thoughts on Two Grand Projects: The European Constitution and the European Civil Code", in: Kaarlo Tuori & Suvi Sankari (eds), *The Many Constitutions of Europe*, (Farnham: Ashgate Publishing, 2010), pp. 109-141.

Chapter 1

The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell[1]

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One of the biggest historic achievements of the European Union is that the integration of European states and peoples is no longer pursued through "blood and iron", but in a peaceful and civilised way through the medium of law ("integration through law").[2] For the law, both European law and national law, this strategy translates into a fundamental commitment to the aims of European integration. Regarding private law in particular, "Europeanisation" brings about

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[1] This text offers a résumé of my post-doctoral habilitation thesis: *Die Instrumentalisierung des Privatrechts durch die Europäische Union*, (Baden-Baden: Nomos, 2010). It is dedicated to the memory of the late Austrian private law scholar Franz Bydlinski, who died on 7 February this year, 2011. In part, the present text draws on earlier publications, including: "The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code", (2005) 1 *European Review of Contract Law*, pp. 211-227; earlier version also in: Stephan Grundmann & Martin Schauer (eds), *The Architecture of European Codes and Contract Law*, (Alphen a.d. Rijn: Kluwer Law International, 2006), pp. 255-267; "Private Suretyships as a Socio-legal Crucible of Modern Civil Law", in: A. Colombi Ciacchi (ed.), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, (Baden-Baden: Nomos, 2007), pp. 21-52; "The Three Lives of European Private Law", in: L. Antoniolli & F. Fiorentini (eds), *A Factual Assessment of the Draft Common Framework of Reference*, (Munich: Sellier European Publishers, 2010), pp. 299-312.

[2] W. Hallstein, *Die Europäische Gemeinschaft*, 5th ed. (Düsseldorf-Vienna: Econ Verlag 1979), p. 33; M. Cappelletti, M. Seccombe & J.H.H. Weiler (eds), *Integration through Law*, vol 1, (Berlin: Walter de Gruyter, 1986).

a paradigmatic change in the basic function of private law: balancing the interests of the parties to a legal relationship in a fair and just way becomes superseded and displaced by the collective objectives of European integration. The term "instrumentalisation" is supposed to reflect private law's submission to such European policy objectives. Alongside the central objective of establishing the European internal market, these objectives include, most importantly, the protection of consumers, workers, small- and medium-sized enterprises, the industry and the environment as well as non-discrimination policy.

The reconstruction of the instrumentalisation thesis intended here will start from the point of departure of the Europeanisation process in private law: the relationship of justice and social steering, as it has developed through the evolution of modern private law at national level (Section 1). After this, the effects of Europeanisation of private law will be analysed in general terms (Section 2) and with specific reference to individual excessive phenomena of instrumentalisation (Section 3). In order to return to a justice-oriented conception of private law, a European codification of contract or private law seems to have the largest potential. However, such an instrument would need to be elaborated in a more effective and legitimate institutional framework than the current process of creating a Common Frame of Reference (CFR) (Section IV).

1. The Instrumentalisation of National Private Law

The instrumentalisation of private law for the realisation of social, economic and political objectives is, of course, no invention of the EU, but has always been also present at national level.[3] Generally, modern private law, as developed since the great codifications of the nineteenth century in Europe, can be described as a socio-normative institution made up of two basic elements: a relatively timeless ethical concept, and a heavily time-dependent societal shaping.

The ethical concept has survived with only minor variations since the era of the Enlightenment and results from the fundamental premises of the freedom and equality of all members of a community and the

[3] See, exemplarily, Ch. Engel, "Zivilrecht als Fortsetzung des Wirtschaftsrechts mit anderen Mitteln", (1995) 50 *Juristenzeitung*, pp. 213-218; H.-D. Assmann, G. Brüggemeier, D. Hart & Ch. Joerges, *Wirtschaftsrecht als Kritik des Privatrechts*, (Königstein: Athenäum, 1980).

fundamental principle of justice. Whereas freedom and equality are children of the Enlightenment philosophies and the grand revolutions, the concept of justice is even older and famously originates from the *Nicomachean Ethics* of Aristotle.[4] Freedom and equality require that every human being be capable of participating in legal relationships of his or her own will and on equal terms. Capacity is no longer restricted, and there is no longer privileged treatment of certain individuals or social classes – in short, classic private law takes on a universal character as the constitution of free and equal citizens. Commutative justice means, in its strong version, that the exchange of performances in contract law and the redress of damages in tort law are to be equivalent; in its weaker and perhaps more important version, it means that private law relationships are to be governed only by criteria originating in the relationship between the parties themselves – and not by reference to external political, social or economic goals ("*Grundsatz relativer Rechtfertigung*").[5] Conversely, modern private law has been lent its societal shaping in its interrelation with the socio-economic institution of the market and through different, successive phases of societal development, which can be roughly characterised as liberal, social and plural.

The end of the nineteenth century is marked by the taming of absolute state power through the rule of law. This corresponded to the liberal legal paradigm, which assigned a central importance to the safeguarding of civil freedoms based upon the rule of law, and guaranteed undisturbed commercial activity to the citizen. In Germany, this liberal paradigm was dominant at the inception of the *Bürgerliches Gesetzbuch* (*BGB*), but was put under pressure in the face of the societal changes of industrialisation, and completely broke down in the economic crisis of the 1920s and 1930s. Conceptually, liberal private law relies on the self-regulation of the market to provide a formal framework for private activities, in which the individual may follow his or her own economic goals autonomously and without state intervention. Thus, it is to be understood as a "societal externalisation" (*Außenwendung*) of its basic ethical concept. In this regard, private law has, first and foremost, to provide the legal

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[4] See, in particular, C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 1997).

[5] This concept has been elaborated by F. Bydlinski, *System und Prinzipien des Privatrechts*, (Vienna-New York: Springer, 1996), p. 92 *et seq*.

infrastructure for economic transactions and to enable predictable and stable decisions, in order to guarantee legal certainty for market participants. To this end, its rules must be universally and abstractly conceived. This implies, indirectly, that the basic principle of freedom precedes that of solidarity – the realisation of which requires intrusions into the sphere of the economic self-determination of individuals. Accordingly, liberal private law renounces, to a large extent, state interference in the market for the purposes of protecting socially weak persons.

The succeeding social paradigm is inspired by the advent of the welfare state and its core function of overcoming the poverty caused by capitalism. Famously, the welfare state relies on interventionist policies of distributing and redistributing social benefits and compensations. Even though the BGB was hardly affected by welfare-state ideas, these gradually effected its social reshaping starting from the turn of the century, which is generally referred to as the process of materialisation (Max Weber). Materialisation started with a judicial reinterpretation of the legal text, flourishing in the economic crises of the 1920s and leading to famous instances of judicial law-making such as the doctrine *clausula rebus sic stantibus* (*Wegfall der Geschäftsgrundlage*). Its heyday was experienced after the Second World War in the welfare state of the *Grundgesetz*, where it is still present today despite the crisis of the welfare model since the end of the 1970s.

The social paradigm of private law experienced a "plural-procedural" expansion through the shift of state functions from those of the traditional, social welfare state to those of the contemporary, security and regulatory state of the risk, knowledge and media society. Therein, increasingly independent social and economic sub-systems are no longer effectively and legitimately governable through state-centred and hierarchically conceived instruments. This leads to an intensified resort to decentralised self-regulation through private-law instruments. However, private law no longer aims at commanding and steering economic and social relationships directly, but limits itself to securing the functioning of the market according to its own rules and regulations. The law, therefore, withdraws itself to a "reflexive"[6] or procedural control function.

[6] This expression originates from G. Teubner, "Substantive and Reflexive Elements in

However, the temporal sequence of these forms of society should not belie the fact that today's society is a product of its liberal and social ancestors, which still subsist. And in so far as legal development reflects societal development, today's law may also be regarded as a mixture of the liberal, social and procedural socio-legal paradigms. Their co-existence may be shown by the fact that, in difficult cases, which are not decided by the legislator but left to courts, fundamentally different solutions — which correspond to the various socio-legal paradigms — compete against each other.[7]

Yet, throughout the evolutionary path of national private law, the weak version of commutative justice has always remained present. In fact, external social, economic and political goals — which may either favour one party, such as workers or tenants, or stand completely outside the party relationship, as in the case of market-integration concerns[8] — may, and, indeed, should, be taken into consideration by lawmakers and interpreters. At any rate, however, the ordering of private-law relationships must always respect the minimum requirements of justice among the parties. According to the weak version of justice presented above,[9] this means, in the words of Franz Bydlinski, that, if one were to ignore the regulatory external dimension of a norm or decision hypothetically, the consequence of

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Modern Law", (1983) 17 *Law and Society Review*, pp. 239-285. Next to the reference to function conditions and entelechies of other social systems, the term "reflexive" for Teubner also denotes "reflection" in the sense of a development of the identity of law under conditions of functional differentiation of society: in this sense the system theoretical self-referencing of law as a completely self-encapsulated autopoietic system in an environment of other autopoietic systems. See G. Teubner, *Recht als autopoietisches System*, (Frankfurt aM: Suhrkamp Verlag, 1989), p. 87, p. 96 *et seq.*; G.-P. Calliess, *Prozedurales Recht*, (Baden Baden: Nomos, 1999), p. 128.

[7] "Private Suretyships", note 1 *supra.*

[8] The protection of typically weak parties such as tenants and workers is principally characterised as an *external* goal here because it may go beyond commutative justice. In other words, it does not necessarily reflect the (true of hypothetical) will of the parties to a contract. However, in the perspective of economic analysis, certain socially motivated interventions into transactions are efficient – for example, the protection of a tenant against excessive rent increase prevents the landlord from obtaining an undeserved monopoly rent corresponding to the tenant's removal costs (which may make him accept a higher rent than the market would otherwise allow in order to avoid the moving). If one accepts this perspective, such social interventions may accordingly still be assigned to commutative justice. See, for example, H.-B. Schäfer & C. Ott, "Die ökonomische Analyse des Rechts – Irrweg oder Chance der Rechtserkenntnis?", (1988) 43 *Juristenzeitung*, pp. 213-222, at 218.

[9] See note 5 *supra*.

the norm-applying decision must still qualify as an outcome which is defendable on the grounds of justice alone — even though other alternatives might serve justice even better. In summary, the party relationship must not be instrumentalised by external collective goals.

This concept of private law and private autonomy is even protected constitutionally in some EU Member States. To quote but one example, the German *Bundesverfassungsgericht* has recently ruled that the high financial contributions which an employer is bound to make for maternity leave allowances granted to female employees under German labour law are unconstitutional[10] — ultimately because the employer does not receive an adequate counter performance on the part of the employee for such payments. Whilst it is socially highly desirable that women on maternity leave do not lose their income, the funding of it is a task of the community as a whole and not of the single employer, who should not have to sacrifice himself or herself for it.

However, such forms of excessive instrumentalisation, so the core thesis goes, occur more often at European level than at national level. Before exploring this phenomenon, the effects of European integration on private law need to be analysed more broadly.

2. Effects of Europeanisation on the Concept of Private Law

As compared to the basic ethical-societal concept of national private law described above, the concept of European private law is different, on account of its orientation towards collective policy goals under the umbrella of integration. Commutative justice may, perhaps, be included among the general principles of European law which EU law has abstracted from the legal systems of the Member States, but it is not an objective of integration that is pursued simultaneously and at equal rank with other political goals.

The integration goal closest to private law is consumer protection. Interestingly, consumer policy and laws were not even part of the original Treaty of Rome, but were gradually added to the integration

[10] See *Bundesverfassungsgericht*, (2004) 59 *Juristenzeitung*, p. 354 with annotations by H. Kube, at 358-361.

project from the 1972 Paris summit onwards.[11] But most legal measures could only be enacted after the introduction of qualified majority voting in the Single European Act of 1986. Since the mid-1980s, European consumer law has extended to important legal fields such as doorstep sales, consumer credit, distance sales, package tours, time-sharing rights, unfair contract terms, and consumer sales. Even though consumer law also reflects early efforts to bring Europe closer to its citizens, it primarily constitutes genuine market regulation in fields typically involving transactions between businesses and the non-professional final users of products and services. In line with this rationale, there was no autonomous legal basis for consumer law until the 1997 Treaty of Amsterdam (and even the legal basis established there, Article 169 paragraph 2(b) TFEU [ex Article 153 paragraph 2(b) EC], has hardly ever been used since), and harmonisation measures allegedly belonging to consumer law, including all consumer-contract law directives, were normally enacted under the general basis for market regulation, Articles 114 and 115 TFEU (ex Articles 94 and 95 EC under the 1997 numbering, formerly 100 and 100a EC). As a consequence, the core objective of European consumer law is *not* social protection, but the establishment and the regulation of the Single Market.

Fortunately enough, the ethical-societal concept of private law and the logic of market integration are, to a large extent, compatible, and, in many cases, even mutually dependent and reinforcing. On the one hand, the European market, just like any other market economy, needs private law as its basic legal infrastructure — that is, the legal framework enabling all kinds of market transactions. In contrast with most fields of economic regulation, the European Community did not have to replace or to harmonise core fields of private law, such as contract or tort law, in order to achieve its integration project. Instead, it was able to make use of the existing national private-law systems, which were similar enough to enable the realisation of most market transactions without major obstacles.[12] Thus, European consumer law is less about enabling, than about regulating market

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[11] Schmid, *Instrumentalisierung*, note 1 *supra*, p. 166 *et seq*.

[12] In line with this, one of the first contributions on the harmonisation of private law in Europe does not mention contract and tort law at all: see W. Hallstein, "Angleichung des Privat- und Wirtschaftsrechts in der Europäischen Wirtschaftsgemeinschaft", (1964) 28 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, p. 211.

transactions. Incidentally, the situation was different in company law,[13] where the existing national institutions did not allow for sufficient compatibility among national systems – with the consequence that new European company forms (the *societas europea*, the European interest grouping and the European co-operative) had to be created and the compatibility of national company forms established by means of the principle of mutual recognition (the *Centros*[14] jurisprudence).

On the other hand, with regard to private law itself, its scope and effectiveness have been considerably enhanced through its integration into the common market.[15] This is true, first, in a territorial sense, in that the reach of private-law instruments is extended beyond national borders. Moreover, as the European economic constitution forces the Member States to do away with discriminating and restrictive national regulation ("deregulation"), the substantive scope left to societal self-regulation and private law as its principal tool considerably increases as well. In particular, as an effect of the deregulation of national monopolies, public undertakings and state aid, the reregulation of the economy at European level by means of private law – "private governance" – has been promoted.[16] Furthermore, European law may also play a positive constitutional "moderating role", in that it controls the rationality and impartiality of national law and jurisprudence, and gives European citizens the right to second-guess their national sovereigns on common European grounds. Thus, in the follow-up case to *Heininger*,[17] which involved consumer credit and doorstep sales law, the ECJ largely rejected the denial on the part of the

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[13] On the evolution of European company law, see J. Wouters, "European Company Law: Quo vadis?", (2000) 37 *Common Market Law Review*, pp. 257-307.

[14] Case C-212/97, *Centros*, [1999] ECR, I-1459 and the follow-up decision Case C-208/00, *Überseering,* [2002] ECR, I-9919 and Case C-167/01, *Inspire Art*, [2003] ECR, I-10155.

[15] This finding has been explicated in the writings of P.-Ch. Müller-Graff; see *idem*, "Basic freedoms -extending party autonomy across borders", in: S. Grundmann, W. Kerber & S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market*, (Berlin-New York: Walter de Gruyter, 2001), p. 133.

[16] See Ch. Joerges, *The Market Without a State? States Without a Market?: Two Essays on the Law of the European Economy*, EUI Working Paper Law No. 96/2 (Florence: European University Institute, 1996), also available at: http://eiop.or.at/eiop/texte/1997-019.

[17] Case C- 481/99, [2001] ECR, I-9945.

German *Bundesgerichtshof* to extend the effect of a consumer's withdrawal from a credit contract (concluded to acquire real property) to the interconnected purchase and mortgaging transactions.[18] Likewise, the *Centros*[19] jurisprudence, in which the ECJ allowed European citizens to have companies established under a foreign law registered in their home states, is interpreted by some as a desirable correction of inadequate and inefficient national corporate capital rules – a correction not of market failures, but of nation state failures, as Christian Joerges put it.[20]

However, alongside these bright sides, there is also a dark side to the use of private law as an integration tool. There is, indeed, a worrying tendency for private law to be instrumentalised excessively, which entails private parties being sacrificed to integration objectives. This thesis will now be illustrated by various examples.

3. Examples of the Excessive Instrumentalisation of Private Law by the EU

3.1. An Incoherent Consumer Model

The first examples deal with consumer-information rights. Clearly, there is absolutely nothing wrong with information rights in themselves. As both economic analysis and contract practice show, information asymmetries among professional traders and consumers are a frequent type of market failure, which information rights are able to correct in many cases.[21] In line with this basic finding, information rights constitute the most prominent and frequent regulatory tool in European consumer law. This seems to be inspired by the model of an inadequately informed consumer who is able to make rational decisions only after receiving adequate information. Thus, to quote but one example, in the *Cofidis* case,[22] the ECJ quashed national time limits restricting the exercise of consumer-protection

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[18] Case C-350/03, *Schulte*, [2005] ECR, I-9215.
[19] Case C-212/97, *Centros*, [1999] ECR, I-1459.
[20] See Ch. Joerges, "On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (justum facere) for the EU Multi-level System", in: A. Hartkamp *et al.*, (eds), *Towards a European Civil Code*, 3rd ed. (The Hague: Kluwer Law International, 2004), pp. 159-190, also available at: http://www.ejcl.org/73/art73-3.html.
[21] See, generally, H. Fleischer, *Informationsasymmetrie im Vertragsrecht*, (Munich: C.H. Beck, 2000).
[22] Case C-473/00, *Cofidis*, [2002] ECR, I-10875.

rights on the grounds that consumers *may* ignore their rights completely, but needed to be protected nonetheless.

Conversely, regarding national information rights, these are often found to be inconsistent with the four market freedoms on proportionality grounds by the ECJ.[23] In particular, in the field of misleading advertising, national information rights requiring clear and unambiguous information are treated restrictively. In what boils down to an unrealistic assumption about market behaviour, consumers are, for example, supposed to recognise objectively wrong manipulative advertising statements[24] or foreign-language labels which are similar to well-known domestic products.[25] In this jurisprudence, we seem to face the opposite model of a well-informed and intelligent consumer. As a result, consumer information requirements are construed in a wide manner in *European* consumer contract law, whereas *national* consumer-protection-based limitations on the basic freedoms are construed narrowly. However, this distinction is by no means justifiable under private law, as — in the words of Stefan Grundmann — one should not require a lower degree of attention from a consumer entering into contractual negotiations than from a consumer reading advertisements in his or her armchair.[26]

The background of this jurisprudence seems to be that national consumer-protection instruments, including information rights, were recognised as valid limitations of the basic freedoms in the famous *Cassis de Dijon*[27] jurisprudence. Therefore, a wide recognition of national information rights would reduce the *effet utile* of the market freedoms. At the end of the day, the different treatment of national and European information rights shows that the ECJ's true concern is

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[23] On the relationship of contract law and the market freedoms, see O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EGV*, (Tübingen: Mohr Siebeck, 2003).

[24] Case C-470/93, *Mars*, [1995] ECR, I-1923. In this decision, the ECJ argued that a consumer would not confuse the (larger) size of a "10 per cent more" advertisement on a chocolate package with the actual (smaller) increase in quantity.

[25] Case C-369/89, *Piageme*, [1991] ECR, I-2971.

[26] S. Grundmann, *Europäisches Schuldvertragsrecht*, (Berlin-New York: Walter de Gruyter, 1999), p. 270, note 106. For a similar critique, see H. Fleischer, "Vertragsschlußbezogene Informationspflichten im Gemeinschaftsprivatrecht", (2000) 7 *Zeitschrift für Europäisches Privatrecht*, p. 791.

[27] Case 120/ 78, Rewe v Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.

not a uniform model of a consumer, and not even consumer protection as such, but the optimisation of the *effet utile* of European law *irrespective of* its contents and objectives. Thus, both consumer information, in particular, and private law, in general, are subordinated to integration purposes. Clearly, this approach prevents private law from adequately fulfilling its core task of realising justice among the parties.

3.2. The Instrumentalisation of Uninformed Consumers to Open up National Insurance Markets

The previous cases have already shown that, even though information rights are the predominant tool of European consumer law, they, too, may be displaced if counteracting higher-ranking market-integration objectives so demand. This tendency is confirmed by another instrumentalist line of case law in which information rights have been considered to be violations of market freedoms, because these rights may dissuade consumers from specific market behaviour which is considered useful for integration purposes. As an example, one may quote the *Axa Royale Belge* case[28] decided by the ECJ in 2002, which deals with information rights under the Third Life Insurance Directive.[29] This Directive contains an extensive catalogue of the information obligations for an insurer. It stipulates that additional information may only be required by national law to the extent that the information is necessary for a proper understanding by the policyholder of the essential elements of the contract. However, a Belgian provision stipulated that life insurance policies had, *inter alia*, to inform the policyholder that the cancellation, reduction or surrender of an existing contract before its termination date would generally be detrimental to his or her position. With regard to this provision, the ECJ argued that it was not only too general and vague, but that it did not encourage the consumer to make comparisons between the various insurance policies offered on the Single Market. Instead, it encouraged him or her to stick to the existing agreements. In doing so — and this was the decisive rationale — the information duty under Belgian law negatively affected the access of foreign insurers to the domestic market. On these grounds, the ECJ found the Belgian provision to be incompatible with the Directive.

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[28] Case C-386/00, [2002] ECR, I-2209.
[29] Dir 92/96/EEC, OJ 1992 L 360/1.

Whilst the Belgian provision may actually have such protectionist side effects, one should not ignore its legitimate core objective. In fact, it addresses the notorious phenomenon that the termination of life insurance policies before the termination date is normally economically disadvantageous to the policyholder. This is generally the case, irrespective of the fact that foreign competitors may offer a certain insurance policy at better conditions. Unlike the rather redundant amount of information prescribed under the Directive, which may even cause counterproductive information overload,[30] the Belgian information requirement was probably more appropriate in terms of making the consumer examine the consequences of an early termination of a life insurance contract. If this simple, but effective, information is prohibited, it means that the ECJ prefers consumers to incur potentially high financial losses when prematurely terminating life insurance policies rather than run the risk of diminishing the market-access chances of foreign insurance companies. In other words, contractual justice among the parties is again sacrificed to the promotion of the integration of the Single Market.

3.3. Difficulties with the Enforcement of Law in Other Member States Treated as an Ambivalent Argument

Beyond information requirements, the instrumental approach of the ECJ is also found in private law in its interpretation of the topos of the "common area of law and justice", which deals with problems with the enforcement of law in other EU Member States. Though, in the *Mund/Fester*[31] case in 1994, the ECJ required the disregard of such problems for the sake of integration, it paid heed to them in the *Gysbrechts*[32] case.

The *Mund/Fester* case dealt with the bail required for foreign claimants as prescribed by paragraphs 110 section 1 (former version) and 917 section 2 of the German Code of Civil Procedure (*Zivilprozessordnung*, abbreviation: ZPO). The ECJ ruled that "special problems" with law enforcement are absent given the existence of the

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[30] On the phenomenon of information overload in European consumer law, see M. Martinek, "Unsystematische Überregulierung und kontraintentionale Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr", in: S. Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, (Tübingen: Mohr Siebeck, 2000).

[31] Case C-398/92, *Mund/Fester*, [1994] ECR, I-467.

[32] Case C-205/07, *Gybrechts*, [2008] ECR, I-9947.

Brussels Convention on Jurisdiction and Enforcement[33] (today replaced by the Brussels Regulation[34]), which meant that bail from EU foreign nationals is no longer justifiable. The ECJ argued that the Member States should be seen as a common area of law and justice. In reality, this is hardly plausible, as proceedings in numerous other EU Member States, Italy for example, are known to be long and tedious, which may render it very difficult or even prohibitive to obtain legal costs. Besides this, *ordre public*, an objection which allows a state to refuse the enforcement of a judgment, still has effect in Europe. The ECJ deliberately ignored such enforcement problems in the *Mund/Fester* case, in order to promote the generation of a common area of law and justice. According to the Court, national law is not allowed to pay heed to such problems; instead, it is required to practise a kind of Europe-oriented affirmative action in order to promote the common area of law and justice. However, it would have been methodologically more honest if the ECJ had not simply ignored the difficulties of enforcing court decisions in foreign countries, but had attempted to give reasons for the instrumentalisation of civil procedural law (paragraphs 110 section 1 and 917 section 2 of the Code) in favour of integration.

Another approach was taken by the ECJ in the *Gysbrechts* case of 2008. This case dealt with the special constellation of stricter national law allowed under the minimum-harmonisation principle contained in the Distance Sales Directive. According to the Belgian Consumer Protection Law of 1991, distance sellers were not allowed to demand payment from consumers before the withdrawal deadline of seven days had expired. This rule had been interpreted to mean that sellers were also not allowed to require the consumer to give a credit card number during this seven-day period, because the seller would then have the ability to receive the purchasing price before the withdrawal deadline expired. Mr. Gysbrechts, a Belgian grocer, who sold products online in France as well as in Belgium, had to pay a fine in criminal proceedings before a court of first instance due to a violation of this rule. The court of appeal suspected, however, that the rule

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[33] Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ L 299, 13.12.1972, p. 32; consolidated version, OJ C 27, 26.1.1998, p. 1).

[34] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, pp. 1-23.

infringed the free movement of goods, and referred the case to the ECJ. The ECJ ruled that stricter national rules were, in accordance with the minimum-harmonisation principle contained in the Distance Sales Directive, allowed in principle, but they needed to be compatible with the free movement rules (the "fundamental freedoms"). In this respect, the ECJ found the Belgian rules to be in violation of the European freedom of export. In a first step, the Court confirmed that this freedom only extends to a non-discrimination rule, whereby only national limitations with unequal effects on domestic and foreign products are forbidden. Nonetheless, this non-discrimination rule was then found to be affected, as the consequences of the Belgian law made it very difficult for sellers to enforce claims against consumers in other countries, especially small claims. That said, the ban on prepayment could be justified under the rationale of effective consumer protection, because a consumer who has already made payment would probably be less inclined to make use of his withdrawal rights. However, under the proportionality test, the ban on requiring the credit card number at the conclusion of a contract was not justifiable according to the ECJ if, as was the case here, its only purpose was to prevent early collection of payment. Instead, the Court regarded the legal ban on early collection to be sufficient as such. As a result, the Belgian rule fell foul of proportionality.

The ECJ's argumentation is acceptable in this case. It is already problematical, especially for low-value trans-border business, not to be allowed to demand payment before the expiry of the seven-day deadline. In addition, having to deliver without any sort of security leads to unfair advantages on the part of the consumer against the seller. Court actions against foreign customers for small claims are often prohibitively expensive, which entails that there is good opportunity for dishonest consumers to take advantage of sellers. The ECJ's decision, in which the seller is allowed to ask for a credit card number, but is not allowed to use this until after the expiry of the seven-day deadline, is a plausible compromise in this case. Compared to the *Mund/Fester* decision, however, it is hard to explain why the ECJ now allowed the consideration of enforcement difficulties in another Member State, whilst it had not done so in the earlier case. This distinction can only be explained by a sort of *effet-utile*-driven arbitrariness, in which justice among parties as the paramount goal of private law is widely ignored.

3.4. The Abolition of Minimum Harmonisation and its Consequences: The Example of the Product Liability Cases of April 2002

The issue of minimum harmonisation provides another example of European consumer law tending to favour, not consumers, but European enterprises – in attempting to provide them with a uniform regulatory framework which reduces transaction and market-access costs. This trend is visible in the current plans of the Commission to abolish the minimum-harmonisation principle[35] which has been contained in most consumer contract law directives since 1990. This principle aims to grant consumers the best possible protection by allowing the Member States to retain stricter national consumer laws than those contained in European directives.

The effects of the planned abolition of this principle have already made themselves visible in ECJ jurisprudence. In comparison with most consumer contract law directives, the 1985 Product Liability Directive[36] does not contain a minimum-harmonisation clause, though most commentators read such a clause into it on account of its framework character and the large number of gaps.[37] This reading is fully plausible, as the fragmentary texture of the Directive cannot reasonably be expected to do justice to this complex and socially highly sensitive matter governed by different national regulatory traditions.[38] However, in three cases decided on 25 April 2002, the ECJ found that no minimum-harmonisation principle could be read into the Directive in the light of its paramount goal of establishing uniform regulation of product liability – so as to prevent market distortions when undertakings in one state are forced to pay more to

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[35] European Commission, Consumer Policy 2002-2006, 2002, approved by the Council of Ministers on 2 December 2002, OJ 2002 C 11/1.

[36] Dir 85/374/EEC, OJ 1985 L 210/29.

[37] See G. Brüggemeier, "Produkthaftung und Produktsicherheit", (1988) 152 *Zeitschrift für das gesamte Handelsrecht*, p. 511, 531 & 534; G. Howells, "Product Liability – A History of Harmonisation", in: A. Hartkamp *et al*. (eds), *Towards a European Civil Code*, 3rd ed., (Demeter: Kluwer, forthcoming).

[38] See H. Koch, "Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie", (1988) 152 *Zeitschrift für das Gesamte Handelsrecht*, p. 537; the incomplete character of the Directive becomes visible also in its complex interplay with product safety law; see G. Howells, "The Relationship between Product Liability and Product Safety – Understanding a Necessary Element in the European Product Liability Through a Comparison with the US Position", (1999-2000) 39 *Washburn Law Journal*, p. 305.

the victims of dangerous products than undertakings in other states.[39] In doing so, the ECJ deprived a Spanish plaintiff, whose health had been seriously affected by the transfusion of infected blood in a public hospital, of a claim for damages against the hospital existing under a Spanish product liability statute.[40] The reason for this was that – unlike under Spanish law, which followed US law in this respect – the victim could only sue the producer of the defective product, but could not sue another member in the commercial chain, such as the hospital which had not actually produced the infected blood itself in this case. Alongside the Spanish case, the ECJ convicted France and Greece in a treaty-infringement procedure as they had not transposed the Directive word by word into national law, but had tried to remedy some of its apparent shortcomings, such as the minimum threshold required for the restitution of damages (*Selbstbeteiligung* in German, *franchise* in French).[41]

This jurisprudence is unfortunate in that it sacrifices national consumer protection without any visible gain for European industries. Indeed, both the narrow scope of the application of the European Directive and its many gaps render its objective to provide European undertakings with a uniform product liability regime absolutely illusory.[42] As a result, the ECJ has, in this case, petrified a

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[39] The rejection of this jurisprudence seems to be quasi unanimous among European commentators: See G. Viney, "L'Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux", (2002) I 177 *La Semaine Juridique*, p. 1945; J. Calais-Auloy, "Menace européene sur la jurisprudence francaise concernant l'obligation de sécurité du vendeur professionel", (2002) 31 *Recueil Le Dalloz*, p. 1458; A. Palmieri & R. Pardolesi, "Difetti del prodotto e del diritto privato europeo", (2002) IV *Il Foro Italiano*, p. 296; Ch. Joerges, note 16 *supra*, p. 30 *et seq.*; M.-E. Arbour, "Compensation for Damage Caused by Defective Drugs: European Private Law between Safety Requirements and Free-Market Values", (2004) 10 *European Law Journal*, pp. 87-101. A more positive assessment seems to underlie the comment by R. Schaub, "Abschied vom nationalen Produkthaftungsrecht? Anspruch und Wirklichkeit der EG-Produkthaftung", (2003) 10 *Zeitschrift für Europäisches Privatrecht*, pp. 562-589.

[40] Case C-183/99, *González Sánchez*, [2002] ECR, I-3901.

[41] Cases C-52/00, *Commission* v *France*, [2002] ECR, I-3827 and C-154/00, *Commission* v *Greece*, [2002] ECR, I-3879.

[42] See the telling comment by a leading German practitioner: J. Schmidt-Salzer & H. Hollmann, *Kommentar EG-Richtlinie Produkthaftung*, vol 1 (Heidelberg: Recht und Wirtschaft, 1986) Einl IV, 135 *et seq*, note 73 *et seq.*, & 79: "Hält man sich die Milliarden und Abermilliarden von Produkten vor Augen, die jährlich innerhalb des Gemeinsamen Marktes veräußert werden, ist bereits bei Beschränkung auf den in der Richtlinie geregelten Bereich (Personenschäden, private Sachschäden)

nearly twenty-year-old piece of legislation already infused with massive shortcomings. In doing so, it prevents Member States from adequately fulfilling their responsibility to provide industry and consumers with a socially- and economically-adequate and consistent product liability law.[43] In a most unusual resolution, the Council of Ministers explicitly criticised the jurisprudence and reminded the ECJ of the EU's mandate of promoting consumer protection.[44]

4. Conclusions

In summary, whilst the four examples described above cannot of course do justice to the whole body of European private and consumer law, they represent a threatening instrumentalist tendency, in which the *effet utile* of market integration is placed above all – including above justice among the parties. To remedy these shortcomings, the project of a more comprehensive harmonisation of

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betriebswirtschaftlich der Nachweis, daß innerhalb der Europäischen Gemeinschaft die unterschiedlichen Haftungsregeln die Warenströme beeinflussen, abwegig. Dazu sind die Unterschiede des Haftungsrechts letztlich zu gering und treten Produkthaftungsansprüche relativ viel zu selten auf. Die Beobachtung des Anteils, unter Ausklammerung 1. der US-Schäden, 2. der gewerblichen Sachschäden und 3. der Produkt-Vermögensschäden die sog. konventionellen Produktschäden innerhalb der Betriebshaftpflichtversicherung haben, belegt eindeutig, daß es sich im Vergleich zu den Warenvolumina um eine quantité négligeable handelt […]. Die vorgenannten Beispiele belegen, daß ein Unternehmen […] schlichtweg fahrlässig handeln würde, wenn es seinen Warenstrom-Dispositionen und -kalkulationen die Haftungsregelungen der EG-Richtlinie zugrunde legen würde." Paradoxically, it seems to be exactly the ineffectiveness of the Directive which has made it an attractive model for legislators worldwide, who want to boast a high consumer protection standard without effectively limiting their industries. See M. Reimann, "Product Liability in a Global Context: the Hollow Victory of the European Model", (2003) 11 *European Review of Private Law*, pp. 128-154.

[43] It may be added that this case law also leads to a different treatment of various Member States: Article 13 of the Directive explicitly allows the application of competing national liability regimes based upon contract or tort. However, in the lack of legislative action, national courts for example in Germany have developed traditional tort law into a fully-fledged product liability regime. As a result, those Member States which – more or less by chance – have developed a product liability regime formally still based on fault (though in practice converted into one close to liability without fault by the inversion of the burden of proof and similar judicial devices) would probably be allowed to keep it whereas others such as Spain, whose legislatures have opted for a strict liability regime, have to accept the primacy of the Directive.

[44] OJ 2003 C 26/1; for a comment, see P. Rott, "Produkthaftung und Vollharmonisierung – der Rat kartet nach", (2003) 35 *Recht der Internationalen Wirtschaft*, editorial.

European private law might become even more important. For just as the Charter of Fundamental Rights of the European Union has increased the weight of non-economic rights as compared to the market freedoms, a European private-law instrument would increase the significance of private-law justice in the EU system. It is true that a moderate instrumentalisation of private law for European policy objectives could not, and indeed should not, be terminated. However, a European instrument might decrease the danger for excessive instrumentalisations. Instead, it would increase the weight of private law among European-law disciplines, and the ECJ would *nolens volens* become the guardian of the coherence of private law. Thus, the European institutions would be barred from using private law as a "discretionary legal commodity" for the realisation of integration objectives.

Against this background, the most important question of European private law today is in which procedures and by which institution a European instrument could be prepared in an effective and legitimate way. In this respect, the current design of the CFR process appears to be defective. The process up until now has resembled the open method of co-ordination (OMC): politically unaccountable academic experts chosen by a small group of project pioneers have elaborated the Draft Common Frame of Reference (DCFR) in accordance with their own self-made procedural rules in non-public meetings; others have had little chance to influence the process, as competition was apparently not desired by the Commission. The meetings with the stakeholder networks were too few, too short and all too little prepared to enable any meaningful feedback and legitimation by civil society. At the present stage, the DCFR would not, therefore, qualify as a legitimate hard code. The need to enhance both the scientific quality and the political legitimacy of the process remains undeniable. If would seem, however, that both aims cannot be achieved under the current institutional setting.

As an alternative, a proposal voiced by this author in 2000 before the European Parliament[45] has received new attention from academics[46]

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[45] See Ch. U. Schmid, "Legitimacy Conditions for a European Civil Code", (2001) 8 *Maastricht Journal of European and Comparative Law*, p. 277.

[46] See H. Collins, *The European Civil Code: The Way Forward*, (Cambridge: Cambridge University Press, 2008); W. Ernst, "Der 'Common Frame of Reference' aus juristischer Sicht", (2008) 208 *Archiv für die civilistische Praxis*, pp. 248-282; H. Eidenmüller, F.

and politicians[47] in recent times: the creation of a European Law Institute on the model of the famous American counterpart institution, *The American Law Institute*. Such an institute is now planned to be founded by a committee composed of famous European judges and lawyers in a conference to be held in Paris on 1 June 2011.[48] Such an institute would constitute an academically – and politically – legitimised body to which the responsibility of elaborating an enhanced draft could be delegated. It could bundle, structure and consolidate discussions, enhance the quality of the work, improve the acceptance of the results among lawyers and ensure the compatibility of draft legislation with the social, economic and political context in which private law operates. Prepared in this way, a European private-law instrument would have a better chance of being effective and legitimate. Only then might a European instrument deploy its full potential of terminating the excessive instrumentalisation of private law by market rationales and of endowing private law with a voice of its own in the concert of European legal disciplines.[49]

Faust, H.Ch. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann, "Der Gemeinsame Referenzrahmen für das Europäische Privatrecht", (2008) 63 *Juristenzeitung*, pp. 529-584, at 549-50.

[47] Viviane Reding, "A European Law Institute: an Important Milestone for an Ever Closer Union of Law, Rights and Justice", Speech at the European University Institute, Florence, delivered on 10 April 2010 (accessible at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/154&format=HTML&aged=0&language=EN&guiLanguage=en).

[48] See http://www.europeanlawinstitute.eu

[49] Complementing in a sense the argument of H. Collins, "The Voice of the Community in Private Law Discourse", (1997) 3 *European Law Journal*, pp. 407-421.

Chapter 2

From *Effet Utile* to *Effet Néolibéral* Why is the ECJ Hazarding the Integrity of European Law?

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The work of Christoph Schmid teaches us an important lesson. The critical legal movement is not simply radical, in seeking to respond directly to social movements demanding justice within the law. Instead, the critical legal movement is intensely conservative. It seeks primarily to preserve the integrity of law, responding to the social environment, but doing so only from *within* the law. Law is not politics and political law is a non-law. In this regard, the modern ECJ is now failing the law. In contrast to the historic or *ancien* Court, it has become political in its jurisprudence and has, in effect, ushered in an era of neo-liberal integration. Nonetheless, and in common with an increasingly cosmopolitan network of courts at global level, the ECJ is speaking for a cosmopolitan community to which the critical legal movement must also respond. Accordingly, our task within this movement is now one of persuading the ECJ to withdraw from freedoms-based jurisprudence and to seek to ensure, not simply individual cosmopolitan justice, but also the social justice of the collective by means of the maintenance of a complex, intricate and sometimes highly troublesome legal method that is socially-constitutive in its response to social-justice demands, but is likewise constitutive of law in that it always maintains legal integrity (method of "*Rechtsverfassungsrecht*").

1. The Disappointed Lawyer

Christoph Schmid is a disappointed lawyer.[1] And he is not alone.[2] The reason for his and others' disenchantment: the recent jurisprudence of the European Court of Justice, in particular, the *Laval*, *Viking* and *Rüffert* cases.[3] Given the apparent anti-union content of these judgments, it might be tempting to dismiss the current degree of disquiet, even anger, about the actions of the Court as the result of left-leaning dissatisfaction with the globally competitive orientation of EU policies. In this view, lawyers who have long supported a largely progressive process of integration[4] have now simply thrown their toys out of the pram as the desire for economic growth expressed within Europe's Lisbon agenda has been put into decisive action. However, such a dismissal of recent critique is nonetheless wrong. Instead, the very real concern of disappointed lawyers is also a fear for the integrity of European law.

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[1] See, in particular, Ch. U. Schmid, "From *Effet Utile* to *Effet Néolibéral*: A Critique of the New Methodological Expansionism of the European Court of Justice", in: R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Antwerp-Oxford: Intersentia, 2010), pp. 295–314; but also Schmid, "Judicial Governance in the European Union – the ECJ as a Constitutional and a Private Law Court", in: E.O. Eriksen, Ch. Joerges & F. Rödl (eds), *Law, Democracy and Solidarity in a Post-National Union*, (London-New York: Routledge, 2008), pp. 85–105. The issues discussed in these essays are, of course, taken up and elaborated further in his habilitation thesis on *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010). Throughout this essay, the references will primarily be to the two publications in English.

[2] See, among many, Ch. Joerges & F. Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval", (2009) 15 *European Law Journal*, pp. 1–19; in broader constitutional perspectives, see D. Grimm, "Zum Lissabon-Urteil des Bundesverfassungsgerichts: das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union", (2010) 48 *Der Staat*, pp. 476–495; and, above all, the German Constitutional Court in its *Lisbon* Judgment, *Re Ratification of the Treaty of Lisbon* [2010] *CMLR* 13.

[3] Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti, [2007] ECR, I-10779; Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet, [2007] ECR, I-11767; Case 346/06, Dirk Rüffert v Land Niedersachsen, [2008] ECR, I-1989.

[4] Which has, as an obvious example, furthered the cause of women's labour rights.

The vital importance of Schmid's work is thus that it reunderlines the forgotten truth of a broad, critical legal studies movement: that — paradoxically — it is *also* "conservative" in nature. Even in its more extreme existential forms, which, by means of never-ending deconstruction and self-analysis, must *per se* doubt the potential for the very "being" of law, critical legal study is still marked by nostalgia. It is still characterised by its continuing endeavour, however fruitless or negatively expressed,[5] to identify an *independent* — internal and/or self-referential — source of legitimacy for law and the legal system. Schmid is a party to this endeavour and must now, as a consequence, question the direction upon which the ECJ has chosen to embark.

With his study of "judicial governance" within the field of European private law, Schmid, above all, hearkens back to the very beginnings of the critical legal movement and to the conundrum of legal indeterminacy. For him, "judicial activism", and, in particular, judicial activism within the EU, is, as such, not a new phenomenon. Instead, it must be understood as an intensification of the common consequences of legal adjudication. Granted, the weakness of political community within Europe determines that a judicial branch tends to assume "tasks which are, under the classic separation of powers doctrine, reserved to the executive and legislative power". Nonetheless, for Schmid, this is not "an anomaly, but instead reflects the very nature of adjudication", and does so both for "methodological" and for "social" reasons:

> Methodologically, there is no clear borderline between the application of the law and its creative development; the application of general norms to specific fact patterns always adds new meaning to them. Socially, adjudication is always embedded in a wider societal context and is, therefore, always influenced by the political, economic and social circumstances under which it operates and which influence the minds of jurists and inform their decisions.[6]

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[5] Alternatively, the conclusion that law has no "being" of itself reflects a presumption of legal existence.

[6] Schmid, "Judicial Governance", note 1 *supra,* p. 85.

Law is necessarily indeterminate. As the great progenitors of legal critique recognised – progenitors such as Ehrlich, Sinzheimer and Heller, as well as the political scientist, Harold Laski – the judicial application of individual legal norms is not law's end, but law's never-ending beginning. Further, however, as Schmid reiterates – contemporaneously highlighting the radical dimension within legal critique — "such influence is not undesirable, but is instead indispensable in order to adapt the law to its changing social environment". As a consequence, law within this school of thought must seek its own legitimacy in its wider social environment, such that "there is no clear borderline between judicial and political governance".[7] Nonetheless, and vitally so, critical conservatism necessarily also returns to Laski's dictum that: "The problem of the juristic philosopher, in short, is the difficult one of validating his purely formal analysis of categories for the actual world about us."[8]

Although "modern governance theory is right in assessing both [political and judicial governance] from the perspective of the general theoretical criteria of effectiveness and legitimacy",[9] we must never forget that law is *not* politics, is *not* an expression of political partisanship, or indeed an application of brute force. The tools of political science are important, but they are not sufficient for the question of the legitimation of law. The European judicial branch is never elected. If law is to retain legitimacy, the influence of the wider social environment must, instead, be experienced in law, not as a "political moment", but within its own independently-legitimising methodology. In its contructivist form, the critical legal studies movement is thus not a movement that seeks to promote social radicalism for its own sake. Instead, radicalism is tempered, even tamed (perhaps sometimes actually denied), by a legal methodology which must respond to social movements in order to retain legitimacy; but can only do so legitimately where radicalism can be recognised within the extant legal framework; that is, within the coherent — "scientific" (Laski) — principles, doctrines and self-understanding of the legal system at the moment of its application.

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[7] *Ibid.*

[8] H.J. Laski, "Law and the State", in: *idem*, *Studies in Law and Politics*, (1935), p. 202, reproduced in P.Q. Hirst, *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski*, (London: Routledge, 1993).

[9] Schmid, "Judicial Governance", note 1 *supra*.

Christoph Schmid is a critical, but conservative, lawyer, and his work consequently reveals to us the full extent of the dangers posed by recent ECJ jurisprudence. The issue is not simply one of the unravelling of Member State regulatory complexes which support and sustain national social policy, be it in the field of labour or consumer law. Far more, the problem is one of the undermining of the integrity of the European legal system as European Justices engage in a "schematic" application of the doctrine of *effet utile*, to such an extent that it has become no more than a political statement of *effet néolibéral*.[10] The problem is one of the delegitimising of the major motor of European integration — European law – as ECJ judges indulge in "formalistic self-restraint" and exhibit poor technical legal skills in their decision-making.[11]

This short comment approves of and expands slightly on Schmid's analysis. Firstly, in order to investigate the constitutional, rather than the private law, jurisdiction of the ECJ more closely, and to examine the changing quality of adjudication in this sphere. And secondly, to pose the question that Schmid does not address: *why* are ECJ judges hazarding the quality of European law in this manner? The final aim is thus to use the answers to these questions to assess Schmid's own critical legal methodology; to ask whether his disciplining legal mirror to European law's social environment, the doctrine of "reflexive balancing", would be sufficient to restore the integrity of European law.

2. The Cunning Lawyer

According to Schmid, recent disquiet about the actions of the ECJ within constitutional circles has long been predated by concern amongst private lawyers about selective and destructive European judicial interventions into the dense web of private regulatory protection maintained at national level. Here, the main problem has been one of "diagonal" conflict between European provisions which regulate one area of common competence, but impact negatively upon other areas of national regulatory protection.[12] Within these

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[10] *Ibid*.

[11] *Ibid*.

[12] On this notion, see Ch. U. Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", (2000) 8 *European Review of*

diagonal conflicts between national and supranational legal systems, the combination of the over-weaning desire of the ECJ to maintain the effectiveness of European law (*effet utile*), together with a strangely inappropriate, or literally-expressed, formalism, as well as sometimes shocking examples of technical incapacity, have led to deregulatory impacts and incoherence with regard to consumer and contractual protection at national level (*effet néolibéral*).[13] Nonetheless, as Schmid also concedes, European adjudication in the private sphere was once far more civil in nature.[14] And it is here that parallels might be drawn between the ECJ's constitutional and private legal jurisprudence. As a young "constitutionalising" Court, the ECJ once displayed the wisdom of a Methuselah, but appears, paradoxically, to have lost in legal acumen as it has aged.

Schmid also briefly comments on the constitutional jurisdiction in Europe. For him, the early years of the ECJ may have been characterised by acts of judicial activism, which invigorated European law by means of its marriage with the "law-external" integrationist European movement. However, such invigoration was not merely legitimised by law, but was also legitimised *within* the law, as judicial development of the revolutionary doctrines of direct effect and supremacy were also firmly founded within ancient and "universally recognised" legal principles, such as the Roman law *venire contra factum proprium* and estoppel, its common law equivalent. Simply stated, the Member States might not renege on the law that they had themselves laid down in the treaties to their own advantage. Accordingly, European citizens might avail themselves of the promises of the "common market". The translation of *venire contra* and estoppel doctrines into the founding or constitutional principles of European law – establishing its effectiveness, limiting national sovereignty and creating individual European rights – was revolutionary to the degree that the ECJ had thereby founded a supranational legal system that mirrored a social reality of (or radical desire for) European integration. It was nevertheless also a conservative act of legal translation, solidifying the quality of a newly

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Private Law, pp. 155-172, and in the habilitation thesis (note 1 *supra*), p. 139 *et seq*., & 479 *et seq*.

[13] Schmid, "From *Effet Utile* ", note 1 *supra*.

[14] *Idem*, "Judicial Governance", note 1 *supra*. See, in full detail, his habilitation thesis, note 1 *supra*, p. 443 *et seq*.

constitutionalised European law by means of its anchoring within the continuity of ancient and European-wide accepted legal tradition.

In this critical legal approach, judicial activism thus encompasses acts of legal creation that retain their legitimacy only to the degree that they are "non-political" acts, comprehensible with sole reference to legal tradition as acts of legal consolidation that certainly radicalise law, but simultaneously maintain the integrity of the legal system. Applying the vocabulary of the German legal academic, Rudolf Wiethölter,[15] the act of legal adjudication can, therefore, be deemed to be legitimate only to the degree that it can be understood as *Rechtsverfassungsrecht*; or a legal process whereby law constitutes itself in a dual procedure of social-constitution (radical reflection of social movements) and self-constitution (conservative maintenance of legal integrity).

This reading of Wiethölter's formula nevertheless also echoes and recalls the famous paradox within law that was identified by Max Weber, and therefore presents an important challenge. In Weber's view, law must forever be impossibly torn between a formalistic jurisprudence, that guarantees the continuity and integrity of the legal system – as well as that of the market economy – and a contrary legal materialisation impetus that mirrors a legal-external desire for the establishment of social justice within the law, no matter how legally inconsistent such justice might appear. However, and moving beyond Schmid's analysis, it is exactly in this challenge, in this tension between paradox and radicalised proceduralism – or between legal impossibility and *Rechtsverfassungsrecht* – that the full genius and cunning of the historic or *ancien* European Court of Justice may be identified.

In other words, in addition to the traditional or principled formalism that Schmid identifies as feeding the early constitutional jurisprudence of the ECJ, the initial, economically integrationist, evolution of European law might also be argued to be a reflection of legal formalism *sensu* Weber. After all, absent the conventional

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[15] See R. Wiethölter, "Just-ifications of a Law of Society", in: O. Perez & G. Teubner (eds), *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart Publishing, 2005), pp. 65–77. For a discussion of the importance of the notion of *Rechtsverfassungsrecht*, see M. Everson & J. Eisner, *The Making of the European Constitution*, (London: Routledge-Cavendish, 2007), pp. 22-40.

legitimation of a constituted legal order and *pouvoir constituent*, the most obvious form of independent legitimation for the higher law of the European *economic* community and its common market was surely to be found in the primary modern or post-naturalistic function of western law: the establishment and defence of the increasingly abstract marketplace; a marketplace which had long since transcended the traditional face-to-face affairs of affluent market burghers. Weber's formal law was the law of certainty and economic security, the private law of contract and contractual rights that ensured the possibility of exchange both within and across advanced industrial societies. Translated into the activist constitutional jurisdiction of the ECJ, this social or non-state law was accordingly reborn as a limitation of sovereign national rule and the establishment of personalised European economic rights within – in somewhat Teutonic Euro-speak – a "European private-law society".[16] Both the doctrines of supremacy and of direct effect broke down the barriers to trade found within national legal systems, thereby establishing and securing the European marketplace.[17]

At this one level, the ability of the historic ECJ to maintain a *Rechtverfassungsrecht* within Europe might, arguably, already be affirmed. Supranational supremacy and post-national rights were a reflection of a new integrationist movement and were undoubtedly socially radical in their impact. Nonetheless, the doctrines were also founded within the primary function of the law of the modern European nation state – that is, the establishment of the national, and now the European, economy – and were, accordingly, just as much a part of an extant tradition of legal legitimation. However, it is not this, the founding economic formalism of the European court that marks it out as an exceptional judicial institution. Instead, and, again, somewhat paradoxically, the genius and cunning of the historic ECJ is to be found in the apparent instability of its legal method. In elevating a private-social law of legal-economic formalism to the constitutional jurisdiction, the ECJ had likewise confronted itself with the impossible task of mediating between social, economic and political demands for justice within a politically-independent legal

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[16] See E.-J. Mestmäcker, "Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts", (1991) 10 *Rechtshistorisches Journal*, pp. 177-192, and the critique of K. Günther, "'Ohne weiteres und ganz automatisch'? Zur Wiederentdeckung der Privatrechtsgesellschaft", (1992) 11 *Rechtshistorisches Journal*, pp. 473-499.

[17] Everson & Eisner, note 15 *supra*, p. 14 *et seq*.

medium. The only possible answer to this conundrum was surely to be found in the embrace of legal inconsistency, rather than methodological perfection. In this regard, then, the *ancien* Court's constitutional wisdom may be reconstructed from its preparedness to switch at will between application of scientific measures of material justice and the occasional retreat into nonsensical formalism, as well as its underlying promotion of an inventive form of radical proceduralism, which simultaneously denied the Court any role in the establishment of a European polity *and* sought to foster the quality of politicised decision-making in the European Union.[18]

In further explanation, the constitutionalising ECJ of the 1980s and 1990s – the period of deepening and widening integration – was necessarily faced, not only with a heightened form of the Weberian paradox as the demand for the re-materialisation of the newly-established single European market made itself felt in clashes between national and European law, but also with the concrete political justice claims of an emerging European polity. The single European market might have been established with the aid of Weberian formalism, but the consumer protection and social policy concerns that underlay the national regulatory complexes that acted as barriers to that market still retained their power to persuade. At the same time, the socially-constitutive momentum established by the incrementally expansive process of economic integration similarly gave rise to inevitable questions about the appropriate nature and structure of the institutional framework for policy-making within the Community and Union: should the Member States (Council), Europe's integrationist conscience (Commission) or the people (Parliament) determine the future course of the Union? In the face of such complexity, the measure of the ECJ's *Rechtsverfassungsrecht* was not to be found in its formalist perfection, or in its unlimited promotion of the economic rights of individual Europeans – a promotion which would undoubtedly have fed a regulatory race to the bottom. Nor was it to be found in the Court's self-assured assumption of a constituting role with regard to the political institutions of the EU. Instead, it was to be found in methodological imperfection, cautious judicial self-restraint, and an underlying effort to ensure that political and social debate, rather than law, would determine the integration *telos*.

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[18] *Ibid*.

Certainly, negative integration, or the series of cases that ensured the creation of a single market, was grounded in the market-building tradition of legal formalism. At the same time, however, a response to materialisation impulses was similarly visible, as principles of proportionality and precaution, together with a demand for scientific review of the quality of national regulation, were deployed in concert to delimit the reach of European law and European market-building. National regulatory frameworks would continue to materialise the European marketplace where appropriate. By the same token, however, the Court was sometimes required to create its own material principles of justice to govern the process of institution-building within the nascent European polity.[19] Yet, such occasions were importantly limited by the Court to instances in which there was overwhelming support for evolution of European principles by virtue of the large degree of historical concordance of the constitutional orders of the Member States. Where such support was not available,[20] the Court notably retreated into a nonsensical literal form of legal formalism, shielding itself from political pronouncement by means of statement of the "textually obvious".[21] Finally, however, a methodological tendency to promote legal proceduralism was also apparent, as the ECJ laid great emphasis on the quality of EU decision-making, by, for example, championing the right of interest groups and all sections of the European polity to be heard within the policy-making process.[22]

Although it was adept in deploying techniques as diverse as economic formalism, scientific materialisation, institutional proceduralisation and the "transcendental nonsense"[23] of literal formalism, the Court was by no means – nor by the same token – consistent in its methods. Yet, such imperfection was undoubtedly also marked by one common feature: the effort of a cautious Court never to engage in politics. In its cautious self-restraint, the Court accordingly founded its socially-constitutive radicalism within its

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[19] For example, in the matter of the preservation and/or expansion of parliamentary competences.

[20] Most notably with regard to expansion of the basis of individual standing for judicial review; see Everson & Eisner, note 15 *supra*, pp. 125–156.

[21] *Ibid*.

[22] *Ibid*.

[23] F.S. Cohen, "Transcendental Nonsense and the Functional Approach", (1935) 35 *Columbia Law Review*, pp. 808–849.

efforts to rationalise (science) and to encourage (interest-groups) political and social – rather than legal – debate on the integration *telos*. At the same time, the constitutional cunning of the Court was manifest in its contemporaneous preservation of the integrity of the European legal system through a methodological legal dexterity – or inconsistency of method that also encompassed nonsensical literalism – which nonetheless sought to ensure that, although it was an activist Court that promoted social radicalism, European law would never become a mechanism for the promotion of individual political goals or brute force.

3. The Importunate Lawyer

Living with imperfection is a hard task, especially for lawyers. However, what may be termed the *ancien* ECJ's "radical proceduralism" has served the Court well for 40 years. The Court's preparedness to sacrifice methodological perfectionism in the service of a legal integrity that was founded, not simply in economic formalism, but far more in a methodological inconsistency that had as its aim the shielding of the legal system from brute politics, has ensured a wide measure of respect for its judgments. Why, then, has the current ECJ departed from this cunning and cautious path?

Critique of the current Court's jurisprudence abounds, above all, in reference to *Viking*, *Laval* and *Rüffert*.[24] Summarising, however, the main complaint – whether expressed in purely legal or more contextual terms – would appear to be that the Court has ceased to mediate the consequences that flow from its elevation of marketplace legal formalism out of the sphere of social/private law and into the European Constitution. This comes in addition to the Court's inconsistent departure from its own earlier doctrinal findings in cases such as *Schmidberger*[25] and *Albany*.[26]

Choosing simply to ignore the Weberian paradox, the ECJ appears similarly to have dispensed with the impossibly intricate quest for

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[24] Here, see only, Schmid, "Judicial Governance", note 1 *supra*; Joerges & Rödl, note 2 *supra*.

[25] Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, [2003] ECR, I-5659.

[26] Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, [1999] ECR, I-5751.

Rechtsverfassungsrecht, placing its legitimising faith in the efficiency-oriented legal pursuit of a comprehensive vision of allocative justice that has seen the national right to strike subordinated to the European freedom to provide services, and the national political competence to support collective-bargaining agreements deemed to be anti-competitive in nature. Free movement of labour, so the Court assures us, will ensure the prosperity of the European Union.

Whispered voices have attributed this new departure of the ECJ to a growing degree of doctrinal inexperience within a Court whose personal character has changed dramatically in the wake of European enlargement: thus, for example, the failure properly to apply *Schmidberger* and its elevation of a personal right to protest above a personal right to trade might be attributed to simple ignorance of the constitutional doctrine of *Wesensgehalt*, or of the precedence of political rights of expression above personal rights to trade. Nonetheless, such anecdotal and personalised critique must be treated with extreme caution; above all, because the most accessible legitimating narrative of allocative efficiency was furnished by an established European lawyer. It was AG Maduro in *Viking* who chose not only to ignore *Albany* and its affirmation of politically-legitimated social action that limits the competitive EU regime, but also to seek – successfully – to persuade the ECJ that market freedoms should be given horizontal direct effect, transforming a once negative regime of regulatory limitation into a radical framework of free competition extending beyond the state to the private and social sphere. European citizens as well as national governments must now fully respect the competitive strictures of the European market.[29]

Certainly, the personal characters and histories of jurists also have their impact upon law. Nonetheless, in the collegiate settings of courts and legal systems, paradigm shifts – such as the one that has seen the ECJ swing from methodological imperfection to a seemingly politically-partisan pursuit of economic efficiency – must surely educe from a broader attitude-altering movement within law; a movement that ensures that the arguments of leading jurists will be accepted by the whole of a legal community. And it is in this respect

[29] In doctrinal terms, Maduro's attribution of direct effect to the then Article 28 is a highly questionable reading of the case of *Schmidberger*, which imposed a duty of proportionality not on Austrian protestors, but upon the Austrian police (state).

that the full sweep of recent ECJ jurisprudence should be set in a global and cosmopolitan adjudication context that has seen national constitutional courts, international trade courts, supranational and international human rights courts, as well as the ECJ, evolve and apply an individualistic, rights-based form of jurisprudence. That is, a right-based jurisprudence that has certainly advanced the cause of individual justice against the collective, but has similarly jarred and irritated, again and again, as it has cut through the politically-contingent decision-making, arrangements and regulatory frameworks of the collectively-established political community.[30]

Moving very briefly to a more deconstructive form of legal critique, and focusing upon global legal support for individual rights, the recent case law of the ECJ might thus also be argued to be an expression of judicial empathy and love. Within the global setting of an increasingly cosmopolitan legal order, detached from the collective constituencies of nation states, and often addressed by a cosmopolitan class of claimants who have always been disadvantaged by processes of collective organisation, the impossibilities and inconsistencies of *Rechtsverfassungsrecht* are a poor crutch, indeed. Instead, the global legal order responds to its own social constituency – those who are inevitably excluded from inclusionary states by simple virtue of their founding – with its own impossibility, or *objet petit a*[31]of a radical personal commitment to a partial vision of justice that is founded in immanence; the immediacy of judicial response to individual claims for existential justice.

In its citizenship jurisprudence, the cosmopolitan ECJ – increasingly made up of lawyers who have learned their law within a European, rather than national, context – has notably challenged the very concept of nationality, even in its European form, as it has (laudably) set aside the exclusionary impact of nationality law upon cosmopolitan individuals for whom our established

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[30] For an interesting example of the real dangers posed by this movement with regard to national polities, see S. Issacharoff, "Democracy and Collective Decision Making", (2008) 6 *International Journal of Constitutional Law*, pp. 231–288.

[31] The term is from Lacan – a psychoanalytical nomination of total personal dedication to the partial fulfilment of unattainable objects of desire; see M. Everson, "Towards a European Law of Suspicion", in: J. Neyer & A. Wiener (eds), *Political Theory of the European Union*, (Oxford: Oxford University Press, 2010), Chapter 7.

national/political collective presents existential challenges.[32] By the same token, *Viking* and *Laval*, in particular, may then also be identified as instances of empathetically determined adjudication. The Posted Workers Directive upon which each is based is, without doubt, a politically-contingent mechanism, characterised by its textual reproduction of the lack of political agreement on social policy at EU level: the Directive is contradictory in literal terms, at once affirming and challenging of the collective-bargaining agreement, which has traditionally formed the core of labour policy in old, "corporatist" Europe.[33] Where once the *ancien* ECJ might have withdrawn, calling upon its *Albany* jurisprudence to justify its refusal to deliver a definitive pronouncement in the absence of political direction, the importunate ECJ once again reached for its rights-based canon in order to confront the Member States. Eastern Europe had been promised "justice" within the EU. Here, real and visible Latvians (*Laval*) and Estonians (*Viking*) were being denied the right to work. The ECJ, accordingly, reached for the only weapon in its armoury, which would immediately rectify the situation for these individuals: the unlimited and unalloyed promotion of individual European economic rights. In this manner, Eastern Europeans would at least benefit from their comparative labour cost advantage.[34]

Judicial impatience, empathy and love: critical lawyers are fully aware of the outcomes of this misplaced activism. An individual instance of justice-giving has, as its corollary, the triumph of neo-liberalism within the law and the system that it secures – a version of neo-liberalism whose logic demands that it eventually unravel *all* measures of employment protection. An individual instance of justice-giving has, as its impact, the foreclosure of political voice and political protest, as a largely disadvantaged group of industrial workers throughout Europe (East as well as West) sees its right to strike severely curtailed.[35] An individual instance of justice-giving likewise threatens to undermine European law itself, as the law gives voice to a social movement which undoubtedly exists – the demand for individual justice beyond the politically-contingent repressions of the nation state – yet does so, not within *itself*, but within an

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[32] *Ibid*.
[33] Schmid, "From *Effet Utile*", note 1 *supra*.
[34] Everson, note 31 *supra*.
[35] *Ibid*.

impossible *objet petit a*, as law affirms radicalism not within its established doctrines or principles, not yet within the imperfections of a radical proceduralism that denies the political character of law, but, instead, within the immediacy of individual judicial recognition.

4. The Challenged Lawyer

At core then, the recent case law of, and controversy about, the ECJ might be traced back to the age-old conundrum of individual *versus* social justice, or the question of how to balance the interests of the individual against those of the community. As such, the ECJ's recent importunate pronouncements may not be simply denounced and dismissed. Firstly, as Laski's pluralist tradition reminds us, the recognition of the inevitable iniquities of collectivisation is not new.[36] Instead, the constant spectre at our nation-state or welfare-state feast remains the knowledge that any collective action to ensure social justice inevitably excludes the impecunious individual who is not present at the moment of social settlement. Secondly, however, the eager ECJ is not alone in harrying the law of the nation state. Instead, the whole of an increasingly cosmopolitan global legal order has invested radically within a rights-based jurisprudence that is founded within the provision of immediate and existential legal relief. The lure of a desire for such individual justice is likewise not only a matter of lawyerly self-gratification; immediate satisfaction for the emotional demands that are so often aroused in the jurist who is primarily seen as the font of all justice. Instead, the global cosmopolitan jurisdiction is also responding to the very real justice demands of an increasingly articulate global cosmopolitan constituency, and, more particularly, to a group within that constituency (the asylum seeker or unemployed Eastern European) which lacks the resources to aid itself.

The challenge to the integrity of European law may thus be argued also to derive from more laudable aims. At this level, then, the task of opening up an alternative path for the ECJ and the global legal order becomes a particularly difficult one. Clearly, arguments must be made which demonstrate the potentially self-defeating nature of such unrestricted legal activisim: law-external arguments, which reveal the justice destroying facets of neo-liberalism, as well as the law-internal

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[36] Everson & Eisner, note 15 *supra*, pp. 157–199.

argument that warns against a fatal – driven by the radical movements of both the left and the right – backlash against a European law that is seen to have become political law. Nonetheless, this response is not enough. Instead, legal critique must now also identify a form of response that offers up a perspective for cosmopolitan, as well as collective, justice, and that similarly dampens judicial desire for self-satisfaction by means of immediate provision of existential justice for the individual.

In this regard then, Schmid's notion of "reflexive balancing" for the private jurisdiction of the EU becomes particularly interesting, not simply since it reiterates the dictum that the private law of the EU must also be understood in the complex terms of a constitutional law, which demands the balancing of private and social interests; nor, because it notes that legal integrity might also be better served where the ECJ leaves doctrinal "fine-tuning" to the legal systems of the Member States.[37] Instead, and because Christoph Schmid's reflexive balancing also draws on Christian Joerges' notion of "deliberative supranationalism", it also offers a nascent perspective for the evolution of cosmopolitan justice. Arguing that the ECJ should respect the complex laws of the Member States and intervene only to ameliorate "the failings of the nation state settlement", Joerges thus makes immediate corrective reference to our overwhelming spectral concern: the exclusionary impact of collective organisation.[38] We can only understand the EU as a just and legitimate organisation where it both preserves the advantages of collective organisation within the nation state (social provision) *and* moves – by means of deliberative and co-operative problem-solving – to overcome that state's negative externalities. The job of the law is not to promote justice directly, but to structure the political discussions and debates which may or may not furnish justice.

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[37] Schmid, "Judicial Governance", note 1 *supra*.

[38] The starting point of Christian Joerges' plea for a European conflicts law which seeks to compensate structural nation state failures which even constitutional democracies tend to produce; see, recently, his "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", LEQS Paper No. 28/2010, updated version, TranState Working Paper Nr. 148, Bremen 2011, available at: http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=189, forthcoming in R. Nickel & A. Greppi (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance*, (Baden-Baden: Nomos, 2011), Chapter 5.

If viewed from the traditional pluralist perspective, deliberative supranationalism cannot be regarded as a perfect theory. Above all, it offers little aid in solving immutable value conflicts between national collectivities, which cannot be overcome through deliberation, and might similarly be argued to rely too greatly on an underlying concept of rationality, which might forever disadvantage plural centres of self-organisation outside the Member State.[39] Nonetheless, this is not the important point here or, indeed, at the current stage of European integration. Deliberative supranationalism contains an inspirational message that should also appeal to the cosmopolitan lawyer: the nation state must answer to its excluded constituency. At the same time, deliberative supranationalism would seem to be the only available framework within which we can even begin to conceive of managing the complex clash between national and cosmopolitan justice, within which we can address the conflict between the interests of the post-national individual and the national political collectivity.

To this degree, then, the notion of deliberative supranationalism speaks an enduring truth to law: it demands recognition, by the lawyer, that the road to cosmopolitan justice may be long and hard, and should, furthermore, be a matter for politics rather than law. This is now the primary task for the critical legal movement: it must re-iterate that desire and/or judicial love needs must be sublimated. A *Rechtverfssungsrecht* that seeks to preserve the integrity of law can never be perfect. At the same time, it is far from being a matter of provision of immediate justice, but is, instead, a long and slow process of the adaptation of a politically autonomous legal system to its social environment. Law, itself, is not itself a radical force. Instead, it must remain deeply conservative if it is ever to furnish its own promise of socially radical responsiveness.

[39] Everson & Eisner, note 15 *supra*, pp. 26–30.

Chapter 3

Interlegality in European Private Law A Question of Method? Hermeneutical Observations on Schmid's Habilitation Thesis

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1.

A close reading of the habilitation thesis submitted by Christoph Schmid[1] reveals that what he has done is to develop a "theory of everything" for European private law. His aim is to come to terms with what he sees as a historical fact, which he articulates as follows:

> The underlying liberal conception of private law based upon justice was […] first sacrificed [in the European Union] to the collective "logic of the market" – a tendency that was to take on far greater dimensions as integration proceeded.[2]

Schmid's ambitious project is to infuse European private law with an element of justice that has, until now, been lacking – with

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[1] Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtkonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010).

[2] *Ibid.*, p. 436. All following translations of excerpts from Christoph Schmid's book are made by the author. Original text of the above quote in German: "Die gerechtigkeitsbezogene liberale Grundkonzeption des Privatrechts wurde [in der europäischen Union] erstmals der kollektiven Logik des 'Marktes' geopfert – eine Tendenz, die im weiteren Verlauf der Integration noch viel größere Ausmaße annehmen sollte."

ramifications that go well beyond the mere issue of functional usefulness. The complexity of his theory matches that of its subject, so that the task of briefly summarising his argument would necessarily be quite difficult, and I make no attempt to do so here. Instead, my concern is with the methodological implications of Christoph Schmid's thinking. For, what interests me here today is the question of *interlegality in European private law*.[3]

To open the discussion, I would like to begin with another passage from Schmid's thesis:

> In order to put the constitutional-procedural model of [European private law] into practice, a further development of traditional legal hermeneutics is required. Restricting the interpretation of European law by adhering to the classic interpretational criteria, as is done in the rulings of the ECJ, is, in numerous respects, inadequate. [4]

Schmid uses the term "inadequate" here with regard to the resolution of two specific difficulties which European law has – to date – been unable to resolve, both of which relate to questions of methodology. The first is this:

> The real effects of European norms are felt only in the interaction with national norms, which may vary from one Member State to the next. [5]

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[3] I have addressed the theme of interlegality in: Marc Amstutz, "Métissage: Zur Rechtsform in der Weltgesellschaft", in: Fischer-Lescano, Rödl & Schmid (eds), *Europäische Gesellschaftsverfassung*, (Baden-Baden: Nomos, 2009), p. 333 *et seq.*; Marc Amstutz, "Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht", in: Ch. Joerges & G. Teubner (eds), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden: Nomos, 2003), p. 213 *et seq.* [English version: "In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning", (2005) 11 *European Law Journal*, p. 766 *et seq*.].

[4] Schmid, note 1 *supra*, p. 829. "[Es] bedarf […] zur Verwirklichung des konstitutionell-prozeduralen Leitbilds des [europäischen Privatrechts] auch einer Erweiterung der traditionellen juristischen Hermeneutik. Eine Beschränkung auf die Auslegung des Europarechts nach den klassischen Auslegungskriterien, wie sie der EuGH in seiner Rechtsprechung vornimmt, ist in mehrerlei Hinsicht inadäquat."

[5] *Ibid*., p. 829. "[E]uropäische Normen [entfalten] ihre tatsächliche Wirkung erst im Zusammenspiel mit nationalen Normen, die je nach Mitgliedstaat verschieden sein können."

European private law, in Schmid's view, fails to take this interaction into account. Is it even possible to define its precise nature and come to terms with it? This is the first question he poses.

The second difficulty is described by Schmid as follows:

> To the traditional methods of interpretation must be added consideration of the practical effects of a ruling and of its social legitimacy. [6]

The objective that Schmid has in mind here can be summarised in a single phrase: *legitimacy by "effect test"*.[7]

In raising these two methodological issues – *multi-level law* on the one hand, and *ignorance of the law's effects* on the other – Schmid has crossed into almost entirely uncharted conceptual territory.[8] How can such antithetical aspects of European private law be reconciled? How can national and supranational law interpenetrate[9] when the differences between them on such fundamental concepts as market, justification, legitimacy, and consideration of outcomes, are so seemingly irreconcilable?[10] Even if it were possible to find general agreement on the notion that the solution can be found only by an adaptation of legal method – a proposition which is, in itself,

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[6] *Ibid.* "[D]ie traditionellen Auslegungsmethoden [sind] um die Berücksichtigung der tatsächlichen Folgen einer Entscheidung und ihrer gesellschaftlichen Legitimität zu erweitern."

[7] This issue is addressed in the following chapters in Gunther Teubner (ed), *Entscheidungsfolgen als Rechtsgründe*, (Baden-Baden: Nomos, 1995): Gunther Teubner, "Folgenorientierung" p. 9 *et seq.*; Niklas Luhmann, "Juristische Argumentation: Eine Analyse ihrer Form", p. 19 *et seq.*; Rudolf Wiethölter, "Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?", p. 89 *et seq.*; Dieter Grimm, "Entscheidungsfolgen als Rechtsgründe: Zur Argumentationspraxis des deutschen Bundesverfassungsgerichts", p. 139 *et seq.*

[8] Schmid, note 1 *supra*, p. 829; see, also, Gunther Teubner, "Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus", (1996) 15 *Rechtshistorisches Journal*, p. 255 *et seq.*; Amstutz, "Métissage", note 3 *supra*, p. 338.

[9] Amstutz, "Métissage", note 3 *supra*, p. 338; Christian Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", (1997) 3 *European Law Journal*, p. 378 *et seq.*

[10] Amstutz, "Métissage", note 3 *supra*, p. 333 *et seq.*; Gunther Teubner, "Altera pars audiatur: Law in the Collision of Discourses", in: R. Rawlings (ed.), *Law, Society and Economy*, (Oxford: Oxford University Press, 1997), p. 149 *et seq.*; Pierre Legrand, "Against a European Civil Code", (1997) 61 *Modern Law Review*, p. 44 *et seq.*

questionable – by what strategy is it conceivable that the inherent *inflexibility of methodological dogma*,[11] which is so deeply rooted in Continental European law, could be overcome by the "*new effectivism*" as proposed by Schmid?[12]

The heart of the problem appears to lie in a circumstance that Christoph Schmid describes as follows:

> In the European multi-level system, the traditional system of private law is replaced by a multi-level conflict-of-laws regime, which is characterised by unforeseen voting constraints, incoherencies, and incompatibilities between European and national norms, and which leads to serious problems in the application of the law at the expense of legal certainty. [13]

The solution proposed by Christoph Schmid can be termed an "*alternative methodological meta-principle*".[14] What this meta-principle seeks to achieve is a "*reflexive balance*" in the system of European judicial governance, in order to ensure a justice-driven and

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[11] Peter Behrens, "Gemeinschaftsrecht und juristische Methodenlehre", (1994) 5 *Europäische Zeitschrift für Wirtschaftsrecht*, p. 289 *et seq.*; Niklas Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhkamp Verlag, 1993), p. 289; Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol. II: *Anglo-Amerikanischer Rechtskreis*, (Tübingen: Mohr, 1975); Axel Flessner, "Juristische Methodenlehre und europäisches Privatrecht", (2002) 57 *Juristenzeitung*, p. 16 *et seq.*, points out that what is needed in European private law is "*[…] eine Methodenlehre [brauchen], die sich einstellt auf Pluralität der Rechtsquellen, Relativität der Teilrechtssysteme, Diversität der Rechtsinhalte*". ("[…] a legal method that takes into account the plurality of the sources of law, the relativity of sectoral systems of law, diversity in the substance of law".)

[12] Schmid, note 1 *supra*, p. 750.

[13] *Ibid.*, p. 700. "Im europäischen Mehrebenensystem wird das überkommene System des Privatrechts von einem komplexen Mehrebenen-Kollisionsregime abgelöst, das durch unvorhergesehene Abstimmungszwänge, Inkohärenzen und Inkompatibilitäten zwischen europäischen und nationalen Normen charakterisiert ist und zu großen Rechtsanwendungsproblemen zulasten der Rechtssicherheit führt."

[14] *Ibid.*, p. 453. In this connection, see Amstutz, *Rechtsverfassungsrecht*, note 3 *supra*, p. 216 *et seq.*; Rudolf Wiethölter, "Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm", in: Lüderitz & Schröder (eds), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts: Bewahrung oder Wende? Festschrift für Gerhard Kegel*, (Frankfurt aM: A. Metzner, 1977), p. 223.

politically-sensitive co-ordination of European and national private law.[15]

Essentially, Schmid's meta-principle is an instrument that is at the disposal of the ECJ as a "*background agenda*" for the development of European private law.[16] Its purpose is to support the ECJ in its task of performing the function of a constitutional court for European private law. The nature of this task was already described by Schmid, in 2006, as follows:

> [T]he ECJ should leave doctrinal fine-tuning […] to national courts, and limit itself to "procedural framework-setting", which includes instigating and monitoring learning and rationalisation processes in national law.[17]

Clearly, as already noted, we are dealing here with a very ambitious undertaking. What is ultimately at issue is nothing less than what Rudolf Wiethölter once named a "*learning social model*",[18] which is applied here concretely to European private law.[19]

But what exactly does this mean? Rather than working through the scant theoretical conclusions deduced in the existing scholarship, I would like to consider, as commended by Schmid in his thesis, the still somewhat fragile and diffuse, but nevertheless quite finely-defined shoots that can be gleaned from the private law jurisprudence of the ECJ. What I am arguing here is that *a legal "learning social model" is already in place in Europe, in skeletal form, even if nearly all of the work that will be required for putting the flesh on those bare bones still remains to be done*.[20] My purpose in choosing this

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[15] Amstutz, "Zwischenwelten", note 3 *supra*, p. 216 *et seq*.; see, also, note 30 *infra*.
[16] Wiethölter, note 14 *supra*, p. 223.
[17] Christoph U. Schmid, "Judicial Governance in the European Union: The ECJ as a Constitutional and Private Law Court", in: E.O. Eriksen, Ch. Joerges & F. Rödl (eds), *Law, Democracy and Solidarity in a Post-national Union: The Unsettled Political Order of Europe*, (New York: Routledge, 2008), p. 85 *et seq*., p. 101.
[18] Rudolf Wiethölter, "Entwicklung des Rechtsbegriffs", in: V. Gessner & G. Winter (eds), *Rechtsformen der Verflechtung von Staat und Wirtschaft*, (Opladen: Westdeutscher Verlag, 1982), p. 56; see, also, Dan Wielsch, *Freiheit und Funktion: Zur Struktur- und Theoriegeschichte des Rechts der Wirtschaftsgesellschaft*, (Baden-Baden: Nomos, 2001), p. 210.
[19] Amstutz, "Zwischenwelten", note 3 *supra.*
[20] For more details, see Amstutz, "Zwischenwelten", note 3 *supra*; see, also, Wielsch,

inductive path is to establish a standpoint: a point upon which I can stand, and looking out from which it will be possible to assess Christoph Schmid's thoughts on the question.

2.

What I have referred to as a "learning social model" is already contained, with astonishing clarity, in the ECJ's *Marleasing* jurisprudence[21] – despite the harsh criticism leveled at *Marleasing* by Christoph Schmid (who speaks of the "ambiguous terms" used by the ECJ).[22] I will give an overview of this jurisprudence and attempt thereby to place it in a light that may serve as an alternative to the perspective chosen by Schmid himself. This will be done in three steps. (1) I will begin by delineating the *problem*, to which this jurisprudence may be seen as a reaction. (2) This will be followed by an outline of the *solution* which it proposes. (3) Finally, I will describe the *effects* that it produces within the context of European private law.

1. The Problem: While European Union private law represents an autonomous legal order, with *ipso jure* validity in all of the Member States, it is, nevertheless, dependent for its effects on the national legal order of each of those States.[23] As such, European private law cannot be understood as statutory law in the classic sense.[24] Rather, it is a floating "collection" of norms originating in a variety of sources, and interwoven into a wide range of legal interpretive contexts.

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note 18 *supra*, p. 209 *et seq*.

[21] Case C-106/89, *Marleasing*, [1990] ECR, I-04135 .

[22] Schmid, note 1 *supra*, p. 734; see, also, Martin Schwab, "Der Dialog zwischen dem EuGH und nationalen Exegeten bei der Auslegung von Europarecht und angeglichenem Recht", (2000) 29 *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, p. 446 *et seq*., & 470 *et seq*.

[23] Claus-Wilhelm Canaris, "Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre", in: Koziol & Rummel (eds), *Im Dienste der Gerechtigkeit: Festschrift für Franz Bydlinski*, (Vienna-New York: Springer, 2002), p. 47 *et seq*., & 97 *et seq*.; Rolf Wank, "The Role of Law in Economic Markets: Recent Cases of the European Court of Justice in Employment Law", (2010) 54 *Saint Louis University Law Journal*, p. 585 *et seq*., & 591 *et seq*.; Bernd Biervert, "Art. 249 EGV", in: J. Schwarze *et al.* (eds), *EU-Kommentar*, (Baden-Baden: Nomos, 2009), p. 26.

[24] Amstutz, "Zwischenwelten", note 3 *supra*, p. 217; see, also, the concept of a "postmodern" codification of European private law proposed by Ugo Mattei & Anna di Robilant, "The Art and Science of Critical Scholarship: Post-modernism and International Style in the Legal Architecture of Europe", (2002) 10 *European Review of Private Law*, p. 55 *et seq*.

One collateral effect of this simultaneous autonomy and dependence is that the principle of legal hierarchy must be considered obsolete in the context of European private law.[25] To put it differently: attempting to overcome the obstacles arising from cultural diversity by imposing a unified system of European private law would require the abandonment of the notion of socially embedded law (and, in this sense, also of a certain conception of justice, the essence of which is, however, quite different from that adopted by Christoph Schmid in his habilitation thesis).[26]

What is recognisable here is that, at the centre of European private law, there is an overriding sense of "*consitutional*" *unrest*: the socio-cultural logic variously at work in each of the individual Member States will, for many years to come, continue to affect the divergent and unconnected development of private law at national level. The image that imposes itself is one of European private law as what Ilya Prigogine has termed a "*dissipative structure*":[27] *a system of norms, whose meaning and whose stability – whose "permanence" – finds its source in the interaction between the constantly changing private law regimes in the Member States*.

This realisation in no way contradicts the notion of a convergence of Europe's national private law regimes. It does, however, render imperative a fundamental inquiry into how to deal with a "*heterarchically*" *designed system of private law, operating simultaneously on several legal planes.* There is a need, in this connection, for a legal instrument that can organise and guide the *co-evolution of networked legal orders*.[28]

2. The Solution: Fundamentally, its name is "*Marleasing*".[29] According to the ECJ, as set forth in that decision, conformity with directives always takes precedence over national methods of interpretation where a Member State has already expressed the

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[25] Amstutz, "Zwischenwelten", note 3 *supra*, p. 220 *et seq.*; *idem*, "Métissage", note 3 *supra*, p. 339; and Legrand, note 10 *supra*, p. 44.
[26] Schmid, note 1 *supra*, p. 475 *et seq.*
[27] Ilya Prigogine, *Les lois du chaos*, (Paris: Flammarion, 1994), p. 16 *et seq.*
[28] Gunther Teubner, "Eigensinnige Produktionsregimes: Zur Ko-Evolution von Wirtschaft und Recht in den varieties of capitalism", (1999) 5 *Soziale Systeme*, p. 7 *et seq.*, & 13.
[29] Case C-106/89, *Marleasing* [1990] ECR I-4135.

legislative will to implement the directive correctly.[30] The direction taken in the development of a growing body of ECJ case law clearly speaks for this reading of *Marleasing*.[31]

The decision in *Wagner Miret*,[32] in particular, dealt with a case that today may be considered classic, in which a national legislature took the view that the existing provisions of national law were sufficient to satisfy the requirements of the directive. It therefore enacted no further legislation in the matter. It later transpired, however, that this view was not entirely justified. The ECJ held that, in such cases, it was incumbent upon the national courts to bypass the *original intention of the legislature* and to supplant it with the *Member State intention to implement* EU directives.[33]

In the literature, this decision was construed by numerous authors as support for the notion that Member State courts had a duty to

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[30] Case 14/83, *Von Colson and Kamann* [1984] ECR 1891, para. 26; Case 79/83 *Harz* [1984] ECR 1922, para. 26; see, also, Case 222/84 *Johnston* [1986] ECR I-3969, para 53; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3533, para 12; Case 125/88 *Nijman* [1989] ECR, para 6; Cases C-378/07 to C-380/07, *Angelidaki*), [2009] ECR, I-03071 para. 106; Case C-555/07, *Kücükdeveci*, para. 47, nyr.

[31] See, especially, Case C-334/92, *Wagner Miret*, [1993] ECR, I-06911, para. 6; Case C-168/95, *Arcaro*, [1996] ECR, I-04705, para. 41; Case C-335/96, *Silhouette*, [1998] ECR, I-04799 para. 36; Case C-185/97, *Coote*, [1998] ECR, I-05199 para. 18; Case C-63/97, *BMW*, [1999] ECR, I-00905, para. 22; Case C-131/97, *Carbonari*, [1999] ECR, I-01103, para. 48; Case C-107/97, *Rombi*, [2000] ECR, I-03367, para. 23, 53; Case C-365/98, *Brinkmann*, [2000] ECR, I-04619, para. 40; Case C-240/98 - C-244/98, *Océano*, [2000] ECR, I-04941, para. 30; Case C-456/98, *Centrosteel*, [2000] ECR, I-06007, para. 16; Case C-262/97, *Engelbrecht*, [2000] ECR, I-07321 *et seq.*, at 39; Case C-62/00, *Marks & Spencer*, [2002] ECR, I-06325, para. 24; Case C-356/00, *Testa*, [2002] ECR, I-10797, para. 43; Case C-160/01, *Mau*, [2003] ECR, I-04791, para. 35 *et seq.*; Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, [2003] ECR, I-04989 para. 93; Case C-60/02, *Criminal Proceedings against X*, [2004] ECR, I-00651 para. 59; Case C-371/02, *Björnekulla Fruktindustrier*, [2004] ECR, I-05791 para. 13; Joined Cases C-398/01 to C-402/01, *Pfeiffer*, [2004] ECR, I-08835 para. 110 *et seq.*; Case C-196/02, *Nikoloudi*, [2005] ECR, I-01789, para. 73; Case C-316/04, *Stichting Zuid-Hollandse Milieufederatie*, [2005] ECR, I-097, para. 77 *et seq.*; Case C-212/04, *Adeneler*, [2006] ECR, I-06057, para. 110; Case C-287/05, *Hendrix*, [2007] ECR, I-06909, para. 57; Case C-188/07, *Commune de Mesquer*, [2008] ECR, I-04501, para 83 *et seq.*; Case C-237/07, *Janecek*, [2008] ECR, at 36; ECJ, Case C-465/07, *Elgafaji*, [2009] ECR, at 42; Joined Cases C-378/07 - C-380/07, *Geropotamou*, [2009] ECR, para.106.

[32] Case C-334/92, *Wagner Miret*, [1993] ECR, I-06911, at 20 *et seq.*; see, further, Joined Cases C-397/01 to C-403/01, *Pfeiffer*, [2004] ECR, I-08835, para. 115; and Case C-371/02, *Björnekulla Fruktindustrier*, [2004] ECR, I-05791, para. 12.

[33] See note 32 *supra*.

adjudicate *contra legem* where circumstances required.[34] Christoph Schmid, in his thesis, sides with the contrary voices in the literature, which see this construction as *inadmissible*.[35] The most recent case law and the current tendency in the literature, however, focus on other issues relating to the matter than *contra legem.*

The question of whether there exists a duty to adjudicate *contra legem* has now been clearly decided in the negative in the *Pupino*,[36] *Adeneler*,[37] and *Impact*[38] decisions. It is clear, however, that putting the response in these terms brings into relief the fact that there is a problem in the way in which the question was formulated. As Wulf-Henning Roth has shown, the necessity of adjudicating *contra legem* never even comes up in this context, since it must be assumed that "the State, in making use of the leeway granted to it by the directive, fully intends to fulfil all of the duties incumbent upon it as arising out of the directive".[39] It goes without saying that this also applies when the law currently in effect is classified as being in conformity with the directive. From the legislative point of view, the lawmakers, by deciding that the law in force, as it is, fulfils the demands of directive law, have revised their *original intent*.[40] In a legal setting such as this,

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[34] Martin Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, (Berlin-New York: Springer 1999), p. 340; Ton Heukels, "Von richtlinienkonformer zur völkerrechtskonformen Auslegung im EG-Recht: Internationale Dimensionen einer normhierarchiegerechten Interpretationsmaxime", (1999) 2 *Zeitschrift für Europarechtliche Studien*, p. 317; the opposing arguments are summarised in Thomas M.J. Möllers, "Doppelte Rechtsfortbildung contra legem? Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den EuGH und nationale Gerichte", (1998) 33 *Europarecht*, p. 43 *et seq*., with references; see, also, Wulf-Henning Roth, "Die richtlinienkonforme Auslegung", in: Karl Riesenhuber (ed.), *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis*, (Berlin: Walter de Gruyter Recht, 2006), p. 330; further, Stefan Grundmann, *Europäisches Schuldvertragsrecht: Das europäische Recht der Unternehmensgeschäfte*, (Berlin-New York: Walter de Gruyter, 1999), p. 116 *et seq*.; a similar approach is taken in Ernst Steindorff, *EG-Vertrag und Privatrecht*, (Baden-Baden: Nomos, 1996), p. 451; Carsten Herresthal, "Voraussetzungen und Grenzen der gemeinschaftsrechtskonformen Rechtsfortbildung", (2007) 13 *Europäische Zeitschrift für Wirtschaftsrecht*, p. 400.

[35] Schmid, note 1 *supra*, p. 475 *et seq*.

[36] Case C-105/03*, Pupino*, [2005] ECR, I-05285, para. 47, (for Framework Decisions).

[37] Case C-212/04, *Adeneler*, [2006] ECR, I-06057, para. 110.

[38] Case C-268/06, *Impact*, [2008] ECR, I-02483.

[39] Roth, note 34 *supra*, p. 330 (my translation); similarly, Marietta Auer, "Neues zu Umfang und Grenzen der richtlinienkonformen Auslegung", (2007) 60 *Neue Juristische Wochenschrift*, p. 1108 *et seq*.; *contra*, Herresthal, note 34 *supra*, p. 400.

[40] Joined Cases C-240/98 to C-244/98, *Océano*, [2000] ECR, I-04941, para. 25 *et seq*.;

there no longer exist any legal objectives capable of being in contradiction with directive law, so that there is also no need to adjudicate *contra legem*.[41]

3. The Effects: In the past, the legal system, through legal acts, was very often the medium of a deterministic model of society, that is, of a "*normative*" social paradigm.[42] It is precisely here that the ECJ, by imposing an obligation on the national courts to interpret the national law in conformity with EU directives, has intervened. The ECJ has come to the recognition that, in the dynamic setting in which the networking of the Member States' individual private law regimes is taking place, it is no longer useful to think in terms of such a "*normative*" social model.

In the case law of the ECJ, in any event, jurists are engaged in work that is performed on numerous legal planes. To put it differently, the Court uses the instrument of directive-consistent interpretation as a means of stimulating the development of "*learning*" social models (and this occurs directly within the legal orders of the Member States).[43]

The distinction drawn by von Hayek between "*legal order*" and "*order of action*" is a useful concept for explaining the method used by the ECJ to compel the traditionally self-sufficient and autarchic private law regimes of the Member States to open themselves *cognitively*.[44] The distinction draws attention to the fact that a legal order and an order of action are *not identical* with each other. It is only "in combination with the concrete facts of the moment" that the law

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ECJ, 5 October 2004 (Joined Cases C-397/01 to C-403/01, *Pfeiffer*), [2004] ECR, I-08835, para. 112.

41 Auer, note 39 *supra*, p. 1108; *Timothy Roes*, Case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG*, (2010) 16 *Columbia Journal of European Law*, p. 446 *et seq*., & 504 *et seq*.; *contra*, Herresthal, note 34 *supra*, p. 400.

42 Wiethölter, note 18 *supra*, p. 56.

43 Amstutz, "Zwischenwelten", note 3 *supra*, p. 225 *et seq*., & 235; Wielsch, note 18 *supra*, p. 210.

44 See Amstutz, "Zwischenwelten", note 3 *supra*, p. 225; Niklas Luhmann, *Rechtssoziologie*, 3rd ed., (Opladen: Westdeutscher Verlag, 1987), p. 340; Niklas Luhmann, *Die Weltgesellschaft*, in: *idem*, *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft*, 5th ed., (Wiesbaden: Verlag für Sozialwissenschaften, 2005), p. 79 *et seq*.

determines "the overall order of action".[45] For von Hayek, a legal system is, at best, a *necessary*, but by no means a *sufficient*, condition for the establishment of a general social order.

It is precisely this distinction that the ECJ successfully exploits in its *Marleasing* jurisprudence, using it as a means of encouraging the Member States to open themselves to *new* experience by building on their *previous* experience. Christoph Schmid, in his thesis, is sceptical as to the practical feasibility of such an approach.[46] This attitude, however, is only the reflection of an unwillingness to leave the law sufficient *time*, of a refusal, that is, to recognise the reality of the *evolutionary* nature of law. It is in this sense that the reservations expressed by Christoph Schmid strike me as somewhat overstated. It is possible, however, that his scepticism may be understood differently. What troubles him is, perhaps, reflected in the question, "What is it precisely that is learned in a *Marleasing* case?"

The response, I would suggest, is that what was learned in each case is the technique for the production of "*normative compatibilities*" within the structure that is evolving out of the existing orders of European private law.[47] This is the final purpose behind the experimental process that was initiated by introducing the requirement of directive-consistent interpretation. "Normative" procedures in the legal order, it is hoped, will lead to "compatibility" in the order of action. In more concrete terms, the various *existing*

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[45] Friedrich August von Hayek, "Rechtsordnung und Handelnsordnung", in: Rechts- und Staatswissenschaftlichen Fakultät der Universität Freiburg/Br. (ed.), *Zur Einheit der Rechts- und Staatswissenschaften: Ringvorlesung der Rechts- und Staatswissenschaftlichen Fakultät der Albert-Ludwigs-Universität Freiburg/Br. Wintersemester 1966/1967*, (Karlsruhe: C.F. Müller, 1967), p. 209.

[46] Schmid, note 1 *supra*, p. 734.

[47] See Marc Amstutz, "Normative Kompatibilitäten. Zum Begriff der Europakompatibilität und seiner Funktion im Schweizer Privatrecht", in: A. Epiney *et al*. (eds), *Schweizerisches Jahrbuch für Europarecht 2004/2005*, (Bern: Stämpfli 2005), p. 235 *et seq.*; further, Amstutz, "Métissage", note 3 *supra*, p. 340; *idem*, "Zwischenwelten", note 3 *supra*, p. 218, & p. 224 *et seq.*; see, also, Mel Kenny, "Globalization, Interlegality and the Europeanized Contract Law", (2003) 21 *Penn State International Law Review*, p. 569 *et seq.*; Manuel A.J. Moreira, Book Review: *Haciendo Justicia: Interlegalidad, Haciendo e Género en Regiones Indigenas*, Maria Teresa Siera (ed.) (Mexico, DF: Ciesas, 2004), (2007) 30 *Political and Legal Anthropology Review*, p. 367 *et seq.*; Robert Wai, "The Interlegality of Transnational Private Law", (2008) 71 *Law & Contemporary Problems*, p. 105 *et seq*.

private law regimes are to be woven together with each other so that they *operate in as uniform a manner as possible*.[48]

Perhaps the most significant (and, at the same time, most paradoxical)[49] element of the ECJ's method is that the Court seeks to bring about this "weave" of legal orders *by allowing differences*.[50] The central concern is that the private law regimes of the Member States align themselves with each other by each acting *on its own*, "organically", as it were, by drawing on the characteristics and peculiarities specific to their *own legal cultures*, rather than by grafting *foreign* legal concepts onto them. EU private law is to come about not by working *against* national legal mentalities, but by working *with* them.[51]

What happens, then, in a *Marleasing* case, is this: by means of the directive-consistent interpretation requirement, the *multiple autonomies* of European private law regimes are *heterarchically*, *polycentrically* and *polycontextually* reconstituted – and this occurs not by formal or substantive means, but "*procedurally*", that is, by setting a procedure in motion whose evolution is guided by metanorms. What it comes down to is this: *legal method as "constitutional law"*.[52] In this, I believe, Christoph Schmid's conception and my own are in (nearly) complete agreement.[53]

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[48] Rüdiger Voigt, "Weltrecht – Entsteht eine 'dritte Rechtsordnung'?", in: M. Schulte & R. Stichweh (eds), *Weltrecht: Internationales Symposium am Zentrum für Interdisziplinäre Forschung der Universität Bielefeld*, (Berlin: Duncker & Humblot, 2008), p. 367 *et seq*., with references.

[49] Thomas Wilhelmsson, "The Legal, the Cultural and the Political: Conclusions from Different Perspectives on Harmonisation of European Contract Law", (2002) 13 *European Business Law Review*, p. 547 & 548 *et seq*.

[50] Wiethölter, note 18 *supra*, p. 56; see, also, (with regard to European CSR) Grit Fiedler, Interview: A question of values and diversity – EU Commissioner Günther Verheugen on Corporate Social Responsibility, European Agenda 03/2008, 13: "I am convinced that CSR is a question of values and diversity. CSR varies enormously according to the size and sector of the enterprises and according to different national and cultural contexts"; for a theoretical perspective, see Marc Amstutz & Vaios Karavas, "Weltrecht: Ein Derridasches Monster", in: G.-P. Calliess *et al.* (eds), *Festschrift für Gunther Teubner zum 65. Geburtstag am 19. Juni 2009*, (Berlin: Walter de Gruyter, 2009), p. 645 *et seq*.

[51] Behrens, note 11 *supra*, p. 289.

[52] Wiethölter, note 18 *supra*, p. 56; on which, see Amstutz, "Métissage: ", note 3 *supra*, p. 349; Amstutz, "Zwischenwelten", note 3 *supra*, p. 244; Wilhelmsson, note 49 *supra*, p. 548 *et seq*.

[53] Amstutz, "Zwischenwelten", note 3 *supra*, p. 236.

3.

Finally (and to sum up), a passing thought: with the *Marleasing* decision, the ECJ creates *interlegality* by linking together the operations of different legal systems in a *network*. It exercises *judicial restraint in matters of substantive law*, so that it does not actually intervene in any way in the legal systems out of which it is creating its weave or fabric. There is also good reason for this restraint: to act otherwise, would be to forfeit the entire concept of interlegality. The notion of "justice-based political sensitisation", as posited by Christoph Schmid in connection with his "methodological meta-principle", is approximately as compatible with the concept of interlegality in European private law, which I have just outlined, as oil is with water. The question now is: can such a mixture ever work?

Chapter 4

Modernisation of Company Law in the European Integration Process?

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1. Questions, Question Marks

"Instrumentalisation of Private Law by the European Union – Private Law and Concepts of Private Law in the Development of the Constitution of European Integration"[1] – A long title of a book, in which the author, after 834 pages in fine print, bids farewell to the patient reader by quoting the intellectual joyful leap of a monk from St. Gallen in a medieval marginal note in dog Latin. To our surprise and instant admiration, Christoph Schmid finishes his book light-footed, jumping off "*pede laeto*".[2] What about Bertrand Russell's legendary remark on having been totally exhausted when he had finished his *magnum opus*? How can a critical reviewer prevail in the face of this degree of mental and bodily fitness? I shall confine my remarks to a small part of the treatise, namely his narrative on the fate of company law in the European integration process.

Christian Joerges kindly provided me with the title of these notes. I added the question mark. My question mark does not refer to the

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[1] Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union – Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010).
[2] *Libro tandem nunc completo saltat scriptor pede laeto*, Schmid, note 1 *supra*, p. 834.

process of integration within the legal area of the EU. It rather relates to the subject of "company law", the character and level thereof, as well as its changes in the integration process. My questions are: What is company law in Europe? What can "modernisation" mean? Which connections of norms and fundamental policies could be created by changes of that subject matter? Or is it just a change of the point of view? Has company law – to relate it again to Christoph Schmid's title – *sub specie* "private law" been instrumentalised by the EU? Or has something else been targeted? Are we concerned with a matter of "private law" alone? How should the basic conflicts between national policies of "company law" and the constitution of a Single Market be tackled?

2. On the Terms "Instrumentalisation" and "Modernisation"

Allow me to begin with a short digression on the two terms "instrumentalisation" and "modernisation" of law which are underlying the following critical exercise. They are frequently used in an innocent way. Both terms drew my attention back to two texts, which I studied forty years ago: Max Horkheimer's *Zur Kritik der instrumentellen Vernunft* (*Critique of Instrumental Reason*) of 1946[3] and Christian Joerges' *Zum Funktionswandel des Kollisionsrechts* (*On the Functional Change of Choice-of-Law*) of 1971[4].

"Instrumentalisation" of law is a bewildering term. This is highlighted in a quote taken from the introduction of a paperback collection of several of Horkheimer's articles dating back to the year 1968.[5] It is one of the key passages which led to the renunciation of the Dioscuri of the Frankfurt School – Max Horkheimer and Theodor W. Adorno – by the left core of the student movement. Horkheimer quotes his friend and companion Otto Kirchheimer from the last issue (1945) of the "Zeitschrift für Sozialforschung".

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[3] Max Horkheimer, *Zur Kritik der instrumentellen Vernunft*, (edited by Alfred Schmidt), (Frankfurt aM: Suhrkamp Verlag, 1967).

[4] Christian Joerges, *Zum Funktionswandel des Kollisionsrechts – Die "Governmental Interest Analysis" und die "Krise des Internationalen Privatrechts"*, (Berlin-Tübingen: Walter de Gruyter-Mohr Siebeck, 1971).

[5] Max Horkheimer, *Traditionelle und kritische Theorie – Vier Aufsätze*, (Frankfurt aM: Suhrkamp Verlag, 1970).

> The system of technical rationality as a justification of law and legal practice has abandoned every system for the maintenance of individual rights. It has transformed law and legal practice into an instrument of merciless domination and suppression in the interest of those who control the essential economic and political levers of social power. The process of alienation from law and morality has never [in history] been extended as far as in a society which purportedly completed the integration of these terms. [6]

Kirchheimer wrote this in his New York exile during the war and Horkheimer quoted it in 1968, directed towards the student movement. "Instrumentalisation" is not only used as a combat term by the Frankfurt School Critical Theory. It carries a pejorative connotation throughout the recent history of philosophical thought as a description of an over-assessment of the means over the ends.

The relationship of the term "instrumentalisation" to the term "modernisation" is not pure chance. Explicitly since the *querelle des anciens et modernes* in the eighteenth century, it is common to link "the modern", which follows the changing fashions, to a decline of morality and the social whole. In the nineteenth century, Karl Gutzkow concisely stated "that 'the modern' contains a certain aftertaste, a 'hautgout' of things in their state of culmination which renders them piquant".[7] In his acme, Christian Joerges has generalised this critical idea of an aftertaste beyond an assumed culmination point on a sunny afternoon in the elegance of Voltaire's tongue: "On n'est pas content avec ça".[8]

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[6] Horkheimer, note 5 *supra*, p. 11. Translations by the author. Original text: "Das System technischer Rationalität als Begründung von Gesetz und gesetzlicher Praxis hat jedes System zur Erhaltung individueller Rechte abgeschafft und Gesetz und gesetzliche Praxis zum *Instrument* erbarmungsloser Herrschaft und Unterdrückung im Interesse derer gemacht, von denen die wesentlichen ökonomischen und politischen Hebel sozialer Macht kontrolliert werden. Niemals ist der Entfremdungsprozess von Gesetz und Moral so weit gegangen als in der Gesellschaft, die angeblich die Integration dieser Begriffe vollendet hat."

[7] Cf. keyword "Modern, Moderne", in: Joachim Ritter & Karlfried Gründer (eds), *Historisches Wörterbuch der Philosophie Band 6: Mo-O*, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1984), column 54-62, there on Gutzkow column 55 with reference to further sources. Original text: „dass das Moderne in einem gewissen Beigeschmack bestehe, in einem Hautgout der Dinge in ihrer Kulmination, die sie pikant macht."

[8] He stated this after a pause for reflection, which is typical for him, inspecting his

3. Plurality, Collisions and Mutual Recognition in Company Law

Let us now turn to the salient issue of company law in the European integration process. As someone who is specialised in business contracts, company law and choice-of-law from a comparative law perspective, I confine myself to dealing with the part of Schmid's book, which discusses what I like to call the "*Cassis/Centros*-complex".[9] This complex relates to a series of widely discussed decisions of the European Court of Justice concerning the recognition of "foreign" Member State companies in the light of the EU freedoms. If I understand Schmid correctly, he views the inherent policy of these decisions as a highlight of an "instrumentalisation" of private law on the part of the EU for a regulatory purpose. He critically suggests that this could be "ostensibly the climax of a neo-liberal program of deregulation"[10].

I do not deny that these decisions affect the scope of Member State regulation in the company law context. The European Court of Justice had to enforce freedom of establishment and movement issues in light of existing protective measures in a number of Member State jurisdictions which originated partly in national doctrines of private international law and partly in protective measures motivated by purportedly jeopardised local creditor and other stakeholder interests.

Did the Court execute a neo-liberal regulatory policy in this instance? Of course, one could argue that the Single Market/freedoms-logic of the EU itself represents a neo-liberal deregulation program. But that might amount to a matter of terms, or to a blunt denial of the validity of the basic progressive treaty policy since Rome. The deeper problem seems to rest in the way the ECJ decisions were understood in the mainstream German doctrine, including the relevant treatment

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[then] daily café liègeois, on the French Atlantic island of *Oléron*. However, the further assumption back then, that the name of the island would derive from Latin term "oleo" (in English "stink, smell, savour") has proven to be wrong. The Latin name of the island was *Ularius*.

[9] Schmid, note 1 *supra*, pp. 286-287, 374-388, & 490-492, in particular, pp. 498-518 with references to the case law of the ECJ to which I will refer with the well-known names of the famous decisions only.

[10] Schmid, note 1 *supra*, p. 517. Original text: "vordergründig um den Höhepunkt eines neoliberalen Deregulierungsprogramms".

by Schmid. He deals with the well-known line of cases *Segers/Centros/Überseering/Inspire Art* and *Daily Mail/Cartesio* in the traditional German scheme: "incorporation theory *versus* real seat theory". The real seat theory is widely considered a hallmark of (local) creditor protection. The "theory" was developed for enforcing local incorporation of foreign companies. According to the prevailing German doctrine, the "logical" alternative is the purportedly "more liberal" incorporation theory which recognises foreign companies as such. Schmid obviously follows the view originally introduced by Behrens that the ECJ has decreed a conflict-of-laws rule in the meaning of the incorporation theory.[11]

This is a surprising move in the book. Schmid takes frequent recourse to Joerges when discussing choice-of-law methodology. Joerges argues for an open policy-based approach. However, Schmid follows Gerhard Kegel's concept on conflict-of-laws, and, in this context, the allegedly "logical" dichotomy of incorporation and real seat. According to Kegel and others these are the only two possible choices for defining "connecting factors" of the so-called "corporate statute" (*Gesellschaftsstatut*).[12] Moreover, Schmid assumes that the ECJ has opted "for" one of these theories.

By noting this I do not question Schmid's diagnosis of collisions of norms within the European legal space. They exist without any doubt between national laws of different rank; they exist between different fields of law which followed different conceptual patterns or different policies (notorious German example: antitrust law versus partnership law in the context of no-competition clauses for the partner of an unlimited partnership); moreover, they exist in collisions of European Law and International Law.

But there is a twist. Forty years ago, Christian Joerges formulated the basic problem of private international law *viz*. conflict-of-laws resulting from an analysis of the choice-of-laws debate of the realists in the USA: Do choice-of-law rules or "collision norms" (*Kollisionsnormen*) follow a pattern derived from a logic of essence

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[11] Peter Behrens, "Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH", (1999) 18 *Praxis des Internationalen Privat- und Verfahrensrechts* (IPrax), pp. 323-331.

[12] Gerhard Kegel & Kurt Schurig, *Internationales Privatrecht*, 9th ed., (Munich: C.H. Beck, 2004), pp. 566-593, in particular, at 572.

(*Wesenslogik*)? Or do we have to resort to the underlying legal policy of individual conflicting norms which claim to be applicable?[13] In other words, do conflict rules follow an abstract *juridical* rationality (the position of Gerhard Kegel, allegedly taking recourse to Friedrich Carl von Savigny) or should they deal with a method of mutual compatibility by looking at the conflicting policies of the norms involved?[14]

In the seminal case *Centros*, the ECJ does not, in any event, take a decision "for" a conflict-of-laws rule in the sense of Kegel. The court does not decide in favor of the incorporation theory. In particular, its jurisprudence is not about a compromise formula, which is now the leading opinion in Germany and was first advanced by Palandt-Heldrich:[15] for European Member States and full EFTA States "incorporation theory", for Switzerland and (as Kegel already postulated in a quixotic gloss:[16]) for sub-Saharan Africa: "real seat theory".

All the follow-up decisions of the ECJ refrain from formulating – despite some unnecessary intellectual digressions by one or the other advocate-general – any comprehensive unitary "corporate statute". Very calmly and correctly, the Court fulfills its task of securing the freedoms by treating national substantive law and national conflict-of-laws rules in the same way. The judges reject those national rules, be they substantive or conflict-of-laws rules, which cannot be justified in the face of the freedoms. That means we are not discussing "autonomous" or even "European-law-resistant" conflict-of-laws rules in the meaning of Kegel or Kindler.[17] The line of decisions is not about the "modernisation" or "liberalization" of company law including its conflict-of-laws rules in the European Member States: it

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[13] Joerges, note 4 *supra*, pp. 166-167.

[14] Details in: Erich Schanze, "Das Problem des Gesellschaften im Internationalen Privatrecht", in: Torstein Frantzen, Johan Giertsen & Giuditta Cordero (eds), *Rett og toleranse, Festskrift til Helge Johan Thue*, (Oslo: Gyldendal, 2007), pp. 423-439, in particular, at 437.

[15] Palandt-Heldrich, *Kommentar zum BGB*, 65th edition, (Munich: C.H. Beck, 2006), Anhang zu Art. 12 EGBGB; the current 70th edition 2011, edited by Thorn, follows this line of reasoning.

[16] Gerhard Kegel, "Es ist was faul im Staate Dänemark", (1999) 9 *Europäisches Wirtschafts- und Steuerrecht* (*EWS*), Editorial.

[17] Kegel & Schurig, note 12 *supra*; *Münchner Kommentar zum BGB/Kindler*, 4th edition, (Munich: C.H. B, 2006), *Internationales Handels- und Gesellschaftsrecht*, para. 1-3, 7.

is, in fact, about a methodological return to the relevant fundamental issue of settling norm conflicts in the face of legitimate national and European policy claims of different applicable norms.

In order to tackle the problem of conflict of relevant company laws I have advanced, in a series of papers, a "control approach of the Member States moderated by European law" ("euroaprechtlich moderierte Kontrolltheorie"). Thereby, I want to promote an understanding of a conflict-of-laws approach which claims and, indeed, safeguards *reciprocal respect for the conflicting legal orders*. While I was studying the *Centros*-decision in detail, I was first in doubt looking at the apparently quite raw analytic scheme used by the ECJ: (1) *Cassis* (a "soft" duty of recognition *tel quel*); (2) justification (recognition of vital interests of the Member States by application of the four-step test); (3) *Keck* (equal treatment on the local market level); (4) granting an exception in instances of fundamental Union interests. On second inspection, this step-by-step approach is convincing as a matter of application to difficult norm conflicts. It is, indeed, "workable".[18]

The applied scheme fulfills, at least in the area of "company law", a *desideratum* which Christian Joerges formulated for the methodology of conflict-of-laws in 1971 as follows: it looks "for decisions promoting the least curtailment of the interests of the affected jurisdictions" ("Entscheidungen, die in den jeweils interessierten Jurisdiktionen die relativ geringfügigste Störung bedeuten").[19] This scheme transforms the old concept of *comitas* from a benevolent wish into a production process for normativity which can be applied to settlements between conflicting relevant legal policies. I presume that this approach is neither cheap "modernisation" nor an

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[18] In the meaning of an evaluation scheme (*Prüfungsschema*): Erich Schanze & Andreas Jüttner, "Anerkennung und Kontrolle ausländischer Gesellschaften – Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH", (2003) *Die Aktiengesellschaft* (AG), p. 30 *et seq.*; *idem*, "Die Entscheidung für Pluralität: Kollisionsrecht und Gesellschaftsrecht nach der EuGH-Entscheidung Inspire Art", (2003) *AG*, p. 661 *et seq.*; Erich Schanze, "The Recognition Principle – Tracing Sir Thomas' Vision to Present European Law", in: Elspeth Reid & David L. Carey Miller (eds), *A Mixed Legal System in Transition – T. B. Smith and the Progress of Scots Law*, (Edinburgh: Edinburgh University Press, 2005), pp. 293-301; Erich Schanze, "Anmerkung zu BGH NJW 2005, 3351 ('Liechtensteinsche Anstalt')", *Lindenmaier-Möhring-Online* I/2006, pp. 10-12; Erich Schanze, note 14 *supra*.

[19] Joerges, note 4 *supra*, p. 166.

"instrumetalisation" of legal strategy. It is rather an approach that capable lawyers should be prepared to follow: developing a methodological framework fit for legal application. I am looking forward to better suggestions.

Still plagued with skepticism I discussed these issues with a friend from Scotland, David Edward, who was, together with the relevant reporting judge Melchior Wathelet, one of the key actors adjudicating that line of cases of the ECJ.

Judge Sir David Edward vehemently denied every kind of "teleology" or judicial activism in their decisions. He referred to the *sens clair* of the articles on freedom of establishment. According to him, these cases were just about an almost literal application of the treaty norms. Most likely, he would have been amused about the conjecture that those decisions were based upon a "neo-liberal program of deregulation".

Certainly, I do not dissemble that I was pleased with the clear words in *Überseering*, which rejected the arguments of the representative of the Federal Republic of Germany by calling them unacceptable. These arguments were based on a bulwark-like mentality and did not show respect for the freedom of establishment at all.[20] In view of the explicit reasoning in *Centros* it would have been up to the German court of first instance, the regional court (*Landgericht*) in Düsseldorf, to reject the legal stratagem of the defendant denying the legal personality of the claimant. Two further national courts and the ECJ were needed to settle this case.

It is more difficult to appreciate the findings in the "synthetic" case *Inspire Art*, which was initiated by the Dutch industry for (UK) incorporations.[21] Here, the result of rejecting substantive national rules, explicitly made up for shying away "foreign" corporations, is plausible. However, the immanent reasoning of the ECJ raises some doubts. Does the present state of secondary EU law, which, most likely, exists in its particular form mainly by chance, pose an absolute limit for every kind of future regulation by a Member State?

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[20] Schanze & Jüttner, "Anerkennung und Kontrolle", note 18 *supra*.
[21] In detail, see Schanze & Jüttner, "Die Entscheidung", note 18 *supra*, p. 661, note 1.

The case of *Daily Mail* is still good law. This was consequently clarified in the quite absurd case *Cartesio*.[22] The parable, which is particularly popular in Germany, of seeking equal treatment for the "moving in" and "moving out" of companies, fails to realise that it is only possible to recognise something that "exists" in one Member State. It is also hard to overcome the point that the Member State retains the right to define the rules for "existence". The label "creature theory" (*Geschöpftheorie*), which Christoph Schmid also uses in this context, is another example for a popular and likewise misleading anthropomorphism in the context of legal persons and partnerships in Germany and elsewhere. *Daily Mail* demonstrates that problem in sufficient clarity. That case was not about the "existence" of a "creature" but about the treatment of an existing undertaking for reasons of taxation. The determination of conflict rules concerning the recognition and control of companies in the light of European and national legal policies does not deal with "creatures" but rather with legal positions and the relationship of conflicting norms.

4. On the So-Called "Market" for Company Laws

A frequent header for the *Cassis/Centros*-complex is "competition of legal orders". As a representative of the law-and-economics movement one might expect my confident praise of this line of thought.[23] In my relevant papers, I drew attention to the general usefulness of creating options for regime choice. The *decision for plurality* makes sense in the European context.[24] In my view, it is about heuristics based on the premise that justice can live in various guises and in many houses.

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[22] On this case: Schmid, note 1 *supra*, p. 514 *et seq*. Schmid is, however, of the opinion that an equal treatment of moving in and moving out of companies would be useful, a position which I do not share. The ECJ recognised that problem in *Daily Mail*. That *Daily Mail* was not mentioned in *Centros* was on purpose, as Judge Sir David Edward has affirmed in a private conversation.

[23] Expressed, for example, in the headline by Horst Eidenmüller, "Wettbewerb der Gesellschaftsrechte in Europa", (2002) 23 *Zeitschrift für Wirtschaftsrecht* (*ZIP*), p. 2233 *et seq*.

[24] Beyond the papers, quoted in note 18 *supra*, see Erich Schanze, "Die Bedeutung von Law and Economics für die Unternehmen", in: Rechtswissenschaftliche Abteilung der Universität St. Gallen (ed.), *Rechtliche Rahmenbedingungen des Wirtschaftsstandorts Schweiz – Festschrift 25 Jahre juristische Abschlüsse an der Universität St. Gallen*, (Zurich-St. Gallen: Tobler, 2007), pp. 103-117.

However, there are inherent limits to an analysis of institutions which treats them as if they were physical goods. The idea of encouraging the choice of varieties of cassis liqueurs in a Single Market can only imperfectly be transposed to the choice between different legal regimes. To put it briefly: in the case of liqueur consumption, should I not be able to control my desires, I will take the bottle of my choice containing 16, 22, or 25 per cent of alcohol. The number on the label guides my "informed" consumer choice. *I know what I get, and I know the consequences.*

In contrast, legal regime choice is haunted by a high complexity if not opaqueness of second order conditions. The fact that (partial) legal regimes (such as the company laws) are "embedded" in specific (whole) national orders creates deep knowledge problems concerning the systemic relevance of relevant "neighboring" norm sets.

If we use the paradigm of "pricing" institutions in economic analysis of law, the methodology may lead to confusing short cuts, but it may also be a virtuous exercise. Done with diligent restraint it forces the researcher to be clear about the assumptions and to understand the limits of a rigorous fact-based normative analysis. It will, in many cases, reveal the arbitrariness of standard legal techniques of "interest weighing", the prevalence of rent-seeking, path dependency and other forms of institutional slag. It will also inform about the costs of political and judicial paternalism. It yields substantial critical insights within the *context of discovery* of workable regimes. In the example of company law we have gained a better institutional understanding of the issues of finance and creditor protection. It is, however, in my view, less instructive within the *context of justification* of existing institutions.[25]

5. Recognition and the Problem of the So-Called "Unified Statute" (*Einheitsstatut*) in the Conflict-of-Laws Rules on Company Law

Returning to the technical debate about private international law for companies, treated by Schmid, we are confronted with a basic

[25] In details: Erich Schanze, "What is Law and Economics Today? A European Perspective", in: Peter Nobel & Marina Gets (eds), *New Frontiers of Law and Economics*, (Zurich: Schulthess, 2006), pp. 99-113.

question. What can be the subject of recognition?[26] The German doctrine of the "unified statute" in the area of company law insists that there is one single legal factor, the notorious Savignian "Rechtsverhältnis"("legal relationship") which would yield a single conflict-of-laws rule (law of the real seat *or* place of incorporation).

If only the recognition of foreign legal persons as such were at stake, one could think about such a conflict-of-laws rule, which, of course, requires besides "incorporation" the continuing existence of the legal person under its incorporation regime. This does not, however, yield a lot of legal mileage, since the level of recognised attributes of the legal person still remains an open question. In which legal framework do these recognised entities act? Do they operate like a battleship in foreign waters? I do not think so. In terms of European law: Where does *Keck* come into play? What is the binding "general law of the market" (*allgemeines Verkehrsrecht*) which safeguards equal footing on the relevant markets for all competing incorporated market participants?[27]

On closer inspection, the reference to the venerable conflict-of-laws methodology developed by Savigny does not help in the case of companies. Notwithstanding the "nexus"-interpretations of corporations[28], a legal person remains a person, i.e. a subject with certain attributes. A person is no "legal relationship" (to which Savigny's question on "the legal relationship's nature"[29] relates). Indeed, Savigny himself never conceived juridical persons as legal relations. Kegel misunderstood this concept either unconsciously or

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[26] See Heinz-Peter Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums", (2006) 70 *Rabels Zeitschrift für ausländisches und internationals Privatrecht*, pp. 651-731; Schanze, "The Recognition Principle", note 18.

[27] Schanze & Jüttner, "Die Entscheidung", note 18 *supra*. That is also the way I understand the reading of the company-law cases of the ECJ by Christian Joerges, "Zur Legitimität der Europäisierung des Privatrechts – Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU", EUI Working Paper LAW 2003/2, although he seems to criticise our lacking respect for certain national rules. We hold, in application of the four-step test, that the issue of co-determination as a matter of company law cannot be imposed on a foreign corporation; this has to be distinguished from the co-determination in the local establishment as a matter of labor law.

[28] Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, (Cambridge MA-London: Harvard University Press, 1991, pp. 1-39.

[29] Original wording: "Nathur des Rechtsverhältnisses".

consciously. Savigny has, in contrast to Kegel, suggested a pragmatic liberal solution to the problem. He focused, as a matter of practical convenience, not as a matter of legal construction, on the *chosen* seat, the seat contained in the charter, and not on the *real* seat. The jurisprudence in Germany followed his concept until the 1930s. The Duchy of Saxe-Gotha had been Germany's Delaware for mining companies.[30]

The "turnaround" of the new nationalistic jurisprudence of the 1930s to focus on the real administrative seat was elevated by Kegel as a matter of a logic of essence (*Wesenslogik*). This move reflects, besides nationalistic hypertrophy, the fact that "modern corporate law" had in the meantime assumed a high degree of regulatory content. The law on public joint stock companies of 1937 represents a body of binding regulatory norms. It was understood as the legal framework for the dominant corporate actor within the fascist economy, the notorious *Reichsnährstand*. Vestiges of this concept are evident in paragraph 23 sub-paragraph 5 Public Stock Companies Act (AktG)[31], which was never repealed.[32]

Kegel's so-called real seat theory, if one neglects its roots, represents – in a certain way – a "functional" adjustment to the fact that company law has been offloaded by public regulatory law. And, as is generally known, regulatory law is connected through "special conflict-of-laws rules" ("Sonderanknüpfungen") which usually point to the local law. Equally well known is the fact that Savigny's original concept relates to private law alone; this justifies his use of the term "Private International Law". The real seat theory deals with the problem of regulatory content within the company statutes in a radical way. It is a "coagulated special conflict-of-laws rule". It forces companies to be local, so that the local law is applicable *in toto*, including its "private law" components. As far as the private law rules are concerned,

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[30] In more detail on von Savigny, see Schanze, note 14 *supra*. On the decisions of the Imperial Court (*Reichsgericht*) and on Gotha, see the dissertation by Christoph Trautrims, *Das Kollisionsrecht der Personengesellschaften*, (Munich: AVM, 2009), pp. 45-59.

[31] *Aktiengesetz* of 6 September 1965 (BGBl. I S. 1089), as amended.

[32] For lawyers, who are not familiar with German company law: The law on public stock companies (*Aktiengesellschaft*, AG) in Germany is, in contrast to the law of the German "Limited" (*Gesellschaft mit beschränkter Haftung*, GmbH), not "enabling" but mainly mandatory law, including rules which would be treated in capital-market regulations elsewhere.

namely the requirements for the existence of a private economic undertaking, one has to deal – as already discussed – with the recognition of its subjectivity, its attributes, which bring it into existence, and its embeddedness in the regulatory context of national law. The odd thing about the "modern" seat theory is that it is essentially a non-recognition theory. It only recognises "locals". It establishes, as *Überseering* aptly demonstrates, the painful hospitality of the Greek giant Procrustes.[33]

By contrast, the "incorporation theory" is based on a misunderstanding of the regulatory problem. It is not just labeled wrongly, since the relevant connecting factor is the *existence* in another jurisdiction, not only its incorporation. It is also meaningless with regard to the theme of regulating market conduct, unless one claims that hospitality towards companies requires *per se* a state to tolerate the "foreign creature" unconditionally with all its attributes and forms of behavior.

Faced with those antinomies of the allegedly mutually exclusive "theories" on the treatment of companies in private international law, I have suggested a methodological reorientation. Under the presumption of equality of "companies" it seems to be helpful to differentiate – for the development of a conflict-of-laws rule – between "subjective attributes of the company" (*Subjekteigenschaften*) and "general market law" (*allgemeines Verkehrsrecht*) in which all companies, foreign or local, do business.[34] As a starting point, we have to respect the "foreign" company in "domestic" legal relations. At the same time, the necessity for the nation state to control "foreign" companies has to be respected as long as the compatibility requirements of the *new – freedom-driven – comitas* (in EU or WTO law) are fulfilled.

This is what the decisions of the ECJ are about. According to the methodology of the ECJ in the application of the fundamental freedoms, the refusal to tolerate an attribute of a legal subject needs to

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[33] Schanze, note 14 *supra*, p. 424 *et seq.*

[34] The first time in the commentary on *Überseering*: in Schanze & Jüttner, "Anerkennung und Kontrolle ausländischer Gesellschaften – Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH", note 18 *supra*; see, also, the dissertation by Andreas Jüttner, *Gesellschaftsrecht und Niederlassungsfreiheit – nach Centros, Überseering und Inspire Art*, (Frankfurt aM: Recht und Wirtschaft, 2005).

be justified. It is clear, however, that companies, which have been recognised in that way, will have to comply with justified local general rules, the rules of a specific marketplace/market for specific goods within the Single Market (*Keck*). This may be questioned if overriding Union concerns are at stake. To this extent all market participants are treated equally within the (European/global) market economy.[35]

If I am correct, the decisions of the ECJ, discussed by Schmid, do not deal with deregulation, instrumentalisation or modernisation of company law. National deregulation steps and a better understanding of company law may be friendly side effects. The ECJ decisions rather urge us to rethink conflict-of-laws methodology in both the Union and WTO context. A new reading of Christian Joerges' 1971 book on the functional change of conflict-of-laws may be an excellent starting point.[36]

6. Towards a "Governmental Interest Analysis" in the Union Setting

I do not conceal that Christian Joerges, when writing his book, did not take into consideration the "constitutional problem" of the United States of America, namely the "establishment clause" and the "commerce clause". Today we recognise the close relation to the European freedoms. We are also beginning to see the US developments in a different light. Without an understanding of the US constitutional framework and the federal legislation for the financial markets we would not be able to re-evaluate the so-called Delaware-process, which is, today, largely understood as corporate law-making in the sense of producing enabling regimes for business. The contemporary absence of these determining factors in Joerges' analysis of the US developments was simply due to the fact that the "choice-of-law revolution" and the related "governmental interest analysis" of the American realists, which he examined, focused almost completely on inter-state torts. When discussing these topics in Frankfurt in 1970 I, too, was unable to raise this issue. It had not been topic in the conflict-of-laws class of David F. Cavers I attended in 1968. The "activist" reading of the freedoms in the Treaty of Rome was still to come. Moreover, at that time, I did not see any reason to

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[35] Schanze, note 14 *supra*.

[36] Joerges, note 4 *supra*.

study Savigny's treatment of recognizing corporations more carefully. I believed, unsuspectingly, that Kegel's approach to the "Gesellschaftstatut" would be a report of Savigny's thoughts.

The US constitutional context underlying the "surprising tolerance" for the (then) suspected "race to the bottom" was presented for the first time in detail by Richard Buxbaum in 1988.[37] Given the historical bias in favor of legal harmonization in the EU until the 1990s, Buxbaum's account was left a sleeping beauty, even though it is paradigmatic for the understanding of the process of European integration as a conflict between harmonization and plurality.

Even if I am critical of Christoph Schmid's narrative on the important ECJ decisions on company law, I have to praise him for taking the right focus. In his book, he correctly shifts the emphasis of analysis to the collision of laws in Europe. The development of rules for the recognition of plurality is more important than assiduous harmonization of law.

Research on the colliding US State and Federal interests and the settlement thereof through concrete rules of the "US constitutional comity" has been and still is an important task in order to gain a better understanding of the willful plurality of jurisdictions in the US. The lack of legal unity there is not by accident. It reflects the limits of harmonization and the conflict-settling potential of diversity. The democratic process of law-making in every single State within the Federal Union requires recognition by entering into a "governmental interest analysis".

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[37] In Richard M. Buxbaum & Klaus J. Hopt, *Legal Harmonization and the Business Enterprise – Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.*, (Berlin-New York: Walter de Gruyter, 1988), Chapter 2 (Buxbaum). It could well be that the general title of the book was misleading at its time because the long essay of one of the leading contemporary US corporate-law scholars Richard Buxbaum (pp. 25-165) is not concerned with "legal harmonization" but with "the introduction of enterprise law to constitutional law in a federal setting" (at 165). This is a prescient research program which has still to be elaborated for Europe. It is unfortunate that Christoph Schmid was obviously not aware of this important text published in Series A vol. 4 of the European University Institute. See, also, recently, Richard M. Buxbaum, "Is There a Place for a European Delaware in the Corporate Conflict of Laws?", (2010) 74 *RabelsZ* , pp. 1-24.

The parallel research task for the European Union is even more urgent, and possibly essential for the future of the Union. Given a multilingual and deep-rooted multi-jurisdictional European context there is no general magic formula for dealing with unity and plurality. A grass-roots methodology of the *Cassis/Centros* type has some obvious promise. The research task of considering these issues in detail requires a fresh start. We should address this task, to refer again to Schmid's fancy final quotation, *laeto pede*, light-footed – because the way could become stony. At its very beginning we are already facing two warning notices. These concern, firstly, a continuing European disinterest in the constitutional experience of the United States of America with unity and diversity, and, secondly, a prevailing national conflict-of-laws doctrine which is wrapped in a cobweb of dysfunctional concepts.

Chapter 5

Competion Law and Private Law in the European Union

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1. Intoduction

It seems quite natural that, in his *opus magnum* on the "instrumentalisation" of private law by the European Union, Christoph Schmid discusses EU competition law. Competition policy is not only one of the most important common policies of the Union, but, in addition, is also complementary to the internal market. Private operators are not to frustrate the achievement of a single market by raising barriers for cross border business.[1] Schmid discusses competition law and policy at several points in his work, in different contexts. He carefully analyses the evolution in the application of the different branches of competition law: anti-trust, mergers, the liberalisation of state monopolies and state aid.

The possibility for the Treaty rules to influence private law is even more clear in the case of the anti-trust provisions of Article 101 TFEU (ex Article 81 EC) and Article 102 TFEU (ex Article 82 EC) than in that of the internal market freedoms, since the former are addressed to businesses and the latter to the Member States.

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[1] For the market integration function of EU competition law, also discussed by Schmid, see hereafter in detail.

Article 101(2) itself refers to private law: restrictive agreements within the meaning of Article 101(1) are null and void. More fundamentally, the prohibition of Article 101(1) very strongly affects commercial agreements. However, EU competition law, as such, is public law. In this regard, it is interesting that, in its *Courage*[2] judgment of 2001, the Court of Justice stressed that the recognition – by the law of the Member States – of claims for damages for victims of cartel infringements is necessary for the effective enforcement of anti-trust law. I will return to Christoph Schmid's discussion of this case law in a second part of this contribution.

First, I would like to discuss Christoph Schmid's view of the evolution of EU competition law against the background of his central thesis, *i.e.*, that the market integration objective of the EU endangers the justice objective of private law. With regard to competition law, Schmid concludes (p. 821)[3] that EU competition law creates an incisive framework for private agreements. The task of competition law is a neo-liberal one, *i.e.*, to correct only fundamental market failures in the form of cartels, abuse of a dominant position, and mergers (which endanger effective competition) in order to optimise the playing field of the private autonomy of market participants. Nevertheless, according to Schmid, there are instances in EU competition law in which the main collective objective of guaranteeing a system of undistorted competition dominates the justice objective of private law.

In the last section, I will briefly address the question of whether private law is, indeed, greatly affected by competition law, and will argue that this is less so than Schmid maintains.

2. EU Competition Law, Market Integration and Private Law

On p. 365 *et seq.*, Christoph Schmid highlights the evolution that EU competition law and policy underwent after 1958. The beginning of this millennium has seen the modernisation of the different parts of

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[2] Case C-453/99, *Courage* v *Crehan,* [2001] ECR, I-6297.

[3] Hereafter, all page numbers in the text refer to Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010).

EU competition law (vertical restrictions, the implementation of Articles 101 and 102 TFEU, the 2004 reform of the merger regulation, and, finally, the Treaty of Lisbon, which removed the objective of a system of undistorted competition from the Treaty to a Protocol). The key words of this evolution are "a more economic approach" and "effect-based versus form-based approach" (pp. 365-366).

In the reform of the application of Article 101 TFEU to vertical restrictions in 1999 (Regulation 2790/1999; now Regulation 330/2010), Schmid sees the abandonment of the absolute priority of market integration in favour of a more economic approach of the assessment of vertical agreements, although, he concedes, the objective of market integration still continues to play an important role (pp. 368-369). It should be noted here that the traditional approach in consecutive block exemption regulations (BER) for motor vehicles, consisting of a regulation of the contractual relationship between manufacturers and dealers (which is not an objective of competition law), has been abandoned; Regulation 461/2010 provides that the existing BER for motor vehicles, Regulation 1400/2002, will expire on 1 June 2013. At that date, the distribution of cars will be subject to the general BER 330/2010, meaning that distribution contracts for all goods, including cars, will be subject to a very generous exemption from the application of the competition rules, provided the parties have a market share below 30%, and that these agreements do not contain one of the few blacklisted clauses. In other words, EU competition law, generally, will not really affect distribution contracts, except for a limited number of issues, such as territorial restrictions and non-compete obligations.[4]

With regard to merger control, Schmid argues that the Significant Impediment of Effective Competition (SIEC) test, introduced in 2004 (and inspired by the US SLC – Significant Lessening of Competition – test), allows for more flexible decisions than under the former dominance test. In practice, this may be less true. An overview of merger control in the first five years since 1 May 2004 (a period with not less than 1,665 notifications) shows that the proportion of prohibition decisions has fallen from 1% (before 2004) to 0.1%.[5] It

[4] See Articles 4 and 5 of Regulation 330/2010.

[5] Frank Maier-Rigaud & Kay Parlies, "EU Merger Control Five Years After the Introduction of the SIEC Test: What Explains the Drop in Enforcement Activity?",

would seem that the Commission has hardly prohibited any mergers upon the basis of non-coordinated unilateral effects. However, on the other hand, Schmid rightly observes that, from a legal perspective, the more economic approach can prudently be assessed as a positive step, since it has not been implemented radically and schematically, but has led to a more contemporary reform of abstract legal rules without weakening legal certainty (p. 374).

More generally and more fundamentally, on p. 548 *et seq*., Schmid discusses the negative effects of EU competition law on national private law. He quotes Christian Joerges' 1997 article[6] on the *Pronuptia*[7] case: the application of Article 101 TFEU to franchising. Joerges writes:

> From the perspective of anti-trust's new economic rationale, any protection of the franchisee's interests through mandatory rules will seem to be misguided in principle.

Although Schmid seems to agree, I am not sure that I do. Schmid, himself, qualifies the judgment as a "rule of reason" approach. It is submitted that it is a somewhat "ancillary restraints" approach: those restrictions that are inherent for the proper functioning of an arrangement that is fundamentally not objectionable from a competition perspective are not to be qualified as restrictions of competition within the meaning of Article 101(1). This means a limited (in fact, a very limited) impact of the competition rules on contractual relations. The limited application of Article 101 to franchising (certainly with the general BERs 2790/1999 and 330/2010 with a market share threshold of 30% for those provisions in franchise agreements that would be restrictive of competition) has, moreover, not prevented Member States (such as France and Belgium) from introducing protective rules for prospective franchisees in the form of precontractual information duties on franchisors, or the development in the law of the Member States of rules (generally through case law upon the basis of general contract law or the law of obligations) to protect franchisees in their

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(2009) 30 *European Competition Law Review*, p. 565 *et seq*.

[6] Christian Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", (1997) 22 *European Law Journal*, pp. 378-406.

[7] Case 161/84, Pronuptia de Paris GmbH v Irmgard Schillgalis, [1986] ECR, 353.

contractual relationship with their franchisor (see, as a testimony thereof, Article IV.E-4:101 *et seq*. of the Draft Common Frame of Reference,[8] containing such protective rules, notably with regard to precontractual information and respective rights and obligations of the parties).

On the other hand, I largely agree with Schmid in his analysis of the case law on the application of the EU anti-trust rules to delegated self regulation. Schmid does not criticise the exclusion of collective labour agreements from the application of Article 101 TFEU. I also agree with this exclusion (but for other reasons than those mentioned in the judgments of *Albany*[9] and others: the social exclusion), namely, that trade unions are not associations of undertakings. Schmid is, however, critical of the very large immunity for market regulations worked out by professional associations, on the mere condition that these regulations are endorsed by the state or are taken by persons who are deemed to act in the general interest. Indeed, the 1993 judgments in *Meng*,[10] *Reiff*,[11] and *Ohra*[12] are surprising. Representatives of the companies concerned *de facto* made horizontal agreements on prices or other parameters of competition. These cartels are not, however, assessed as such. Article 101 does not apply because decisions are taken according to a legitimate procedure with adequate participation rights for the parties concerned for the achievement of the general interest. Schmid rightly observes that such a ruling is based upon the unrealistic assumption that procedural guarantees will force parties with a private financial interest to act in the general interest (p. 595). Schmid mentions later judgments (*Spediporto* and *Pavlov*) which are based upon the same attitude.

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[8] Published as Christian von Bar, Eric Clive & Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR),* Outline Edition, (Munich: Sellier, 2009).

[9] Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, [1999] ECR, I-5751.

[10] Case C-2/91, Staatsanwaltschaft beim Landgericht Berlin v Wolf W. Meng [1993] ECR, I-5751.

[11] Case C-185/91, Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH. & Co. KG [1993] ECR, I-5801.

[12]Case C-245/91, Officier van justitie in het arrondissement Arnhem v OHRA Schadeverzekeringen NV [1993] ECR, 1-5851.

The highlighting of the ECJ's loose enforcement of the general interest can be found in *Arduino*[13] *and Cipolla*[14] (p. 596). In these judgments, the ECJ ruled that tariffs elaborated (formally only "proposed") by a lawyers association do not fall within the scope of Article 101 if they are approved by the state, because such approval qualifies such an action as a state measure.

Schmid rightly criticises the Court's view on how the public interest is taken care of.

3. Private Enforcement of EU Competition Law

In *Courage* (Case C-453/99) and later in *Manfredi* (Case C-295/04), the ECJ recognised the right of victims of anti-trust violations to claim damages. The Member States have to guarantee effective claims for damages under their national law.

On p. 576, Schmid assesses *Courage* positively, in that it constitutes, according to him, a social materialisation ("*soziale Materialisierung*"). This is the opposite of what happens, for example, in state aid law, where fundamental principles of unjust enrichment and legitimate expectations are almost totally sacrificed to favour the effectiveness of the state aid rules.

It is submitted that this is only an apparent contradiction. In reality, both the exclusion of private law remedies in order to escape from the duty to refund unlawful state aid, and the recognition of claims for damages in cases of infringement of the anti-trust rules serve the same purpose: the effective application of the competition rules (for undertakings), on the one hand, and of the state-aid rules (for Member States), on the other. However, the only limited recognition in state-aid law of the legitimate expectations of the beneficiaries of unlawful aid is less shocking than it seems. A company that receives state aid has, of course, a specific duty to check whether that aid is compatible with EU law. The expectation that the state aid can be kept will very often not be legitimate.

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[13] Case C-35/99, Manuele Arduino and others v Compagnia Assicuratrice RAS SpA [2002] ECR, I-1529.

[14] Joined Cases C-94/04 and C-202/04, *Federico Cipolla and others,* [2006] ECR, I-11421.

4. Some General Remarks: Is Private Law Indeed Transformed by EU Competition Law?

All by all, I do not believe that national private law is very much transformed by EU competition law (including state aid law).

Article 101(2) TFEU has only affected private law marginally, since the consequences of the nullity in this Article are left (by the Court of Justice) to national law (in this regard, see the interesting observations of Schmid on pp. 551-552 on how the *Bundesgerichtshof* has decided, under German law, and, according to the author, in a satisfactory way, on the consequences of restrictive clauses in line with the ECJ's *Pronuptia*[15] judgment for the agreement as a whole [while the sanction of Article 101(2) as such only affects the restrictive clause], after the preliminary ruling).

Claims for damages for violations of the anti-trust rules are to be determined by national law. In *Courage* and *Manfredi*, the ECJ only recognised the existence of a *right* to damages, and it set some very general rules, including that the victim has a right to be compensated not only for *damnum emergens*, but also for *lucrum cessans*, and has a right to interest. Admittedly, *Courage* forced England to abandon, in the area of competition law, a well-established rule that a contract party cannot claim damages from his or her contract party because he or she has participated in an illegal form of conduct, but this would not seem to be very fundamental.

In the area of vertical restraints, thanks to a very generous block exemption regulation, the impact of Article 101 on contracts is also limited. In the field of horizontal cartels, the impact would seem to be even less, since collusion between competitors is generally not formalised in a binding agreement. If one looks at the Commission's application of this Article to cartels, one is struck by the fact that most of the decisions (imposing fines on the members of a cartel) relate to concerted practices within the meaning of Article 101(1), and not to agreements. Private law is hardly affected by these interventions at all.

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[15] ECJ Case 161/84, Pronuptia de Paris GmbH v Irmgard Schillgalis [1986] ECR 353.

That being said, Schmid's thesis has the merit of having highlighted the evolution and mechanisms of all the branches of EU competition law (anti-trust, merger control, state aid, and the liberalisation of state monopolies) from a private law and constitutional perspective.

Finally, these short comments on only one small part of Schmid's rich book do not do full justice to the very solid scientific treatise of private law and private law concepts in the development of a European integration constitution (the subtitle of the book) or to the original methodology for the analysis of the fundamental Treaty freedoms and private law (see p. 475: reconstruction through conflict of laws, and, in particular, the "*diagonale Kollision*", p. 480 *et seq*.).

All in all, Christoph Schmid has shown how private law is influenced by EU primary law, in particular, by competition law, and that the neo-liberal foundation of EU competition law has important implications for the relationship between justice and social steering (see p. 547).

What we see today may be just the start of a new evolution in the relationship between EU law and national law. In this process, the distinction between private law and public law becomes more and more blurred.[16]

[16] See extensively about this process in general, W. van Gerven & S. Lierman, *Algemeen Deel Veertig Jaar Later*, (Mechelen: Kluwer, 2010).

Chapter 6

Consumer Protection and Social Justice

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1. The EU as a Danger to Social Protection in Private Law

Christoph Schmid's idea of instrumentalisation,[1] describing the subordination of private law to the functioning of the internal market and – the ensuing materialisation of private law and the danger of a loss of its comprehensive notion of justice – will, in the following, be the starting point for further deliberations concerning the law of consumer protection in the EU. These remarks will constitute the first steps of an attempt to bring new life to social justice in European private law, with a focus on European consumer law and competition law, and to withdraw European private law from one-dimensional market functionalism. A European social model, which finds itself at an early stage of its development, could serve both as a basis and as a point of orientation for the improvement of European consumer protection law. Two points seem to be particularly important in this context:

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[1] Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtkonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010); *idem*, "The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code", (2005) 1 *European Review of Contract Law*, p. 211.

1. the new model of a "vulnerable consumer" which has been developed out of the European law of services for the public (services of general economic interest, in Article 106 paragraph 2 TFEU and Article 36 of the EU Charter of Fundamental Rights[2]),[3] a regulatory law, in which private and public legal instruments are closely intertwined; and
2. the external interests affected by consumer transactions on the internal market, the so-called "external social functionality" of consumer contracts on usually globally-integrated markets (which supplements the traditional internal perspective of the contract parties and the "relativity of contractual relations" by an additional external perspective).

Both areas are marked by new forms of regulation and new governance structures, which operate together with state measures in complex contract-based market activities between a number of private actors. These structures can be analysed by a scientific method called "contract governance" which examines regulatory techniques, regulatory models and external and internal effects of organisation on an interdisciplinary basis.[4]

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[2] Charter of Fundamental Rights of the European Union, 2010 OJ (C 83) p. 39; Art 36: Access to services of general economic interest - The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

[3] Commission Green Paper on Services of General Interest, 21.5.2003, COM (2003) 270 final, 2004 OJ (C 76).

[4] F. Möslein, "Contract Governance within Corporate Governance – Lessons from the global financial crisis", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499610; F. Möslein & K. Riesenhuber, "Contract Governance – A Draft Research Agenda", (2009) 5 *European Review of Contract Law*, p. 248; P. Vincent-Jones, "Contractual Governance: Institutional and Organizational Analysis", (2000) 20 *Oxford Journal of Legal Studies*, p. 317; P. Zumbansen, "The Law of Society: Governance through Contract", (2007) 14 *Indiana Journal of Global Legal Studies*, p. 191, and the contributions in the European Law Journal, (2009) 15 *European Law Journal*, pp. 155-276 (special issue on "Regulating Markets and Social Europe: New Governance in the EU"). On the merits, see, also, H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), p. 225 *et seq.*; O.E. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations", (1979) 22 *Journal of Law & Economics*, p. 233.

Meanwhile, the social deficit of European private law has been described in a convincing way by many authors from a variety of perspectives.[5]

The separation of the social and the economic constitution ("*die Entkopplung der sozialen von der wirtschaftlichen Verfassung*")[6] in both EU law and in European private law is certainly the wrong path. Social protection, in the sense of protection of the weaker contract party, by instruments of private law must be an integral part of market relations because the balance or imbalance of powers of the relevant market participants is a key characteristic which marks all contractual or extra-contractual private-law relationships on the markets. This applies to contract law as well as to the law of competition and of services for the public. In contract law, the principle of regard and fairness (or the principle of solidarity) should be regarded as an equal partner or counterpart of the principle of freedom of contract.[7] Markets are always "socially embedded"[8] or as Ole Lando, the doyen of European contract law,[9] put it:

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[5] Study Group on Social Justice in European Private Law, "Social Justice in European Contract Law: a Manifesto", (2004) 10 *European Law Journal*, p. 653; Ch. Joerges & F. Rödl, "Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem 'sozialen Defizit' des Integrationsprojekts", ZERP-Diskussionspapier 2/2008; F.W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", (2002) 40 *Journal of Common Market Studies*, p. 645; H. Rösler, "Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law", (2010) 18 *European Review of Private Law*, p. 729, at 750 *et seq.*; M. Hesselink, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice", (2007) 15 *European Review of Private Law*, p. 323.

[6] Joerges & Rödl, note 5 *supra*, p. 22.

[7] B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, (Vienna, Springer, 2001), p. 376 *et seq.*; *idem*, "Das vertragsrechtliche Prinzip der Rücksichtnahme und Fairness zwischen Sozial- und Wirtschaftspolitik und privatrechtlichem Interessenausgleich", in: G. Peer, W. Faber *et al.* (eds), *Jahrbuch Junger Zivilrechtswissenschaftler 2003. Die soziale Dimension des Zivilrechts*, (Stuttgart-Munich: Boorberg Verlag, 2004), p. 9, at 18; *idem*, "The 'Social' Side of Contract Law and the new Principle of Regard and Fairness", in: A. Hartkamp & M. Hesselink (eds), *Towards a European Civil Code*, 3rd ed. (Nijmegan: Kluwer Law International, 2004), p. 273, at 286; *idem*, "Die Europäisierung des Vertragsrechts aus vertragstheoretischer und verfassungsrechtlicher Perspektive", in: H. Kopetz, J. Marko & K. Poier (eds), *Soziokultureller Wandel im Verfassungsstaat*, (Vienna-Cologne: Böhlau Verlag, 2004), p. 305, at 315; *idem*, "The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality", (2005) 1 *European Review of Contract Law*, p. 442.

[8] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*,

> [S]ocieties, which build on a market economy combined with solidarity, fairness and loyalty, fare better than those where the law of the jungle governs. Strong ethical standards establish trust, and trust enhances trade and production. Solidarity and fairness not only further people's economy but also their feeling of security and peace of mind.[10]

But recent ECJ decisions, such as *Viking*, *Laval*, and *Rüffert*,[11] and projects of the EU Commission in the area of European contract law show that the old view according to which social-policy concerns have to be subordinated to the liberal economic constitution and have to be kept apart from the future European contract law,[12] which is mainly internal-market oriented, has not yet been overcome.

The lack, or the weakness, of a European social model should cause the EU to have more respect for the national social models. This respect should replace the present European outplaying or subordination of national social protection against or under the market freedoms. But, perhaps, a European social model does exist somewhere out there, somewhat hidden or still very small, a model which could be helpful for the further development of European consumer protection law?

(1944), (Boston MA: Beacon Press, 1957), pp. 45-58 & 71-80.

[9] See the Principles of European Contract Law (PECL) drafted by the so-called "Lando-Commission": O. Lando & H. Beale (eds), *Principles of European Contract Law. Parts I and II Combined and Revised*, (The Hague: Kluwer Law International, 2000); O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds), *Principles of European Contract Law, Part III*, (The Hague: Kluwer Law International, 2003).

[10] O. Lando, "The Structure and Legal Values of the Common Frame of Reference (CFR)", (2007) 6 *European Review of Contract Law*, p. 245, at 251.

[11] Schmid, *Instrumentalisierung*, note 1 *supra*, p. 346 *et seq.*; Case C-438/05, *ITF (Viking Line)*, [2007] ECR, I-10779; Case C-341/05, *Laval*, [2007] ECR, I-11767; Case C-346/06, *Rüffert*, [2008] ECR, I-1989.

[12] See, in this regard, in particular, the Commission Green Paper "on policy options for progress towards a European Contract Law for consumers and businesses", 1.7.2010, COM (2010) 348 final; and C. von Bar & E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition (Oxford: Oxford University Press, 2009).

2. Regulatory Law as Novelty in European Private Law

The consumer protection directives of the EU in the area of contract law contain "regulatory private law" in the wider sense. They introduce state control of what the content of a consumer contract or a precontractual relationship may be and what its content may not be. A much more complex form of state regulation in private law can be observed in those markets which are particularly in the public interest and which had been dominated by state monopolies before they were privatised and deregulated by the EU: the markets for the supply of energy and water, telecommunication, public transport and the like. This complicated network of public and private legal norms that shapes the triangular relationship between customer, provider and state necessitates new dogmatic categories and research methods in order to ensure a successful analysis and an improvement of its structures and content.[13]

A number of authors have justifiably criticised that the EU Commission in its contract law project (Common Principles of European Contract Law, Common Frame of Reference, optional instrument)[14] and even the EU in the existing contract law directives

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[13] H.-W. Micklitz, "Europäisches Regulierungsprivatrecht: Plädoyer für ein neues Denken", (2009) *Zeitschrift für Gemeinschaftsprivatrecht* (*GPR*), p. 254 (I), (2010) *Zeitschrift für Gemeinschaftsprivatrecht* (*GPR*), p. 2 (II); *idem*, "Universal Services: Nucleus for a Social European Private Law", EUI Working Papers LAW 2009/12; *idem*, "The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation", EUI Working Papers LAW 2008/14; G. Bellantuono, "The Limits of Contract Law in the Regulatory State", (2010) 6 *European Review of Contract Law*, p. 115; I. Houben, "Public Service Obligations: Moral Counterbalance of Technical Liberalization Legislation?", (2008) 16 *European Review of Private Law*, p. 7; M. Freedland, "The Marketization of Public Services", in: C. Crouch, K. Eder & D. Tambini (eds), *Citizenship, Markets, and the State*, (Oxford: Oxford University Press, 2000), p. 90; P. Rott, "A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC", (2005) 1 *European Review of Contract Law*, p. 323; *idem*, "Consumers and services of general interest: Is EC consumer law the future?", (2007) 30 *Journal of Consumer Policy*, p. 49; F. McGowan, "State Monopoly Liberalization and the Consumer", in: D. Geradin (ed.), *The Liberalization of State Monopolies in the European Union and Beyond*, (The Hague: Kluwer Law International, 2000/1999), p. 207.

[14] The EU Commission assisted the drafting of the DCFR in the years 2005-2009 with considerable financial support in the framework of the "Network of Excellence CoPECL" (Common Principles of European Contract Law) within the 6th

also neglects the majority of long-term contracts of consumers, customers or EU citizens that are of vital social importance to them: including labour contracts, landlord-tenant contracts, and, partly, also consumer credit contracts.[15] This list of long-term contracts with fundamental social relevance could be supplemented by contracts for old-age provision, (nursing) home accommodation contracts, public services (the supply of energy and water, telecommunications, and so on) and certain financial service contracts.[16]

In all these fields, a broadening of the spectrum of the functions which have to be fulfilled by contract law can be observed. Not only do the interests of the two contract parties play a role (internal dimension), but the complete market(s) in which this transaction or this kind of transaction is embedded must also be taken into account. External factors, such as the dynamics of competition and the necessity for efficiency-enhancing or distributive state interventions, must be considered (external dimension). In compliance with the state task of managing the economy (regulatory capitalism), it is not only instruments of public law, but also private-law instruments, which must be used. The boundaries between public and private law become blurred. The goals of regulatory intervention are, in most cases, the fostering of competition, the safeguarding of the fairness of competition, and the protection of weaker market participants.

The relationship between traditional general contract law and the special regulatory private law is marked by a remarkable tension. General contract law cannot reconcile the conflicting perspectives of

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Framework Progamme for Research and Technological Development (Decision No. 1513/2002/EC, 2002 OJ (L 232) p. 1). See A. Somma (ed.), *The Politics of the Draft Common Frame of Reference*, (The Hague: Kluwer Law International, 2009).

[15] L. Nogler, "Why do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?", (2008) 14 *European Law Journal*, p. 483, at 498; U. Reifner, "Comment to Luca Nogler: Social Contract Law through Labour Law?", (2008) 14 *European Law Journal*, p. 500; L. Nogler & U. Reifner, "Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model, Jubilee Thomas Wilhelmsson", (2009) 3/4 *Juridiska Föreningen i Finland*, p. 437; L. Nogler & U. Reifner, "Social contracts in the light of the Draft Common Frame of Reference for a future EU Contract Law", I Working Papers, Università degli Studi di Catania (2010), available at: http://aei.pitt.edu/13707/01/nogler-reifner_n80-2010int.pdf.

[16] B. Lurger, "Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis", in: R. Brownword, H.-W. Micklitz, L. Niglia & S. Weatherill (eds), *The Foundations of European Private Law*, (Oxford: Hart Publishing, 2010), Chapter 3.2.4.

party autonomy (freedom of contract) and regulation. Therefore, the traditional contract law of national codifications and statutes (and, in future, also the general contract law of the [Draft] Common Frame of Reference or the optional instrument which are modelled on the traditional rules) loses its relevance for legal practice and is marginalised in favour of the special regulatory regimes, which gain the upper hand.

The task of a modernised general contract law would be the balancing of the regulatory interventions which favour competition or social protection against the principle of party autonomy, and the definition of the boundaries of those interventions with regard to party autonomy. New rules for the governance of contractual relationships are necessary (contract governance). The function of contract law to foster competition must be taken into account on a broad scale and not only in exceptional situations and cases, and the same holds true for the protection of weaker parties (the social function of contract law). The external dimension of contract law must be integrated into the classical contract law doctrine. Traditional contract law, sector-specific regulatory law and competition law must work hand in hand. The materialised contract law pursues a variety of goals – functioning of competition and party autonomy, social balance and protection of weaker market participants, control and regulation of external effects – which have to be put in relation to each other and balanced against each other.

3. Two Consumer Models and Two Models of Social Protection in EU Law

3.1. The Cross-Border Consumer Shopper

In the field of EU consumer protection directives and in the (Draft) Common Frame of Reference, the reasonably well-informed, reasonably observant and circumspect average consumer is used as the relevant model. In the course of maximum harmonisation,[17] he or

[17] H.-W. Micklitz & N. Reich, "Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'", (2009) 46 *Common Market Law Review*, p. 471, at 481 *et seq.*; B. Gsell & H. M. Schellhase, "Vollharmonisiertes Verbraucherkreditrecht – ein Vorbild für die weitere europäische Angleichung des Verbrauchervertragsrechts?", (2009) 64 *JuristenZeitung*, p. 20; V. Mak, "Review of the Consumer Acquis: Towards Maximum Harmonization?", (2009) 17 *European Review of Private Law*, p. 55; N. Reich, "Von der Minimal- zur Voll- zur

she will even become more observant, circumspect and informed. At present, maximum harmonisation can be found in the Directive on the Distance Marketing of Financial Services,[18] the new Consumer Credit Directive,[19] the new Timeshare Directive,[20] the Unfair Trade Practices Directive,[21] and the proposal of the Commission of 8 October 2008 concerning a Directive on Consumer Rights,[22] which will put together and amend the four older directives on doorstep selling,[23] distance selling,[24] unfair contract terms,[25] and consumer guarantees.[26] Clearly, the EU is primarily interested in the well-to-do consumption-and-information-oriented consumer who is able to spend his or her money (also) in cross-border transactions, and who thereby fosters the competition within the internal market. With regard to these market-fostering activities, he or she is to be assured the full support and protection of EU law.

This consumer model is also used in the manifold activities and publications by the Acquis Group and the Study Group on a European Civil Code (SGECC), both of which have been working on

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'Halbharmonisierung'", (2010) 18 *Zeitschrift für Europäisches Privatrecht*, p. 7.

[18] Directive 2002/65/EC of 23 September 2002 concerning the Distance Marketing of Consumer Financial Services and amending Directives 97/7/EC and 98/27/EC, 2002 OJ (L 271), p. 16.

[19] Directive 2008/48/EC of 23 April 2008 on Credit Agreements for Consumers and repealing Council Directive 87/102/EC, 2008 OJ (L 133), p. 66.

[20] Directive 2008/122/EC of 14 January 2009 on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts, 2009 OJ (L 33), p. 10.

[21] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), 2005 OJ (L 149), p. 22.

[22] COM (2008) 614 final; with regard to this proposal for a directive, see also the draft report by *rapporteur* Andreas Schwab in the IMCO-Committee of the European Parliament, 31.5.2010, 2008/0196(COD), in which he opposes the maximum harmonisation approach.

[23] Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts negotiated away from Business Premises, (1985) OJ (L 372), p. 31.

[24] Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, (1997) OJ (L 144), p. 19.

[25] Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, (1993) OJ (L 95), p. 29.

[26] Directive 1999/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, (1999) OJ (L 171), p. 12.

behalf of the Commission. Within the framework of a wide-ranging EU research project called "CoPECL" (Common Principles of European Contract Law), these two groups elaborated a text of European rules with comments and comparative notes for almost the whole of "patrimonial law" following the style of Continental civil-law codifications. These rules and accompanying comments and notes were published under the strange name "Draft Common Frame of Reference" (DCFR).[27] At present, a group of experts appointed by the Commission, which consists, to a large extent, of former members and the heads of the Acquis Group and the SGECC, give advice to the competent officials of the Directorate-General for Justice. The Green Paper of the Commission on "policy options for progress towards a European Contract Law for consumers and businesses", which was published on 1 July 2010,[28] confirms the suspicion that the Commission wants to see a so-called "optional instrument" adopted, which incorporates the norm texts of the DCFR – with smaller changes or omissions – and which can be freely chosen by the contract parties.

The Green Paper (p. 2 *et seq.*) wants to make us believe that the divergency of national contract-law systems is bad because it allegedly creates additional transaction costs and legal insecurity for the businesses which want to offer their goods and services across their borders in other EU Member States. This divergency allegedly also causes a lack of trust in the internal market on the part of consumers. The "Digital Agenda for Europe" strives for the creation of sustainable benefits from a digital internal market through the removal of legal fragmentation. Full harmonisation – as in the more recent consumer directives and the directive proposal on consumer rights – will not be sufficient to reach these goals. According to the Commission, it will be necessary to achieve some kind of unification also of general contract law, at least as an optional twenty-eighth system of contract law.

3.2. The Vulnerable Consumer

In the EU law of services of general economic interest, we encounter a younger and very different model of the consumer: the "vulnerable"

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[27] C. von Bar & E. Clive, note 12 *supra*.
[28] COM (2010) 348 final.

consumer.[29] Particularly weak EU citizens are also mentioned by the Communication of the Commission "Europe 2020":[30] a European platform for the struggle against poverty and social exclusion is to be created (p. 23), and particularly endangered groups are to be granted better protection, such as single parents, elderly women, minorities, the Roma community, and handicapped and homeless persons. The Stockholm Programme of the European Council 2010,[31] under the title of "a Europe of Rights", speaks of the need for the European legal area to respect diversity and to protect the most vulnerable EU citizens. The struggle against racism and xenophobia, the rights of children, the discrimination of minorities such as the Roma people, and crime victims are mentioned as examples. Under Point 4 – "a Europe that protects" – one can find deliberations concerning data protection, crime prevention, co-operation in law enforcement, migration and asylum.

Not only in the law of services for the public, but also in the whole of consumer law, it is high time to reconsider the effectivity of traditional protection instruments anew, and to develop new instruments that really reach these groups of consumers who are in particular need of protection. It is precisely these groups that have been so elegantly neglected by the model of the reasonably well-informed, reasonably observant and circumspect average consumer and the mainly information-oriented EU consumer-protection system for decades. An empirical and legal study carried out by Ben-Shahar and Schneider[32] shows, for example, that, in reality, information and information duties protect weaker parties much less than the strongest critics of the information model ever dared to imagine. Consequently, advice, and the documentation of the satisfaction or dissatisfaction of other consumers in reliable ratings and the like, should replace information duties. This will support the interests of both the vulnerable – as well as of less vulnerable – consumers and

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[29] See Section 1 *supra*, point 1.

[30] Europe 2020: A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

[31] An open and secure Europe serving and protecting citizens, 2010 OJ (C 115) p. 1; point 2.

[32] O. Ben-Shahar, "The Myth of the 'Opportunity to Read' in Contract Law", (2009) 6 *European Review of Contract Law*, p. 1; *idem* & C.E. Schneider, "The Failure of Mandated Disclosure", University of Chicago Working Paper 516, 2010, available at: http://www.law.uchicago.edu/Lawecon/index.html.

customers because the real consumer bases his or her decisions much more on "reliance" and "trust" than on comprehensive information.[33] He or she also does not act in pure self-interest as traditional economic theories used to assume, but possesses a sense of fairness and co-operation.[34] Trust, bilateral fairness and co-operation are important factors which reduce both transaction costs and the need for information, and, at the same time, increase the overall satisfaction of the parties with regard to the contracts concluded.

New approaches to the protection of weaker parties are found in the area of contract law of public services (services of general economic interest). The private service provider is obliged to pursue goals which are in the public interest. The provider must comply with so-called "public service obligations" which – to some extent – also become part of his or her contract with the consumer, or exercise some other influence on this contract.[35] Guiding principles which shape such public service obligations are: accessibility, availability, continuity, solidarity, affordability, universality, sustainability, transparency, safety, and non-discrimination and equality of treatment.[36] In addition, other private-law instruments are also used to ensure the compliance with these duties.

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[33] E. Kirchler, "Vertrauen in der Wirtschaft: Regeln und Kontrollen oder Verhaltensprinzipien und Kooperation?", Österreichisches Bank-Archiv (ÖBA) 776 (2009).

[34] G. Low, "The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology", (2010) 18 *European Review of Private Law*, p. 285, at 294 *et seq*.

[35] See, for example, the Universal Service Directive 2002/22/EC (as amended by Directive 2009/136/EC) on universal service obligations relating to electronic communications networks and services, or Article 3 of Directive 2009/72/EC concerning public service obligations and customer protection on the internal market in electricity.

[36] Protocol No 26 of the Treaty of Lisbon on Services of General Interest; White Paper on Services of General Interest, COM (2004) 374, p. 8 *et seq.*; Draft European Framework to Guarantee and Develop Services of General Economic Interest, adopted by the ETUC Steering Committee in their meeting in Brussels on 20 September 2006, Annex to the Resolution "Towards a framework directive on services of general (economic) interest" 6-7/06/2006, p. 3 (fundamental principles taken into account by service providers). See, also, I. Houben, "Public Service Obligations: Moral Counterbalance of Technical Liberalization Legislation?", (2008) 16 *European Review of Private Law*, p. 7, at 11 *et seq*.

4. Global Social Justice and European Consumer Protection Law

4.1. What is Social Justice?

What is "social justice" in the light of the global economic crisis, of ecological problems and of globalisation?[37] "Social" means to improve the living conditions of employees and other non-wealthy persons. "Social" is what puts the individual person in a position to develop himself or herself in accordance with his or her interests and abilities.[38] This definition is the opposite of those approaches which contend that everything which serves the whole population economically is "social", *i.e.*, every strengthening of the economic location and the like – independent of the living conditions of the individual person and the distribution of wealth in the society in which the individuals live. Social justice is not a mere or automatic by-product of a functioning competition on the markets (the market-functional approach to European consumer contract law) and the growth of the national economy. And, as we have seen, the purportedly functioning competition can also be played out as the adversary of social justice: in its decisions in the cases *Viking*, *Laval* and *Rüffert*, the ECJ fosters the competition of different wage levels and levels of social protection.

In the light of the multiple crises, we should also ask ourselves in which areas the capitalist logic, the principle of a free market and the internal market of the EU should operate, and in which they should not. What we need in order to conduct a good life is not entirely produced by the capitalist economy. Social policy must take increasing care of the protection, the extension and the development of these non-economic areas, also within and with the means of European private law. These are essential questions for our future.

It has been justifiably stated that social-democratic parties and party programmes are caught in the trap of the national state.[39] At present, it is not only national, but also transnational, policy which is necessary to defend the "social". The weakening of the rights of employees and their interest organisations, which can be observed in

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[37] U. Brand, "Sozialdemokratische Politik in Zeiten der Krise", *Zukunft* 04/2010, p. 34.
[38] *Ibid.*, pp. 34, 37.
[39] *Ibid.*, pp. 34-35.

many EU Member States over the last decades, must be seen in its manifold relations to the development of the global economy. The global competitive pressure reduces the readiness of the economy and the possessors of wealth to conclude compromises, which was also supported by the policy of many Member States – even by social democratic governments. Unfortunately, the sudden interest of the economy in a state that takes on more tasks and massively interferes in the market economy in a corrective function during the global economic crisis in 2008–2010 has not led to a breakthrough of social ideas or a reorientation in economic (market) law or politics.

The analysis of our present modes of production and living reveals a close relationship between social questions and ecological questions: the quality of life, access to good food and accommodation and to public transport, and the building of cities worth living in have both social and environmental policy implications. The democratisation of society in all areas, particularly in teaching relationships, and the reduction of work time which will be necessary in the future will lead to a restructuring of society as a whole, to a change in gender relationships, and to every employee and citizen having more time for family work, social and societal commitment, political engagement and self-development.

4.2. External Dimension and Variety of Principles in Contract Law

What could the consequences of the realisation of the global and transnational dimension of social policy and social justice for market law and particularly for consumer protection law be? At present, no global or transnational consumer protection law exists; there is only the consumer protection law of the EU and that of the individual Member States. How could these react to the global context and connections?

The starting point of the analysis must be the *internal dimension* of each contract. A contract, in the first place, sets up a legal relationship between the parties and thus shapes their life reality (relativity of contract). The state rules for this internal dimension of the contract are mainly characterised by two principles: the principle of party autonomy and the principle of regard and fairness with regard to the interests of the other (weaker) contract party.

This traditional internal view should be supplemented by a look at the *external factors* of contracts:

- There is an inter-relationship between the conclusion of contracts and the functioning and fairness of market competition. Contracts which are concluded in a great number can endanger competition. The transactions with financial certificates and derivates which were built as bubbles around a sick US American land market are only a particularly spectacular example of this. Beyond this example, every "mass transaction", *i.e.*, every contract concluded and performed in large numbers under certain circumstances and conditions, has effects on the functioning and fairness of competition.
- "Social Justice" in contractual relations (solidarity or regard and fairness) can be tested or realised not only with regard to the interests of the other (weaker) contract party (internal dimension), but also with regard to the interests of third persons (external dimension). Consumer contracts are often found at the very end of a longer chain of contracts between other persons who are involved in the creation of a service or a product and its sale. Thus, the fact that a service or good is consumed by a consumer under certain conditions (through a contract) has indirect effects on the workers in the production of the goods or services in third countries (for instance, with child labour, under conditions which endanger the health of the workers, excessively long working hours, low wages), on the (non-)protection of the environment in the production and sale, and on the organisation, the profit and the decisions taken on the part of the enterprises involved.

First, social justice should be understood as "real" social justice, which is more than a by-product of economic growth; second, it should be also understood as *global social justice*: The financial crisis in 2008 and 2009 has shown that we have to trace the global economic consequences, *i.e.*, the consequences of our markets and market rules, back to the individual contractual relationships. The whole global economic network must be taken into account. This does not just apply to financial markets: the global consequences of our consumption in the environment, and for the social living conditions of people in countries both close and far, should form part of the analysis of contractual relations (global social and environmental network). The model of EU-wide and global competition of social-

protection standards operating at present, which results in a lowering of these standards, must be confronted with, and succeeded by, a new model of social protection and social justice which is equally able to think and operate in global terms.

The integration of the external perspective of global social justice in consumer contracts could find a starting point in the model of product-safety law: businesses have to inform consumers about the risks and dangers of a product. If the risks are considerable, the product must be removed from the market for safety reasons, which has to be caused, implemented and controlled by public-law instruments and public authorities. Contracts on the sale of such products are either void or their delivery constitutes a breach of contract by the seller. The seller is liable for any damages incurred by the consumer under the law of torts.

The application of these rules should not remain restricted to the health and financial interests of consumers and customers, but should be extended to the dangers to the environment, for human rights, workers' rights, *etc*. *Vice versa*, the lack of any dangers to the environment, to human rights and to workers' rights on the part of a product can be used as a powerful argument in public relations: for instance, the sellers of "fair trade"[40] products use the positive external effects of their products in a global context as a strategy to increase their sales. In this context, a space for innovative solutions emerges: in the areas of self-regulation, the creation of new organisational arrangements and legal protection instruments. In the future, the state regulation of contracts and consumer markets should not only be competition- and market-oriented, but also social-justice- and environment-oriented. Besides market functionality, the functionality of rules with regard to social and environmental concerns should also be taken care of.

The first steps of a regulatory functional use of traditional legal instruments are already to be found in contemporary private law, where these instruments have a conduct-regulating effect on groups

[40] "Fair trade" products guarantee the implementation of certain standards of protection of the environment and of the people producing the goods, such as, for instance, fair prices for the farmers in developing countries that secure them good living conditions, and no child labour.

of market participants in order to improve the quality of competition and the protection of weaker parties: for example, the actionability of prizes promised by an entrepreneur to a consumer under section 661a of the German Civil Code (BGB)[41] and section 5j of the Austrian Civil Code (ABGB); the duty of the injurer to compensate the victim for immaterial losses or to pay punitive damages; the sanctioning of a violation of EU consumer protection directives with national civil-law instruments such as the nullity of a contract, annulment of contract for mistake, and the remedies of general tort law. In addition, new regulatory approaches and instruments could be developed.

5. Conclusions

5.1. Change of Scientific Methods

The present development of regulatory private law in general, as well as of consumer protection law in particular, as described above, testifies to the fact that the boundaries between legal regulation in favour of public interests, on the one hand, and in favour of private or party interests, on the other, become blurred. The legal instruments of public, as well as of private, law increasingly influence both types of interests. The public and the private get intertwined in the legal market order. As a result of the materialisation of private law, which has been intensified under the influence of EU law, the distinction between private law and public law has lost much of its former significance. This also applies to questions of social orientation and social justice. Public and private, EU and national law work hand in hand also in this area. Scientific academic studies in the field of law will have to be based upon more than one legal discipline: private-law professors will have to acquire expert knowledge also in the field of public law, and will have to co-operate with public-law professors, and *vice versa*. In addition, national autonomous law and EU law will always have to be analysed together.

As far as questions of legal development and of the evaluation of legal rules in the context of economic and social policy goals are concerned, interdisciplinary research is necessary. This was already

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[41] "An entrepreneur who sends promises of prizes or comparable announcements to consumers and creates the impression through the design of such mailings that the consumer has won a prize must give the consumer that prize." BGB Section 661a "Promises of prizes".

expressed in the new scientific approach of "contract governance".[42] The great number of institutional arrangements and factors which influence and control the behaviour of parties with regard to contracts, namely, economic, social, psychological and other factors, must be taken into account in the scientific analysis of market law, *i.e.*, national and European public and private law. Thus, new approaches in the neighbouring fields of the law – institutional economics, behavioural economics, happiness research, and so on – gain importance also for legal research activities.

5.2. Strengthening of Social Protection in EU Law Through European Consumer Law

Within EU law, the tension between the market economy and social justice has resulted in various arrangements and legal structures, the non-balanced structure of which has encountered serious criticism. Most often, it has been market function and market freedoms which have enjoyed priority, whereas social protection has appeared as an uncertain candidate which has only been taken into account on some occasions, but for the main part has been ignored.

Social concerns can be found in different positions with regard to the market economy:

There are social and societal goals which cannot — or cannot sufficiently — be achieved through a market economy or through the functioning of free markets. At this point, the social must be added from the outside and must be safeguarded by the introduction of its own separate rules (for example, the creation of high-quality living conditions through a variety of circumstances such as education, cultural offers, political participation, public security, and social aid).

Other social concerns are an integral part of market law. They correct the principle of freedom of contract and operate mainly with traditional contract-law and private-law means (for example, huge parts of the law of consumer contracts, and the law of unfair trade practices). To these, the new regulatory arrangements of "regulatory private law" have to be added. The realisation of a high standard of social protection, on the other hand, requires a certain wealth within the national economy and thus a satisfactory functioning of markets.

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[42] See Section 1 *supra*.

A strong gross national product alone does not create social justice, but it increases the leeway for social policy and the effectivity of legal instruments and institutions which serve the realisation of social protection and social justice.

From the close inter-relation and inter-dependency of the market and the "social", it follows that a separation between a liberal freedom-and-competition-oriented market law which is – without any model of social protection or European social model – dominated by EU law, on the one hand, and a socially-oriented market law which will mainly be left in the competence of the Member States, on the other hand, is not a viable solution. This conclusion should also apply to European private law. A European social model will certainly not emerge – or not emerge exclusively – from European consumer protection law. But in European consumer law, a development of new social protection instruments and arrangements could be initiated which could constitute – among others – a valuable contribution to the creation of such a European social model.

For European consumer protection law, this task means the following in particular:

- the necessity to improve its protection approaches, such as, for instance, the extension of protection to those consumers who are in particular need of protection (vulnerable consumers) (catch word: services of general economic interest);
- the use of more effective protection instruments, the advantages of which with regard to traditional instruments have been proven by scientific studies (catch word: contract governance);
- the improvement of the co-ordination of public and private legal protection instruments and regulatory arrangements (catch word: regulatory private law); and
- the integration of external protective concerns and contexts into consumer protection law (catch word: global social justice).

Chapter 7

National and European Fundamental Rights in European Private Law: A Shield Against the Instrumentalisation of Private Law

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1. Introduction

In the first part of his *opus magnum*, Christoph Schmid concentrates, on the one hand, on the transformation of private law on the way to a democratic constitutional state, with its observable conceptional developments (the "materialisation" of the formal law and the "neo-liberal-plural" paradigm). On the other hand, he addresses the instrumentalisation of private law for internal market integration purposes. Decisions of the ECJ have played a central role in this process, and have led Schmid to accuse the Court of commissioning market integration and endangering the normative quality of the democratically-legitimate private law of the national states.

This chapter takes an exemplary look into this criticism, by using the example of the jurisprudence on the significance of fundamental rights in private law. Both in his habilitation thesis[1] and elsewhere,[2]

* The author thanks Christian Joerges for his very helpful comments on an earlier edition of this chapter, Tobias Pinkel for his translation, and Chris Engert for his thoughtful editing.

[1] See Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010), p. 443 *et seq.*

[2] See, especially, "Vom effet utile zum effet neoliberal. Eine Kritik des neuen

Christoph Schmid looks intensively into the recognition of fundamental freedoms as fundamental rights. Schmid sees a drastic example of this in the recent ECJ decisions about employment law, in which the fundamental freedoms were seen as prevailing over national employment law and thus abridged the exercise of the right to protest, a social fundamental right.[3] I will not, however, cover these much, albeit not overly, discussed topics here. More interesting, to my mind, is the fact that fundamental rights were first introduced to Community law in the 1960s, a development which — also through provisions of the German constitutional court[4] — is mainly due to the ECJ.[5]

In the 1970s, the ECJ consolidated its appreciation of European fundamental rights as general principles of Community Law. In doing so, the Court referred to two sources of fundamental rights: the common constitutional traditions of the Member States and the European Convention on Human Rights, which is binding for the Member States.[6] This recognition of European fundamental rights was then incorporated in 1992 in the EU Treaty of Maastricht and in the following treaties.[7] At the beginning of the new century, a third

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judiziellen Expansionismus des Europäischen Gerichtshofs", in: Andreas Fischer-Lescano, Florian Rödl & Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden: Nomos, 2009); see, also, "Judicial Governance in the European Union – The ECJ as a Constitutional and a Private Law Court", in: Erik Oddvar Eriksen, Christian Joerges & Florian Rödl, *Law, Democracy and Solidarity in a Post-national Union*, (London-New York: Routledge, 2008), pp. 85-105.

[3] Case C-438/05, ITJ (*Viking Line*), [2007] ECR, I-10778; Case C-341/05, *Laval*, [2007] ECR, I-11767; Case C-346/06, *Rüffert*, [2008] ECR, 1-1989. For *Viking* and *Laval*, see Christian Joerges & Florian Rödl, "Von der Entformalisierung europäischer Politik und dem Formalismus europäischer Rechtsprechung im Umgang mit dem "sozialen Defizit" des Integrationsprojekts", ZERP-Diskussionspapier 2/2008. For *Rüffert*, see Schmid, note 1 *supra*, p. 355 *et seq*.

[4] BverfG 29 May 1974, BverfGE 37, 271 (*Solange I*).

[5] Case C-29/69, *Stauder*, [1969] ECR, 1-419.

[6] Case C-4/73, *Nold*, [1974] ECR, 491.

[7] See Article F Sec. 2 of the EU Treaty of Maastricht (OJ C 191 from 29.07.1992) "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This provision was left unchanged by the Treaty of Amsterdam (OJ C 340 from 10.11.1997). The same formulation was then adopted in Article 6 Sec. 2 of the EU Treaty of Nice (OJ c 80 from 10.03.2001).

source of European fundamental rights was added: the Charter of Fundamental Rights of the European Union, which was proclaimed at Nice in 2000,[8] and which was finally put into effect at the end of December 2009 with the EU Treaty of Lisbon.[9]

It seems to me as if the increased anchoring of fundamental rights in European Union Law could counteract, or at least curtail, the abhorrent developments described by Christoph Schmid. At any rate, the protection of fundamental rights in European Union Law seems, on paper — as *law in the books* — to be more comprehensive, more detailed and, to some extent, more advanced than in the systems of law of the Member States. However, this is not an argument against Schmid's instrumentalisation theory. It is difficult to dispute that the application of law by judges, or *law in action*, has emphasised economic freedoms.[10] In this respect, one may also speak of an instrumentalisation of fundamental rights for the functioning of the internal market.[11]

The instrumentalisation of fundamental rights through the ECJ jurisprudence is not the central subject of this chapter, however. Instead, this chapter addresses the legal-political orientation of the horizontal effect of European fundamental rights in the case law of the Member States. At the end, the question of to what extent this legal-political orientation becomes similar to a form of instrumentalisation will be discussed.

The term "horizontal effect of fundamental rights" signifies the impact of fundamental rights on the legal relationship between two private parties. The most common form of horizontal effect is the reference to fundamental rights in the grounds of a civil decision.[12]

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[8] OJ C 364/02 from 18.12.2000.

[9] OJ C 306, 17 December 2007, Treaty of Lisbon; OJ C 83, 30 March 2010, consolidated version of the EU Treaty and the Treaty on the Functioning of the EU.

[10] See Schmid, note 1 supra, p. 360 *et seq*., with further references.

[11] See, in another context, Jürgen Habermas, (2010) *Deutsche Zeitschrift für Philosophie*, pp. 343-357: "[E]ine Politik […] , die vorgibt, den Bürgern ein selbstbestimmtes Leben primär über die Gewährleistung von Wirtschaftsfreiheiten garantieren zu können, zerstört das Gleichgewicht zwischen den verschiedenen Kategorien von Grundrechten."

[12] See Aurelia Colombi Ciacchi, "Jenseits der 'Drittwirkung'. Grundrechte, Privatrecht und Judicial Governance in Europa", in: Andreas Furrer (ed.), *Europäisches Privatrecht im wissenschaftlichen Diskurs*, (Bern: Stämpfli, 2006), pp. 231-

In 2010, a comparative analysis of the horizontal effect of fundamental rights in both the literature and the civil jurisprudence in Germany, England, France, Italy, the Netherlands, Poland, Portugal, Spain and Sweden was released — almost simultaneously with Christoph Schmid's book. The aforementioned analysis was the ZERP project entitled "Fundamental Rights and Private Law in the European Union", which was co-ordinated by Gert Brüggemeier, Giovanni Comandé and myself.[13]

This chapter will summarise some of the findings of this project. Thereby, I will attempt to analyse these findings from the point of view of the instrumentalisation of fundamental rights in European private law and in the light of Christoph Schmid's ideas.

2. European Fundamental Rights in Their Horizontal Application by Civil Courts of the Member States

The first step of the research project entitled "Fundamental Rights and Private Law in the European Union" was to collect civil rulings from German, English, French, Italian, Dutch, Polish, Portuguese, Spanish and Swedish courts which used fundamental rights as a basis of their argumentation. Cases of direct horizontal effect were considered, in which a civil legal consequence was directly based upon a fundamental right, as well as cases of indirect horizontal effect, in which a civil legal consequence arose from a fundamental-right-based interpretation of a civil norm or doctrine.[14]

This collection of horizontal-effect rulings was first organised by civil law topics. The main pillars in this topic-based model were contract law, tort law, family law, and property law.[15] In order to ease the comparative search and analyses, a summary in English and a set of

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[13] Gert Brüggemeier, Aurelia Colombi Ciacchi & Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union*, vol. 1*: A Comparative Overview;* vol. 2*: Comparative Analyses of Selected Case Patterns*, (Cambridge: Cambridge University Press, 2010).

[14] The subject matter and methodology of this project are explained by Gert Brüggemeier, Aurelia Colombi Ciacchi & Giovanni Comandé, in the "Introduction", in: Brüggemeier *et. al,* vol. 1, note 13 *supra*, pp. 1-7.

[15] On the four pillars of contract, tort, property, and family, see Brüggemeier *et al.*, note 13 *supra*, vol. 1, pp. 1-7, at 4.

organisational keywords were created. One of the keywords was the fundamental right which the case in question covered.

This made it possible to bring out the fundamental rights that were found to be applied horizontally in many, if not all, of the nine countries. These are, most notably, the following five fundamental rights:

1. the right to life;[16]
2. the right to privacy and free development of the individual;
3. freedom of opinion and information;
4. property and possession;
5. equal treatment or non-discrimination.

These fundamental rights are also European fundamental rights, because they are found in the ECHR[17] as well as in the Charter of Fundamental Rights,[18] and are a part of the common constitutional traditions of the Member States.

The first four of the aforementioned five fundamental rights (life, privacy, freedom of opinion, and property) are classic civil liberties or human rights of the first generation. They fit into what Christoph Schmid calls the "liberal paradigm".[19] In contrast, the fifth fundamental right, non-discrimination, fits into what Christoph Schmid calls the "material paradigm".[20]

When these five fundamental rights have horizontal application in civil jurisprudence, their reference to the three paradigms of private law — liberal, material and procedural — becomes considerably more complex. On the one hand, cases with horizontal effect of fundamental rights show what Christoph Schmid described as the

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[16] This fundamental right is only mentioned first because it is the highest-ranked. It is applied much less in civil cases than the other four fundamental rights.

[17] In the ECHR, see Article 2 (the right to life), Article 8 (the right to respect of private and family life), Article 10 (freedom of expression), Article 14 (the prohibition of discrimination). Property and possession are protected in Article 1 of the first protocol of the ECHR.

[18] In the charter, see Article 2 (the right to life), Article 7 (respect of private and family life), Article 11 (the freedom of expression and information), Article 17 (the right to property), and Article 21 (non-discrimination).

[19] Schmid, note 1 *supra*, p. 18 *et seq*.

[20] *Ibid*., p. 25 *et seq*.

overlapping of the legal paradigms.[21] On the other hand, it is not to be overlooked that the liberal, classical civil liberties, in particular, are applied horizontally by civil courts in order to protect weaker parties or to achieve a materialisation of private law.[22] This even happens in the post-welfare, neo-liberal United Kingdom. In 2004, the English Court of Appeal referred to the right of possession in Article 1 of the first protocol of the ECHR (the right to the peaceful enjoyment of one's own possessions), in order to protect a tenant from eviction by his landlord.[23]

It stands to reason that the horizontal effect of fundamental rights in the civil jurisprudence of the Member States does not depict a neutral legal-political phenomenon. This point is discussed in further detail in the following section.

3. Legal-Political Trends of the Horizontal Effect of Fundamental Rights

If one were to attempt to systematise the different legal-political trends that seem to result from the constellations of the horizontal effect of fundamental rights in Germany, England, France, Italy, the Netherlands, Poland, Portugal, Spain and Sweden, then one would recognise (above all) six tendencies:

3.1. Protection of the Weaker Party in Contract Law

The first tendency is the protection of weaker parties, or rather, the correction of unequal levels of power in contract law. The courts consistently fall back upon fundamental rights in order to protect the interests of employees against employers, small businesses against bigger corporations, patients against doctors, hospitals, *etc.*, more than they would be protected by an ordinary application of private law.[24]

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[21] *Ibid.*, p. 77 *et seq.*

[22] On this in detail, see Aurelia Colombi Ciacchi, "Social Rights, Human Dignity and European Contract Law", in: Stefan Grundmann (ed.), *Constitutional Values and European Contract Law*, (Alphen a.d. Rijn: Kluwer Law International, 2008), pp. 149-160 with further references; Colombi Ciacchi, "The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice", (2006) 2 *European Review of Contract Law*, pp. 167-180, at 175 *et seq.*, with further references.

[23] *Shaws (EAL) Ltd* v *Walbert Pennycook* [2004] EWCA Civ 100, [2004] Ch 296; [2004] 2 All ER 665.

[24] Colombi Ciacchi, "The Constitutionalization of European Contract Law", note 22

Through this special emphasis on the interests of weaker parties on the part of judges in the consideration of colliding interests and fundamental-rights positions, an attempt is made to compensate for structural inequalities in the bargaining abilities and socio-economic relations of private individuals.[25] This fits, without doubt, into the material paradigm: the socially dissatisfying consequences of a formal application of contract law are being corrected by new, material interpretations which take the actual socio-economic situation of the contractual parties into account. Indeed, it would also be theoretically possible to achieve these new interpretations without falling back upon the fundamental rights. However, the use of the fundamental-rights argumentation offers two important advantages. First, it creates a new doctrine of civil law which deviates from the consolidated jurisprudence, is more legitimate, and is protected from non-fundamental-rights argumentation. Second, through the reference to fundamental rights, it is made clear that, in the handling of conflicting fundamental rights between private parties by the legislation and jurisprudence to date, the interests of one party were cut too short, which is why an adjustment is now necessary.[26]

3.2. The Fight against Discrimination

The second legal-political tendency with regard to the horizontal effect of fundamental rights is the reduction of discrimination. Since the end of World War II, courts have been using fundamental rights to a large degree in order to counter unequal treatment (for example, between men and women,[27] Jews and Christians,[28] children born

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supra, pp. 167-180, at 175 *et seq*., with further references; Chiara Perfumi & Chantal Mak, "The Impact of Fundamental Rights on the Content of Contracts: Determining Limits to Freedom of Contract in Family and Employment Relations", in: Brüggemeier *et al*., vol. 2, note 13 *supra*, pp. 33-75 with further references; Maria Gagliardi & Anna Sukhova, "Contractual Duties of Care, Confidence and Co-operation in the Context of Fundamental Rights and Constitutional Principles", in: *ibid*., pp. 7-108 with further references.

[25] See Aurelia Colombi Ciacchi, in the "Concluding Remarks", in: Brüggemeier *et al*., vol. 2, note 13 *supra*, pp. 421-437, at 427.

[26] See Aurelia Colombi Ciacchi, "Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships", (2005) 13 *European Review of Private Law*, pp. 285-308.

[27] Hans Carl Nipperdey, RdA 1950, 121-128 ("Gleicher Lohn der Frau für gleiche Leistung"). For the Italian jurisprudence, see Cassazione 25 September 2002 No. 13942, Dir. e giust. 202, 32 m. Anm. Grassi.

[28] See, in France, Tribunal de la Seine 22 January 1947, D 1947, 126: The court found a clause of a testament which eliminates rights to inheritance for a person who marries

within wedlock and out of wedlock,[29] and homosexuals and heterosexuals[30]).

On the one hand, one could see the fight against discrimination in private law matters as a materialisation of private law:[31] the formalistic understanding of freedom and equality is, at least partially, replaced by a material understanding, which recognises and attempts to compensate for human lack of freedom and inequality. On the other hand, anti-discrimination policy is completely compatible with neo-liberal market liberalism and with a non-solidarity society, as Alexander Somek convincingly argued.[32]

3.3. Economic Upgrade of the Interests of the Individual, and Social Equality in Tort Law

Usually, the horizontal application of fundamental rights in tort law serves the purpose of enabling or bettering the ability to compensate for damages to the person. Here, damages to the person means injuries to the body, health or personality, instead of conventional property damages.

Consequences in tort law due to infringements of one's personality rights (including privacy) are the most frequent cases of the horizontal effect of fundamental rights in German, English, French, Italian, Dutch, Portuguese, Polish, Spanish and Swedish law.[33] In this

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a Jew to be invalid because of a violation of public policy (Art. 900 Code Civil). Here, the term public policy was interpreted in the light of the French Constitution of 1946. For this, see Christoph Herrmann & Chiara Perfumi, "National Report on France", in: Brüggemeier *et al.*, vol. 1, note 13 *supra*, pp. 190-252, at 218 *et seq.*

[29] See, in Portugal, Tribunal Constitucional Ac. TC 99/88 DR, II série, 22 August 1988. For this, see Gisela Kern, "National Report on Portugal", in: Brüggemeier *et al.*, vol. 1, note 13 *supra*, pp. 547-609, at 577 *et seq.*

[30] *I.e.*, in *Ghaidan* v *Godin-Mendozy*, [2004] UKHL 30. The House of Lords affirmed a right of abode of the spouse of a man after his death based upon a new interpretation of the Rent Act of 1977 in the light of Articles 8 and 14 ECHR. For this, see Chiara Favilli & Nuno Ferreira, "Different Legal Treatment of Married and Unmarried Couples in the European Union", in: Brüggemeier *et al.*, vol. 2, note 13 *supra*, p. 374, at 349 *et seq.*

[31] For material private law, see Schmid, note 1 *supra*, p. 27 *et seq.*, with further references.

[32] Alexander Somek, "Das europäische Sozialmodell: Diskriminierungsschutz und Wettbewerb", [The European Social Model: Protection against Discrimination and Competition], (2008) *Juridikum*, pp. 118-125.

[33] See Joanna Krzeminska-Vamvaka & Patrick O'Callaghan, "Mapping out a Right to

way, the economic value of personal interests that were not, or were only limitedly, compensatory in preconstitutional tort law has been recognised.

Other damages which have gained relevance through the horizontal effect of fundamental rights are non-property damages caused by bodily or health infractions. In Germany, this has resulted in further liability only very rarely: using the constitutional protection of personality allowed, for instance, compensation to be granted to people who could no longer feel pain (because of damage to the nervous system) owing to the tortious act.[34]

In Italy, the consequences of this tendency went much further. This is due to two revolutions in liability law. The first was the recognition of compensation for bodily and health damage *per se*, completely independent of the existence of economic loss.[35] This principle, according to a judgment of the Italian *Corte Costituzionale* of 1986, follows the constitutionally-anchored fundamental right to health (Article 32 *Costituzione della Repubblica Italiana*).[36] However, thoughts on social equality and personal dignity also fostered this doctrine: it was found to be unjust and incompatible with the equality of all persons if, for example, two school children were injured by the same unlawful act, and the parents of one belonged to the upper class while those of the other belonged to the working class, and compensation was awarded differently based upon their future income potentials.[37]

Privacy in Tort Law", in: Brüggemeier *et al.,* vol. 2, note 13 *supra*, pp. 111-164; Aurelia Colombi Ciacchi, in: *ibid*., pp. 421-437, at 423 *et seq*.

[34] See BGH 13 October 1992, BGHZ 120 1 = NJW 1993, 781 with note Erwin Deutsch = JZ 1993, 516 with note Dieter Giesen (Compensation because of a brain injury caused by a doctor's mistake, which is equal to destruction of personality). For a re-interpretation of monetary compensation as civil compensation, see Gert Brüggemeier, *Haftungsrecht. Struktur, Prinzipien, Schutzbereich: Ein Beitrag zur Europäisierung des Privatrechts*, (Berlin-Heidelberg-New York: Springer, 2006), p. 575 *et seq*.

[35] Gert Brüggemeier advocates compensation for personal damages (injuries to physical or mental integrity that cannot be restituted); see Brüggemeier, *Haftungsrecht. Struktur, Prinzipien, Schutzbereich: Ein Beitrag zur Europäisierung des Privatrechts*, note 34 *supra*, p. 557 *et seq*.

[36] *Corte Costituzionale* 14 July 1986 No. 184, Foro it. 1986 I 2053 with note by Giulio Ponzanelli.

[37] This argument was triggered by the "Gennarino" case during the 1970s: When the child of a simple worker was the victim of an accident, the Milan court (Trib. Milano

In Italian literature and jurisprudence, this doctrine was called *danno biologico* (biological damage).[38] This is the most frequent and also most known constellation of the horizontal effect of fundamental rights in Italian civil jurisprudence.[39]

Finally, the second revolution was brought about by jurisprudence of the highest Italian judges: the principle overcoming of the traditional legal system of very limited compensation of non-material damages. With a set of decisions in 2003, the *Corte di Cassazione* (the Supreme Court) and the *Corte Costituzionale* (the Constitutional Court) created a new principle, which states that all violations of fundamental rights establish a right, *per se*, to compensation.[40]

The principle of *per se* compensation of violations of fundamental rights has the potential to become a pan-European principle of law.[41] One could see it as a national level equivalent to effective remedy in the case of human-rights violations according to Article 13 ECHR. At any rate, all of the aforementioned developments of Member State jurisprudence show a materialisation of tort law. As in contract law, the horizontal effect of fundamental rights opens the door to a more

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18. January 1971) calculated the extent of the compensation based upon the assumption that the child would pursue the same career as his father. This decision was heavily criticised as class justice. See Annamaria Galoppini, "Il caso Gennarino, ovvero quanto vale il figlio dell'operaio", (1971) *Democrazia e Diritto*, p. 255, who provocatively asks how much a worker's child is worth.

[38] For this, Francesco Busnelli, *Il danno biologico. Dal "diritto vivente" al "diritto vigente"*, (Turin: Giappichelli, 2001); Guido Alpa, *Il danno biologico. Percorso di un'idea*, (Padua: Cedam, 2003).

[39] For the "Europeanisation of danno biologico", or rather for the relation between this doctrine and the tort law provisions of the Draft Common Frame of Reference (DCFR), see Gert Brüggemeier, "Gemeinsamer Referenzrahmen (Entwurf), Buch VI: 'Außervertragliche Haftung für die Schädigung anderer' – eine kritische Stellungnahme", in: H.-J. Ahrens, C. von Bar, G. Fischer, A. Spickhoff & J. Taupitz (eds), *Medizin und Haftung: Festschrift für Erwin Deutsch zum 80. Geburtstag*, (Berlin-Heidelberg: Springer, 2009), pp. 749-768.

[40] Cass. 31 May 2003 No. 8827 and 8828; Corte cost. 11 July 2003 No. 233, Foro it. 2003 I 2201. For this, Giulio Ponzanelli (ed.), *Il "nuovo" danno non patrimoniale*, (Padua: Cedam, 2004).

[41] In the Draft Common Frame of Reference, a *per se* damage (injury, as such, Article 6:204 DCFR) can also lead to compensation in cases other than violations of fundamental rights. For a commentary on this norm, see Christian von Bar (ed.), *Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab. Dam.)*, (Munich: Sellier European Law Publishers, 2009), pp. 986-990.

flexible and better consideration of social and human needs in the application of private law.

3.4. Control of the Power of the Media

A fourth legal-political dimension of the horizontal effect of fundamental rights is seen in cases of conflict between personality rights, on the one hand, and freedom of opinion and information, on the other.[42] This is, as already stated, the most common constellation of the horizontal effect in Germany, England, France, Italy, the Netherlands, Poland, Portugal, Spain and Sweden.[43]

Here, the falling back on fundamental rights serves not only the materialisation of private law: the plural-procedural paradigm also plays a role in this constellation. On the one hand, it is a matter of protecting the constitutionally-safeguarded interests of natural persons from abuses of power by non-state actors (the media). On the other hand, it is also an issue of procedural control of processes considered political in a broad sense: with their decisions, the courts help to define the borderline between private and public matters, or, rather, determine some rules of the political discourse.

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[42] The most known cases in German are BGH 29 June 1990, *GRUR* 1999, 1034 (Magazine article about the Prince of Hanover's affairs and divorce: weighting the fundamental right to freedom of opinion according to Art. 5 Sec. 1 GG against the general personality right according to Art. 1 Sec. 1, Art. 2 Sec. 1 GG); in England, *Campbell* v *MGN Ltd* [2004] UKHL 22 (Magazine article about Naomi Campbell's drug addiction: weighting of the human right of privacy according to Article 8 ECHR against the human right of information according to Art. 10 ECHR); in France Cass. 14 December 1999, D 2000; 372 with note Beigner (release of a book with details about Mitterand's illness: weighting of the right of freedom of opinion according to Art. 10 ECHR against the right to privacy according to Art. 8 ECHR and Art. 9 *Code Civil*); In Italy Cass. 20 April 1963 No. 990, Foro it 1963 I 877 (release of "juicy" details about Mussolini's lover Clara Petacci and her family: the granting of compensation because of violation of the fundamental right to free personality development according to Art. 2 of the Italian Constitution); in Portugal, STJ 19 November 2002 No. 02A2028, http://www.stj.pt (release of true but reputation-damaging facts about a famous lawyer: weighing the fundamental right of freedom of opinion and information according to Article 37 Portuguese constitution against the fundamental right to reputation, honour, and own image according to Articles 25 & 26 Portuguese Constitution).

[43] See note 31 *supra*.

3.5. The Exercise of Political Rights in Privately Managed Spaces

A fifth legal-political dimension of the horizontal effect of fundamental rights offers an even stronger characterisation through plural-procedural elements: the exercise of political rights in spaces that are private property but which are also open to the public. In multiple European states, courts are often confronted with suits by people who were banned by the operators of shopping centres, sports stadiums or airports for handing out flyers or practising other forms of political activism.[44] This is, primarily, a matter of setting the borderline between the private and the public, and the rules of the political discourse.[45]

3.6. Environmental Protection

Environmental protection is a sixth legal-political dimension of the horizontal application of constitutional principles. In many European countries, constitutional rules were applied along with private law instruments, especially property law, to protect the owners and users

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[44] In Germany, BGH NJW 2006, 1054 (protests against the German deportation practice on the premises of Fraport AG), for this, Andreas Fischer Lescano & Andreas Maurer, "Grundrechtsbindung von privaten Betreibern öffentlicher Räume", (2006) 59 *Neue Juristische Wochenschrift*, pp. 1394-1396. A political activist filed a constitutional complaint against this BGH decision, where famous Frankfurt professors Günter Frankenberg and Gunther Teubner were delegated for the process. On 22 February 2011, the BVerfG decided this case in favour of the complainant. It held the prohibition of political demonstrations issued by Fraport AG to be disproportionate and it declared the inconstitutionality of the BGH decision which considered this prohibition lawful. A classic case of mall litigation, which dealt with the handing out of flyers for a citizens' initiative in an English shopping centre, even required the intervention of the European Court of Human Rights: *Appleby* v *United Kingdom*, (2003) 37 *European Human Rights Report*, p. 38. For this, see Oliver Gerstenberg, "What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech, and The Influence of Constitutional Norms on Private Law", CES Working Paper, no. 110 2004, and (2004) XVII *Canadian Journal of Law and Jurisprudence*, pp. 61-81; *idem*, "Private Law and the New European Constitutional Settlement", (2004) 10 *European Law Journal*, pp. 766-786. In Italy, see Trib. Verona 7 July 1999, *Il diritto dell'informazione e dell'informatica* 1999, VI, 1059 (distribution of political flyers in a shopping centre). In Sweden, see NJA 1971, 571; in Spain, STS 7 November 2001, RJ 2001/1025. See Jana Gajdosova & Stathis Banakas, "Private Property, Public Access and the Access to Information – A Comparative Analysis", in: Brüggemeier *et al.*, vol. 2, note 13 *supra*, pp. 281-297.

[45] See Gerstenberg, "What Constitutions Can Do", note 44 *supra*, and *idem*, "Private Law", note 44 *supra*.

of land and the environment itself from harmful emissions.[46] According to Christoph Schmid's terminology, this legal-political dimension of the horizontal effect of fundamental rights also shows a material and a plural component.

4. Legitimate Legal Policy or Fundamental Rights Instrumentalisation?

The legal-political elements of the section above do not represent a complete list. One could insert even more examples. However, for the purpose of this chapter this is not necessary. The question is, now, whether, and, if so, to which extent, the falling back on fundamental rights in a horizontal effect in order to achieve legal-political goals in private law represents an instrumentalisation of fundamental rights.

The understanding of fundamental rights which underlies this article is based upon a legal-philosophical approach which Dietmar von der Pfordten calls "normative individualism".[47] According to this approach, legal and political decisions are to be justified in the last instance by reference to the specifically concerned individuals. What matters are the single individuals and their concrete wishes, interests and aims. Normative individualism is, therefore, the diametrical opposite of normative collectivism, according to which legal and political decisions should be justified by reference to some form of a collective, be it the state, society, the economy, a societal sub-system, *etc*.[48]

This chapter takes a stand for normative individualism and against normative collectivism. It follows the idea of the classic, personalist fundamental-rights concept of the Enlightenment and not that of the

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[46] See, already, Salvatore Patti, *La Tutela Civile dell'Ambiente*, (Padua: Cedam, 1979). For a detailed comparative study of this topic, see Barbara Pozzo (ed.), *Property and Environment*, (Bern: Stämpfli, 2007). See, also, Maria Dolores Sánchez Galera & Judith Zehetner, "Action against Emissions: Fundamental Rights and the Extension of the Right to Sue in Private Nuisance to Non-owners", in Brüggemeier *et al.*, note 13 *supra*, pp. 298-321.

[47] Dietmar von der Pfordten, "Normativer Individualismus und das Recht", (2005) 60 *Juristenzeitung*, pp. 1069-1080. For the other descriptions in which the main thought of normative individualism emerges ("humanism", "legitimatory individualism", "subjectism", "self-determination", "autonomy", "individuality", "individual value", "individual", *etc.*), see, *ibid.*, p. 1069 with further references.

[48] *Ibid.*, p. 1069 *et seq*.

sociological system-theory interpretation of fundamental rights as impersonal institutions. According to the former concept, fundamental rights were originally and essentially private, subjective-individual rights which operate *erga omnes* and protect the individual against excesses of power by public and private entities.

At the time of the Enlightenment, fundamental rights were conceived as instruments protecting the individuals not only against the state, but also against the *pouvoirs intermédiaires* of the *ancien régime*, *i.e.*, corporations. This function of fundamental rights is more contemporary than ever. Today, we live in a sort of new medieval era, after the crisis and/or transformation of national states and their regulations. This new medieval era is denoted by an ever-intricate growth of public and private forms of regulation that are in complex correlation with each other. Thus, today, we need even more urgently fundamental rights that operate as *erga omnes* rights which protect every single individual against all public and private powers, rule makers, corporations, functionally differentiated societal sub-systems, anonymous matrices[49] and others.

This shows that the more closely a fundamental-rights argumentation comes to the fundamental interests of the individual, the more convincing and legitimate the argumentation becomes. To this extent, the legal-political orientation of the horizontal effect of fundamental rights is legitimate and is not an instrumentalisation, as long as the horizontal effect strengthens the consideration of the fundamental interests of the individual concerned.

This is actually the case in the aforementioned constellations of the horizontal effect of fundamental rights at national level. Despite its use (also) for purposes of the materialisation of private law, despite its plural and procedural dimension, this effect normally leads to a better, stronger consideration of the fundamental interests of the private individual. These interests, *i.e.*, the actual self-determination of weaker contractual parties, or the vital interests of political activists in "mall litigation" cases, were not adequately considered before their breakthrough in the respective private law cases. The interests of the counterparties, however, such as the economic

[49] See Gunther Teubner, "Die anonyme Matrix: Zu Menschenrechtsverletzungen durch 'private' transnationale Akteure", (2006) *Der Staat*, pp. 161-187.

freedom of banks, were already adequately protected by the private law *instrumentarium*. Thus, some fundamental rights were favoured by private law with no compelling reason, while other fundamental rights were neglected. It is precisely this which has been corrected by the horizontal effect of fundamental rights. Courts have used the horizontal effect of fundamental rights to protect individuals whose interests had not been fought for by a powerful lobby at legislative level.

In summary, it must be noted that the horizontal effect of fundamental rights is not legal-politically neutral. Yet, the legal-political orientation of this horizontal effect in the case law of national civil courts (at least, in all the cases which I have analysed) has not depicted an illegitimate instrumentalisation of fundamental rights. In fact, in these constellations, the genuine content of the fundamental rights and the fundamental interests of individuals has been actualised. The horizontal application of fundamental rights by the courts of the Member States is, therefore, a very positive phenomenon.

This stress of the advantages of the horizontal effect of fundamental rights in national jurisprudence is not, however, a defence of the flawed horizontal application of fundamental rights in the ECJ decisions in *Viking, Laval*, and *Rüffert*.[50] This case law made the freedom of enterprise into a fundamental right which is not only equal to social fundamental freedoms, but one which also prevails *over* them.[51] On this point, this chapter shares the same view as Christoph Schmid's analyses and criticism.[52] It would be desirable for the European judiciary to let itself be inspired by Schmid's book and come to a mature, tactful horizontal application of fundamental rights, in the light of the case law of civil courts of the Member States.

[50] See note 1 *supra*.
[51] See Alexander Somek, note 32 *supra*, pp. 118-125.
[52] Schmid, note 1 *supra*, p. 350 *et seq.*, with further references.

Chapter 8

Codification without Democracy? On the Legitimacy of a European (Optional) Code of Contract Law

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1. Introduction

In the continuing debate on the Europeanisation of private law,[1] there is growing concern about the legitimacy of some initiatives taken by the European Commission. The most important of these initiatives has been invoked by the recently published Draft Common Frame of Reference of European Private Law (DCFR).[2] In its 2010 Green Paper on European Contract Law, the European Commission asks how this academic DCFR can be used to develop the internal market further by turning the Draft into a "political" instrument. The Green Paper sketches seven policy options, including a regulation setting up an optional instrument of European contract law, a directive or regulation on European contract law, and even a regulation establishing a European Civil Code.[3] Although the choice of the preferable policy option is still open, the Green Paper makes it clear

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[1] See, for a stimulating and insightful account of the Europeanisation process in the field of private law, Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung*, (Baden-Baden: Nomos, 2010).

[2] Christian von Bar & Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, (Munich: Sellier, 2009).

[3] Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses, COM (2010) 348 final.

that the idea of a European code for (parts of) private law is still on the agenda of the Commission. This contribution asks what the legitimacy of such a code could be. I focus on the idea of an optional contract code, not only because this is the most likely policy option to be chosen by the Commission,[4] but also because such a code is the most interesting alternative from the viewpoint of legitimacy: I will argue that an optional contract code does not have to satisfy the traditional democratic requirements that national civil codes have to meet. But my argument is broader than this: it also seeks to put into perspective the idea that the whole of private law needs to pass through democratic procedures in order to be legitimate.

It seems appropriate to start this chapter with a brief survey of the functions of codification (Section 2). The survey will show that one of these functions is, at least historically, to make the prevailing law state law and therefore to subject it to a democratic process at national level. However, in a postnational world, not all the rules that are important in establishing the parties' rights and obligations are *in fact* any longer democratically legitimated, nor do they *need to be* any longer legitimated through national parliaments. The general background to the need to develop alternative forms of legitimacy is sketched in Section 3. This opens the way for a discussion of the legitimacy of civil codes, and, in particular, of a European optional code (Section 4).

2. Three Functions of Codification

The first question addressed in this chapter is what the main reasons for codifying private law (or law in general) are. Following the classical distinction made by Jean Maillet,[5] three different functions of codification can be distinguished. They offer insight into the fundamental question of why one would like to lay down the law in a comprehensive set of rules issued by the state. Although the functions identified by Maillet are particularly important to understand the coming into being of European codifications in the

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[4] See Jim Brunsden, "Call for single contract law system", *European Voice* 17 June 2010.

[5] Jean Maillet, "The Historical Significance of French Codifications", (1969-1970) 44 *Tulane Law Review*, p. 681 *et seq*. This does not, of course, mean that codification could not also have other functions.

nineteenth century, they are also useful to understand the present efforts to codify the existing law.

The first function of codification is to *expose* the law, in order to present the existing or desired law in a comprehensive, rational and systematic way. The reason behind this aim of codification is undoubtedly to enhance the accessibility and predictability of the law. When Jeremy Bentham famously wrote the following: "A complete digest: such is the first rule. Whatever is not in the code of laws, ought not to be law. Nothing ought to be referred either to custom, or to foreign law, or to pretended natural law, or to pretended laws of nations",[6] he precisely sought to remedy that law was not accessible to everyone in his time. To promote this (in Bentham's words) "cognoscibility" of the law was also one of the main reasons behind the enactment of the *code Napoléon* (which is clearly visible if one visits Napoleon's tomb in Paris, where the ornament devoted to the *code civil* emphasises two things: the "*simplicité*" of the *code* and the fact that the law had now finally become "*intelligible pour tous*"). But even in present times, this motive is still important: when the Dutch enacted the main part of their new Civil Code in 1992, one of the main reasons for this was to make the whole of Dutch private law consistent again.[7] And the present debate about the future of European contract law is primarily initiated by the concern of the European Commission that the present *acquis* is too fragmentary and therefore needs to be reorganised in a more coherent way.[8]

The second function of codification is, at least historically, to *unify* the law. This unification aimed to achieve two different things. On the one hand, codification often sought to eliminate territorial diversity, abolishing diverging laws within one country. The main reason for this type of unification is to serve the economic good: unification of

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[6] Jeremy Bentham, "General View of a Complete Code of Laws, 1802", in: John Bowring (ed.), *The Works of Jeremy Bentham*, (Edinburgh: W. Tait, 1839), p. 205.
[7] J.H.A. Lokin & W.J. Zwalve, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 3rd ed. (The Hague: Boom Juridische Uitgevers, 2006).
[8] This motive can already be found in the first Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final. See, most recently, the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses, COM (2010) 348 final.

law would promote trade. This motive cannot only be seen in the codifications of the nineteenth century, it is still used today. In the recently published draft for a comprehensive codification of Chinese private law, it is admitted that the present situation in China is not ideal: separate regulations on General Principles of Civil Law, Contract Law, Law of Real Rights, Marriage Law, Adoption Law and Inheritance Law lead to co-ordination problems that are supposed to endanger the needs of the market economy, in particular on a more and more unified national market.[9] The European Commission uses the same motive when it spells out the need for a more uniform contract law in order to enhance the European economy, no doubt prompted to do so by the only limited competence of Article 114 of the Treaty on the Functioning of the European Union. On the other hand, codification served in the past also as a way to unify the status of people. In particular, the *code Napoléon* explicitly aimed to create equality among citizens by abolishing the existing privileges for the nobility and clergy (which is the reason why the *code civil* is sometimes described as the true constitution of France[10]).

The third function of codification lies in the desire of the national legislature to modify the nature of the law itself: the prevailing laws were no longer to be based upon custom (as in feudal law), on foreign law (such as Roman law), on religious law (such as canon law) or upon "pretended natural law" (as Bentham put it). Instead, law became the product of the nation state, and, therefore, a democratic thing. The main concern here was one of legitimacy: by requiring that law be passed through the national parliaments, the citizens who were subject to the prevailing rules also became their authors.

It is clear that all these three functions still play a role today when states decide to codify their law. But one can very well call into question whether each of these functions is still met in the best possible way by making use of the instrument of codification. Thus, it is an open question as to whether codification can still fully satisfy the function of making the law both accessible and predictable. Today's law is increasingly characterised by a plurality of sources

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[9] Liang Huixing (ed.), *The Draft Civil Code of the People's Republic of China: English Translation*, (Leiden: Martinus Nijhoff, 2010), Preface.

[10] The reference is to Jean Carbonnier, *Droit civil: Introduction*, 20th ed. (Paris: Dalloz 1991), p. 123: "le Code civil reste la constitution la plus authentique du pays."

that can never be fully grasped in one systematic codification.[11] Also when it comes to the needs of the European economy, a traditional codification may no longer be appropriate. It may be true that a uniform law on the territory of one state is conducive to the economy of that state, but it is much disputed as to whether the same is true for the European or global economy: the debate about the exact relationship between uniform law and interstate trade is likely to continue.[12] In the remainder of this chapter, I will discuss the third function of codification and ask whether the present state of Europeanisation and globalisation stand in the way of ensuring the legitimacy of law. If the function of codification is to make the prevailing law state law, it should, after all, be questioned as to whether achieving this aim is still possible at the present time and what alternative there could be to this.

3. Beyond State Law: On Rules without National Democratic Legitimacy

Before I return to the European codification process, it seems useful to adopt a somewhat broader view and to ask what precisely are these rules not made by the national political institutions, but which are still relevant in establishing the parties' rights and obligations, especially in the law of contract. Next to the rules of the national legislatures and courts, we now have at least three other types of actors involved in the making of private law.[13]

First, private law is increasingly a product of supranational law makers. The most important example in the context of private law is the United Nations Convention on Contracts for the International Sale of Goods (CISG). In the almost seventy-five countries that have

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[11] Jan M. Smits, "The Complexity of Transnational Law: Coherence and Fragmentation of Private Law", in: *Netherlands Reports to the Eighteenth International Congress of Comparative Law*, (Antwerp: Intersentia, 2010), pp. 113-130.

[12] See Jan Smits (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives*, (Groningen: Europa Law Publishing, 2005), Stefan Vogenauer & Stephen Weatherill (eds), *The Harmonisation of European Contract Law*, (Oxford: Oxford University Press, 2006), and Gary Low, "How and Why We Are (Not) Bothered by the Costs of Legal Diversity: A Behavioural Approach to the Harmonization of European Contract Law", (2010) 18 *European Review of Private Law*, pp. 285-305. See Schmid, note 1 *supra*, p. 299.

[13] The following is based upon Jan M. Smits, "Democracy and (European) Private Law: a Functional Approach", (2009) 2 *European Journal of Legal Studies*, pp. 26-40.

adopted the CISG, a new contract law regime has come into existence *next to* the set of rules on national contract law. This means there is no longer one uniform and coherent contract law for the entire national territory, and that it depends on the transactions involved (and on whether the parties have excluded the applicability of the convention or not), and which legal regime (with its own rules, rationality and mode of interpretation) applies.

Second, we are witness to the rise of a "private global norm production".[14] On the one hand, norms and policy decisions are no longer being made by national states alone, but by other actors as well. Apart from organisations such as the International Monetary Fund and the World Bank, the activities of the World Trade Organization, in particular, can have an important impact on the conduct of private parties, more specifically, on the issues of free trade, taxes, intellectual property and the protection of health. On the other hand, various types of voluntary law,[15] such as norms adopted by corporate networks (the most important example being codes of conduct for corporate social responsibility [CSR] or environmental responsibility), rules of standardisation organisations for technical standards (such as the "*codex alimentarius*") and other types of self-regulation, also influence the conduct of private parties. These norms beyond the nation state[16] would not be recognised as binding in a traditional conception of the law because they do not meet the formal criterion of being enacted by the relevant authorities and backed by coercive power. But they often do set the norms for specific groups of people, and are, therefore, important in predicting their behaviour: in this sense, they are often more important as a source of private law than rules that are formally binding.[17]

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[14] Gunther Teubner, "Breaking Frames: The Global Interplay of Legal and Social Systems", (1997) 45 *American Journal of Comparative Law*, p. 149 *et seq.*, at 157.

[15] See Anne-Marie Slaughter, "International Law in a World of Liberal States", (1995) 6 *European Journal of International Law*, p. 503 *et seq.*, at 518.

[16] Gráinne de Búrca, "Developing Democracy beyond the State", (2009) 46 *Columbia Journal of Transnational Law*, p. 101 *et seq.*, at 104.

[17] For a general account of private law beyond the nation state, see Ralf Michaels & Nils Jansen, "Private Law Beyond the State? Europeanization, Globalization, Privatization", (2006) 54 *American Journal of Comparative Law*, pp. 843-890, Nils Jansen & Ralf Michaels, "Private Law and the State", (2007) 71 *Rabels Zeitschrift*, pp. 345-397 and the special issue of the (2008) 56 *American Journal of Comparative Law*, pp. 527-843.

A third actor involved in the making of private law is the European Union. Over the last twenty years, the European legislature issued almost twenty directives in the field of private law, which have all been implemented by the (now) twenty-seven Member States.[18] These formally binding rules are accompanied by several sets of soft law, which were prepared with the support of the European Commission. The DCFR is now the most important example.[19] These rules were prepared with a view to their future application by private parties, legislatures and courts.

Apart from the emergence of these three types of non-national actors setting the rules for private parties, I should mention that the legitimacy of national law is also affected in a different way. This is the possibility for citizens to choose their "own" law. Within the limits established by private international law (which usually requires some connection between the parties, or between their activities, and the designated state[20]), people are often able to choose the law that suits their interests best. This has led to a "law market"[21] that is already very real in some areas (such as commercial, corporate, tax and contract law). This phenomenon is also a challenge for the democratic character of law: if the citizens of one state can choose the law of another state, the close connection between the *establishing* of a rule and the *applicability* of that rule disappears.

When confronted with this production of norms beyond the nation state, one can argue in two different directions. First, one can argue that there is a need to *domesticate* these rules by making them part of national law. Second, one can accept the need to find the legitimacy of these rules in *another* source than that of the national state. In my view, the latter is the preferable option: not only is the authority of the aforementioned norms independent of the state, but this authority is also not exercised within clearly defined territorial entities. Instead, the relevant rules are often both chosen and applied

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[18] See, for a recent overview, for example, Reinhard Zimmermann, "The Present State of European Private Law", (2009) 57 *American Journal of Comparative Law*, p. 479 *et seq.*
[19] von Bar & Clive, note 2 *supra*.
[20] 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 (Rome I), [2008] OJ L177/6.
[21] Erin O'Hara & Larry Ribstein, *The Law Market*, (New York: Oxford University Press, 2009).

across existing borders.[22] Issues that were previously within the domain of democratic decision-making at national level have thus shifted to the European or international level, and to norm-generating communities of a non-territorial nature. We therefore need to find alternatives to democratic law-making.[23] As one author put it: "Democracy will be possible beyond the nation state — or democracy will cease to be possible at all."[24]

The intermediate conclusion is clear: the legitimacy of various types of rules which establish the rights and obligations of private parties cannot be found in the traditional democratic procedures of national origin. Alternatives must be developed. This leads me back to the relationship between democracy and civil codes.

4. The Legitimacy of an Optional Contract Code

4.1. A Functional Approach towards Legitimacy

It became clear in the above that new types of rules require new forms of legitimacy. What does this mean for the codification of private law at European level? My starting point is that — as James Bohman put it — democracy is the "set of institutions by which individuals are empowered as free and equal citizens to form and change the terms of their common life together […]".[25] Such deliberation on the common good on the part of the citizens is a key aspect of democracy, also in Habermas' view of democracy as a form of communicative forum in which speakers express their views and others respond.[26] The main expressions of such communication are the national constitutions through which a society expresses the ideas

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[22] Jost Delbrück, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?", (2003) 10 *Indiana Journal of Global Legal Studies*, p. 28 *et seq*., at 29.

[23] See for a differently oriented account of the development Florian Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", (2008) 56 *American Journal of Comparative Law*, pp. 743-768.

[24] Anton Pelinka, "Democracy beyond the State: On the (Im-)Possibilities of Transnational Democracy", Trans: Internet-Zeitschrift für Kulturwissenschaften, No. 15/2003; see, in more detail, Smits, note 13 *supra*, pp. 26-40.

[25] James Bohman, *Democracy across Borders: From* Demos *to* Demoi, (Cambridge MA: The MIT Press 2007), p. 2.

[26] See Jürgen Habermas, *Faktizität und Geltung*, (Frankfurt aM: Suhrkamp Verlag, 1992).

that it has about itself. Typically, no constitutional law can exist before such a basic legal order for the polity is formed.[27]

It is important to realise that not the whole of private law is part of this public sphere. One can debate where the exact boundaries lie, but everyone would agree that the *res publica* is not unbounded: there is a difference between the life of the polity and the private life of the citizens.[28] In private law, not all rules traditionally given in codifications are, in fact, relevant to the common life of the citizens. In particular, the facilitative rules that one typically finds in the law of contract are not necessarily subject to political decision-making. These rules are merely there to facilitate choice by private parties; the mere fact that the rules can be set aside by these parties if they consider this fit makes these rules of a different order than mandatory rules. This calls for a sharp distinction between mandatory and facilitative rules when discussing the legitimacy of private law.[29] In my view, the legitimacy of facilitative rules need not necessarily be found in a national democratic process, but can also originate from the *choice* by private parties to make an alternative set of rules applicable to their relationship. In this approach, we look at the *functions* that democracy fulfils and investigate to what extent these functions can be met in a different way.[30]

In this functional approach towards democracy, it is useful to distinguish between three different aspects of democratic legitimacy.[31] Formal legitimacy lies in the institutional authority to provide certain rules. In civil law jurisdictions, the power (and sometimes even the obligation[32]) to codify private law is traditionally vested in the national legislature. It is clear that the types of rules mentioned in Section 3 cannot be legitimated in this way. However, an important underlying aim of this formal legitimacy is to ensure that those in power can be held accountable for their acts by being

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[27] But see Neil Walker, "Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship", University of Edinburgh School of Law Working Paper 2010/25.

[28] David Held, *Models of Democracy*, 3rd ed. (Cambridge: Polity Press, 2006), p. 283.

[29] See recently on the importance of this distinction Gerhard Wagner, "Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights", (2010) 3 *Erasmus Law Review*, pp. 47-70.

[30] Smits, note 13 *supra*.

[31] Following Bohman, note 25 *supra*, p. 139 *et seq*.

[32] See Article 107 of the Dutch Constitution and Article 34 of the French Constitution.

voted out of office by the citizens. Looked at in this way, there are other forms of accountability that can be used to reach a similar result. One of these forms is the so-called market accountability:[33] legitimacy is not established through the election process, then, but through the market by the degree of satisfaction of those affected by a policy or rule. At this point, it is appropriate to refer to the recent book by Nils Jansen on non-legislative codifications.[34] Jansen argues that the reason for the validity of private law in European history was usually not the fact that it was officially promulgated, but the fact that it was *used* in practice. It is often the *profession* that provides rules with the necessary authority, not the legislature: the "abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as an ultimate source of the law".[35]

If formal legitimacy is understood in this way, it comes close to another aspect of legitimacy: the fact that people have genuine opportunities to approve or to reject a policy or decision. This popular legitimacy need not lie in parliamentary representation. With the transnationalisation of law, the more effective forms of participation are likely to be based upon groups, creating new political communities along functional and not national lines.[36] The rules mentioned in Section 3 can, indeed, be much better legitimised in this way: they are usually only meant to have importance for certain groups of people and do not need to be agreed upon by the entire polity.

The final aspect deals with deliberative legitimacy. The deliberative process of citizens offering reasons to each other for certain policies was already referred to in the above. Again, such deliberation need not take place by the public at large. One can also apply it to the group of people most affected by the rules in question. If an important condition for democracy to be successful is the quality of

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[33] See, for example, the overview, with many references, by Gregg Garn, "Moving from Bureaucratic to Market Accountability: The Problem of Imperfect Information", (2001) 37 *Educational Administration Quarterly*, pp. 571-599, at 578.

[34] Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective,* (Oxford: Oxford University Press, 2010).

[35] *Ibid*., p. 43.

[36] See Delbrück, note 22 *supra*, p. 38: "functional authorities of varying geographical scope run by individuals selected by lot from among those with a material interest in the issue in question." See, also, de Búrca, note 16 *supra*, p. 123.

the deliberation,[37] it can even be argued that informed deliberation among specialists leads to greater legitimacy than a general debate among non-specialists.

These three aspects taken together show that legitimacy can be based upon a limited number of citizens choosing the rules which they like best for reasons which have to do with the professional quality of the rules in question. This leads to the question of what this means for the legitimacy of an optional European code of contract law.

4.2. An Optional Contract Code

If we accept the general considerations set out in the above about how private law can be legitimate beyond the state, what does this mean for the optional European code of contract law as propagated by the European Commission? Although the exact contents and design of this code are still unclear, its contours were sketched in the 2010 Green Paper:

> It would insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts. It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts.[38]

The essence of my plea until now is that the mere fact that this optional twenty-eighth legal system is not made by a democratic law giver, as we are familiar with at national level, is not enough to deny it any legitimacy. This means that the view expressed by Bastiaan van Zelst[39] and others[40] should be rejected. This view rightly asserts that

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[37] The obvious references are to John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993) and to Jürgen Habermas, note 26 *supra*.

[38] Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses, COM (2010) 348 final, at 9.

[39] Bastiaan van Zelst, *The Politics of European Sales Law*, (The Hague: Kluwer Law International, 2008), pp. 244-245.

[40] Notably Study Group on Social Justice in European Private Law, "Social Justice in European Contract Law: a Manifesto", (2004) 10 *European Law Journal*, pp. 653-674 and Martijn W. Hesselink, "The Politics of a European Civil Code", (2004) 10

the DCFR will be the basis for the optional code, but unjustifiably criticises this as wrong.[41] Van Zelst neatly summarises the existing criticism in this way:

> First of all, the scholars that are involved in the drafting of the DCFR lack democratic legitimacy. The group represents neither all of the populations of the Member States, nor their political convictions. Secondly, it is questionable whether professors should be vested with the translation of social-political reality into legislation. In a democratic society, this would seem to principally be the task of the (democratically legitimised) legislature […].[42]

Christoph Schmid is also concerned about the lack of legitimacy of an optional code, and argues that such a twenty-eighth system should only be applicable to cross-border contracts. The decision to make it also available for domestic cases should, in his view, lie with the individual Member States, which would then have to involve the national parliaments in making their decision.[43]

My understanding of the legitimacy of an optional contract code is different. If the legitimacy of an optional code can lie in the fact that parties choose it, it need not be legitimated through national parliaments. The market accountability that I mentioned in Section 4.1 can be more important in legitimating at least non-mandatory contract law than is usually assumed. If market accountability in, for example, schools, means that good schools attract students, whereas bad schools are held accountable by students that leave, a similar mechanism can operate in the field of non-mandatory contract law through the mechanism of jurisdictional competition. This means that, when parties have freedom of choice as to the applicable legal regime, they will choose the regime that they like best. If the optional

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European Law Journal, pp. 675-697.

[41] I am also very critical of the DCFR, but not for reasons of its purported lack of legitimacy. See, for example, Jan M. Smits, "The Draft Common Frame of Reference: How to improve it?", in: Hans-W. Micklitz & Fabrizio Cafaggi (eds), *European Private Law after the Common Frame of Reference*, (Cheltenham: Edward Elgar Publishing, 2010), pp. 90-100.

[42] van Zelst, note 39 *supra*, pp. 244-245.

[43] Schmid, note 1 *supra*, p. 299.

code is not made applicable by the parties, the drafters are accountable for the lack of success of that particular legal regime.

The view that changing the law requires a political decision by a parliament that should be involved in both the drafting and the adoption of rules is, therefore, a rather traditional view of democratic input. It is also a view that is contradicted by our experience with the drafting of private law rules. Mandatory national civil codes were often drafted without much input from parliaments. It is true that the final decision about the enactment of a code is taken by national parliaments (and when it comes to the introduction of a *binding* European Civil Code, this should also be the case), but, in drafting the code, the relevant decisions are usually made by the drafters themselves.[44] This makes sense because of the often highly-detailed and technical questions involved in the drafting process. Only when it comes to politically sensitive issues (such as the establishment of the proper level of consumer protection) should parliaments be involved. An important exception to this working method was the procedure followed in the establishment of the new Dutch Civil Code. Immediately after the start of the drafting process in 1947, a list of questions about key issues was presented to Dutch parliament.[45] However, in so far as these questions involved matters of the Code's structure and other typically scholarly issues, I do not see how any parliamentary input can be helpful. For instance, the question of whether a general action for unjust enrichment should be part of the Code is not a question to be decided by parliament.

It is also important to realise that our experience with optional instruments confirms that these special sets of rules usually come into place without any input from parliaments in the drafting stage. Instead, the input usually consists of a parliamentary decision to adopt an already *existing* instrument drafted by legal experts. The two most important examples of such instruments are the American Uniform Commercial Code (UCC) and the United Nations Convention on Contracts for the International Sale of Goods (CISG). In these two cases, the only "democratic" input consisted of

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[44] See, also, Peter A.J. van den Berg, *The Politics of European Codification*, (Groningen: Europa Law Publishing, 2007).

[45] See, in more detail, Martijn W. Hesselink, "The Ideal of Codification and the Dynamics of Europeanization: The Dutch Experience", in Vogenauer & Weatherill, note 12 *supra*, p. 39 *et seq*.

individual American state parliaments (in the case of the UCC) and of national parliaments (in the case of the CISG) adopting an already existing instrument. These experiences indicate that parliaments are not necessarily involved in the drafting of a successful code.

5. Concluding Remarks

It was argued in the above that an optional European contract code does not have to satisfy the traditional democratic requirements national civil codes have to meet. Its legitimacy can be largely based upon choice by the contracting parties. This view fits in with the needs of a post-Westphalian world in which we need to find new forms of legitimacy outside of the familiar concepts developed for the nation state.

Chapter 9

Private Law, Democracy, Codification
A Critique of the European Law Project*

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1. European Private Law and Democratic Theory of Private Law

The debate on European private law, currently somewhat delicately based around the academic Draft Common Frame of Reference, is concerned *inter alia* with the prospects for European private law in the strong sense.[1] This means a private law created at European level and intended to apply uniformly to the whole European area. The idea of European private law in this strong sense has to be brought into relation with fundamental theoretical questions of private law. This is only right and proper when we are dealing with a project in

* Translated by Iain Fraser.

[1] Christoph Schmid, at the conclusion of his book (Christoph Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeption in der Europäischen Integrationsverfassung*, [Baden-Baden: Nomos, 2010, p. 831], considers the prospects and potential for a European private law codification. He refers, in particular, to the possibilities currently under discussion of European private law as statutes that are selectable in conflict of laws (for instance, in law of contract, property law or family law) and/or as a model law for the Member States. He is favourable to both approaches, against the background of his justifiable concern about the integrity of private law.

which private law as a whole is to be rewritten and located at a higher level of public order.[2]

One of these theoretical questions of private law that has already been raised in the debate is the question of the relation between private law and democratic law-making.[3] This has been a recurrent question even in the normal operations of national private law, at least under the surface, when the democratic legislator set about intervening in private law, otherwise administered and developed mainly by the courts and the legal profession. In a situation concerning not just one single intervention but a new and comprehensive codification of private law to be adopted at European level, these issues will inevitably re-emerge and be the subject of dispute once more. However, in the European case, the roles are distributed differently than in the national framework: it is not the democratic legislator that wishes to take over private law.[4] It might instead seem as if legal scholars were claiming substantive creative power for themselves, and as if the democratic legislator were to be largely kept away from the project.[5]

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[2] The various pronouncements on the part of European institutions here oscillate between "utterly unfeasible politically" (Dirk Staudenmayer, Head of Unit in the EU Commission DG for Health and Consumer Protection; see, "Ein Europäisches Zivilgesetzbuch – Podiumsdiskussion", [2008] II/1 *Verhandlungen des 67. Deutschen Juristentages*, Q 11) and its description as one of seven "options" in: Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM (2010) 348 final, 1 July 2010, 12.

[3] Study Group on Social Justice in European Private Law, "Social Justice in European Contract Law", (2004) 10 *European Law Journal*, pp. 653-674; Martijn Hesselink, "The Politics of a European Civil Code", (2004) 10 *European Law Journal*, pp. 675-697; Harm Schepel, "The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law", (2007) 32 *Law and Social Inquiry*, pp. 183-199; Alain Verbeke, "Negotiating (in the Shadow of a) European Private Law", (2008) 15 *Maastricht Journal of European and Comparative Law*, pp. 395-413; Bastiaan van Zelst, *The Politics of European Sales Law*, (The Hague: Kluwer Law International, 2008).

[4] For such a critique, see, exemplarily, Werner Flume, "Vom Beruf unserer Zeit für Gesetzgebung", (2000) 21 *Zeitschrift für Wirtschaftsrecht*, pp. 1427-1430. The most recent example of a sharp confrontation came in Germany with the 2006 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*).

[5] This fear was even expressed at the European Parliament in a resolution: "European Parliament Resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward", available at: http://ec.europa.eu/consumers/rights/contract_law_en.htm.

The exposition below is aimed at a more precise focus on the democratic issues of the Draft Common Frame of Reference, understood as an authoritative draft of a future unitary European Civil Code. We may start by noting that, even among the protagonists of the project, no one takes the view that a unitary European private law need not be formally adopted in the regular law-making procedures of the European institutions.[6] Thus, the problems do not involve questioning the notion of the need for formal democratic legitimation of European private law in the course of further developments. But grasping what the democratic issues are beyond this is not at all simple. The Draft Common Frame of Reference was, and still is, discussed particularly from the angle of whether it contains successful rules,[7] and whether the project for a unitary European codification of private law makes sense at all.[8] Both criticisms are, of course, relevant in themselves, but they will each be given an explicitly democratic turn below, by leaving aside the specific content, and asking about the need for, and the possibility of, a democratic genesis of rules of private law (Sections 2 and 3), and about the meaning of a European social constitution without a political costitution (*Gesellschafts- ohne Politikverfassung*) (Section 4).

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[6] See, for example, Christian von Bar, Eric Clive & Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Outline Edition, (Munich: Sellier European Law Publishers, 2009), Introduction, no. 4. The precondition for this is of course a corresponding power for the Union; on this see, Oliver Remien, "Europäisches Privatrecht als Verfassungsfrage", (2005) 40 *Europarecht*, pp. 699-720; Stephen Weatherill, "Constitutional Issues - How Much is Best Left Unsaid?", in: Stefan Vogenauer & Stephen Weatherill (eds), *The Harmonisation of European Contract Law*, (Oxford-Portland OR: Hart Publishing, 2006), pp. 89-103.

[7] Wolfgang Ernst, "Der 'Common Frame of Reference' aus juristischer Sicht", (2008) 208 *Archiv für die civilistische Praxis*, pp. 248-282; Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, "Der Gemeinsame Referenzrahmen für das Europäische Privatrecht", (2008) 63 *Juristenzeitung*, pp. 529-550; Simon Whittaker, "The 'Draft Common Frame of Reference': An Assessment", 2008, available at: https://www.justice.gov.uk/publications/docs/Draft_Common_Frame_of_Reference__an_assessment.pdf; Luisa Antoniolli, Francesca Fiorentini & James Gordley, "A Case-Based Assessment of the Draft Common Frame of Reference" (2010) 58 *American Journal of Comparative Law*, pp. 343-358.

[8] Nils Jansen, "Traditionsbegründung im europäischen Privatrecht", (2006) 61 *Juristenzeitung*, pp. 536-546; Reinhard Zimmermann, "The Present State of European Private Law", (2009) 57 *American Journal of Comparative Law*, pp. 479-512.

2. Legal Scholarship, Law-Making and "Apolitical" Private Law

2.1. Law-Making Science I: Comparative Law as Political Project

The process that has now led to the Draft Common Frame of Reference was entirely in the hands of established legal scholars.[9] This brought an assessment of the process as being "technocratic" from some observers.[10] However, leading lights in the process fixed, early on, on the position that the project for a European code of private law could succeed only if it were set forth as a scholarly project. Methodologically, what was called for was a stock-taking of the private law in force in the Member States, based on the model of the US restatements. According to Christian von Bar, Ole Lando and Stephen Swan:

> The appropriate method for preparing such a restatement is one which embraces European legal expertise on an inclusive basis, making use of thorough comparative law research to formulate the most suitable principles for a pan-European legal text.[11]

There may currently be a tendency for comparative law to abandon its self-perception as a hermeneutical discipline in exchange for the charms of influential policy consulting. However, it seems remarkable that the self-perception as scholars who are pursuing a trade independent of politics remains untouched. And yet, the political aspect is openly stated by these major actors:

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[9] For a list of those involved, see Christian von Bar & Eric Clive (eds), *Principles, definitions and model rules of European Private Law, Draft Common Frame of Reference (DCFR),* Full Edition, (Munich: Sellier European Law Publishers, 2009), p. 25 *et seq*.

[10] For example, Study Group on Social Justice in European Private Law, note 3 *supra*; Hesselink, note 3 *supra*; Ugo Mattei & Fernanda Nicola, "A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda", (2007) 7 *Global Jurist*, Issue 1 (Frontiers), Article 2.

[11] Christian von Bar, Ole Lando & Stephen Swan, "Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code", (2002) 10 *European Review of Private Law*, pp. 183-248, at 221 *et seq*.

> The results of comparative law research must be consolidated in the form of norms. Moreover, a mere description of deviations from the existing national legal systems is insufficient. What is called for is the composition of uniform basic rules ("Principles"), based on a careful analysis of pros and cons, which overcome the existing substantive differences. In other words, Principles also contain suggestions of a legal policy nature; they construct a building plan for a future European legal system.[12]

But even open acknowledgment of the directly political nature of one's own work does not lead to critical reflection on both the process and the conditions of its legitimation.[13] This contradictoriness requires no further elucidation.

2.2. Law-Making Science II: Apolitical Private Law

The apolitical approach of the drafting process cannot, then, be justified upon the basis that it is a mere enterprise of comparative law, since this is not so. There is a different and more ambitious position formulated by Jan Smits, which is as follows.[14] The exclusive management by legal scholars is not a flaw in the drafting process; instead, this sort of procedure is in line with the essence of private law. This is because private law is marked by its fundamental difference from public law. This difference is manifested *inter alia* in the fact that private law, in contrast with public law, cannot be instrumentalised for arbitrary purposes.[15] This is especially true for

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[12] See von Bar, Lando & Swan, note 11 *supra*, p. 221.

[13] Consistency can, admittedly, be restored by moving decidedly away from the objective of a European private law and issuing the model rules only as a pedagogical aid to pan-European legal comparison; see Hans Schulte-Nölke, "Arbeiten an einem europäischen Vertragsrecht – Fakten und populäre Irrtümer", (2009) 62 *Neue Juristische Wochenschrift*, pp. 2161-2167, at 2162. There is a pointed critique of this new self-description in: Nils Jansen & Reinhard Zimmermann, "Was ist und wozu der DCFR?", in: (2009) 62 *Neue Juristische Wochenschrift*, pp. 3401-3406.

[14] Jan Smits, "Democracy and (European) Private Law: A Functional Approach", Tilburg University Legal Studies Working Paper Series 1/2010 (2010), pp. 26-40, at 38 *et seq.*; see, also, *idem*, "Codification Without Democracy? On the Legitimacy of a European (Optional) Code of Contract", Chapter 8 *supra*.

[15] Essential, here, is Ernest Weinrib, "The Idea of Private Law", (Cambridge MA-London: Harvard University Press, 1995); on whom, see Florian Rödl, "Normativität und Kritik des Zivilrechts", (2007) 114 *Archiv für Rechts- und Sozialphilosophie Beiheft*,

the objectives of economic efficiency and distributive justice. Such purposes are pursuable by means of public law, but not by means of private law. In contrast, private law exists primarily to ensure justice between private parties regarded and treated by the law, in this connection, as free and equal. The guiding normative principle of their legal relations is corrective justice.[16] Since the point is neither growth nor distribution, it is a non-political task to articulate the rules of private law under the principle of corrective justice. If, however, it is a non-political task, then it is simply a good thing if the articulation of the rules of private law is done by experts, and political actors are not involved at all. From this viewpoint, it seems only appropriate that the Draft Common Frame of Reference is a product of legal experts who see themselves as apolitical. It can also be deduced that the democratic legislator should preferably hold back at a later point, too.

Many of the critics of the Draft Reference Framework take the opposite view.[17] The view underlying their positions can be formulated perhaps as follows: the assertion of a categorical separation between public and private law is fundamentally wrong. While private law may constitute an externally identifiable subject, it falls under no special normative principle and can be employed for any purpose, as can any (other) public law. Accordingly, the process of developing private law cannot lay claim to any special remoteness from politics, either, which could justify an exclusive claim of scholarship to manage law-making in private law. Since, therefore, the shaping of private law is just as much a political task as the accomplishment of any other law-making, the involvement of the democratic legislator must not be purely formal. Instead, the democratic legislator ought substantively to take over the process of making private law. However, to date, there is little of this to be seen in the European private-law process, and, correspondingly, the dominance of legal experts should be emphatically criticised.

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pp. 167-178. In a similar direction, see, also, Schmid, note 1 *supra*, p. 74 *et seq*.

[16] The authors of the Draft Common Frame of Reference also see themselves as committed to this view, but they do not bring it to bear in support of their authority: see von Bar, Clive & Schulte-Nölke (eds), note 6 *supra*, no. 24.

[17] See the references in note 10 *supra*.

Although both sides represent diametrically opposed positions in relation to the fundamental nature of private law, they do, however, seem to agree on one point: both share the view that the basic nature of private law determines whether a substantive takeover of law-making in private law by the democratic legislator is required or not. In fact, however, this view shared by both sides is false. As will be shown, the assertion of a special nature of private law in no way justifies putting the democratic legislator in second place, leaving it with only the function of notarial confirmation of the academic drafting work. The question of whether private law has a special nature, in that it follows a special normative principle, is totally independent of the question of whether the democratic legislator ought to take over the creation of private law entirely.

But a decision on private law rules which is legitimated democratically, rather than technocratically, is essential, here, for three reasons: first, the thesis of the special nature of private law is openly disputed, with legal scholars being among its critics. This is, then, a conflict among the experts, even if one of the camps may clearly be in a minority. Consequently, the question arises as to how the dispute is to be decided. Here, it is helpful to consider what the object of the dispute is. Both sides adduce in their favour insights into the very essence of private law. In one case, an essential peculiarity is claimed; in the other, an essential peculiarity is denied. Accordingly, the question is one of basic concepts. Basic conceptual questions are part of theory, or, if you will, of philosophy. But, while for private law, it is often said that its form is better left up to legal scholars, nobody would come up with the idea of delegating other questions of a basic conceptual nature in general terms to "theoreticians" or philosophers. Instead, the democratic legislator, in principle, claims the authority to decide such questions for itself, and, without further ado, adopts laws that call for the answering of the most difficult basic conceptual questions. As examples, let us mention only the areas involving control over human life, such as prenatal selection, abortion, living wills and assisted suicide, and the settlements of tough conflicts of norms such as those of the protection of personality *versus* freedom of enterprise, or freedom of religion *versus* the requirement of neutrality on the part of the state. Here, no one would come up with the idea that, because of the basic conceptual nature of the questions involved, all the legislator has to do is rubberstamp the

drafting work of the experts. Instead, it is the opposite that is the case: it is, in general, widely accepted that only the legislator as the representative of the democratic public is entitled to decide upon such questions, by majority. To be sure, experts should be allowed to set the scene and, perhaps, even to offer instruction. But the legislator has the last word. The question of the special nature of private law, however, is of exactly this nature: In private law, do we see ourselves as being subject to a special order, the normativity of which is upheld by the idea of formal freedom and equality, or do we see private law as one means among others for attaining political objectives such as social justice or growth, and see our own existence in this system as a means to obtaining these objectives? This is a basic conceptual question upon which only the democratic legislator is entitled to decide.[18]

Secondly, even if the assertion of an essential specificity of private law is taken as a basis, the question still arises as to where the boundaries of private law actually are. Even a legislator who, in principle, takes the view that private law has a special nature which conflicts with its instrumentalisation for arbitrary purposes would, in a further stage, have to define how far this special private law ought to reach. These boundaries are not obvious. Many would agree that labour law does not belong here,[19] although its individual aspects undoubtedly come about in private-law forms. Beyond this, there are persuasive voices seeking, with good reason, to extend this area to a field of social contract law that would cover all contracts concerning the existential life risks of the dependently employed.[20] Still others might, perhaps, wish to take all consumer protection out, or subject particular types of damage to a redistributive strict liability. It also seems worth discussing the removal of those areas which, while

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[18] This is certainly not a question that a quasi-executive such as the European Commission should be deciding by tendering for and commissioning research projects. On its initiative role, see Christian von Bar & Hans Schulte-Nölke, "Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht", (2005) 38 *Zeitschrift für Rechtspolitik*, pp. 165-168.

[19] For instance, Smits, note 14 *supra*, p. 40.

[20] Luca Nogler & Udo Reifner, "Social Contracts in the Light of the Common Frame of Reference for a Future EU Contract Law", in: Luisa Antoniolli & Francesca Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference*, (Munich: Sellier European Law Publishers, 2010), pp. 365-407.

sometimes governed by private-law forms, have, as their object, public goods, such as energy or water supply or telecommunications.[21] Ultimately, all these decisions are of a fundamental conceptual nature, to the extent that the point is to determine how far some special nature of private law does, in fact, reach, in the same way as the basic decision about the special nature of private law as such. As a consequence, this is an issue upon which only the democratic legislator should decide.

Thirdly and finally, we must ask to what extent it is right that, just where the special nature of private law is, in principle, both affirmed and localised by the democratic legislator, the latter is seen as, in fact, being unfit to take the decision about the implementing manifestations of the specific principles of justice. If the legislator has previously fixed on a special form of justice in private law, there is, perhaps, nothing against this. The legislator would seem to be able — without further ado — to take an independent judgment as to whether corrective justice calls for accepting responsibility for reliance or expectation damages, or whether a possibility of subsequent performance is to be opened up, or whether damages caused by default are to be determined absolutely or in relation to the general rate of refinancing interest. The legislator can also judge independently the extent to which a general right of personality should go. To be sure, here the assistance of experts would be needed in order to be clear about the various possibilities of decision. But this does not differentiate private law in any way from other areas of law.

Accordingly, we have to state that the questions about the special nature of private law, its possible scope and its implementation in specific norms are all questions which require democratic legitimation. The assertion of some special "apolitical" nature of private law is only one interpretation of the meaning of private law. But it supplies no basis for lowering the requirements for its democratic legitimation compared to other areas of law.

In particular, it does not permit to take out of the hands of the democratic legislator the substantive authority to decide as to whether, and, if so, to what extent, this view of the meaning of

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[21] Rödl, note 15 *supra*.

private law is to be adopted at all. This would, however, be the consequence were the legislator to be seen as called upon, in connection with private law, only to give notarial confirmation of previous scholarly work. This would mean that precisely these decisions would be left in the hands of the scholars alone. Admittedly, the decision cannot formally be taken away from the democratic legislator, since this is a constitutional requirement. But the democratic legislator can be forced into a corner by the procedures and the accompanying public discourse, and not least by the dimension and complexity of the project, to such an extent that it no longer feels able to take the task on substantively. We shall go into this below.

3. Modern Democracy and Codification

The codification of private law has been a matter of debate in Germany for some two hundred years, albeit under changing democratic auspices. The famous controversy between von Savigny and Thibaut in 1814 about the "vocation of our time for legislation and legal science" did not yet concern the question of democratic self-determination and its relation to scholarship and adjudication. Here, perhaps not entirely remote from some motivations to be found in Europe today, Thibaut was, in contrast, concerned with the unity of the nation and the facilitation of economic intercourse through legal unity.[22] The strengthening of the (not yet democratised) political aspect played no part at all. The contractualist von Savigny was primarily concerned with upholding the position of the historical legal school and the renaissance of Roman law associated with it, which would be endangered by a politically controlled codification project.[23] Again, when, after the German Empire was founded in 1871, the German Civil Code actually did come into being as an act of state legislation, it was not a reshaping by a political legislature that was involved.[24] The point was, from the national perspective,

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[22] Uwe Wesel, *Geschichte des Rechts. Von den Frühformen bis zur Gegenwart*, (Munich: C.H. Beck, 1997), p. 434.

[23] On the social function of von Savigny's position in relation to the absolutist state, see Dieter Grimm, "Grundrechte und Privatrecht in der bürgerlichen Sozialordnung", in: *idem* (ed.), *Recht und Staat der bürgerlichen Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1987), p. 205 *et seq.*

[24] Programatically, see already Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse. Werke 7*,

unification, and, from an economic point of view, calculability. The precondition for codification as a political undertaking was, however, that political actors, in particular, could make no substantive claim to shape the plan. What was essential, then, was to succeed in creating a free space in which judges and ministry officials in particular could develop the drafts in a framework in which conflicts would not take political shape.[25]

In contrast, today's discussion about a European private law seems remarkably untouched by considerations regarding national codification projects and their social and political contexts. Instead, it would seem as if some actors wish to handle the European act of codification with the same approach as their German predecessors did over a hundred years ago:

> Ultimately, legal science […] provided an additional aid. Since pandectistics, remote as it was from practice, had succeeded through the method of conceptual jurisprudence in isolating the sensitive material of the rules to be taken into the Code, in both the general awareness and their own, from the acid of the grumbling social conflicts […, the Civil Codes in Europe] were not compromise formulas by hard-fighting politicians, but the technically refined work, done in comfortable remoteness from day-to-day political needs, of "strictly scientifically minded" jurists.[26]

If one replaced the "conceptual legal method" above with the "comparative method", one would come perhaps astonishingly close to the authentic self-perception of the Reference-Framework drafters. But it is simply not enough to call together a group of academically enlightened jurists. Historically, in Germany, it was possible to let the

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(1821), (Frankfurt aM: Suhrkamp Verlag, 1986), 363 (§ 211).

[25] Impressive confirmation of this description can be found in the presentation of the genesis of the Code in Werner Schubert, *Materialien zur Entstehungsgeschichte des BGB: Einführung, Biographien, Materialien*, (Berlin *et al*: Walter de Gruyter, 1978).

[26] Friedrich Kübler, "Kodifikation und Demokratie", (1969) 24 *Juristenzeitung*, pp. 645-651, at 646; see, also, Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, (Göttingen: Vandenhoeck & Ruprecht, 1967), p. 473, and Staudinger-Coing & Honsell, *Kommentar zum Bürgerlichen Gesetzbuch, Einleitung zum BGB*, (Munich: Schweitzer, 2004), no. 92 *et seq.*

work of such jurists become a private-law act only because there was a hegemonic consent of the *bourgeois* strata still dominant politically and socially as to the essential content and function of the codification.[27] It was not to deal with modern industrial conflict, still less social reform, but to record the existing legal framework of the social order that had actually only just disappeared.[28] But this function was not even a big priority; rather, the codification found broad support, above all, as a project to create legal unity, and in party-political terms, above all, from the liberal parties, the centre and important sections of the conservatives.[29] At the time of the codification of German private law in the German Civil Code, then, there was a homogeneity of interests among those mainly involved in shaping it albeit only through veto positions). This alone made it possible for the codification of private law to be entrusted to jurists as a consolidation project. The supporters of the codification of European private law by scholars of comparative law ought, perhaps, to explain why they believe that they can, today, simply do without the social requirement of sufficient homogeneity of interests.

But it is not just as an attempt at repeating history[30] that the demand for a codification of European private law is to be criticised, but also from the viewpoint of a sociologically interested theory of private law. Private law, despite its simple statutory nature, constitutes, more or less, the core of the constitution of society (*Gesellschaftsverfassung*), in contrast to the political constitution of the state. It lays down the modes and basic rules for social interaction. Originally born, at least in Germany, under the banner of strict separation of state and society,[31] modern private law has to reflect the historical shift in the relationship between state and society. The major transformation of statehood in the twentieth century was the change from the rule-of-law state to the social state. In relation to the codification of the private law of the social state, Friedrich Kübler had already

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[27] Franz Wieacker, note 26 *supra*, p. 478 *et seq*.
[28] Staudinger-Coing & Honsell, note 26 *supra*, no. 30.
[29] *Ibid*., no. 19 *et seq*.; the broad support was reflected in the vote count in the Reichstag on 1 July, 1896: 233 aye, 48 nay, 18 abstentions (see *ibid*., no. 88).
[30] Karl Marx, "Der achtzehnte Brumaire des Louis Bonaparte", in: Marx & Engels, *Werke*, (1852) (Berlin: Dietz, 1972), p. 115.
[31] Dieter Grimm, "Zur politischen Funktion der Trennung von öffentlichem und privatem Recht in Deutschland", in *idem*, note 23 *supra*, pp. 84-103.

established in the late 1960s that the state's penetration of the social sphere was also leading to an enhancement of the complexity of private law. At the same time, the presence of aspects of the state in the social sphere ensured that the social interests affected by private-law rules were no longer prepared to leave law-making in private law up to a group of strictly academically-minded jurists.[32] The overall social development under the banner of the social state was, therefore, reflected in a differentiation of law that seems to make the notion that the complex, finely-worked legal developments can still be abstracted and compressed into the form of a codification look rather ridiculous.[33]

The shift in the social state observable since the 1980s from an interventionist state to an "ensuring state" ("*Gewährleistungsstaat*")[34] did not make things any easier for private law and its codification. After all, the "ensuring state" is characterised by its setting up and provision of a multiplicity of public functions and goods while employing private-law forms. This calls for considerable effort at adapting private law, since the public function can no longer be guaranteed through an autonomous order external to private law by public law, but must be represented in the private-law forms themselves. This means that, while the basic private-law forms, above all person, property, contract and liability, remain, their articulation into a structure of codified rules has to reflect their new function in the "ensuring social state".

Given these premises, even in a national framework, a comprehensive recodification of the private law in force seems scarcely achievable. The 2002 German reform of the Law of

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[32] Kübler, note 26 *supra*, p. 647.

[33] *Ibid*.; on the contrast myth about the German Civil Code, see Gert Brüggemeier, "Gesellschaftliche Recht-Fertigung oder 'Der Kodex als Irritation des Rechts' – eine Glosse", in: Christian Joerges & Gunther Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden, Nomos, 2003), pp. 101-112.

[34] On this Claudio Franzius, "Der 'Gewährleistungsstaat'. Ein neues Leitbild für den sich wandelnden Staat?", (2003) 42 *Der Staat*, p. 493; Gunnar Folke-Schuppert, "Der Gewährleistungsstaat – modisches Label oder Leitbild sich wandelnder Staatlichkeit?", in: Gunnar Folke-Schuppert (ed.), *Der Gewährleistungsstaat – Ein Leitbild auf dem Prüfstand*, (Baden-Baden: Nomos, 2005), pp. 11-52.

Obligations (*Schuldrechtsreform*) does not contradict this proposition, but underlines it. This is because the reform, very differently from the original project for reworking the Law of Obligations,[35] and also in contrast with what the title "reform of the Law of Oligations" would suggest, did not even venture a new draft of the whole Law of Obligations, but only of particular aspects of contract law and the statute of limitations. The law of non-contractual obligations, in particular, remained untouched, not to mention the rest of the General Part of the German Civil Code, or of property law. But to the extent that new rules were made, they aimed in their content – similarly to what happened when the German Civil Code was created – particularly at codifying the case law,[36] and no abstractions in the form of clear rules were achieved. Instead, the valid law often remains just as open and indeterminate in the statutory form as in its previous form as case law.[37] Against this background, the 2002 reform of Law of Obligations looks more like documentation of the impossibility of codifying modern differentiated case law.[38]

The reason why the reform of the Law of Obligations was achieved at all lay in the combination of political will by the Red-Green government, the skilful selection of the legal experts, the inclusion even of critical academic voices as well, and the broad involvement of business circles. Otherwise, the massive academic and political resistance could scarcely have been wrestled down. Such resistance will be all the greater if, in contrast to the case of the German reform of the Law of Obligations, what is at stake is not just, essentially, stock taking of a largely undisputed legal situation in the form of abstract rules, but the creation of a new statutory text in the form of a synthesis of the best rules from the national private-law systems.[39]

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[35] Bundesministerium der Justiz (ed.), *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts*, (Cologne: Bundesanzeiger, 1992).

[36] Particularly notable are the provisions on *culpa in contrahendo* (§ 311 Abs. 2 BGB) and on the frustration of contract (§ 313 BGB).

[37] On this, see Barbara Dauner-Lieb, "Kodifikation von Richterrecht", in: Wolfgang Ernst & Reinhard Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform*, (Tübingen: Mohr Siebeck, 2001).

[38] Fundamentally on this, see, already, Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*, (Tübingen: Mohr, 1956), p. 142, 221 *et seq.*, & 242 *et seq.*

[39] Antoniolli *et al.*, note 7 *supra*, p. 358.

However, it can also be seen from the example of the German reform of the Law of Obligations how much room for manoeuvre the democratic legislator is, in fact, left with in modern codification projects: none at all.[40] Even the experts among the members of the house were not in a position to cope creatively with the complexity of a codification project, and any claims to shape the project constituted an endangerment of the whole thing. On top of this, the political way of working, with its important aspect of negotiating compromises, is rather unfavourable to the maintenance of systematic coherence, which is something a codification really has to have.

But this statement is not to be regarded as contradicting the idea of a democratic shaping of private law. It is directed against the idea of democratically shaping it through comprehensive codification. The development of private law must today primarily come in the form of incrementalist moves on the part of judges and legal scholars. The development is accompanied here most notably by an expert public which can explain, illuminate and (controversially) assess the approaches taken in individual cases. It is against this background that the case law takes its next steps. The democratic legislator comes in whenever the case law or the factual developments in the world have shown difficulties that make the politicisation of some particular aspect possible, with or without the involvement of the wider public.[41] In contrast, codification, as shown above, is, even in itself, an enterprise that can scarcely be handled any longer. As a democratic undertaking, it is impossible. Accordingly, nothing is better suited to excluding claims to democratic creation from the outset than bringing the codifying of private law-making onto the agenda. The exclusion of the democratic sphere is enhanced many times further when the point is to synthesise the "best rules" out of twenty-seven national private-law systems and several legal families. This, and not some dispute about the special nature of the private law, is the key

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[40] The second and third readings in the *Bundestag* took a total of just one and a half hours (see Plenarprotokoll 14/192 of 11.10.2001, 18745 A). On the outcome, see, also, Rainer Schröder & Jan Thiessen, "Von Windscheid zu Beckenbauer – die Schuldrechtsreform im Deutschen Bundestag", (2002) 57 *Juristenzeitung*, pp. 325-329.

[41] Christian Joerges, "Zur Legitimität der Europäisierung des Privatrechts", in Joerges & Teubner, note 33 *supra*, pp. 183-212, at 187 *et seq.*; Gert Brüggemeier, *Prinzipien des Haftungsrechts. Eine systematische Darstellung auf rechtsvergleichender Grundlage*, (Baden-Baden: Nomos, 1999), p. 31.

democratic issue with the Draft Common Frame of Reference, interpreted as the first stage towards a European Civil Code.

4. A Social Constitution without a Political Constitution

But there is still another aspect that makes the imperturbability of the advocates of the European private-law project surprising. The private-law codifications in France, Germany and Italy always served to create not just legal unity, but also national unity.[42] This may, perhaps, even be an incentive to some protagonists of European private law; a European Civil Code would indeed be an enormous step towards the social integration of Europe. All Europeans would be citizens of a unitary order with identical civil liberties. But the citizen of the social constitution has – this is the achievement of modernity (which came rather late in Germany) – a twin, namely, the citizen of the political constitution.[43] Both constitutions, the political and the civil constitution, form a unity, with the political constitution merely having a minor performative advance: in accordance with the rules of the political constitution, the citizens adopt for themselves an order of equal liberties as a civil constitution in the form of private law.

To be sure, there are examples where the unity is only partially achieved. Thus, the political constitution embraces all US citizens, but the civil constitution is not complete at federal level, because, in such areas as law of tort and family law, the private-law systems of the individual states continue to exist. The European private-law project aims at a converse state of affairs, for which there are no longer any models today: the civil constitution is to become European, while the

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[42] Reinhard Zimmermann, in: *Historisch-kritischer Kommentar zum BGB*, (Tübingen, Mohr Siebeck, 2003), vor § 1 no. 9; Staudinger-Coing & Honsell, note 26 *supra*, no. 19 *et seq*.

[43] Friedrich Kübler says in a historical retrospect: "[The Codes] are at the same time the documents of the liberal revolution: with the codifications, civil society freed itself from the imposed legal structures of the *ancien régime*; in them it created its constitution based on the consensus of all reasonable people. *That paved the way to the democratic polity* that clad the law in the form of statute and subjected this to legitimation by the will of the majority." (Friedrich Kübler, "Traumpfade oder Holzwege nach Europa", in: [1993] 12 *Rechtshistorisches Journal*, pp. 307-314, at 310; my emphasis.)

political constitutions, *i.e.*, the units in which the members are given democratic equality as citizens, remain national. When the citizens of Europe, or at least parts of them, were asked whether they wanted a political constitution for Europe, they clearly rejected it. The reform Treaty of Lisbon can no longer be understood as even a symbolic precursor of such a future constitution. Do those proponents now think that they can make the citizens of the Member States believe that they ought to have a unitary civil constitution even though they do not want a political constitution? Or do the proponents of codification, perhaps, want to detach the idea of European private law from an emphatic idea of a civil constitution of equal liberties and sell it as a technical requirement for the internal market? The European citizens (and many of their private-law scholars) are likely to simply no longer go along with this.

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This report contains the proceedings of a colloquium held at the Centre of European Law and Politics (ZERP) in Bremen on 9 July 2010, on Christoph Schmid's critical evaluation of the Europeanisation of private law expressed in his habilitation thesis *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der europäischen Integrationsverfassung*. The main concern in his book is the normative integrity of European law in general, and European private law in particular. Schmid's 'instrumentalisation thesis' challenges the excessive submission of private law to the integration objectives of the European Union. The claim is that integration has illegitimately become its own aim, at the price of commutative justice in private law.

This report presents further investigations into this problematic, as indicated in the title *European Constitutionalism without Private Law – Private Law without Democracy*. In connection with Schmid's work, the contributors deal with different aspects of the relation between the European integration project and the normative foundations of private law.

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Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research. The project has 21 partners in 13 European countries and New Zealand and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007-2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.