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The European Civil Code

The Way Forward

Hugh Collins

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The European Civil Code

Hugh Collins argues that the European Union should develop a civil code to provide uniform rules for contracts, property rights and protection against civil wrongs, thus drawing together the differing national traditions with respect to the detailed regulation of civil society. The benefits of such a code would lie not so much in facilitating cross-border trade, but in establishing foundations for a denser network of transnational relations of civil society, which in turn would help to overcome the present popular resistance to effective and functional political institutions at a European level. These principled foundations for a more inclusive and less 'balkanised' civil society in Europe also provide elements of a required European Social Model that offers necessary safeguards for consumers, workers and disadvantaged groups against the pressures of market forces in an increasingly global economic system.

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The European Civil Code

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Preface

A British author writing about the European Union must overcome contradictory preconceptions. Continental colleagues will probably assume that the work will be sceptical about any proposal emanating from Brussels. If the proposal concerns the introduction of a comprehensive civil code that would replace the uncodified common law of England, this forecast of the British author's hostility probably seems guaranteed. Yet within the United Kingdom, anyone who demonstrates much interest in or sympathy with the activities and proposals of the European Union is immediately suspected of conspiring to abandon national sovereignty to foreign powers. Most English private and commercial lawyers, convinced of the superiority of their tools of production, the common law, prefer to ignore European legal developments as much as possible, though, if cornered, would urge their government to wield a veto power against initiatives that might interfere with their business routines. In this work, the reader should forgo either of these tempting preconceptions.

Although the book offers considerable critical evaluation of the past and current forays of the institutions of the European Union into the field of private law, ultimately identification with the values and long-term goals of Europe steers the argument towards a re-conception of the European agenda rather than a rejection of the project for a European Civil Code. In its essentials, the book provides a critical evaluation of why the development of a civil code in Europe is a valuable, though daunting, project. In so doing, however, the work criticises much of what has been achieved so far and casts doubt on the viability of current plans. In particular, taking account of the diversity of existing national private law systems and the way the European Union functions as a multi-level system of governance, it is argued that, to be

legitimate and effective, a European Civil Code would have to comprise principles-based regulation, a framework of normative standards for a transnational civil society rather than a complex body of detailed rules.

My ideas on this subject have evolved over more than a decade. In more than a score of papers, I have wrestled with many of the topics addressed here, with investigations ranging from the detailed inadequacies of European institutions to broad questions about the essential qualities of cultural diversity in Europe. This book is not a collection of those articles, but rather a re-consideration of the themes and issues from a more comprehensive viewpoint, a synthesis of the arguments and ultimately a clearer sense of direction for the way forward for a European Civil Code.

It has been an exciting period to study private law in Europe as the 'balkanised' national legal systems have been thrown suddenly together by the need to adapt to the ever-more ambitious harmonisation of laws agenda in Europe. My papers and now this book have been stimulated by many colleagues from continental Europe. Although there have been too many helpful colleagues to mention them all here, special debts should be acknowledged to especially influential interlocutors: Günther Teubner, Christian Joerges, Thomas Wilhelmsson, Jacobien Rutgers, Ruth Sefton-Green, Miguel Poires Maduro, Stephen Weatherill and Guido Alpa. Many thanks to them for their stimulating encouragement, together with my fellow editors of the *European Review of Contract Law,* Stefan Grundmann, Martijn Hesselink, Muriel Fabre-Magnan, Vicenzo Roppo and other members of the Study Group on Social Justice in European Private Law. I should also acknowledge the friendly assistance of colleagues at the LSE, especially Damian Chalmers, who together provide a lively forum in which to explore ideas about Europe. I am grateful finally to the Arts & Humanities Research Council for supporting a period of research leave in which this book took shape. The book assumes that the Lisbon Treaty will take effect, though the negative Irish referendum occurred too late to be considered here.

Department of Law
London School of Economics
1 February 2008

Series Editors' Preface

Hugh Collins' book on the future of European private law develops a distinctive argument for legal change in an increasingly well-trodden field of study. He makes a sustained and convincing argument for a different normative basis for legislative developments at the EU level as regards a putative European Civil Code. He wishes to distract private law from its current market integration focus, where the only politically acceptable justifications for interventions in private law relations can be found in the impact of failure to harmonise or actively to promote mutual recognition on the evolution of the single market for goods, services, persons and capital. Instead Collins' normative proposal links private law to European civil society, understood in its widest sense to include the multitude of everyday relations between persons. At present, these private law relations are regulated predominantly at the national or subnational levels. Sympathetic to arguments for closer integration, but specifically for reasons of promoting welfarism and social justice rather than political union as such, Collins rejects the monolithic 'top-down' approach of building common institutions or searching for a common European foreign policy favoured by EU institutional and many national elites. Rather, he wishes to see fostered the conditions for 'bottom-up' development rooted, as he puts it, 'in the bonds for commonplace social interactions'. Through these will come the necessary community which can sustain, in turn, political development at the supranational level. Collins' argument is ambitious, and requires a fully developed critique of the current *acquis communautaire* and a direct engagement with the legal competences and legal instruments of EU law as it exists. What he proposes would, he acknowledges, require seismic shifts in both legal and political terms, but he argues that such changes would offer

significant gains in terms of the promotion of social justice within a distinctive European economic constitution underpinned by welfarism and protection of the weaker party in private relations, rather than economic (neo-)liberalism. It is testimony to the increased importance of the law and institutions of the European Union in private as well as public law fields that distinguished private law scholars such as Hugh Collins are beginning to bring to bear their legal and intellectual imaginations on the question of European private law, envisioning a more human face to the legal framework of legal integration. What is particularly attractive about the argument is that it could offer a bonus in terms of strengthening the legitimacy of political action at the EU level. We are delighted that Collins' book is appearing in the series *Cambridge Studies in European Law and Policy*.

Laurence Gormley
Jo Shaw
May 2008

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I Civil society and political union

> Napoléon Bonaparte in defeat and exile dreamt of a future 'association européen' with 'one code, one court, one currency'.[1]

Was Napoléon's speculation about the composition of the future European Union one of his dangerous fantasies? Or was he correct to believe that an association between the peoples of Europe would have to be founded on and sustained by unified laws, a single system of justice and a common currency? Are these apparently technical and humdrum matters concerning the law and commerce the crucial cement for binding together the nations and regions of Europe? Surely these devices could not be as important to the future of the European Union as the controversial topics debated in the press about constitutions, institutional reform, a rapid response force, a common foreign policy, the 'democratic deficit' and allegations of inefficiency and corruption? Notwithstanding the lack of media interest in the ordinary law of commerce and private relations, my thesis supports Napoléon's speculation: unified law, especially the laws governing commonplace social and economic interactions between people, could make a vital contribution to the future of the European Union. The general framework of this argument can be expressed in a few general propositions.

(1) The European Union today is a political structure without a community. It is a system of government for a continent, but this territory is fragmented into many political and cultural communities. Although nation states have pooled some of their

[1] Compte de la Cases, *Mémorial de Sainte-Hélène: Journal de la vie privée et des conversations de l'empereur Napoléon à Sainte-Hélène* (London: Colburn and Bossange, 1823), quoted in T. Judt, *Postwar: A History of Europe Since 1945* (London: Heinemann, 2005) 715.

sovereign powers in the institutions of the European Union, at the level of everyday social interactions, national borders still present serious obstacles to the formation of a single community – a transnational civil society. Because the European Union does not rest on a deeply integrated civil society, its political union often proves fragile and dysfunctional, to the detriment of all.

(2) Any successful community or social order is rooted in the bonds established through commonplace social interactions. In its basic elements, a cohesive civil society evolves through working together in productive activities, through exchanges of goods and services, and by the establishment of private associations, family relations, and all the different kinds of connections formed between ordinary people in their daily lives. In modern societies, private law – principally the laws of property, civil wrongs and contracts governing relations between citizens – helps to channel these relationships, to stabilise expectations and sometimes to correct disappointments and betrayals.

(3) Once established, these relations of civil society form the bedrock out of which political communities and shared identities arise. Through the long-term repetition of these social interactions of civil society, there emerges a belief on the part of the participants that they are members of the same community and share a common identity. Comprising a single people, an integrated community, they require and accept political union – a single governance structure – as well.

(4) The European Union, however, lacks such a dense set of connections between peoples. It has failed to establish an integrated transnational civil society out of which a common European identity could be constructed. The protection of fundamental economic freedoms by the European Treaties – the free movement of goods, services, capital and labour – created elements of a European civil society by giving citizens the right to engage in commerce across borders. The additional regulatory interventions of the Single Market initiative reduced further the barriers between national communities. These measures removed some of the most conspicuous obstacles to cross-border trade such as quotas, tariffs and prohibitions. But a more comprehensive and inclusive transnational civil society requires more extensive support.

(5) It is necessary to adopt common legal principles. By harmonising the basic rules and institutions governing social interaction in civil society, Europe can enable the evolution of a transnational civil society community. In short, as Napoléon foresaw, the European Union needs to work towards uniform laws: an integrated body of legal principles to govern all the different kinds of relations formed by citizens in a civil society.

These propositions comprise the central message of this book. At a time when many have lost faith in the possibilities for greater solidarity among the peoples of Europe, it is a message of hope. My project seeks to sustain the aspiration expressed in the European Treaties for a closer union of peoples in Europe in order to foster peace, prosperity and respect for human rights.

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
>
> The Union's aim is to promote peace, its values and the well-being of its peoples.[2]

We should not permit conflicts of interest and the posturing of nationalism to impede the search for permanent and more productive unity.

Yet closer political union cannot be imposed on a reluctant populace by the ruling political elites. In the name of democracy and accountability, grand constitutional schemes for a federal union will be interrogated and found sorely lacking. Instead, greater unity or social solidarity among the peoples of Europe must be sustained from below, in the networks and interdependencies of social life. Shared legal principles play an important role in supporting and channelling those many ties that bind individuals to each other and to their communities as a whole. Comprising an agreed statement of rights, obligations and principles, the principles of private or civil law articulate a community between individual citizens built on shared values of fairness and respect for others. By acknowledging common rules for a transnational civil society, the peoples of Europe can increase mutual trust and confidence, which is an essential strand in the construction of stronger bonds of solidarity. In the long run, rather than a political constitution, these common rules brought together in a Civil Code are the essential legal measure for the further evolution of Europe towards its aspiration of an ever-closer union of its peoples and more effective pursuit of its goals of peace, prosperity and respect for human rights.

[2] Arts. 1A and 2(1) inserted into the Treaty on European Union by Art. 1 of the Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

1 The constitution of everyday life

Why is the project for constructing a Civil Code so important to the future of Europe? Are not solutions to other much-publicised problems – from the perceived illegitimacy of the 'democratic deficit' in Europe's institutions to the waste and inefficiencies generated by subsidies and quotas – more pressing and fundamental? Without denying the seriousness of the challenges presented by these and many other familiar sticks used to beat European institutions in the media, the case for regarding a Civil Code as a central project for Europe depends on its intimate connection to a broader aspiration. A Civil Code provides a vital ingredient in constructing an economic and social constitution for Europe. In the long run, in order to build greater solidarity among the peoples of Europe, it is this social and economic constitution that must be constructed.

This other constitution, what we shall call the 'Economic Constitution',[3] does not itself seek to alter the political arrangements for sharing sovereignty between nation states, let alone impose a federal sovereign state on Europe. Nor does this Economic Constitution impose changes in political allegiances. Rather, an economic and social constitution tries to establish a consensus of values regarding fairness and social justice for a community. It provides a cement of social and economic principles around which a community may build more permanent institutional structures. In Europe, this economic and social constitution is sometimes called the European Social Model. But this European Social Model remains unrealised: an aspiration that still requires both detailed articulation and popular acceptance.

A Civil Code would supply part of the detailed articulation of an economic and social constitution for Europe. These elementary rules provide the foundation for civil society by guiding, channelling and regulating social and economic interaction between individuals and business organisations. Private law rules require performance of contracts and respect for another's interests, both personal and proprietary. The precise meaning of the concept of private law differs between

[3] M. E. Streit and W. Mussler, 'The Economic Constitution of the European Community – "From Rome to Maastricht"' in F. Snyder (ed.), *Constitutional Dimensions of European Economic Integration* (London: Kluwer Law International, 1996) 109; W. Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27.

legal systems.[4] Some national legal systems, but not all, include family and domestic relations within this category, though the central focus of private law always concerns the economic and productive relations between ordinary people. Together, these legal rules construct a framework that ensures respect for personal dignity. At the same time these rules articulate principles and values regarding fairness and justice in social and economic relations with others. By combining these elements, a Civil Code describes a web of standards that comprise an economic and social constitution for society. This framework enables individuals to interact, to create reciprocal bonds, to form associations, to mix and to be inclusive. A Civil Code provides a constitution on which all the networks of civil society can be constructed, whether they concern economic exchange, social cooperation, or the establishment of permanent associations.

A Civil Code also initiates a process that leads to popular acceptance of this economic and social model. Every assertion of rights and obligations arising under the private law rules of the code implies an acceptance of its standards of justice and fairness. A complaint to a fishmonger by a customer that her mackerel tasted stale and bitter involves an acceptance of certain rules regarding sales of goods to consumers; any acknowledgement or response to the complaint also takes as a reference point those legal rules about contracts and their quality standards. Through such dialogues, multiplied by the near-infinite variety of interactions in civil society, the rules of private law are tested, refined and ultimately accepted as the legitimate ground rules. They become popularly accepted not by a momentary vote in a ballot but rather through the repeated use of the rules to guide behaviour and communications. The rules of civil law provide a shared basis for communications that enable trust and mutual understanding or, to paraphrase Damian Chalmers, an epistemic context for making plans and getting on.[5]

A Civil Code created at a European transnational level of governance achieves these goals across borders and cultures. It articulates the

[4] G. Alpa, 'European Community Resolutions and the Codification of "Private Law"' (2000) 8 *European Review of Private Law* 321; for a more sceptical account that doubts any stable meaning at all: D. Kennedy, 'Thoughts on Coherence, Social Values and National tradition in Private Law', in M.W. Hesselink (ed.), *The Politics of a European Code* (The Hague: Kluwer Law International, 2006) 9.

[5] D. Chalmers, 'The Reconstitution of European Public Spheres' (2003) 9 *European Law Journal* 127.

shared principles of fair dealing, just treatment and respect for the interests of others that constitute vital ingredients in a European Social Model. By relying on such a code of principles for guidance, citizens of Europe can more easily establish trust and respect despite the differences of languages, cultures and nationalities. The same standards would apply to a customer's complaint about rotten fish whether made in London, Athens, or Helsinki. A European Civil Code would provide the necessary epistemic context for communications that help to establish a transnational civil society across borders and between cultures.

Such a constitution for everyday life is normally presupposed by the constitution for the political institutions of the state. Historically, in nation states, civil law provided the bedrock on which political associations and institutions were constructed. The evolving rules of ownership, trade and personal status contained in private law described the structure and scope of a community. Legal discourses weave their own distinctive interpretations of the standards that should govern relations in civil society and how those standards are connected to broader political principles such as the protection of individual rights and the obligations of membership of a community. Reliance on the rules implies a common identity and membership in a community. Without such an implicit common identity and membership, it seems impossible to imagine a single polity, an association of all the peoples of Europe.

The European Union needs this other constitution – this constitution for everyday life – to further its economic objectives of promoting peace, the well-being of its peoples, and to secure its values of respect for human dignity, freedom, democracy, tolerance, justice and social inclusion. Without a foundation in shared principles of civil law that help to create a transnational civil society, endeavours to promote better cooperation and coordination at a supranational level of governance in Europe will surely remain frustrated.

The contemporary need for a European Civil Code arises precisely because the political elites have proceeded in their construction of a supra-national political constitution without having established in advance sufficiently dense networks of civil society on which such a constitution might rest. Like the constitution of a golf club, those political rules about membership and governance make little sense unless there is already an underlying network of individuals who play much the same game with each other according to their shared conventions. Similarly, for Europe, the interconnections of civil society need to be dense and intricate before greater political integration can be

contemplated. The central problem in Europe at present is not so much one of reconnecting citizens to its political institutions – a connection that was always thin in any case – but one of connecting citizens to one another across national borders in the ordinary relations of civil society.

Rather than having unity imposed from above, a Civil Code empowers citizens to construct their own interpretation of how the ever-closer union of peoples in Europe should evolve. By weaving the fabric of a civil society that extends beyond the borders of nation states through routine transactions of everyday life, such as buying goods, travelling, renting accommodation and studying in schools and universities, citizens will become more receptive to regarding themselves as having in part a shared polity or political society. They will become more willing to accept a political and social identity of being in part European, of sharing an identity in common with other Europeans, of being part of a wider political community or polity, while at the same time retaining their national and local cultures and allegiances.

The need for a European Civil Code derives from the need to facilitate the construction of a European civil society, in which national boundaries appear less significant as social and economic ties cross these artificial borders in associations and increasingly dense networks.[6] That European civil society relies on mutual trust and respect, which requires in turn a shared set of values and principles regarding fair dealing, fair opportunities and effective protections from adversity. A code of principles of private law articulates those values and ideals. It provides the foundations on which greater solidarity between the peoples of Europe can be built.

2 Mutual recognition

Yet is a European Civil Code really needed in order to achieve the aim of a transnational civil society? Surely it is possible to establish economic

[6] The term 'European civil society' is usually employed in a narrower sense in EU documents to refer to representative non-governmental organisations with European-wide membership, which can give voice to the concerns of citizens and business interests: EC Commission, *European Governance: A White Paper*, COM (2001) 428, 11–18. In this book my use of the concept employs the broader usage of social theory and refers very broadly to any cross-border social and economic activity within Europe. For clarifications, see: K. A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8(1) *European Law Journal* 102.

and social ties across national boundaries without a uniform set of transnational rules? For centuries, indeed, nation states have found a route towards establishing thin threads of civil society across borders. They have achieved support for international commerce and other kinds of social relations without unifying civil laws. The method has depended in modern societies on a broad idea of mutual recognition of sovereignty.

Each nation state recognises the legal authority of the other states within those other states' borders. Further, each state recognises the legal authority of other states where the other's rules and jurisdiction seem to have the closest connection to the events under consideration. Under these rules of private international law (or conflict of laws), for instance, a traffic accident that occurs between a British driver and a French cyclist in France will be governed by French law, even if a claim for compensation is brought before an English court. Moreover, courts in the United Kingdom will respect the decisions of the French courts and even enforce judgments for damages awarded by the French court through domestic procedures. A special choice of law rule governs contracts involving international trade: as a general principle, though subject to exceptions, the parties to the contract are free to determine both the law that should govern the transaction and the courts which will have jurisdiction to adjudicate over any dispute. In order to promote mutual recognition and to avoid anomalies, the European Union has been working towards the harmonisation of these rules of private international law.[7]

This mutual recognition of the authority of other national legal systems goes a long way to make an international civil society possible. A contract that is binding under its governing law will normally be regarded as binding in whatever forum a dispute may be litigated. If a person is married according to the rules of one legal system, that person remains married while travelling the globe, even though the rules governing the formation and the very concept of marriage diverge considerably. Similarly, a contract may create a special type of proprietary interest under English law, and that interest is likely to be

[7] Reg. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters; Reg. 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40; Reg. 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

respected even in a country that does not permit such a proprietary right under its legal system, provided that the contract is governed by English law.[8] The combination of choice of law clauses and mutual recognition by national courts enables international commerce to flourish.

Mutual recognition always has limits. National sovereignty is preserved over many issues, so that the effectiveness of foreign legal arrangements may not always be recognised on such grounds as public order and moral standards. If the special type of proprietary interest created by a contract runs contrary to fundamental standards of morality or public order, private international law does not require a national court to respect the applicable law. A contract of slavery, for instance, even though formed lawfully in the state of origin of the parties, would not be respected by the tribunals of any European country.

In pursuit of the goal of establishing a single market without trade barriers, the European Union has employed variations on this technique of mutual recognition to challenge national barriers to the free movement of goods and services. It has expanded the application of the principle of mutual recognition from legal rules to all kinds of regulations, administrative rules and market conventions. In relation to goods, for instance, the strategy has been to require Member States to respect the technical specifications for goods produced in other Member States under a 'country of origin' principle.[9] For example, a car produced according to the technical requirements in the country of assembly can be marketed throughout Europe without the need to comply with different product specifications in other Member States. Similarly, with regard to suppliers of professional services subject to

[8] The position is not absolutely clear in relation to certain kinds of security rights: J. W. Rutgers, *International Reservation of Title Clauses* (The Hague: TMC Asser Press, 1999).

[9] The 'country of origin' principle is not found in modern private international law rules, so there is a debate whether such EU measures conflict with or improve upon the underlying principles: H. Heiss and N. Downes, 'Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective' (2005) 13 *European Review of Private Law* 693; A. M. Lopez-Rodriguez, 'The Rome Convention of 1980 and its Revision at the Crossroads of the European Contract Law Project' (2004) 12 *European Review of Private Law* 167; R. Michaels, 'EU Law as Private International Law?' Discussion Paper 5/2006 (Bremen: ZERP, 2006). But from the perspective adopted here, these distinctions are not as important as the contrast between, on the one hand, harmonised laws and, on the other, mutual recognition and respect for the laws, regulations and standards of other nation states, which is the underlying principle of any private international law system.

regulatory regimes involving formal qualifications, the principle of mutual recognition seeks to enable professionals qualified in their home state to offer their services in a state where they do not satisfy the local regulatory conditions.[10] The country of origin principle applies also to the regulation of the provider of a service through electronic means: the regulations of the home country apply, even where the service is received in another country, though Member States are required to comply with common standards.[11] Again, this expansive use of the principle of mutual recognition as a technique for market integration encounters limits when Member States perceive that important issues of public order and safety are at stake.

Mutual recognition has been the traditional route for building international connections between civil societies. It provides the necessary assurance of legal support for international business transactions. Mutual recognition in all its guises appears to provide a tried and tested way of enabling international cooperation between civil societies, without the need for the adoption of uniform transnational laws. A first question that must be confronted here, therefore, is whether the project of developing a European Civil Code is necessary. Assuming that Europe does require projects that will lead towards the construction of transnational civil society, why will mutual recognition not provide an adequate and comprehensive alternative for building a transnational civil society in Europe? Why is greater harmonisation of the law necessary, when mutual recognition can enable transnational arrangements to be made and disputes to be settled?

3 Social dumping

Although mutual recognition facilitates transnational civil society, it also invites the risk of 'social dumping'. It threatens to undercut the standards that uphold public policy concerns. These concerns may include, for instance, labour standards, consumer safety rules, environmental protection measures and prohibitions against unfair competitive practices. With respect to technical standards there is a risk, for example, that products which conform to the health and safety

[10] E.g. Dir. 2005/36, OJ 2005, L255/22 on the recognition of professional qualifications.

[11] Dir. 2000/31, OJ L178, 17 July 2000, p. 1 on certain legal aspects of information society services, in particular electronic commerce; M. Hellner, 'The Country of Origin Principle in the E-Commerce Directive – A Conflict with Conflict of Law?' (2004) 12 *European Review of Private Law* 193.

standards of one country will be exported to another which requires compliance with more demanding regulatory standards. If mutual recognition permits such imports, the local regulations are effectively subverted. Consumers who purchase foreign products that merely conform to inferior technical standards may be disappointed by the shoddy or even unsafe imported goods they purchase. Similarly, if an employer in one country sends workers to another while retaining the permitted terms and conditions of employment of the country of origin, there is a risk that these workers posted abroad will receive rates of pay that fall below the host country's conventional standards and even below its mandatory rules concerning minimum wages. More generally, the power to choose the governing civil law of contracts encourages businesses to seek legal systems that favour their interests by, for instance, minimising the rights of consumers. In short, the principle of mutual recognition threatens to subvert all kinds of protective standards.

Given this pressure from business organisations to operate in the least restrictive regulatory environment, mutual recognition, especially in the strands of country of origin and free choice of law governing contracts, may provoke a regulatory 'race to the bottom'. It is predicted that nation states will reduce the regulatory burden under which businesses are required to operate in order to attract inward capital investment.[12] A manufacturer of electrical products, for instance, is likely to locate its plant in a country with low technical standards, to which it is inexpensive to conform, and low employment law standards that reduce the cost of labour to the business. In order to attract such a business to its territory, with the ensuing benefits of employment and wealth to be distributed around the community, any country will be tempted to compete for the investment by reducing their domestic regulatory burden. If every state joins this competition to attract capital investment by diminishing social and labour standards, a downward spiral of social protection seems inevitable. On this model, therefore, mutual recognition provokes the response of deregulation and the weakening of social protection.

Although this theoretical model of regulatory competition seems to exaggerate the actual risks in practice, the European Union has adopted measures designed to counter the most obvious dangers of social

[12] J. P. Trachtman, 'International Regulatory Competition, Externalization, and Jurisdiction' (1993) 34 *Harvard International Law Journal* 47.

dumping and deregulation. It permits national restrictions on imports where these controls can be justified by reference to a legitimate goal of public policy under a test of proportionality: the restriction on imports must be an appropriate and necessary control in order to give effect to the legitimate public policy concern.[13] With respect to the legal rights of consumers and employees, businesses are not permitted to exercise a choice of law in the contract which deprives consumers and employees of their rights according to their ordinary place of residence.[14] In addition, workers who are posted to a foreign country must receive basic terms and conditions that conform to those enjoyed by workers in the host country.[15] These protections against social dumping ensure that the greatest risks of abuse are avoided.

Nevertheless, social dumping is an inherent risk of any scheme of mutual recognition. The risk can only be completely avoided by rejecting the principle of mutual recognition in all its guises altogether.[16] In other words, uniform transnational laws solve the problem of social dumping, but only at the expense of abandoning mutual recognition and the diversity of laws. Although the European Union has so far confined uniform laws to regulatory initiatives that ostensibly pursue specific policy objectives, such as worker and consumer protection, the boundary between regulation and general contract law rules cannot be drawn sharply. Taking the problem of social dumping seriously requires the harmonisation of an ever-larger body of laws, edging ever closer towards comprehensive supranational laws, with the distant end point on the horizon of a European Civil Code. Mutual recognition does not, therefore, provide a sustainable long-term alternative to full harmonisation of laws.

4 Post-nationalism

An abandonment of the principle of mutual recognition in all its guises forces us to confront the deepest and most controversial issue provoked by calls for comprehensive principles of European law to regulate civil

[13] EC Treaty Arts. 28 and 30, discussed below in chapter II.
[14] Reg. 593/2008 'Rome I', above n 7.
[15] Dir. 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1.
[16] For the contrary view that choice of law can be reformulated better to serve the public interest: H. Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2003) 9 *Columbia Journal of European Law* 383.

society. Mutual recognition affirms the need to respect the diversity and integrity of nations. The idea that each national legal system should respect the rules of others where they are more closely connected to the issue or dispute exhibits the quality of the comity of nations. Each nation respects the sovereignty of others over their territories and their civil societies. Private international law functions in parallel to public international law: the latter requires mutual recognition of the sovereignty of states; the former requires mutual recognition of the integrity of the distinct civil societies protected by those states. A rejection of mutual recognition seems to entail both a move towards supranational organisations between states and a diminished respect for diversity in the cultures of civil society.

In Europe, it is still the case that national communities remain the principal focus for political life and group identity. The identity of individuals by reference to their holding a particular nationality is powerfully linked to the view that the nation state is unique in possessing political sovereignty. Although a nation state may agree in treaties to share its sovereignty with other states for a common purpose, that practice does not affect the view that the ultimate power and authority still resides with the nation state. For example, the North Atlantic Treaty Organisation (NATO) was created in 1945 as an international organisation, one to which its member states could join or leave according to their sovereign wishes. Although NATO performs the bulk of the vital function of defence for its members, this sharing of sovereignty did not create a supranational sovereign organisation. NATO is not an institution which is permanently vested with the authority to control and direct the defence policies of all its members. According to the policies of national governments, states may join, leave and even form rival associations for the purpose of defence, and NATO has no legitimate authority to prevent them from doing so.

The European Community commenced as a similar kind of non-sovereign international organisation. Its tasks were limited to the performance of particular functions. Following inaugural measures to integrate the production of steel,[17] the Common Market comprised an international treaty to create a single market without customs barriers and other impediments to competition between businesses.[18] Even as

[17] European Coal and Steel Community, Treaty of Paris 1951, which expired after fifty years on 23 July 2002.

[18] Treaty Establishing the European Economic Community, Treaty of Rome 1957.

the powers or competences of the European Community were subsequently expanded to encompass aspects of social policy, foreign relations and justice, the framework of an international organisation, without sovereign power, was preserved. The European Community performed functions on behalf of its Member States in a wide range of fields, but was not regarded as amounting to a supranational or federal body, which itself could exercise its sovereignty independently. In this sense, the European Community retained fidelity to the principle of mutual recognition: each state remained independent in principle, even though it had agreed in treaties to share its sovereignty over particular governmental functions.

As a consequence, the institutions of the European Community remained technocratic in outlook.[19] In particular, the European Commission (the executive body) was charged under the international treaties with the performance of certain functions as an agent of the collective will of the Member States. Its job was to fulfil its roles allocated by the international treaties, such as policing observance of rules against obstructions to cross-border trade, eliminating inference with competition and subsidising agricultural production. The actions of the Commission always had to be justified by reference to the logic of the allocated functional goals or competences such as market integration or a common agricultural policy. The mode of operation was limited to the types of regulatory powers established by the treaties. In practice, the Commission proposed regulatory measures that it believed would promote its functions. The Member States in the Council of Ministers could approve or reject the proposals. The original voting system conferred a veto power on Member States with respect to most areas of the competence of the European Community. Later on, commencing with the Single European Act of 1986, a majority voting system with detailed rules governing weighted votes according to the population size of a country was adopted for measures connected with market integration. Even so, in most fields of governance, Member States retain powers to veto European initiatives.

This technocratic structure of the European Union was hardly likely to appeal to the hearts and minds of the peoples of Europe. The institutions could be lambasted for their democratic deficit. The policies could be criticised for a narrow concentration on the integration of the

[19] W. Wallace, 'Rescue or Retreat? The Nation State in Western Europe, 1945–93', in P. Gowan, and P. Anderson (eds.), *The Question of Europe* (London: Verso, 1997) 21.

economic market, with too little attention being paid to social issues, such as protection of weaker groups. Progressive changes introduced by the Treaties attempted to respond to these criticisms of the European Community both by expanding the role of the European Parliament in the formulation of laws and by extending the range of functions of the Community.

As the governmental competences of the Community expanded, however, the line between a functional international organisation and a supranational sovereign entity began to be blurred. This sense that the European Community had embarked on a route towards becoming a supranational sovereign entity was only heightened by its renaming as the European Union,[20] the introduction of the notion of European citizenship alongside national citizenship[21] and the declaration at Nice in 2000 of Charter of Fundamental Rights of the European Union.[22]

The most dramatic stage in this blurring of the boundary between a functional pooling of national sovereignty and a supranational sovereign entity was the (proposed) Treaty establishing a Constitution for Europe.[23] Although this Constitutional Treaty was almost entirely a consolidating law that brought together in one text the various existing treaties and their amendments together with the Nice Charter of Fundamental Rights, at a symbolic level, particularly in the use of the word 'Constitution', it seemed to represent an acknowledgement of the arrival of a supranational entity. It spelt out the demise of mutual recognition. The word 'Constitution' implied that somehow the European Union could now act as a supranational governmental organisation without always being subject to national sovereign vetoes and controls. Article I–8 of the proposed Constitutional Treaty adopted all the conventional symbols of a sovereign entity: a flag, an anthem, a motto ('United in diversity'), a currency and a 'Europe day'.

When citizens were asked to vote in referenda on the proposed Constitutional Treaty, or national parliaments were asked to ratify it, they could vote against the treaty and its implied creation of a supranational governmental entity on the basis of any and all fears about what it might do, no matter how unlikely and contradictory those fears might be. It was as plausible for a Frenchman to vote against the proposed Constitutional Treaty on the ground that it might lead to a

[20] Treaty on European Union, 7/2/1992 [1992] OJ C191.
[21] Art. 17 EC, created by the Treaty on European Union 1992.
[22] 2000/C 364/01. [23] CIG 87/2/04 Rev. 2, Brussels, 29 October 2004.

dismantling of social protections in favour of a more *laissez-faire* market economy as it was for the British electorate to be minded to reject it on the ground that it might lead to the creation of an excessively rigid and paternalistic economic order. Although the proposed Constitutional Treaty made scarcely any changes to the existing treaties that might have affected Europe's philosophy about market regulation and social protection, that fact was beside the point.[24]

Whatever the political elites might maintain to the contrary, the real issue in the referenda and debates about the proposed Constitution was whether citizens were ready to accept a new stage in the development of post-nationalism in Europe. This step would involve the creation of a supranational governance institution with qualities that attributed inherent sovereignty to it. It was expected that national governments, though remaining highly significant, would share rather than merely delegate governance functions with the European Union. When they had the opportunity to speak or vote, the response to the proposed Constitutional Treaty from the peoples of Europe was often loudly negative. Many were reluctant to accept that the treaties had done more and should do more than establish institutional arrangements between nation states for the performance of limited and defined functions. Despite its declarations of citizenship and respect for fundamental rights, many people in Europe did not accept that the European Union had yet established a 'social contract' or community between all the citizens of those states.[25] Even those people who were broadly sympathetic to the project of the European Union did not regard themselves as associating already as citizens in a pan-European civil society. In the absence of that unity or solidarity in a transnational civil society, that popular sense of a post-nationalist political community, no foundation

[24] For a detailed analysis of the changes proposed in the Constitution: J.-C. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge: Cambridge University Press, 2006).

[25] See for suggestions that such a 'social contract' or association of civil society must be presupposed by a European constitution: J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastrict Decision', in P. Gowan, and P. Anderson (eds.), *The Question of Europe* (London: Verso, 1997) 265, 288: 'The Treaties on this reading would have to be seen not only as an agreement among states (a Union of States) but as a "social contract" among the nationals of those states – ratified in accordance with the constitutional requirements in all member states – that they will in the areas covered by the treaty regard themselves as associating as citizens in this civic society. We can go even further. In this polity, and to this demos, one cardinal value is precisely that there will not be a drive towards, or an acceptance of, an over-arching organic–cultural national identity displacing those of the member states.'

could be found on which to base even a tentative allocation of partial sovereignty to a supranational entity.

Following the demise of the proposed Constitutional Treaty after negative referenda in France and the Netherlands, the Lisbon intergovernmental conference of political leaders agreed in 2007 a watered-down version popularly known as the Lisbon Reform Treaty.[26] Although this revised Treaty repeats some plans for detailed changes to the functioning of the institutions of the European Union, its tone is very different. It stresses that the powers of the European Union are only those conferred by the Member States and that they retain sovereignty over everything else.[27] Although the Lisbon Treaty reaffirms that the Nice Charter of Fundamental Rights shall have the same legal value as the Treaties, it hastens to add that this recognition of the importance of human and social rights does not extend the competences of the European Union at all.[28] There is no more talk about the trappings of sovereignty such as flags, anthems and a special day.

The project to impose supranational governmental institutions from above seems moribund for the time being. The most that the political elites can achieve at present is some tinkering with institutions and marginal expansion of competences. Even these modest measures are

[26] Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

[27] Art. 1.6, containing new Arts. 3a and 3b for the Treaty on European Union. Art. 3b states:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[28] Art. 1.8, containing a new Art. 6 for the Treaty on European Union with regard to fundamental rights. The governments of the United Kingdom and Poland insisted on a protocol that purports to clarify the limited legal implications of this measure by denying that it creates any directly effective rights. However, the European Court of Justice will interpret EU laws in accordance with the Nice Charter and its decisions will be binding on all Member States, so the new Art. 6 will have indirect effects on European law applicable in the United Kingdom See chapter IX below.

plagued by national opt-outs and unprincipled and opaque compromises. To the immense pleasure of its enemies and sceptics, the European Union has the usual trappings of a failed state: a technocratic apparatus that lacks both popular legitimacy and functional effectiveness in its pursuit of policy goals.

5 Networks of transnational civil society

How can the project of the European Union proceed any further? In my view, the key lies not in high politics but in civil society. To persuade citizens of different nationalities that the European project should be supported further in the direction of a supranational form of governance, a denser community formed of shared interests and cooperative associations needs to be established. Europeans need to feel that being European is an important part of their identity, that they are members of a society that partially transcends historic national borders.

One way to bring forward such a process of fostering a European identity is to facilitate and promote all kinds of private agreements that traverse national boundaries. Perhaps the humble package holiday has done more than anything else to facilitate such cross-border links. Although these holidaymakers may remain slightly cocooned in the plastic shell of a hotel by the beach, most venture outside and, despite language barriers, discover that the alien culture can quickly become familiar and welcoming. No doubt many other consumer transactions with a cross-border element help to establish denser links between separate communities. Shopping, eating in restaurants, riding on public transport in foreign cities begin to establish relations based upon stable expectations shared by consumers and business. Long-term family arrangements between partners of different nationalities also diminish the significance and consciousness of national barriers.

Of greater importance to this process of building a transnational civil society will be more permanent associations between groups who share common interests and concerns. Such associations might link together professionals such as doctors and lawyers in transnational organisations, which share knowledge but also establish normative standards for training, professional conduct and research.[29] Similarly, businesses in

[29] G. Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?', in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 3.

particular economic sectors can establish common technical standards regarding product quality, safety and environmental protection. These businesses may also establish common standards for their transactions among themselves along supply chains through standard form contracts. Such business associations might comprise an international clearing system among banks that establishes rules governing transfers of funds or rules governing the creation and transmission of other kinds of intangible financial products. For example, the International Chamber of Commerce provides standard rules for international payment transfers for the supply of goods under its Uniform Customs and Practice for Documentary Credits. Another example may be an integrated transnational supply chain that by means of computerised inventory control and ordering ensures the steady supply of fresh products to the consumer in a supermarket in another country. As well as business associations, transnational civil society can be constructed through networks and associations of professionals, groups with shared scientific concerns and links between institutions such as universities and research groups. Within such transnational associations, through dialogue, agreement, communication networks and observance of conventional practice, we can discern the evolution of shared rules of economic and social governance.

These business associations, social networks, technical standards bodies and scientific associations, together with long-term family relations and more transient transactions such as the package holiday, are the building blocks of a transnational civil society in Europe. They open up the possibilities for transnational networks between citizens to become denser and form part of the routines of everyday life. These routines derive ultimately from mutual reliance and trust, but then themselves reinforce social solidarity, a sense of belonging to and owing loyalty towards a European community.

Although the basic principles of mutual recognition facilitate the emergence of such transnational networks of civil society, greater support can be provided by common principles and standards that consolidate and clarify mutual expectations in transnational civil society. For example, although each country may respect and recognise the qualifications of lawyers in other countries,[30] the differences in

[30] Mutual recognition for migrating lawyers, with many reservations, is based on Dir. 77/249 on lawyers' services [1977] OJ L78/17, Dir. 98/5 on lawyers' establishment [1998] OJ L77/36 and Dir. 2005/36 on the recognition of professional qualifications [2005] OJ L255/22.

training, knowledge and competences of lawyers between Member States may well discourage the acceptance of foreign professionals in practice and prevent the formation of transnational associations and mutual dealings. Where common standards are adopted, however, even if they merely state minimum requirements for qualifications and practical experience, it is easier to overcome these reservations and concerns.

Similar arguments apply to the most basic kinds of links in transnational civil society, such as a cross-border sale of goods. Where consumers can be reasonably confident that the protections afforded by the rules of every Member State are adequate because they conform to common minimum standards, they will be more willing to take the risk of shopping abroad. Common rules can provide safety standards, a right to repair or replacement and compensation for losses and disappointment. Although consumers may still act more circumspectly when purchasing goods and services in an unfamiliar foreign context, the assurance of common standards will diminish these psychological barriers to cross-border trade.

It is probable that where urgent business needs require standardised rules regarding transnational dealings, some kind of institutional mechanism for the creation of the standards will be constructed by private actors. The history of international commerce reveals considerable ingenuity exercised by banks and merchants in constructing standardised customs and practices, such as bills of exchange, documentary credits and technical specifications for products. Although these autonomous private rule systems serve important commercial functions well, they do not contribute strongly to the building of a transnational civil society in the sense of helping to forge a common post-national identity. In their creation, these transnational trade rules and institutions lack the transparency and legitimacy conferred by a democratic legislative process.[31] As a consequence, they remain weak instruments for building a popular sense of shared identity across borders. Indeed, many of these international trade institutions may be regarded with suspicion as devices for facilitating global markets that

[31] These challenges of global governance have, of course, been explored in an extensive literature, of which examples from a legal and private law perspective are: G. Teubner (ed.), *Global Law Without a State* (Aldershot: Dartmouth Gower, 1997); O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart Publishing, 2004); Joerges, Sand and Teubner, *Transnational Governance and Constitutionalism* above n. 29.

function outside the controls of nation states. In which case, such institutions may provoke a fruitless backlash against transnational civil society – the 'anti-globalisation' movements – and a reversion to calls for an unrealistic and impractical national autonomy. What is required instead are methods for ensuring that transnational private organisations which can impose effective normative systems comply with procedural and substantive standards such as those contained in the Nice Charter, which have been endorsed by representative political institutions. This argument suggests that transnational political institutions such as the European Union need both to assist and to regulate international commercial institutions in order to ensure the transparency and legitimacy of their operations. In particular, transnational political institutions must have the space and opportunity to ensure that the standards developed by private commercial organisations conform to the basic principles of social justice in a market economy that have been described here as an Economic Constitution.

6 Towards a European Civil Code

The case for enlarging the scope of common principles of private law, leading eventually to a European Civil Code, depends ultimately on the contribution of such rules to the construction of transnational civil society. My argument has been that without assistance and shaping by transnational political institutions, such as the European Union, the commercial arrangements, customs and rules constructed by private organisations will not establish the necessary sense of post-national identity. The *lex mercatoria*, as these international commercial standards and practices are often labelled, may have the practical effectiveness of law, but it lacks the legitimacy and transparency in its processes of creation, which are necessary for laws to provide the basis for a political identity. A combination of pluralism in the development of standards for a transnational civil society, thereby taking advantage of business and technical expertise, with a requirement for endorsement by political authorities and conformity to substantive standards such as social and economic rights, seems the most likely formula to achieve a properly functioning and accepted transnational civil society.

In Europe, in order to facilitate a transnational civil society that can form the basis for a post-national political identity, it is probably not essential to devise a comprehensive civil code that provides common rules for every kind of social and economic association or transaction.

The common rules could focus, at least initially, on supporting what are perceived to be the key building blocks that will sustain and promote networks and associations in transnational civil society. Some of these elementary building blocks are likely to be discovered in the laws governing contracts, compensation for damage and injury, protection of property rights (especially intangible proprietary interests such as copyright and financial instruments) and business associations. These ingredients may represent the priorities in a programme for building transnational social solidarity, but in principle there should be no restriction on the scope for agreeing common rules for any kinds of transactions and arrangements in civil society.

If Europe is to progress further in its aims of securing peace and prosperity for its citizens, for the time being it should concentrate not on building controversial supranational sovereign institutions, but rather on helping to support and sustain transnational networks of civil society. In the original legal framework for the European Economic Community, it was assumed that integration of communities would be achieved through a combination of the dismantling of regulatory barriers and of the application of mutual recognition principles between broadly similar systems of private law.[32] The principle of mutual recognition is often inadequate for this purpose, because it fails to ensure minimum standards of social protection and provide a reliable basis for mutual trust and confidence. Common rules and principles of private law will provide a superior basis for constructing a transnational civil society. In nation states those common rules have been provided by civil codes that provide support for the basic institutions and arrangements of civil society, such as the enforcement of contracts, compensation for damage and the structure of business associations. Similarly, the European Union needs to develop equivalent rules and institutional arrangements. In short, Europe needs to work towards a Civil Code.

This argument for a project for a European Civil Code is not closely connected to a policy of promoting the smooth functioning of the internal market throughout Europe. Uniform laws may reduce certain obstacles to trade presented by diversity in national contract laws. Yet that market integration rationale does not describe the principal reasons given here for Europe's need for common rules and principles of

[32] P.-C. Müller-Graff, 'Common Private Law in the European Community', in B. de Witte and C. Firder (eds.), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992) 239.

private law. Instead, the project for working towards a civil code provides an opportunity to address central political needs in Europe. First, it offers the possibility of giving substance to an Economic Constitution, of providing some detail for a European Social Model that can be promoted as an ideal of justice to which we all aspire. Second, the acceptance of common rules and principles through social practice will provide substance to and support for a conception of a transnational civil society, which in turn can provide the foundation for a post-national identity, a European polity, for which supranational institutions of governance are required. In combination, these two strands will contribute to restoring confidence and respect on the part of its citizens to the European supranational political structure. Matching the origins in European integration in market building rather than political constitution building, the development of a Civil Code, perhaps commencing with contract law or merely consumer contracts, would serve as the next institutional step in creating a system of governance that reinforces the complex aims enshrined in the treaties of both ever-closer unity while respecting the sovereignty of nation states.

7 Objections, refutations and qualifications

Yet that ambitious agenda for a European Civil Code omits consideration of the many complexities, difficulties and subtleties of the proposals outlined here. The remaining chapters address many of the problems that will inevitably arise and the controversies that will ensue in pursuing the project for a European Civil Code. The nature of some of the fundamental problems, and how they will be addressed, will be briefly indicated here.

Many of the problems examined in subsequent chapters arise from the simple point that Europe has a long history and that inevitably we have to proceed from where we are now rather than from a blank sheet. One crucial constraint, examined in chapter II, concerns the evolution of the institutions and competences of the European Union so far. Having commenced its life as an international organisation with limited functional competences, its technocratic agenda has severely limited its initiatives and appreciation of the issues raised by the project for building a transnational civil society. In particular, the legislation of the European Union in civil matters is deeply unsatisfactory in numerous respects, as well as being ill equipped to perform its designated functions. It provides a poor starting-point for trying to build

institutions and networks of a transnational civil society. Even so, this existing body of laws, including the judicial interpretations of the legislation and treaties, probably cannot easily be dismantled or replaced.

In the light of the limited powers conferred by the European treaties, chapter III observes how the institutions of the European Union have approached the question of the need for a European Civil Code through a distorted and unsatisfactory perspective. This chapter argues that although recent proposals of the Commission may be going in broadly the right direction, these initiatives are motivated, at least ostensibly, by the wrong reasons. The Commission promotes projects leading towards a Civil Code as part of its internal market agenda. As a paradoxical consequence of its limited competence, however, the Commission promotes this work while denying that a Civil Code is its objective. A better justification for these projects, it is argued here, lies in the quest for an Economic Constitution and a post-national identity. As a consequence of this misconception regarding the aim of progressing towards uniform private law, the current plans and political process in Europe are deeply flawed, and the likely outcome of the technocratic deliberations is unlikely to prove fit for any significant and worthwhile purpose.

Developing that argument in chapter IV, we explore what is meant here by an Economic Constitution and consider further the contribution that a Civil Code might make to the development of a European Social Model. We examine how far the European Union has already progressed in establishing the foundations for a Civil Code that expresses a social model through its existing legislation.

Nation states have a longer history than the European Union. They possess sophisticated systems of private law already, and in many cases have done so for several centuries. Although there are family resemblances between national private law systems, with some being close relatives, the diversity of the systems represents a major problem for the construction of a European Civil Code. As well as diversity arising from the legal rules being expressed in different languages and concepts, there are major differences in form and substance. Whereas most European states have a codified system of law, judge-made common law persists in the United Kingdom, Eire and other smaller Member States. Differences in substance prove harder to detect, because the private law rules of every country endorse a version of a market economy that respects private property and freedom of contract. Yet detailed

comparative law studies constantly reveal divergences in values expressed by national laws, such as how much protection to afford a weaker party to a contract and how best to provide that protection. These legal rules have co-evolved with the social practices and conventions of their local communities and reflect those differences: by convention a consumer has the right to taste a melon in Spain before purchase, but in France and England a consumer must take the risk that the melon will not be ripe or sweet. European countries lack identical private law rules and this national diversity represents an important tradition that needs to be accommodated by supranational governance arrangements. Without powerful incentives, the English will not relinquish the common law, nor the French the Code Napoléon, nor the Germans the BGB, etc.

Chapter V addresses the challenge presented by the need to respect cultural diversity to any project for harmonising laws. The central question is how private law can be used to build solidarity between the peoples of Europe while respecting and embracing the value of cultural diversity. The principal answer to this dilemma, it is argued, lies in the construction of a code of principles rather than detailed rules. Chapter VI addresses in particular the challenges presented to a project for a European Civil Code by the existing marked diversity in the private law systems of the different Member States. Given significant disparities in the values and techniques of national private law systems, is the aspiration towards harmonisation either practicable or desirable in view of the possible disintegrative effects on national laws?

As well as confronting these problems arising from the historical legacy, any project for a European Civil Code needs to recognise that the governance arrangements in the European Union will inevitably diverge from the institutional structures established in national legal systems. It should be assumed, for instance, that it will be impracticable as well as probably undesirable to restructure civil courts into a European federal system with a transnational hierarchy of appeal courts. Civil justice must therefore comprise multi-level arrangements in which national courts will handle the bulk of the disputes arising in civil society, though with occasional guidance on difficult questions of interpretation from the European Court of Justice. As a consequence of this multi-level system of adjudication, even with a European Civil Code, the considerable autonomy of national courts will preclude the emergence of uniform private law throughout Europe. National courts will interpret the common rules and principles in divergent ways,

according to their traditions of legal reasoning, and address issues through different legal processes. Chapter VII examines the ramifications of conceiving of a multi-level private law system in Europe.

The problem then to be addressed in chapter VIII is how to cope with continuing diversity of private law in this multi-level system of governance. Elimination or suppression of diversity, it will be argued, is, in principle, undesirable. On the contrary, we need to find the virtue in the divergence of national laws of the opportunity for mutual learning and discovery. At the same time, however, it is possible to create institutions that will encourage and facilitate convergence between national private law systems. It is in this context of promoting convergence that proposals are advanced both for a European Private Law Institute and for autonomous agreements that fix the terms of transactions for the promotion of cross-border trade.

As well as providing this opportunity for mutual learning and discovery, more fundamentally a European Civil Code provides the opportunity to reconsider and enact a new statement of the fundamental principles governing civil society – the core of the Economic Constitution. Much of the private law extant in Europe was originally devised more than a century ago, at a time when political ideologies tended to prize highly values such as the sanctity of private property and contracts. The national civil codes expressed the ground rules for a liberal society, rules which unleashed the forces of a free market economy. In the twentieth century, these laws were much revised to reflect modern values, such as the protection of weaker parties to contracts including consumers and workers, or the use of insurance and tort law to redistribute the costs of accidents that cause personal injury. Instead of talking about *caveat emptor* (let the buyer beware) as in the past, today we speak of ensuring that consumers receive good-quality goods that meet their expectations in return for a fair competitive price. As a result of a succession of legislative and judicial amendments, together with doctrinal evolution, civil codes in Europe today try to endorse a more complex set of values than their liberal predecessors. The law seeks to balance personal freedom or autonomy against values such as fairness and social solidarity. Courts think today about issues in private law in ways that require them to address complex policy questions through techniques such as economic analysis and reflections on the material scope of social and political rights. In making these adjustments to modern values, private law has lost some of its coherence and integrity in all national legal systems.

Chapter IX concludes by observing that the development of a European Civil Code provides an opportunity for a more systematic approach towards the construction of private law rules that would address the new complex values that are engaged in adjudication of disputes in civil society. The patches of European private law so far enacted have compelled each national legal system to question its own settled practices and doctrinal conceptions. But these are merely fragments of a potentially much broader programme for a reconsideration of an expression of social justice in civil society. The development of a European Civil Code would above all present the opportunity for European citizens to try to express and endorse, in the words of the Lisbon Treaty, a conception of a 'social market economy' and 'social justice and protection':

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[33]

Such a conception of a social market economy would fulfil the promise of Europe to achieve both the material advantages of a competitive internal market and at the same time to ensure a fair and socially inclusive conception of distributive justice through the protection of social and economic rights. These rules and principles would constrain and steer the market and other dimensions of civil society for the purpose of constituting and encouraging a particular and distinctive economic and social system in Europe. Chapter IX notes that a civil code is the first, crucial step, towards a balanced and complete Economic Constitution for Europe, the beginning of the realisation of a European Social Model.

[33] Lisbon Treaty, Art. 1.3, creating a new Art. 2.3 in the Treaty on European Union, 13/12/2007, OJ C306, 17.12.2007; the notion of a social market economy is open to a wide variety of interpretations, which vary in national political discourse from rather liberal markets to those more closely regulated for welfare purposes: A. Somma, 'Exporting Economic Democracy – Social Justice and Private Law from the Point of View of Non-European Countries', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 201, 204.

II The *acquis communautaire* in private law

> Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a "European civil code" which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.[1]

In this passage, the European Commission presents itself as entering a period of reflection about the future of European private law. Before the pondering has barely commenced, however, it insists defensively that it has no intention of proposing a European Civil Code, nor even a more limited project for harmonisation of contract law. Nevertheless, the Commission acknowledges that it continues to examine how European legislation and other initiatives might facilitate cross-border trade within the European Union.

The statement reveals tensions within the thinking of the Commission: on the one hand, it is too soon to be sure where its deliberations regarding the improvement and harmonisation of the law for the purposes of facilitating trade within the single market may lead; on the other hand, the Commission insists that it knows already, despite the impossibility of speculation, that its ruminations will not lead to proposals for a civil code or to inflexible solutions. This self-contradictory and politically nuanced sentence is, however, significant for a number of reasons.

Under the allocation of powers between the institutions of the European Union, the Commission has considerable power either to

[1] Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the acquis: The Way Forward*, Brussels, 11.10.2004, COM(2004) 651 final.

block or promote developments towards a European Civil Code. Under the European Treaties, only the Commission has the right to propose legislation in the sphere bearing on the internal market. Ministers from the Member States can amend the Commission's proposals in Council, though only if they can reach unanimous agreement.[2] The Commission's negative statements with regard to the prospects for a civil code, therefore, will apparently keep the proposal off the agenda for action of the institutions of the European Union. It seems unlikely that the Commission will have a change of heart and try to propose legislation described as a code of contract law or a civil code in the foreseeable future.

This result seems inevitable, even though this statement of the Commission differs sharply from the perspective voiced by the European Parliament. On several occasions the European Parliament has called for the creation of a European Civil Code.[3] The parliamentary representatives have expressed their view repeatedly that harmonisation of major branches of private law is essential to the completion of the Single Market. Even with its increased powers under the Treaties, however, the European Parliament can only propose amendments to legislation.[4] It can declaim, but it cannot initiate any effective legislative action. Although unable to take the project of a European Civil Code forward, Members of the European Parliament appreciate that harmonisation of civil law has broader symbolic and ideological importance for the future of the European Union. They are not merely concerned with detailed solutions to particular obstacles to cross-border trade. Nevertheless, the Commission's pre-emptive decision not to pursue anything that resembles a civil code will effectively block the pursuit of these ambitions by the elected assembly.

And yet, and yet: not all is quite as it seems in the quoted declaration of the Commission. Although the statement is literally true, in substance it seems to be highly misleading. It is almost certainly true that the Commission has no intention of proposing a civil code. On the other hand, the proposals which have emerged from its deliberations include measures that in many respects are functionally equivalent to a civil code, or at least to a code of contract law.

[2] Art. 250, EC.
[3] OJ C 292E 1.12.2006, p. 109; OJ C 305E, 14.12.2006, p. 247; P6 TA (2007) 0615, 12.12.2007.
[4] Art. 251, EC.

In this chapter and chapter III, we examine the reasons why the Commission has adopted this confusing stance and its potential ramifications for the development of European private law. A major part of the explanation consists in an exploration of the limited powers or competences of the institutions of the European Union. Since these institutions may only act within the spheres of activity granted to them under the Treaties forming the European Union, proposals for action and legislation must always fit within the defined competences. As a result, it will be argued, the response of the Commission to calls for harmonisation of civil law have been driven not by any serious assessment of the case for harmonisation or by an intelligible programme for creating closer union in Europe, but rather by the need to steer proposals within the limited powers of the Commission under the Treaties. In short, the limited functions of the institutions of the European Union have set in train a movement towards a European civil law that is flawed as a result of 'competence distortions', that is, the constant requirement to comply, at least in form if not always in substance, with the allocation of powers under the Treaties. This chapter examines in particular how these competence distortions have led to the construction of European legislation and judicial doctrines that systematically fail to address the central problems of private law which they should be confronting.

With these constraints on legislative and judicial action highlighted, however, it becomes apparent that in substance, despite its protestations to the contrary, the Commission is pressing for an instrument that approximates to a code of contract law, though not a code of private law more generally. The Commission disguises this agenda in order to give the appearance of remaining within its proper sphere of competence. It hides its plans behind talk of a humble 'tool box' and the frequent repetition of obscure acronyms like NSSM (non-sector-specific measure) and CFR (common frame of reference). But then, disastrously, in order to conserve this mask, the Commission has to set about the construction of this hidden code without ever engaging, or permitting others to engage, in debates about the broader issues at stake, the most important being the character of the economic constitution. These critical arguments are developed in chapter III.

The structures of the European political institutions appear to be determining deeply unsatisfactory outcomes for the evolution of private law in Europe. The danger is that no uniform law on civil matters will be forthcoming because of institutional obstacles rather than

any considered policy choices. As a consequence, the half-measures that may be substituted for a civil code seem destined to be poorly conceived, uninspiring documents, wholly unsuited for their most crucial tasks. These are the distortions produced by the limited competences of European institutions: the wrong kind of instrument designed for the pursuit of an excessively limited policy objective. My principal motive for writing this book is the hope of making a contribution to the avoidance of this mistake by highlighting the problems of the current trajectory of European Union policy in relation to private law.

1 Establishing the common market

A civil code creates the rules that govern everyday interactions between citizens. It concerns property rights, harms and wrongs caused by one person to another, and contracts of all types. It may also include obligations arising in family relations, including succession to property on death. Under the European Treaty, however, the institutions of the European Union lack the competence to regulate most of these issues. Article 3 of the Treaty Establishing the European Community lists the permitted areas of activity of the Community. It includes the prohibition of restrictions on the free movement of goods, persons, services and capital, a construction of a system for ensuring that competition in the internal market is not distorted, and the approximation of the laws of Member States to the extent required for the functioning of the common market.[5] Other European Community Treaty provisions place explicit limits on its fields of competence, such as restrictions on the subjects of regulation in employment law in Article 137. The competence of the institutions of the European Community with respect to the approximation of laws for the purpose of constructing a common market is the closest that these competences approach to the idea of enacting a civil code. Yet these powers fall far short of encompassing

[5] The Lisbon Treaty renames this Treaty as the Treaty on the Functioning of the European Union and rewrites these provisions in Art. 2.12 by distinguishing more carefully than before in new Arts. 2A–E fields where the European Union has exclusive competence to act, such as customs and competition law, and those areas where there is shared competence with the Member States and those areas such as employment policy where the Union may merely facilitate coordination between the policies of Member States.

the whole range of social and economic relations traditionally governed by a civil code.[6]

How far do these competences of the European Community extend in private law matters? By way of further specification in the Treaty, Article 94 permits the Commission to propose legislation for the approximation of such laws as directly affect the establishment or functioning of the common market:[7]

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Under Article 95, the Commission may also make proposals for approximation measures for the purpose of removing restrictions on the free movement of goods, services and capital:

> 1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

These Articles of the Treaty differ with respect to procedure and perhaps substance. With respect to procedure, Article 94 requires

[6] For detailed discussions of competences with respect to private law: S. Weatherill, 'The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality' (2001) 24 *Journal of Consumer Policy* 339; S. Weatherill, 'Why Object to the Harmonization of Private Law by the EC?' (2004) 12 *European Review of Private Law* 633; S. Weatherill, 'Reflections on the EC's Competence to Develop a "European Contract Law"' (2005) 13 *European Review of Private Law* 405; M. Kenny, 'The 2003 Action Plan on European Contract Law: Is the Commission Running Wild?' (2003) 28 *European Law Review* 538; J. Ziller, 'The Legitimacy of the Codification of Contract Law in View of the Allocation of Competences between the European Union and its Member States', in M. W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 89; W. Van Gerven, 'Codifying European Private Law: Top Down and Bottom Up', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 405.

[7] The Lisbon Treaty Art. 2.81 reverses the numbering of Arts. 94 and 95 and makes changes to the legislative procedures, but does not expand the competences of the European Union.

unanimity in the Council of Ministers to approve any legislation, whereas Article 95, by the reference to Article 251, permits qualified majority voting in Council and requires a co-decision procedure that involves approval by the European Parliament. With respect to substance, Article 94 seems broader in its reference to the idea of the establishment of the 'common market', whereas Article 95 focuses on impediments to trade that obstruct the 'internal market', which is described in Article 14.2 as an 'area without internal frontiers in which free movement of goods, persons, services and capital is ensured'.

Whatever the exact scope of these provisions, it is evident that they are directed towards markets rather than a broader range of private relations between citizens. It follows, therefore, that the Commission must confine its legislative action to those parts of a civil code that might affect the operation of markets. This scope will primarily concern the law of contract, though it could also involve other liability rules that impinge on the market, such as liability for defective products that cause personal injuries, and the protection of interests in personal property – as, for example, in terms of contracts that purport to reserve the seller's ownership of goods after delivery until full payment has been made.

This is the first competence distortion. In so far as the Commission seeks to harmonise private law, it must concentrate on rules that affect the operation of the internal market in goods and services. Hence the Commission ignores the calls of Parliament for uniform civil laws more generally and confines its attention to the law of contract. Topics in family law, the law of torts and delict and property law are usually not so clearly within the competence to harmonise regulations governing trade that the Commission feels able to propose any legislative measures. The European Community's agenda is immediately narrowed down primarily to the rules of contract law, without considering how these fit into a broader scheme of fair treatment and distribution in civil society. The scope of European initiatives is limited to transfers of goods and services, but is apparently not concerned with the rules that constitute, protect and control proprietary interests or the rules that determine liabilities towards others who might be affected by the contractual relations. In real property law, for instance, European legislation may control unfair practices in negotiations for contracts for the sale or lease of interests in land, and may supervise unfairness in the small print of contracts, but will not generally interfere in the

assessment of entitlements and possessory rights.[8] With respect to family and domestic relations, apart from rules regarding the cross-border enforcement of judgments,[9] it has been the entirely separate organisation of the Council of Europe that has often taken the lead.[10] It has pioneered work in developing transnational family law, though these discussions lead only to resolutions and recommendations rather than legally binding instruments.[11] Despite the urgings of scholars to develop substantive principles governing matters such as divorce,[12] the European Community so far has scarcely addressed these other dimensions of justice in civil society.

2 The internal market agenda

Within the field of competence to construct a common market, European institutions can pursue two broad strategies: negative and positive integration. Negative integration focuses on the reduction and elimination of national restrictions on cross-border trade. Its primary targets consist of customs tariffs, quotas for imported goods and any requirements for authorisation or licensing to sell products or services. In principle, though, any national law or administrative practice that presents in effect an obstacle to cross-border trade may be the subject of

[8] Art. 295 EC states: 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.' For an analysis of the significance of property law in the context of European integration: D. Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) 10 *European Law Journal* 751; B. Lurger, 'Political Issues in Property Law and European Unification Projects', in M. W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International 2006) 33; for a detailed account of the influence of European rules, see: P. Sparkes, *European Land Law* (Oxford: Hart Publishing, 2007).

[9] Reg. 2201/2003 on jurisdiction and the recognition and enforcement of foreign judgments in matrimonial matters and in matters of parental responsibility for children [2003] OJ L338/1.

[10] There have also been international conventions on private international law aspects, which some Member States have ratified.

[11] Council of Europe, Report on the Achievements in the Field of Family Law, July 1997; K. Boele-Woelki, 'The Road Towards a European Family Law' (1997) 1 *European Journal of Comparative Law*: www.ejcl.org/11/art11-1.html.

[12] D. Martiny, 'Is Unification of Family Law Feasible or Even Desirable?', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), *Towards a European Civil Code*, 2nd edn (Nijmegen: Ars Aequi Libri; The Hague: Kluwer Law International, 1998) 151; Commission on European Family Law, www2.law.uu.nl/priv/cefl; K. Boele-Woelki, B. Braat and I. Sumner (eds.), *European Family Law in Action* (Antwerp and Oxford: Intersentia, 2003); K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law* (Antwerp and Oxford: Intersentia, 2005).

European measures that seek to remove that blockage to free movement of goods and services. In an important sense, negative integration emphasises deregulation. It is part of the mission of the European Community to remove unnecessary national regulatory barriers to trade within the single market. In contrast, positive integration tries to establish uniform laws for regulating the market across Europe. Those rules might prescribe, for instance, the necessary consumer protection measures, the appropriate level of environmental safeguards, or the requirements to provide a professional service. These rules of positive harmonisation might also include, of course, the general law of contracts.

Both negative and positive integration measures can contribute to the construction of a common market. Negative integration aims to remove all kinds of national barriers that directly or indirectly discourage cross-border trade. Positive integration through the approximation of laws attempts to encourage consumers and businesses to participate in the common market by providing the necessary reassurance that the risks of this trade are not substantially greater than those presented by local transactions. For example, if the regulations governing the safety of products are much the same throughout the internal market, consumers and businesses should feel more confident in obtaining their supplies through cross-border transactions. Although both positive and negative integration measures have been adopted in Europe, the institutional arrangements of the European Union provide much stronger backing to the strategy of negative integration than that of positive integration.

Negative integration

Article 28 of the European Treaty prohibits quantitative restrictions on imports and 'all measures having an equivalent effect'. The European Court of Justice has used this provision to declare unlawful any national rules that either directly or indirectly might have the effect of discouraging imports of products.[13] The Court decided that Article 28 was directly applicable. In effect, using Article 28, the Court invalidates any national laws, regulations and administrative requirements that erect unjustifiable barriers to cross-border trade. Equally, traders who breach national regulations that have the effect of operating as a barrier to cross-border trade are held to be acting lawfully, because European law is judged to be superior to national law.

[13] C-8/74, *Procureur du Roi* v. *Dassonville* [1974] ECR 837, ECJ.

Furthermore, the Court accorded the concept of 'measures having an equivalent effect' an expansive interpretation. This prohibition may apply, for instance, to national rules about the packaging, size, weight, composition, presentation and labelling of goods. Article 28 may also encompass regulations about marketing methods or selling arrangements provided that these national measures either directly impede access to the national market of foreign products or in effect impose an additional cost on products imported from other Member States because they have to comply with a different set of rules from those in the country of origin of the product.[14] If such national rules operate as a barrier to cross-border trade, Article 28 can be relied upon to invalidate those rules.

This doctrine was announced most comprehensively in the case popularly known as *Cassis de Dijon*.[15] It concerned German rules that indirectly prevented the sale of this French alcoholic beverage on the odd ground that it lacked a sufficiently high alcoholic content. The German rules were intended to protect consumers against being misled into thinking that they were purchasing stronger liquor than the bottle in fact contained. Under French law, however, it was sufficient for the producers to label the alcoholic content clearly. The European Court of Justice found that the German rules operated as a barrier to trade. Although the German rules did not on their face discriminate against foreign products, in effect the French product could not be marketed in Germany. The rules were therefore, in principle, invalid.

The Court proceeded to hold, however, that national regulations which function as a indirect barrier to cross-border trade may nevertheless be upheld as valid if they can be justified as necessary and proportionate in the pursuit of legitimate goals. Article 30 lists legitimate grounds for national regulation as 'public morality, public policy

[14] The precise scope of Art. 28 with respect to rules about marketing is much debated and litigated: e.g. C-267/91 and C-268/91, *Keck and Mithouard* [1993] ICR I-6097, ECJ; Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb* v. *TK-Heimdienst Sass GmbH* [2000] ECR I-15, ECJ; see: N. Reich, 'The "November Revolution" of the European Court of Justice: Keck, Meng, and Audi Revisited' (1994) 31 *Common Market Law Review* 459; S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *Common Market Law Review* 885; M. P. Maduro, 'Harmony and Dissonance in Free Movement', in M. Andenas and W.-H. Roth (eds.), *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002) 41; S. Weatherill, 'Recent Developments in the Law Governing the Free Movement of Goods' (2006) 2 *European Review of Contract Law* 90.

[15] C-120/78, *Rewe Zentrale AG* v. *Bundesmonopolverwaltung für Brantwein (Cassis de Dijon)* [1979] ECR 649.

or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'. The Court placed a broad interpretation on these concepts and in practice recognised a wider range of legitimate goals:

> Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[16]

The Court applies a 'rule of reason' or a general proportionality test of validity: the national regulations that create an indirect barrier to market access will nevertheless be upheld if they pursue an objective regarded by the Court as a legitimate policy objective and the rules are necessary and appropriate for achieving that goal. In *Cassis de Dijon*, the German regulations concerning alcoholic content could not withstand this scrutiny. Although measures to protect consumers against deception and confusion are a legitimate policy goal for regulation, the Court held that the indirect complete ban on the French product was disproportionate. Regulations requiring clear labelling of alcoholic content would provide adequate protection for consumers, so the obstacle to the sale of the product in Germany could not be justified.[17] Germans could finally savour the French aperitif, a *kir*, at home.

The Court in *Cassis de Dijon* concluded with a flourish:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced to another Member State.[18]

In other words, the Court created a strong presumption in favour of mutual recognition of product regulations under a country of origin principle.

Although the jurisprudence of the Court surrounding Articles 28 and 30 has since developed considerable complexity, the basic pattern

[16] *Ibid.*, para. 8.

[17] E.g. C-178/84, *Commission* v. *Germany* [1987] ECR 1227 (beer purity); C-407/85, *Drei Glocken GmbH* and *Gertruad Kritzinger* v. *USL Centro-Sud* [1988] ECR 4233 (composition of pasta from duram wheat).

[18] C-120/78 *Rewe Zentrale AG* v. *Bundesmonopolverwaltung für Brantwein (Cassis de Dijon)* [1979] ECR 649, para. 14.

established by *Cassis de Dijon* has determined the trajectory of the legislative activity of the European Community. National laws and regulations that control market transactions can be divided into three broad categories:

(1) Rules that do not have any impact on cross-border trade or access to markets: these are not relevant to the European Community's concerns with the common market and fall outside its competence.
(2) Rules that present an obstacle to cross-border trade or impede market access and which cannot be justified with respect to an approved policy objective under a strict test of proportionality: these rules are invalid under Article 28, and cannot be relied upon by national authorities; instead, each Member State should respect the effectiveness of the regulations from the country of origin of the product.
(3) Rules that present an obstacle to cross-border trade or market access and which can be justified under the test of proportionality: these national rules are valid and enforceable, but since they hinder the operation of the internal market, the Commission has the competence to propose harmonisation measures that will reduce the obstacle.

This interpretation of the European Treaty certainly achieved its purpose of the reduction of barriers to cross-border trade. It established a strong supranational legal order for dismantling regulatory obstructions to free circulation of goods and services. The shadow of Article 28 casts doubt on the validity of any indirectly discriminatory protectionist measures in national law. As a directly effective Treaty provision, it may be invoked at any time, in connection with any legal proceedings, even those not immediately concerned with cross-border trade. For the sake of negative market integration, European institutions pointed their most powerful legal weapon at national regulations governing markets and launched a deregulatory barrage.

Positive integration measures

In contrast, the institutional capacity of the European Community for re-regulation or positive integration was much weaker. The legislative process depended on agreement in Council between the Member States. It was always subject to particular interests being able to block measures.[19]

[19] J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism' (1982) 1 *Yearbook of European Law* 257; F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999) 49.

In so far as measures of positive integration were pursued, the interpretation of the Treaty in *Cassis de Dijon* focused the attention of the Commission on two principal tasks for legislation. These tasks provided the focus for Directives designed to implement the Single Market.

The primary concern is to address the diversity of national regulations that survive the test of justification in category (3) above. Since this diversity in national laws may present an obstacle to trade, the Commission can respond to the problem by proposing measures for the harmonisation of regulations. This agenda is best satisfied by full harmonisation of laws, regulations and technical standards.

A secondary concern is that the mutual recognition principle in category (2) above may lead to a 'race to the bottom' in all those other regulations that might not be justifiable. For example, many measures aimed at consumer protection may not satisfy the requirement that they should be strictly necessary. Often a lesser measure such as labelling a product may appear sufficient to protect the consumer from any risks. The general thrust of the decisions of the European Court of Justice has been to require deregulation by the host state that was importing products and services permitted under the rules of the home state of the producer.[20] A producer who complied with the laws in its country of origin could market the products throughout Europe, taking advantage of the lower costs imposed by weaker or less restrictive consumer protection laws. This competitive process had the potential to set in train a decline in consumer protection measures: producers would be tempted to locate their businesses in countries with the lowest regulatory requirements. In response, national governments would be tempted to deregulate in order to attract inward investment or retain production within their territory. Again, harmonisation of laws could avoid that risk of diminishing levels of social protection, though in this case rules that set minimum standards would suffice to address the problem of regulatory competition.

These two concerns set the agenda both for revisions of the Treaty and new legislative measures at the Community level. Under the 'internal market programme' initiated by the Single European Act 1986, Article 95 was introduced to the European Community Treaty. This provision enabled the Commission to push through under a

[20] S. Weatherill, 'Pre-Emption, Harmonization and the Distribution of Competence to Regulate the Internal Market', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market* (Oxford: Hart Publishing, 2002) 41, 47.

majority voting procedure a raft of measures for harmonisation of mostly rather technical laws that fell within category (3) above. At the same time, however, political pressure mounted for the Commission to propose measures in category (2) that would avoid the 'race to the bottom' which might result from the strict test of proportionality and the need for mutual recognition. In this context, for instance, the Commission proposed laws designed to achieve minimum standards of consumer and worker protection. The Treaty was amended, however, to make it clear that the proposed legislation should establish a high level of consumer, environmental and worker protection.[21] The Commission also sought to facilitate mutual recognition by helping to clarify when a business, product, or service was authorised by its home state, and the appropriate standards for authorisation, so that its legitimacy had to be respected by the host state where cross-border trade was taking place. Arrangements for such clarifications were especially important for complex services such as financial investments and insurance.[22]

3 The character of the *acquis communautaire*

Standing back from this picture of legislative activity with respect to market integration that has guided the European Union for the last two decades, we can observe, first, the pressure for negative integration through deregulation and, second, more significantly for present purposes, a particular pattern of measures of positive integration. The focus of European legislation is always directed towards national regulations that obstruct cross-border trade. The emphasis is on detailed regulatory measures rather than the general rules of contract law, because those specific measures can more readily be identified as a potential obstacle to trade. Community laws in this field 'usually contain a fragmentary or even pointillistic regulation of specific issues.'[23] European Directives appear like an archipelago of small islands in the wide seas of national private law systems. The limits to the harmonisation

[21] Art. 95(3).

[22] E. Lomnicka, 'The Home Country Control Principle in the Financial Services Directives and the Case Law', in M. Andenas and W.-H. Roth (eds.), *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002) 295.

[23] J. Basedow, 'Codification of Private Law in the European Union: The Making of a Hybrid' (2001) *European Review of Private Law* 35, 38; W.-H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic National Codes – Problems and Consequences' (2002) 6 *European Review of Private Law* 761.

of private law rules are set predominantly by the need to steer through the reefs of the need to establish legal restrictions to cross-border trade and the absence of justifications for national regulatory autonomy under the rule of reason or test of proportionality.[24]

A typical Community law is the package travel Directive,[25] which establishes minimum standards for providers of package holidays. This harmonisation measure was justified as necessary because the disparities in national laws both presented obstacles to companies trying to market their holiday packages in other countries and discouraged consumers from cross-border shopping. The Directive presupposes, however, the existence of national contract law under which the consumer would purchase the holiday. The Directive is devoted to matters peripheral to the main substance of the transaction of the promise of a holiday in return for payment. The Directive prohibits misleading brochures and requires full disclosure of information about the principal ingredients of the package. The Directive also gives consumers certain rights on cancellation and insists on strict liability for the retailer of the package holiday for failures in performance. In other words, the Directive addresses the perennial concerns of consumers about cancelled and disappointing holidays by setting minimum standards, but many other aspects of the commercial relationship are left to national contract law. For example, the Directive does not specify what measure of compensation, if any, should be payable to a consumer for a disappointing holiday.

Many Directives that have emerged from the internal market programme can be seen to have some bearing on more general rules regarding contracts. The Directive on package travel, for instance, could be regarded as addressing to some extent the vexed general question of duties of disclosure during negotiations for a contract. Depending on how loosely one draws the connection between these Directives and the general law of contract, there may be between twenty and fifty Directives that could be said to impinge on issues addressed by general contract law. The Commission refers to these Directives as the *acquis communautaire* (the '*acquis*') of Community law regarding contracts. Yet

[24] J.W. Rutgers, 'The Rule of Reason and Private Law or the Limits to Harmonization', in A. Schranen (ed.), *The Rule of Reason* (Groningen: Europa Law Publishing, 2005) chapter 9; N. Reich, 'Competition Between Legal Orders: A New Paradigm of EC Law?' (1992) 29 *Common Market Law Review* 861.

[25] Dir. 90/314 of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

it is apparent that the internal market agenda has ensured that this *acquis* has a particular character. The Directives do not in any direct way provide a blueprint for a possible European contract law. On the contrary, the Directives share characteristics that render them unsatisfactory as a source for legal reasoning regarding the evolution of general contract law. In this context, four features of this European legislation should be stressed.

Lack of generality

Under the agenda of market integration, the Commission proposes legislation that addresses obstacles to trade presented by diversity in the national regulations. Positive measures are supposed to suppress that diversity. The legislation is therefore inevitably specific to particular kinds of transactions that had previously been specially regulated by mandatory laws in some Member States. In some instances, the particular market sector is identified by the type of transaction, as in the case of package travel, timeshares for holiday homes,[26] cross-border credit transfers,[27] car distributorships[28] and commercial agents.[29] In other instances, the specific sector is identified by the parties to the transaction, such as measures designed to provide worker or consumer protection, as in the examples Directive on working time[30] and the Directive on the sale of consumer goods and consumer.[31] Even within these narrowly defined topics, the legislation picks out only a few items that arguably require harmonisation, leaving the bulk of the necessary legal rules to be provided by national law. Measures of positive integration therefore never seek to design principles or rules that might be generally applicable to contracts or even to large categories of contracts. Perhaps the Directive with the largest scope is the one

[26] Dir. 94/47 of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83.

[27] Dir. 97/5 of 27 January 1997 on cross-border credit transfers [1997] OJ L43/25.

[28] Reg. 1400/2002 on the application of Art. 81(3) to certain categories of vertical agreements and concerted practices in the motor-vehicle sector, OJ L203, 30. For the contract law implications: E. Truihé-Marengo, 'Towards a European Law of Contracts' (2004) 10 *European Law Journal* 463, 471.

[29] Dir. 86/653 of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

[30] Dir. 2003/88 of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L229/9.

[31] Dir. 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

concerning guarantees in sales, though this measure is confined to sales by professionals to consumers, thereby excluding commercial transactions between businesses. Even within the law of consumer sales, in the pursuit of the objective of removing obstacles to cross-border trade, the Directive concentrates on the harmonisation of the mandatory consumer protection rules that might diverge between Member States.

It is true that as a result of these legislative interventions by the European Community a substantial body of law has been developed, particularly with respect to consumer transactions. Yet the Community has never had to consider more general questions about the appropriate structures and principles for contract law. Should the law, for instance, have two sets of rules – one for consumer transactions and the other for commercial transactions between businesses? Because the proposed measures invariably concentrate on a particular market sector, this and similar fundamental questions do not have to be addressed. Similarly, the Community has rarely had to address basic questions about the general principles regarding the formation and enforcement of contracts.[32]

It is true, admittedly, as Reiner Schulze argues, that the European Community seems in its Treaties and Directives to be committed to certain basic principles such as freedom of contract and non-discrimination against women and minorities.[33] But these general principles provide scant guidance in relation to the typical problems that arise in formation of contracts, such as whether apparent consent was vitiated by defects in information or culpable conduct. Instead, the agenda of the *acquis communautaire* concentrates on the divergence of mandatory rules which often present fairly obvious obstructions to cross-border trade. For example, mandatory requirements for disclosure of information need

[32] H. Schulte-Nolke, 'EC Law on the Formation of Contract – from the Common Frame of Reference to the "Blue Button"' (2007) 3(3) *European Review of Contract Law* 332. Sometimes these issues arise indirectly in cases before the European Court of Justice: e.g. on formation, whether the 'illicit cause' principle of Spanish civil law was excluded by the first Company Law Directive on the formation of companies: C-106/89, *Marleasing SA* v. *Las Comercial Internacionale de Alimentacion SA* [1990] ECR I-4135; e.g. on performance of contracts, rejection of goods not complying with Italian regulations that were invalid under EC law: C-443/98, *Unilever Italia* v. *Central Food* [2000] ECR I-7535; S. Weatherill, 'Breach of Directives and Breach of Contract' (2001) *European Law Review* 177; W. Van Gerven, 'Harmonization of Private Law: Do We Need It?' (2004) 41 *Common Market Law Review* 505, 526. See also discussion below on p. 00.

[33] R. Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 13 *European Review of Private Law* 841.

to be harmonised, because national laws may require different information from producers. As in the case of the Directive on package travel, legislation can propose a list of the required information without addressing complex issues about the effects of failure to supply that information under national law, or indeed the more general issue of the proper extent of duties to provide information prior to the formation of contracts. Similarly, divergence between national laws with regard to requirements of formalities, such as a requirement of a written contract or a signature, could impede the use of the Internet for the use of consumer purchases, so in this field, subject to many exceptions, the Directive on certain legal aspects of information society services, in particular electronic commerce, provides that Member States should amend their legislation containing requirements as to form that are likely to curb the use of contracts by electronic means.[34] But aside from formalities, the Directive makes little attempt to address basic legal issues regarding the formation and enforcement of contracts concluded through the Internet.[35] In short, under the agenda of the completion of the internal market, the Community systematically avoids grappling with the more challenging task of harmonising private law more broadly.

When Directives are implemented into national legal systems, these particularistic rules often sit uncomfortably among the general principles of contract law. The national legislation frequently carves out the particular area regulated by European law, leaving the remainder of the national legal system apparently unaffected by the insertion of what may be new principles. But private lawyers are bound to ask such questions as whether special rules for package holidays might apply to other similar transactions involving carriage of persons or goods, or the provision of accommodation. Or they may ask why certain regulations are confined to consumer contracts, when the problem might equally arise in a different context, such as a large business dealing with a small

[34] Dir. 2000/31, Art. 9 [2000] OJ L178/1. See also, Dir. 1999/93 on a Community Framework for electronic signatures [1999] OJ L13/12.

[35] A. Lopez-Tarruella, 'A European Community Regulatory Framework for Electronic Commerce' (2001) 38 *Common Market Law Review* 1337; K. Kryczka, 'Electronic Contracts and the Harmonization of Contract Laws in Europe – An Action Required, A Mission Impossible?' (2005) 13 *European Review of Private Law* 149; A. D. Murray, 'Entering Into Contracts Electronically: The Real W.W.W.', in L. Edwards and C. Waelde (eds.), *Law and the Internet: A Framework for Electronic Commerce* (Oxford: Hart Publishing, 2000) 17; A. D. Murray, 'Contracting Electronically in the Shadow of the Law', in L. Edwards (ed.), The *New Legal Framework for E-Commerce* (Oxford: Hart Publishing, 2005).

one. Jürgen Basedow bemoans the disintegrative effects of European directives restricted to consumer transactions on the German national legal system:

> The limited scope of these measures interferes with the comprehensive regulation that national private law provides for the respective areas, and in practice entails a distressing split in the national legal systems. The price that the Member States have to pay in terms of completeness and harmony of their laws is high, and should only be paid if the Community's powers are indeed limited to consumer contracts.[36]

Limited harmonisation

In the pursuit of the market integration agenda, the Community can also avoid tackling the most difficult issues that underlie any comprehensive system for regulating market transactions. It avoids systematically, for instance, the central question of how to balance freedom of contract against protection of parties against unfair transactions and marketing methods. It is unnecessary to address such deeper questions of principle, because the required regulation is aimed at removing barriers to trade rather than establishing new ground rules. The technique of minimum harmonisation, for instance, avoids these deeper questions. It sets minimum standards, but permits Member States to maintain more stringent standards (subject to their justification under Article 30 EC).

The Directive on unfair terms in standard form contracts issued to consumers illustrates the partial and incomplete character of measures of positive integration.[37] The legislation forbids certain types of unfair terms such as sweeping exclusion clauses in the small print of standard form contracts. Yet it permits Member States to retain or introduce more protective measures including, for instance, controls over terms regarded as unfair because they represent an excessively high price. These minimum harmonisation Directives therefore seem paradoxical: their justification under Article 95 relies on their ability to reduce barriers to trade, but their structure as minimum harmonisation entails that they do not necessarily remove such barriers at all. In the example of unfair terms in consumer contracts, for instance, though the rules might encourage consumers to shop across frontiers because they will be protected against harsh clauses in standard form contracts, the

[36] J. Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *Common Market Law Review* 1169, 1176.

[37] Dir. 93/13 of 5 April 1993 on unfair terms in consumer contracts OJ L95/93, p. 29.

ability of states to preserve their different regulations, in so far as these regulations provide superior justifiable consumer protection, tends to discourage businesses from trying to sell their products in foreign markets since these businesses cannot be confident of the validity of the terms of their standard forms in those other markets.

In truth, these measures of minimum harmonisation are better conceived as defective tools of positive integration, helping to establish confidence in the common market, but not significantly denting any barriers to trade presented by diversity in national regulations. They may encourage a roving and confident consumer to shop around in other countries, or to surf the Internet for bargains around the whole of Europe. But instruments of harmonisation of laws, they are not.

More crucially, in the context of the development of the internal market, the choice of legislation that merely establishes minimum standards always avoids the need to address the difficult question of how to achieve a fair balance between the protection of the consumer and the interests in business in freedom of contract and security of transactions. These troubling questions that lie at the heart of modern national schemes of civil justice are remitted to national laws. National legislatures may select standards between the minimum contained in the Directive and the opaque upper limits implicit in the need for justification under Article 30. Furthermore, there is a risk that these minimum standards, which are agreed to avoid damaging regulatory competition, end up being regarded as maximum standards, with the consequence that national rules that exceed the standards will be withdrawn or regarded as failing the test of justification under Article 30.

When Europe introduces legislation, therefore, although it announces that the measure seeks a high level of consumer protection, the technique of minimum harmonisation permits the Community to evade tackling the more fundamental questions about the best balance between paternalist protections and freedom of contract. Such questions may be answered from a variety of perspectives, such as efficiency, distributive justice, social inclusion and reinforcement of moral standards and good faith. Private law systems cannot avoid such issues, but Community legislation often does by employing such devices as minimum harmonisation and mutual recognition.

Re-regulation and private law

A third effect of the internal market agenda in Europe on the *acquis communautaire* in private law is that the Commission presents its

legislation as regulation – or, more precisely, re-regulation – of fields already subject to national regulation. This presentation draws an implicit distinction between, on the one hand, regulatory measures designed to control particular aspects of the market, often identified by reference to some kind of market failure and, on the other hand, the general rules of contract law and commercial law. Using this implicit distinction, the Commission presents its role as one of fulfilling the mission of a regulatory authority, one which supervises and corrects the market distortions created by national legislation. As Christian Joerges observes of European legislation:

> Supranational law is also to be understood as a correction of, as it were, systematic "nation state failures" that can primarily be seen in the unavoidable territorial effects that any national policy will impose on "foreign" communities.[38]

This self-description of European institutions as a regulatory authority with the mission of tackling the 'externalities' caused by national regulation implies that Community legislation does not enter the field of the general rules that construct a market – that is, the rules of private law.

This notion of a sharp division between regulation and private law is constantly asserted in legislative documents. Consider Article 3.2 of the Directive on unfair commercial practices:[39]

> This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

The purpose of the Directive is to prohibit unfair commercial practices committed by traders or professionals against consumers throughout the internal market. The Directive's definition of an unfair commercial practice is extremely wide-ranging. It includes practices that give misleading information to consumers, or that fail to provide material information, and those that involve coercion and other types of pressure likely to materially distort the economic behaviour of consumers. These unfair commercial practices certainly include familiar topics in contract law such as fraud, duress, *dol* and *culpa in contrahendo*. Yet the

[38] Ch. Joerges, '"Good Governance" in the European Internal Market – Two Competing Legal Conceptualisations of European Integration and their Synthesis', in A. von Bogdandy, P. C. Mavroidis and Y. Mény, *European Integration and International Co-Ordination* (The Hague: Kluwer Law International, 2002) 219, 237.

[39] Dir. 2005/29 concerning unfair business-to-consumer commercial practices in the internal market OJ L149/22, 11.6.2005.

Directive also forbids some practices such as failure to disclose material information that probably exceed the protections afforded by general contract law in most national legal systems.[40] Far from evidencing concern about this discrepancy in the scope of protection, Article 3.2 seems to imagine that separate spheres of law exist to govern trading practices: on the one hand, there is the national private law of contract, with its rules about the validity of contracts, enforcement and compensation for loss; and, on the other hand, there is European regulation, designed for particular purposes, in this case the one of promoting consumer confidence in the European Single Market.

This provision is not an isolated example. In the preamble to Directives it is often stated that the new regulations do not affect private law rules:

> Whereas the main difficulties encountered by consumers and the main source of disputes with sellers concern the non-conformity of goods with the contract; whereas it is therefore appropriate to approximate national legislation governing the sale of consumer goods in this respect, *without however impinging on provisions and principles of national law relating to contractual and non-contractual liability*.[41]

In this and other examples, it is apparently thought that these separate spheres of law, namely private law and regulation, can co-exist, yet apply to identical situations without mutual interference, and without exerting any gravitational force on each other. In legislation and other documents the Commission asserts that the legislative activities of the European Community are confined to re-regulation, and do not stray into the establishment of the foundations of the market order.

Although we will question and reject this sharp division between regulation and private law in subsequent chapters, the important point to notice here is the use of the distinction by the Commission in exploring the boundaries of its competence. It enables the Commission to present legislation that addresses central issues that arise in private law without having to provide any systematic solutions to the problems. In the case of unfair commercial practices, for instance, the Commission produces a general rule that forbids the use of misleading information in marketing, but avoids having to consider the private law

[40] For comparative surveys: R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005); R. W. de Very, *Towards a European Unfair Competition Law* (Leiden: Martinus Nijhoff, 2006); F. Henning-Bodewig, *Unfair Competition Law* (The Hague: Kluwer Law International, 2006).

[41] Dir. 1999/44, Preamble, para. (6), emphasis added.

implications of this standard – as, for example, the effect on the enforceability of contracts induced by false statements. By labelling the Directive as regulation, not private law, the Commission avoids having to address directly the deeper questions about the basic rules that should govern the market order.

A more accurate description of the contrast being drawn implicitly by European law is not one between private law and regulation, but rather between laws that have mandatory extra-territorial effects and those which do not have such effects. In the former category, the freedom for businesses to choose the relevant law is foreclosed, because the rules are mandatory and applicable to transactions created under foreign law. This category is described colourfully by Stefan Grundmann as 'national contract law rules that are internationally enforced'.[42] Such mandatory standards are likely to be found in consumer law and employment law, hence the emphasis on such measures in the *acquis communautaire*. This consequence is partly an effect of Articles 5 to 7 of the Rome Convention on the applicable law for contracts, which permits the applicability of mandatory national standards despite a contrary choice of law. It is partly also an effect of the way in which national legislation is framed, when it is clearly intended to regulate cross-border transactions and override a contrary choice of law. However this contrast is described, whether it be between regulation and contract, or between mandatory national standards with international applications and other rules, the central point is that the internal market agenda has required the Commission to concentrate its attention on these sticking points in cross-border trade, without contemplating broader issues regarding the facilitation and construction of rules that will support a just market order across the European Community.

Tilt

It is possible to describe any part of law as being tilted towards certain policy orientations. One may say, for instance, that modern family law is strongly oriented to treating husbands and wife as equals in relation to any disputes arising on separation and divorce. In relation to the *acquis communautaire*, it is also possible to point to various fairly consistent policy choices. For example, it is easy to detect the influence of the internal market agenda of reducing barriers to trade on the types

[42] S. Grundmann, 'The Structure of European Contract Law' (2001) 9 *European Review of Private Law* 505, 513.

and extent of regulation that emanates from the European Union. Typically the Council is more ready to agree measures that remove barriers to trade and enhance competition than to consent to regulations that confer many new substantive rights. In connection with consumer law measures, for instance, the typical European directive concentrates its attention on duties to provide information to the consumer rather than to award a consumer new remedies against producers and service providers. The thrust of the Directive on consumer credit,[43] for instance, is to combat market failures by the provision of clear information to consumers who seek credit arrangements, such as the insistence in Article 3 on the use of the annual percentage rate as the means of indicating the cost of credit, and the provision to the consumer of a full statement of the terms in writing mandated by Article 4. The Directive does not address directly the problem of extortionate rates of interest. When the Commission proposes more substantive measures, such as a directive on the liability of suppliers of services,[44] it falls on unreceptive ears. As Norbert Reich has observed about the consumer law directives, 'Consumer rights have, it seems, been overridden by consumer choice'.[45]

In subsequent chapters we will examine the substantive provisions of the *acquis* in greater detail. We will discover a fairly consistent tilt in these measures towards approving regulation of markets, as opposed to complete *laissez-faire* or radical deregulation. Yet this regulation is principally of the 'market functional' kind that addresses perceived market failures, in which the remedy proposed is often the imposition of duties to provide information in the formation of the contract, rather than deal, for example, with unfairness during performance of the contract.[46] Not every Directive fits into this mould, but there is definitely a well-known tendency in that policy direction.[47]

[43] Dir. 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit OJ L42/87, p. 48, amended in Reg. 90/88 and Reg. 98/7.

[44] Commission, Proposal for Council Directive on the Liability of Suppliers of Services, 9 November 1990, OJ C 12/8, 18/1/91.

[45] N. Reich, 'Protection of Consumers' Economic Interests by the EC' (1992) 14 *Sydney Law Review* 23, 25.

[46] O. Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law' (2006) 43 *Common Market Law Review* 817, 822.

[47] S. Grundmann, W. Kerber and S. Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (Berlin and New York: Walter de Gruyter, 2001); G. Howells, A. Janssen and R. Schulze, *Information Rights and Obligations* (Aldershot: Ashgate, 2005).

If we stand back from this substantive body of law, therefore, we will be struck by the manner in which it is tilted in the direction of certain policy goals rather than others. This emphasis is entirely appropriate for transnational measures linked to the internal market agenda, but it undermines any claims that one can discover in the *acquis* the elements of principles for private law more generally. Unlike national private law systems which strive to balance a wide variety of policy objectives, European legislation in private law fields is narrowly focused on particular kinds of problems to which it proposes mostly limited solutions.

4 The judicial *acquis*

Supplementing the legislative *acquis communautaire* in the field of private law, the European Court of Justice has through adjudication developed to a limited extent some more general principles of private law. The opportunity to develop such principles occurs in connection with references by national courts to the European Court of Justice through which they seek authoritative interpretations of the European treaties and legislation. The Court has often been asked whether some kind of private law compensatory remedy should be awarded to an individual citizen or a private business as a result of the government's or another citizen's breach of the requirements of European legislation. Because the European legislation is rather focused and specific, always concerned primarily to harmonise the standards contained in national mandatory rules rather than to create a general scheme of rights and duties between all the parties, it may not answer in full, or even at all, this question about remedies for individuals adversely affected by breach of the legislative standards. Relying on a doctrine developed by the Court itself that Member States should provide effective judicial remedies for breach of European standards,[48] which is probably based upon the right to a fair trial contained in Article 6 of the European Convention on Human Rights, the European Court of Justice can sometimes respond positively to claims for compensation brought by individuals who have suffered loss.

Using this method of reasoning, the Court has developed a broad principle that imposes liability on public authorities for serious breaches of those European laws which were designed to confer rights on individuals, and where the breach has directly caused a loss to the

[48] Case C-222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663.

individual or business.[49] This liability of public authorities can be justified and explained as a necessary measure to uphold the supremacy of European law and to deter national governments from misusing their powers to subvert the effectiveness of European legislation. Where the case involves two private individuals or businesses, however, the justification for the development of principles of liability is less compelling.

If the relevant European legislation has failed to specify what rights and obligations arise between the parties in this particular situation, it is not so evident that the European Court of Justice has the competence to construct new principles of European private law in order to fill in the gaps. It may be true that these new principles would make the European law more effective, but the omission in the legislation to deal with this particular issue may suggest strongly that it was decided to leave the matter of remedies for private parties to the Member State to handle within its domestic private law system. In addition, as noted earlier, the Directive may declare that it has no effect on private law, which discourages judicial development of new individual rights for compensation. As well as this issue of competence under the Treaties, it must be doubted whether the European Court of Justice can successfully fashion a precise private law remedy that fits comfortably into the private law systems of all the Member States. As soon as the Court ventures beyond the basic instruction that the Member States should provide effective judicial remedies for private individuals who have been adversely affected by a breach, the Court risks the imposition of rules and principles that cannot easily be accommodated within a particular legal system.

Walter Van Gerven and others regard this intervention of the European Court of Justice in constructing additional private law claims and remedies in order to bolster the effectiveness of the European legal order as a highly successful development, which lays the foundations in particular for an *acquis communautaire* in the law of tort.[50] The opposing point of view is that in some instances the court has unwisely ventured beyond its mandate and competence to construct principles of private law that disrupt national legal orders and generate uncertainty and

[49] Joined cases C-46/93 and 48/93, *Brasserie du Pecheur* v. *Germany* and *R.* v. *Secretary of State for Transport ex parte Factortame (No 3)* [1996] ECR I-1029, ECJ.

[50] W. Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501; W. Van Gerven, 'Harmonization of Private Law: Do We Need It?' (2004) 41 *Common Market Law Review* 505.

confusion.[51] In order to assess the strength of these competing arguments, it is worth considering three contrasting cases where the European Court of Justice developed what may be described as a private law *acquis communautaire*.

Compensation claims under void contracts

In *Courage* v. *Crehan*,[52] a dispute arose between a brewery and the tenant of two tied pubs owned by the brewery. The terms of the leases required Crehan to purchase all his supplies of beer from the landlord brewery. Crehan gave up the leases because he was making a loss. He claimed that the loss was due in part to the exclusive dealing term of the contract that required him to purchase supplies from the brewery rather than other cheaper sources, and in part as a result of the brewery's sales of beer to competing pubs at lower prices than those charged to Crehan. Assuming that the lease was invalid for breach of competition laws, namely the directly effective Article 81 EC,[53] the question arose whether Crehan might claim compensation from the brewery for his losses in running his business. Although English courts recognised that damages might be available for those harmed by anti-competitive behaviour, it was not thought possible for a party to an unlawful anti-competitive agreement to sue the other for compensation. Under English law such claims would normally be prohibited on the ground that both parties had participated in making and performing an unlawful contract. This issue of the possibility of a claim for compensation was referred to the European Court of Justice as a question regarding the interpretation of Article 81 EC.

The European Court of Justice upheld the right to claim damages even in the context of the claimant having participated in the illegality by being a party to an unlawful contract. The Court justified this result primarily on the ground that the possibility of claiming damages would strengthen the working of the Community competition rules. Having upheld the right to claim damages, however, the Court then insisted that in the absence of Community rules governing the matter, the domestic legal system of each Member State should work out the details of when a claim may be permitted. The Court merely indicated some

[51] E. g. H. Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to "Constitutionalize" Private Law' (2004) 12 *European Review of Private Law* 661.

[52] Case C-453/99, *Courage* v. *Crehan* [2001] ECR I-6314, ECJ.

[53] This issue was finally resolved against the claimant only much later: *Crehan* v. *Inntrepreneur Pub Co* (*CPC*) [2006] UKHL 38, [2006] ICR 1344, HL.

general principles that should govern such claims: that the process should not be excessively difficult for the exercise of rights, that the protection of the right would not entail the unjust enrichment of the claimant and that a litigant should not profit from his own unlawful conduct, taking into account the respective bargaining power and conduct of the two parties to the contract. From these principles, what the Court appears to be saying is that a party to a contract such as Crehan, who can plausibly claim to be in a weak bargaining position with respect to the brewery, may have entered into the contract without being able to negotiate terms that avoided a loss-making contract, and in such cases he should receive compensation for his losses despite his participation in an unlawful competitive agreement.

This decision clearly creates some new principles of private law, which all Member States will be required to observe, even if this demand requires significant changes to private law doctrines. The logic of the reasoning of the court has been severely questioned by Georgio Monti: does the award of a right to claim compensation to a party to an anti-competitive agreement really discourage businesses from entering such agreements in the first place?[54] Most businesses probably assume that their deals will go through without undue problems, and the anti-competitive element, which increases the profits, should make them even keener not to create conflicts and litigation. Alternatively, on the assumption that the right to claim damages has such a deterrent effect, surely that effect would apply equally even where there was no inequality of bargaining power between the parties? If so, that distinction drawn by the Court seems to be irrelevant to the expressed aim of providing a private law remedy to increase the deterrent force of the law.

Next, the decision can hardly be said to have created a clear set of rules and principles. Much of the rhetoric merely restates the familiar dilemmas that plague this part of the law. Courts are generally unwilling to help persons who have acted unlawfully to succeed in their claims, but that view is sometimes qualified if the defendant appears to have been unjustly enriched or is perhaps even more at fault than the claimant. This balance of public and private interests is always hard to strike. The Court provides scant guidance on how this balance should be struck except to say that a rule that always prevents a claim for

[54] G. Monti, 'Anticompetitive Agreements: The Innocent Party's Right to Damages' (2002) 27 *European Law Review* 282.

compensation is unsatisfactory. The Court leaves many other matters indeterminate. It is not clear from the judgment, for instance, on what principles compensation should be quantified: should Crehan receive compensation for his losses, or should he receive the additional profits of Courage to the extent that the brewery was 'unjustly enriched' by its high prices?[55] All these crucial matters are left to the national courts. As Harm Schepel argues, the underlying problem here is that the Court takes its principle of public policy, namely the need to make competition law effective, and applies that in the context of a private law contractual claim without taking adequate account of the existing framework of rights and duties provided by private law and fitting the new principle into it carefully.[56] Over the course of several hundred years English common law has worked out a solution to these kinds of problems, a solution which normally prevents a party to an illegal contract from relying on it to bring a claim. This rule has its critics, and perhaps could be improved upon, but the effect of the judgment of the European Court of Justice is to demand a change in the law, without specifying in any coherent way what new rule should be adopted.

Finally, the Court does not address the difficult conceptual issues involved and the vital question of the range of the principle which it is constructing. For example, on the conceptual side, is the court suggesting that the claim is for compensation for breach of contract, even though the contract is void under competition law and therefore of no legal effect? Or does the claim for compensation arise completely independently of the contract, through tort or unjust enrichment? These classifications may prove important because different principles apply to the assessment of compensation under each category. On the issue of principle, is this right to claim compensation for losses under a bad bargain limited to instances of illegality under the competition law, or does it extend to other instances of illegal contracts, or does it even extend to a broad range of cases where superior bargaining power has been used to drive through a very unfavourable deal? The European Court of Justice fails to supply answers to any of these basic questions.

Although one should not be too harsh on the Court itself, because it is working under the constraint of inadequate legislative guidance and

[55] The European Court of Justice has addressed these questions in part subsequently: joined cases C-295/04–298/04, *Vincenzo Manfredi* v. *Lloyd Adriatico Assurazioni SpA*, 13 July 2006, noted in G. Afferni (2007) 2 *European Review of Contract Law* 179.

[56] H. Schepel, 'The Enforcement of EC Law in Contractual Relations' above n. 51, 661.

the absence of general competence in the field of private law, there can be no doubt that this case represents a shoddy piece of private law jurisprudence. A general principle is declared, but its conceptual basis, its scope of application and its substantive content are all left up in the air.

Cooling-off period for a surety

A second example drawn from the case law of the ECJ that develops the *acquis communautaire* in private law concerns the scope of the Directive on consumer protection in respect of doorstep transactions or contracts concluded elsewhere than on business premises.[57] Under the Directive, a consumer has a 'cooling-off' period, during which the consumer may cancel the agreement, and a right to be informed of this possibility at the time of the formation of the contract. This brief Directive leaves many issues such as remedies to the laws of Member States, and only sets minimum standards.[58] In *Dietzinger*,[59] a young man had agreed to stand as a guarantor for his father's business debts when the bank's representative had visited the parents' house and had explained certain difficulties about extending any further credit to the father and his business. When the bank claimed money under the guarantee, the son sought to avoid payment by relying on his right to revoke the surety agreement on the ground that he had never been informed about his right to cancel the contract. The central issue in the case was whether the Directive applied to a surety agreement of this type in the light of its scope, as defined in Article 1, of applying only to contracts under which a trader supplies goods or services to a consumer. The question referred to the European Court of Justice by the German Court was whether the scope of the Directive could include a surety agreement. The Court upheld the application of the Directive to a surety agreement, but only if the guarantee had been given as an accessory to a contract for the supply of goods or services to a consumer. In this case, the guarantee was given to support the father's business venture, not an acquisition by a consumer, so the Directive was not applicable to the accessory surety agreement.

[57] Dir. 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

[58] P. Mankowski, 'Information and Formal Requirements in EC Private Law' (2005) 13 *European Review of Private Law* 779.

[59] C-45/96, *Bayerische Hypotheken- und Wechselbank AG* v. *Dietzinger* [1998] ECR I-1199.

From the point of view of the purpose of the Directive, this decision is most odd. The aim of the Directive is to protect ordinary persons when they are surprised by unexpected proposed transactions at home or away from business premises. It seems that the young man in this case found himself precisely in this position, no doubt with the added difficulty of implicit pressure from his father to give the guarantee sought by the bank. His protection is required in such circumstances regardless of whether the father is borrowing money for his business or to purchase some expensive item for the home. Why, then, did the Court deviate from this clear purpose of the Directive and introduce an apparently irrelevant consideration regarding the content of the main credit transaction? Following the view of Christian Joerges,[60] it seems likely that the Court was acutely concerned that it should not stray beyond the clear competences of European law and appear to be constructing general principles of private law. Under the European Treaties, the mandate for European regulation is clearly for minimum standards of consumer protection in relation to sales and services, and not for the creation of broader protective standards in contract law as a whole. By drawing the line between guarantees for business transactions and guarantees for consumer transactions, the Court may have created an irrational distinction from the point of view of consumer protection in the context of doorstep transactions, but it protected itself from the criticism that it was augmenting its competence to create general principles of contract law. The Court was no doubt aware of the complex litigation generated in the context of sureties within the family in many Member States,[61] and perhaps wisely avoided a direct intervention.

This is the opposite result from the previously discussed *Courage* case. In that case, the European Court of Justice boldly enunciated broad principles of private law leading to much uncertainty and confusion; in the *Dietzinger* case, in contrast, the Court avoided that result and

[60] C. Joerges, 'Disintegrative Effects of Legislative Harmonization: A Complex issue and a Small Example', in M. Bussani and U. Mattei (eds.), *Making European Law, Essays on the 'Common Core' Project* (Università delgi studi di Trento, 2000) 103; c.f. O. Gerstenberg, '"Integrity-Anxiety" and the European Constitutionalization of Private Law', in K. Nuotio (ed.), *Europe in Search of 'Meaning and Purpose'* (Helsinki: Forum Iuris, 2004) 107.

[61] E.g. *Royal Bank of Scotland plc* v. *Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773; BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgshaft*). For a comprehensive comparative study: A. C. Ciacchi (ed.), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity* (Baden-Baden: Nomos, 2007).

obtained immunity from that kind of criticism by constructing a distinction that seems irrational from the perspective of the purpose of the Directive. Yet this timidity nevertheless inserts into the *acquis communautaire* an odd principle regarding the scope of consumer protection measures: a person who falls within the normal scope of protection measures by being an individual who is under pressure in his own home to agree to a transaction may not in fact be protected where the foundation of the transaction has a commercial element. This approach has nothing to recommend it from the point of view of coherent policy or principle. It is clearly the consequence of a competence distortion influencing the reasoning of the Court.

Non-pecuniary loss

In a third example of judicial construction of an *acquis communautaire* in private law, the European Court of Justice was again decisive in creating a general legal principle, but in this instance relied on a comparative synthesis of private law systems throughout Europe to justify its conclusion. An Austrian case concerned ten-year old Simone Leitner, who went on holiday with her family to the Pamfiliya Robinson Club in Side, Turkey for two weeks. After a week Simone contracted severe food poisoning. Her illness ruined both her holiday and that of her parents, who had to look after her round the clock. Simone and her parents sued the travel agents who had sold them the package holiday. The Austrian court awarded damages to compensate for the pain and suffering caused by the food poisoning. But the Court declined to award damages for the non-material damage caused by the family's loss of enjoyment of the holiday. The Austrian Court referred the case to the European Court of Justice, in order to ask whether under European Community law, unlike Austrian private law, damages could be recovered for non-material damage. European law was relevant by virtue of the Directive on Package travel, package holidays and package tours.[62] Under the Directive, Article 5(2) states that Member States should ensure that holiday organisers compensate 'the damage resulting for the consumer from the failure to perform or the improper performance of the contract'. The holiday organisers are permitted, however, under that Article to limit their liability for losses other than personal injury, provided that such limitation is not unreasonable. The Directive lacks any explicit provision on how damages should be calculated and what

[62] Dir. 90/314 [1990] OJ L158/59.

interests of the consumer might be compensated. Filling in the gap in the Directive, the European Court of Justice ruled that European Community law requires compensation for loss of enjoyment of the holiday as a form of non-material damage.[63]

What is interesting here is the reasoning to support that conclusion. During the judicial proceedings, the European Commission had argued that because liability for non-material damage is recognised in the national private law systems of most Member States, the Court should adopt that majority interpretation for the Directive. The Commission was keen no doubt to promote the most common view held by the diverse national legal systems, because it wanted to promote harmonisation of laws on this matter. After all, harmonisation was one of the alleged purposes of the Directive in the first place. Unfortunately, because the Directive merely fixed minimum standards rather than imposed a compulsory code, full harmonisation or uniformity could not have been an objective of the Directive. It was entirely possible that the majority of Member States accorded more generous damages to claimants than the minimum standard fixed by the Directive, and that the aim of the Directive did not include a levelling up of measures of recovery of compensation in those states such as Austria that do not award damages for non-material loss. Furthermore, the Directive had clearly left a gap in relation to the determination of the items of compensable loss. This gap could be interpreted as a deliberate omission on the part of the Council of ministers, in order to permit national legal systems to vary in their approach and so preserve their own integrity. Nevertheless, the Court seems to have accepted the pro-harmonisation argument as a main justification for its decision. The fact that most jurisdictions were likely to interpret the Directive to require compensation for non-material damage such as loss of enjoyment was regarded by the Court as a sufficient reason to justify the imposition of that interpretation as a uniform standard on all Member States.

Unlike the previous two cases discussed, where the European Court of Justice sought inspiration for the construction of principles of private law from the Treaties and Directives of the European Union itself, in this instance the Court relied on a comparative law method to find common principles of private law across all the Member States. Since the rules are unlikely to be identical across all jurisdictions, the Court must find the majority view or some kind of synthesis of different

[63] Case C-168/00, *Simone Leitner* v. *TUI Deutschland GmbH & Co KG* (2002) ECR I-2631.

shades of principle. The problem with this way of constructing European private law is that it seems to reject any notion of limitations on the competence of the Court, the notion which had apparently prevailed in *Dietzinger*. The Court could have said that the question of compensation for non-material damage had been left to the Member States in the Directive and that it would be inappropriate for the Court to impose any rule at all. It chose not to, but instead developed a principle of European private law regarding non-material damage of uncertain scope. Does the rule, for instance, apply to contracts other than package holidays? The sole certainty produced by the decision is that Austrian law has to be changed to permit non-material damage claims in cases concerning package holidays covered by the Directive.

What these cases reveal is that the European Court of Justice oscillates wildly in its willingness to construct rules and principles of private law as the need arises for the purposes of interpreting European Directives. At one moment, it boldly infers from the general aim of the Directive some general principles of private law (*Courage*), the next it doubts its competence to construct such principles beyond the strict confines of the functional competences of the European Community (*Dietzinger*), and then in another case it again creates a principle of private law of uncertain generality, but not on the basis of the *acquis communautaire*, but rather through a comparative law synthesis (*Leitner*).

Can these decisions of the European Court of Justice be presented as the use of a 'common law' (i.e. judicial precedent) method of evolving principles of private law through precedents and careful elaboration of legal doctrine by the judges? Unfortunately, they cannot. There are two crucial differences in the method used by the Court. In the first place, the competence of the Court is limited to the interpretation of the treaties and legislation of the European Community. In each case it is required to place a more concrete meaning on a legislative text. It is not invited to develop a systematic body of principles. Moreover, this legislation is not designed to provide a source of principles. The Directives are usually focused on narrow fields and provide little guidance with regard to broader principles. The Court must infer the principles it devises from gaps or silences in the Directive, or adopt a view about the necessary implications for private law of the policy choices embedded in the legislation. This uncertain and unpredictable method of inference differs sharply from the analysis of competing principles discovered in case law that characterises the common law method. Finally, unlike the common law courts, the European Court of Justice remains

uncertain about the proper sources of law, or of inspiration for law-making, for this purpose of constructing principles of private law. Should the Court restrict itself to a method that seeks principles that underlie the legislation and Treaties of the European Union, or is it permitted to conduct the kind of comparative law synthesis used in the *Leitner* decision to discover – or, more accurately, to create – common principles? It requires an exceptionally sophisticated and complex view of the Treaties to suppose that the Court is empowered to construct common principles of private law from a synthesis of national legal systems.

Although these three decisions provide only a snap shot of the work of the European Court of Justice in relation to the evolution of principles of private law, they contain representative elements of the main approaches employed by the Court in its reasoning. Can we describe these methods and decisions as laying secure foundations for an *acquis communautaire* in private law? Surely not. In so far as principles have been established, they seem to be uncertain in scope, lacking in conceptual foundations, confused in their policy orientation and disruptive in their effects on national legal systems. One should not blame the Court entirely for this unsatisfactory outcome. The institutional configuration and the content of the legislation that the Court is expected to interpret present severe obstacles in the way of any efforts to construct coherent legal principles. Even so, we must conclude that the judicial *acquis communautaire*, like the legislative *acquis*, in the field of private law provides poor foundations on which to construct a future European Civil Code.

5 Reforming the *acquis*

These criticisms of the *acquis communautaire* in private law, composed of legislation and judicial decisions, have been harsh, perhaps unduly harsh. The underlying problem for the European Union is the absence of institutional competence to develop adequate principles of private law. The internal market agenda concentrates the attention of European institutions on a particular kind of legislative programme. This programme is sector-specific, tends to avoid full harmonisation in order to achieve majority political support and presents itself as re-regulation of national mandatory laws that present obstacles to trade rather than any kind of broader agenda for creating the basic rules for the construction of a market order or an economic constitution. Although the legislative

measures deny that they are addressing the broader concerns of private law, many Directives do encroach on the basic rules of the market. Furthermore, the European Court of Justice is frequently asked to infer private law rights and duties from this body of legislation. As the archipelago of Directives and judicial decisions increases in number, it indicates the presence of a submerged land mass, an implicit, but never articulated and properly justified, set of principles of private law. The *acquis communautaire* in private law is really just an accidental by-product of endeavours to do something else: to help the internal market to succeed. As a result, it is patchy, inconsistent, opaque and often poorly justified.

Although representatives of the institutions of the European Union would certainly be unwilling to concede these criticisms in full, the Commission has acknowledged that there are some problems. It prefers to describe these problems in terms of lesser criticisms such as 'inconsistencies' and 'technical difficulties', rather than to acknowledge criticisms of incoherence or irrelevance. Even so, the Commission has acknowledged the need for reform. In chapter III we shall consider its current agenda for action.

III The hidden code

Given the unsatisfactory characteristics of the *acquis communautaire* outlined in chapter II, it was predictable that these European laws would be criticised for their lack of systematic coherence, internal inconsistencies and incompleteness. To lawyers the Directives appeared like uncharted reefs on which transactions might unexpectedly be dashed. These apparent defects in the *acquis* troubled legal scholars especially. German scholars, who tend to celebrate the systematic and rational qualities of their private law code, disliked particularly the '*pointilliste*' character of the sector-specific legislation which, unlike the paintings in this style, was hard to present as coherent no matter from what vantage-point the *acquis* was observed. It was not surprising, therefore, when the Commission published in 2003 its *Action Plan* for further work on contract law that it was entitled *A More Coherent European Contract Law*.[1]

In that *Action Plan*, a part of the agenda set by the Commission was to improve the quality of European legislation by rendering it more coherent and internally consistent. The *acquis* could be improved, it was asserted, by adopting standard terminology and concepts, by providing greater specificity in some instances, and by dealing with potential overlaps between different measures more thoroughly. It was argued that these improvements would not only achieve greater coherence but also contribute to more consistent application by national courts of the Directives and the implementing national legislation.[2] Yet the agenda set by the Commission was not confined to this proposal for revisions of existing European laws.

[1] Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law: An Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final (*Action Plan*).

[2] *Action Plan*, paras. 55–57.

The Commission also argued that it needed to take further action with respect to contract law in general. Contract law fell within the sights of the internal market agenda, because 'contract law constitutes the principal body of law regulating cross-border transactions'.[3] In this phrase the Commission withdraws from the sharp distinction between contract law and regulation by acknowledging that contract law itself regulates markets. The Commission next recognises that divergences between national contract laws might prohibit, impede, or otherwise render less advantageous cross-border transactions. If national contract laws present barriers to trade by creating actual or perceived risks of unexpected legal outcomes such as the invalidity of a particular term in a contract, the Commission could justify considering harmonisation of the law under Articles 94 and 95 EC, as explained in chapter II. Although national contract laws might well be justifiable rules, if they nevertheless present barriers to trade, under the internal market agenda they could be subject to harmonisation measures.

The discussion about a European law of contract in the Commission's *Action Plan* is therefore exclusively oriented towards the internal market agenda of removing barriers to trade by positive harmonisation measures. The broader questions about how to construct a social market, one that achieves corrective and distributive justice according to a European Social Model, are never mentioned. Instead, the justification for further developments of European contract law is confined to a detailed discussion of the issue whether or not divergences in national contract law in fact present an obstacle to cross-border trade.

The Commission therefore set about searching for evidence that legal diversity in private contract law presents an obstacle to trade. It asked stakeholders to report any problems arising from legal diversity in contract law in cross-border transactions. This evidence was collated in the *Action Plan*. Although this investigation of the available evidence was certainly not systematic or critical, the stakeholders (in practice, mostly business organisations and their lobbyists) did point to a number of predictable difficulties such as lack of clarity and certainty in European law,[4] thereby confirming the need for more coherence in the *acquis*. In addition, the stakeholders noted the added transaction costs of taking legal advice when engaging in cross-border trade. It is clear that there

[3] Communication from the Commission to the Council and the European Parliament, *On European Contract Law* (Brussels, 11.07.2001, COM(2001) 398 final, para.12.

[4] Commission, *Action Plan*, above n. 1, paras. 16–24.

are additional costs connected to cross-border trade including those related to managing cultural, linguistic, administrative and fiscal differences. On the question of barriers to trade caused by legal diversity in contract law or private law more generally, however, the evidence found by the Commission is more particular and tentative.[5]

Having acknowledged the inadequacy of the *acquis communautaire* in private law to provide the foundations for an internal market, the Commission is, however, constrained by its limited competence to solve the problem. As we shall see in this chapter, the Commission's standard arguments regarding the need for positive measures of integration do not really support any initiative to construct a more comprehensive legal framework of principles of private law. The Commission has to found its case on the claim that the diversity of private law systems in contract presents legal risks and transaction costs which cause significant barriers to trade. We evaluate the strength of these arguments next, and find them wanting. Although the Commission can identify some real problems for cross-border trade, the underlying difficulty remains that these justifications for harmonising regulation tend to support only sector-specific or transaction-specific measures. They do not warrant a broader initiative aimed at general principles of contract law or private law more broadly. As a consequence, we discover that the Commission is forced to proceed further towards codified principles under the heavy disguise known as the Common Frame of Reference (CFR, see p. 77). Indeed, such are the problems of squaring a broader project within the limited competence of the internal market agenda that there are hints that the Commission doubts whether it can take any significant steps at all towards European private law for the time being.[6]

1 Legal risk and barriers to trade

How might contract law or aspects of private law more generally present a barrier to trade? The ability to enter legally binding contracts clearly facilitates rather than obstructs trade. But does a cross-border aspect to a transaction call that conclusion into question?

[5] The commission provides a helpful summary of the evidence at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf.

[6] COM(2006) 744 final, 8 February 2007; H. Beale, 'The Future of the Common Frame of Reference' (2007) 3 *European Review of Contract Law* 257.

For most contracts for the supply of goods and services, the only legal difference presented by cross-border trade is the need to identify the applicable national law. As a general rule, the parties to a contract are free to select the applicable law. Once they have made a selection of a particular national law, there is no longer any barrier to trade. As the European Court of Justice observed in *Alsthom Atlantique SA* v. *Sulzer SA*,[7] a seller's warranty against latent defects under French law, which French courts and doctrinal writers have elevated almost to a mandatory character, does not restrict freedom of cross-border trade, since the warranty could be avoided by the choice of a foreign law as the proper law of the contract. There may be some additional legal complexity as a result of the need to apply two parts of the law – both contract law and private international law – to a particular transaction. But the additional cost of choosing the applicable law seems likely to prove minimal.

It should be acknowledged, however, during fierce commercial negotiations, that the choice of law issue may be left undetermined or ambiguous. For example, a business may be permitted to use its standard terms of business only if it accepts the other party's choice of law, with the consequence that the legal effect of the standard terms may be unclear. Some standard terms, for instance, may be designed to displace certain default rules of a particular legal system, but these terms may make little sense as a result of the choice of another legal system. No doubt commercial businesses who are negotiating contracts will not wish to become mired in such details as choice of law for fear of losing the deal, so they may decide not to resolve any uncertainties concerning the applicable law and the possible mandatory effects of other laws. In practice, therefore, the ability to choose the applicable law in commercial contracts may not entirely resolve issues concerning legal certainty, though in principle these questions can be answered in advance. That position with respect to the legal risks surrounding cross-border trade alters, however, in two circumstances.

In some instances, such as contracts with consumers and employees, the Rome I Regulation in effect determines the applicable law.[8] Under that Convention, a consumer or an employee can usually rely on the law of his or her habitual residence to determine his rights. As a consequence, a foreign company has to comply with the laws of the state of residence of the consumer or the employee. It cannot opt for the

[7] Case C-339/89, *Alsthom Atlantique SA* v. *Sulzer SA* [1991] ECR I-107.
[8] Reg. 593/2008, [2008] OJ L177/6.

laws of its home state. In connection with cross-border sales to consumers in particular, a business will need to ensure that its contractual arrangements comply with mandatory rules of consumer protection in the consumer's home state. Otherwise, the applicable law may render parts of the contract invalid or provide the consumer with unexpected remedies. A business may need to generate a different standard form contract for each jurisdiction in which it sells its products and services to consumers. That need clearly adds to the costs of doing business across borders, and in that sense presents a discouragement to cross-border trade. Stakeholders certainly complained to the Commission about this added cost and the uncertainty about the effectiveness of their standard contracts in foreign markets.[9]

It is debatable, however, whether or not this discouragement amounts to a sufficient barrier to trade to attract the concern of the European community. Although businesses may need to alter their standard terms of business in order to comply with national consumer protection laws, or at least recognise that some of their terms may prove invalid under the applicable national law, they can still market the same product or service. Legal diversity in contract law creates an additional transaction cost, which may affect the price of the product. But compliance with national contract law does not impose two sets of costs on a business – costs of complying with both its home state law and the consumer's national law. Without such a double burden for cross-border trade, the European Court of Justice would not usually regard the legal burden as amounting to a barrier to trade under Article 28 EC.

A similar argument can be made with respect to any mandatory national laws that apply to commercial transactions irrespective of a choice of a foreign law. Diversity in these mandatory rules certainly presents a legal risk to contractors in the sense that misunderstandings or false assumptions about the effect of foreign mandatory laws may invalidate what would amount to enforceable contracts in the home state. Examples of such mandatory rules include determinations of authority and capacity of persons or agents to enter contracts on behalf of a company. Similarly, the necessary techniques for the incorporation of standard business terms within the contractual relation differ substantially between countries. Failure to comply with the specified technique for incorporation may prevent reliance upon the apparent

[9] Commission, *Action Plan*, above n. 1, para. 27.

written contract altogether.[10] With regard to dealings in property and securities, national laws often diverge, especially with regard to the necessity to complete formalities such as evidence of the contract in writing and registration. National laws may even differ on basic concepts such as what constitutes a contractual relation, which in turn may determine the extent to which the parties may choose the applicable law. Similarly, choice of law will not be permitted usually with respect to dealings in proprietary interests, so that commercial security rights established by contract such as retention of title clauses will be governed by the place of the property rather than the applicable law of the contract. These technical issues, which fall within the remit of the national private law systems, occasionally present difficulties for businesses for which they will require specialist legal advice. They certainly constitute a legal risk in cross-border trade.

Yet many of these problems may arise in purely domestic transactions. Legal risk is always present in transactions, because there is a chance that the law may be interpreted in an unforeseen way by a court. The additional cross-border dimension may heighten the perception of such a risk, but it can be addressed in the normal way through obtaining legal advice. Again we can observe that compliance with the national law in relation to certain mandatory requirements may increase transaction costs, but it must be a rare case when these mandatory rules actually impede access to a market in the sense of preventing a business from marketing its products and services abroad.

The position with regard to legal risk creating a barrier to trade becomes rather different where the contract itself represents the product being sold. In the case of insurance, for instance, the standard form contract or insurance policy is the product that is being sold. Diversity in national laws applicable to insurance no doubt renders it extremely difficult or impossible to market exactly the same insurance policy throughout the European Community. Similar problems are likely to affect other common transactions involving credit and security.[11] This genuine problem of legal diversity in private law systems presenting an obstacle to trade seems likely to occur whenever the contract is the

[10] Commission, *Action Plan*, above n. 1, para. 35; see further discussion in chapter VIII below.

[11] Commission, *Action Plan*, above n. 1, paras. 47–48.

product itself, rather than a device for conferring entitlements to other products or services.[12]

We may also discover a genuine obstacle to trade where private law regulates permissible marketing techniques. If a business is unable to use its established and successful advertising and selling techniques in another country, that obstacle may effectively prevent its expansion across borders. For example, if a business uses a format franchising arrangement for its retail outlets, and if that technique is forbidden or is restricted in some countries, the opportunity for cross-border trade, in the sense of business expansion into new markets or freedom of establishment, is inhibited.

These two instances of genuine barriers to trade – contracts that constitute the product and marketing techniques – are certainly cases where the European Community has the competence to act under the internal market programme in order to eliminate obstructions to cross-border trade. Of course, several Directives address these problems already, albeit not always comprehensively and successfully. The Directive on unfair terms in standard form contracts with consumers, for instance, provides some uniform rules regarding the invalidity of certain kinds of terms. But since this Directive only establishes minimum harmonisation, many Member States have preserved or introduced stricter controls over standard form contracts, with the consequence for business that compliance with the Directive is not sufficient to ensure the validity of the terms in the contract in foreign markets. The Directive on unfair commercial practices, being one of full harmonisation, achieves better uniformity and reduced risk in this respect, but it is confined to marketing practices addressed by businesses to consumers rather than to marketing practices in general as might be required to complete the internal market agenda. In addition to those Directives, the European Court of Justice has used competition law to invalidate some unjustified impediments to marketing techniques.[13]

Would harmonisation of general contract law contribute to the solution of these genuine barriers to cross-border trade? It is clear that harmonised solutions to identified problems would reduce legal risk resulting from legal diversity. That implies a continuation of

[12] H. Collins, 'Transaction Costs and Subsidiarity in European Contract Law', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 269, 271.

[13] E.g. C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft* v. *Y. Rocher GmbH* [1993] ECR I-2361; C-384/93, *Alpine Investments* v. *Minister van Financien* [1995] ECR I-1141.

sector-specific measures rather than a general contract law. It also implies that these solutions should comprise full harmonisation in order to minimise divergence between national laws. The Commission acknowledges the logic of this argument. It reaffirms the validity of its sector-specific approach time and again. Within the internal market agenda, the problem concerns whether legal diversity or the perception of legal risk creates a barrier to trade. Whenever such a barrier is identified, it is usually possible to identify a particular, sector-specific fix that will eliminate or reduce the height of the barrier. On this view, measures of positive integration based on the need to counter obstacles to trade caused by diversity in national laws can remain narrowly conceived, without any need to address issues concerning broader principles of the private law of contract.

2 Transaction costs

The general argument for harmonisation of contract law that is based on the reduction of transaction costs concerns the relative competitiveness of European countries in world markets. The fundamental reason why transaction costs matter is that they create a competitive disadvantage for an economic system. At first sight the absence of a uniform law does not affect competitiveness between economic blocs. A German company selling to the United States has the same choice of law problem as an US company selling to Germany. But this mirror image does not apply to complex or assembled products. A typical product such as a car is produced by an assembly company from parts supplied by numerous suppliers. Often these suppliers come from other Member States in the European Community. Thus a German car may contain components purchased from France, Italy, or the United Kingdom. Similarly, a US car will be assembled from parts typically derived from other US producers. The transaction costs surrounding these component supply contracts feed into the eventual cost of the product. There is a competitive advantage for economic blocs if these transaction costs in component supply contracts can be minimised. A similar argument can be made with respect to services that feed into the costs of a final product. Transaction costs provoked by choice of law problems thus have a bearing on the competitive advantage of economic blocs such as the United States and the European Community. To the extent that legal risk provokes transaction costs, this burden places an economic bloc at a competitive disadvantage.

It is therefore possible to argue on the basis of the competitiveness of the European Community in global markets that we should seek to minimise transaction costs arising from legal risk. This policy of enhancing the competitiveness of the common market as a whole is surely within the spirit of the project of the European Community. In structure, it is the same argument that provided partial support for the development of a single currency: the transaction costs of changing currency in cross-border trade presented a competitive disadvantage compared to other trading blocs such as the United States with a single currency. Although this general argument for the reduction of transaction costs is valid, the more precise question that must be considered here is whether European measures aimed in one way or another to harmonise contract and commercial law would in fact reduce these costs.[14]

Transaction costs will always act as a brake on trade within the internal market. Within the internal market agenda, however, they are not a sufficient reason on their own to justify the harmonisation of contract law as a whole. The costs of searching for a contractual partner and then negotiating a deal arise regardless of whether or not the transaction has a cross-border dimension. Nevertheless, there is one particular aspect of transaction costs that does appear to be profoundly affected by the cross-border element of contracts. The investigations of the Commission revealed that businesses are particularly deterred from conducting cross-border trade by the costs of adapting their standard terms of business to different jurisdictions.

National legal systems have observed the normal business practice of using printed documents for regulating standard transactions and have adapted the civil codes to channel and control it by a diversity of measures. The purpose of these legal rules has never been to prevent or deter the use of standard documents. On the contrary, the savings on transaction costs and the building of trust through familiar documentation favours general legal support for the facilitation of trade through this kind of self-regulation. What the modern law of contract does for the most part is to facilitate and enforce this business practice. At the margins, however, national legal systems use a variety of procedural and substantive tests to prevent perceived abuses of the business practice. The central and persistent problem voiced by stakeholders to

[14] G. Wagner, 'The Economics of Harmonisation: The Case of Contract Law' (2002) 39 *Common Market Law Review* 995.

the Commission is that this variety undermines their normal business practice as soon as they seek access to foreign markets. Although in principle these legal risks can be greatly reduced by legal advice, some uncertainty always remains. The additional transaction costs and residual legal risk may not amount strictly speaking to a barrier to cross-border trade, but they do act as a deterrent to the expansion of the internal market.

Yet the solution to this problem of transaction costs is not necessarily to develop a uniform law. What businesses require from government is an assurance that their standard terms of business, once developed on the basis of good legal advice, will provide a routine document for doing business with their customers throughout Europe. Access to the mass market requires businesses to develop routine procedures and practices for selling products across a wide market with diverse customers. For reasons of efficiency, businesses want to be able to use a single set of standard terms of business for all its customers. As part of the internal market agenda, European institutions need to consider how best to help businesses in the pursuit of those goals, without of course sacrificing all controls concerning such matters as consumer protection. Uniform laws of contract may help in this respect, but there are other possible solutions.

Transnational standardised contracts

One option mentioned by the Commission concerns the development of standard form contracts for particular sectors that would be deemed to comply with all local requirements and standards.[15] We will return in chapter VIII to consider the strengths and weaknesses of such a proposal.

Optional code of contract law

Another possibility suggested by the Commission is an optional European code of contract law. Parties to cross-border transactions (and perhaps in purely domestic transactions as well) could exercise a choice of law for a European code rather than any national legal system. In a small survey of businesses in eight European countries, this 'optional

[15] H. Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe' (2004) 10 *European Law Journal* 787; S. Whittaker, 'On the Development of European Standard Contract Terms' (2006) 2 *European Review of Contract Law* 51.

code' found wide support.[16] Apparently, businesses want to retain the freedom of choice of law, and they seem to take the view that a European contract law might provide a useful additional option. But this reported enthusiasm for an optional code must be set next to the finding from the same survey that in European countries other than the United Kingdom the prospect of harmonised European contract law was viewed by nearly all business either favourably or very favourably. So these businesses favoured both a uniform law and an optional law, without necessarily expressing a preference for one over the other.

It is unclear, however, that an optional code offers any benefits from the point of view of the reduction of transaction costs for business. The device would offer another set of laws by which to govern a transaction, but the lawyers would still have to adjust the contract or other transaction to this governing law. Indeed, in the early years this optional code would present many uncertainties of interpretation that would increase transaction costs. For that reason, it seems unlikely that lawyers would choose the optional code in commercial transactions. As Jürgen Basedow once observed:

> In the field of general private law this idea of the 'sixteenth model' is not viable except perhaps for a transition period. Thirty years of experience with the Hague Sales Conventions and the Vienna Sales Convention demonstrate that legal practitioners tend to avoid such additional instruments by appropriate contract clauses. They prefer the well-known framework of domestic law.[17]

An optional European code of contract law, whether 'opt-in' or 'opt-out', seems highly unlikely to reduce transaction costs for businesses in commercial transactions, and in practice would probably not be used because of perceptions of the higher legal risks incurred.[18]

This negative conclusion regarding an optional code may have to be modified with respect to consumer transactions. It is conceivable that an optional European code of contract law would permit businesses to

[16] Clifford Chance, *Survey on European Contract Law* (Clifford Chance LLP, April 2005); S. Vogenauer and S. Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – An Empirical Contribution to the Debate', in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Oxford: Hart Publishing, 2006) 105–148.

[17] J. Basedow, 'Codification of Private Law in the European Union: The Making of a Hybrid' (2001) 9 *European Review of Private Law* 35, 44.

[18] For a slightly contrary view: W. Kerber and S. Grundmann, 'An Optional European Contract Law Code: Advantages and Disadvantages' (2006) 21 *European Journal of Law and Economics* 215.

use the same standard form contract in all their transactions in Europe. With European law governing the standard form contract, including mandatory protections for consumers contained in European law, the same document (once translated, presumably) could be used across all Member States and, in theory, should have the same legal effects. In this context an optional code does appear to offer savings in costs to businesses in relation to consumer transactions. If so, businesses might decide to use the optional European code to govern their retail operations.[19] Some commentators, especially Hans Schulte-Nolke, have expressed great enthusiasm for an optional code, particularly in relation to Internet transactions, where consumers could press a 'blue button' signifying their consent to the application of European law rather than their domestic law.[20]

Against this talk of blue buttons, however, Jacobien Rutgers expresses the justified concern that businesses would select European law only if it seemed advantageous in comparison with their national law.[21] This argument is a version of the 'social dumping' problem described in chapter I. For instance, the European rules might afford lower levels of protection for consumers than national law, a possibility that arises because the Directives have specified only minimum standards of protection in many instances. Businesses would then have an incentive to use the optional code, but at the risk of reducing levels of consumer protection in countries with high standards already. There is an ensuing risk of regulatory competition, in which national legal protections are reduced to bring them into line with the European law being chosen by businesses.[22] In addition, it seems unlikely that most

[19] H. Heiss and N. Downes, 'Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective' (2005) (5) *European Review of Private Law* 693, 698.

[20] H. Schulte-Nolke, 'EC Law on the Formation of Contract – from the Common Frame of Reference to the "Blue Button"' (2007) 3(3) *European Review of Contract Law* 332; H. Beale, 'The Future of the Common Frame of Reference' (2007) 3 *European Review of Contract Law* 257, 269 (arguing for the potential benefits to SMEs).

[21] J.W. Rutgers, 'An Optional Instrument and Social Dumping' (2006) 2 *European Review of Contract Law* 199.

[22] B. Lurger, 'The Common Frame of Reference/Optional Code and the Various Understanding of Social Justice in Europe', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 177, 181–184; a different view is expressed by S. Grundmann, 'Der Optionale Europaische Kodex auf der Gundlage des Acquis Communautaire – Eckpunkte und Tendenzen', in H.-P. Mansel, T. Pfeifer, H. Kronke, C. Kohler and R. Haussmann (eds.), *Festschrift fur Eric Jayme* (Munich: Sellier, 2004) 1259.

consumers would appreciate the potential adverse legal consequences of clicking on the 'blue button'. It is understandable, therefore, why businesses may see attractions in an optional European code of contract law. Committed as it is to high levels of consumer protection, the European Union would surely not wish to provide a legal option that permitted reduction in levels of protection.

For the above reasons, an optional code does not present clear benefits from the point of view of transaction costs. In a commercial context it may increase costs, and in a consumer standard form context the savings in transactions costs may be achieved at the risk of circumventing existing national consumer laws. Do these same arguments apply to a mandatory European contract law? Would a uniform transnational law of contract succeed in practice in reducing transaction costs in relation to cross-border trade?

Uniform law

Transaction costs with respect to coping with legal risk are provoked by uncertainty and ignorance. The uncertainty lies in the prediction of legal outcomes. This uncertainty is an inherent feature of law, though some legal systems are no doubt more predictable than others. The problem of ignorance arises from lack of knowledge of law, and is a matter of degree. Ignorance is likely to be greater with respect to foreign legal systems. In any cross-border transaction, this problem of ignorance is likely to be greater than in a purely domestic transaction simply because knowledge of two legal systems is required.

With respect to ignorance, there can be little doubt that uniform laws applicable throughout Europe would, after a period of transition, reduce the problem of ignorance considerably. Lawyers would know the law applicable in all Member States because it would be uniform and the same as domestic law. This advantage in saving on transaction costs provoked by ignorance is also true of the perhaps more manageable option of introducing uniform laws throughout Europe to govern particular transaction types, such as sales, commercial leases, security arrangements, etc.

With respect to uncertainty, there is no clear advantage of transnational law over national law. The problem of predictability has to be addressed at any level of regulation, and it is controversial how that best may be achieved. Some believe codes produce certainty; others maintain that common law systems of precedent produce greater predictability. My own view is that legal systems that try to understand the

expectations and understandings of the parties to contracts and other social relations, and then implement them, have the edge on questions of predictability and the reduction of transaction costs.[23]

Transnational regulation carries with it the risk of diminished certainty in one respect. The problem will be to secure a uniform interpretation of the law in each Member State. Common uniform rules will not on their own guarantee such a result.[24] The normal legal technique for ensuring such a result is to establish a hierarchy of courts with the task of ensuring uniformity within the jurisdiction by means of regulating inferior courts' decisions on appeals. This expensive, but tried and trusted, method for securing uniformity of interpretation implies a much greater significance for a system of European Community civil law courts.[25] Since such a federal system of civil courts seems very unlikely to be developed, European contract law would inevitably lack uniformity in its application between Member States. It will be argued in chapter VII that the resulting diversity of interpretations of a European uniform law is inevitable, but is also desirable for reasons to be explored below. In this context of assessing transaction costs, however, the conclusion must be that divergence of interpretations by national courts will greatly diminish any potential advantages arising from uniform laws.

This brief analysis of arguments for European harmonisation measures based upon transaction costs and legal risk suggests that the expected benefits of cost reduction may not materialise in most instances and that, when they can be achieved, the measures employed may create the risk of the unattractive lowering of standards of consumer protection. In short, the case for harmonisation of contract and commercial law based upon obstacles to trade is extremely thin at best, and probably applies only in connection with particular problems arising in sector-specific transactions.[26]

[23] H. Collins, 'Formalism and Efficiency' (2000) 8 *European Review of Private Law* 211.

[24] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[25] H. Collins, 'Transnational Private Law Regulation of Markets' (1998) 4 *Europa e diritto privato* 967.

[26] For a similar conclusion: H. Beale, 'Finding the Remaining Traps instead of Unifying Contract Law', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002). 67. For a more extended theoretical discussion of the economic costs and benefits: J. Smits (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Groningen: Europa Law Publishing, 2005).

3 The paradox of the Common Frame of Reference

Drawing together these strands in the debates about the evolution of the common market, it becomes possible for the Commission to propose certain conclusions. It can accept that its measures of positive integration in the form of sector-specific Directives lack a coherent approach to market regulation because inevitably they have addressed isolated issues without being concerned about broader principles. In addition, the Commission has to accept, though perhaps reluctantly, that the internal market agenda does not warrant a broad initiative to develop a uniform contract law, because the diversity in the laws of contract between the Member States, though adding to legal risk and transaction costs, does not systematically present a barrier to trade. The Commission therefore finds itself in a dilemma with regard to general measures on contract law. On the one hand, if sector-specific measures could be grounded in general rules of contract law, or at least general rules for broad sectors such as consumer transactions, the coherence and the harmonising potential of the *acquis communautaire* would be considerably enhanced. On the other hand, such a legislative measure would almost certainly exceed the competence of the European institutions, because it would extend its reach well beyond identifiable barriers to cross-border trade. In short, in the framework of the Treaties and objectives of the European Union, a code of contract law is both required and prohibited.

The Commission discovered an apparent solution to this paradox in the notion of a 'Common Frame of Reference' (CFR). In its *Action Plan* for contract law, the Commission proposed that a document should be produced that would describe the general principles of contract law. Following research by legal scholars, and consultation with stakeholders, an agreed document could be used by the European legislator and the European Court of Justice as a tool for bringing greater coherence and consistency to the *acquis communautaire*. In order to provide this coherence and consistency to the *acquis*, in content and function the CFR must look much like a traditional code of contract law. Yet, in order to avoid exceeding the competence of the Commission and the European Union under the existing Treaties, in its formal qualities the CFR could not comprise a legally binding instrument, a legal code of contract law. Hence, the CFR replaces one paradox with another: it is a code that denies it is a code.

In its description of the CFR, the Commission makes the following observations:

> [T]he Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purposes of simplifying the *acquis*. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States' legal orders. It would also be desirable that the Council and the EP [European Parliament] could use the CFR when tabling amendments to Commission proposals . . .
>
> National legislators could use the CFR when transposing EU directives in the area of contract law into national legislation. They could also draw on the CFR when enacting legislation on areas of contract law which are not regulated at Community level . . .
>
> Finally the CFR, based on the EC *acquis* and on best solutions identified as common to Member States contract laws, could inspire the European Court of Justice when interpreting the *acquis* on contract law . . .
>
> The Commission considers at this stage that the CFR would be a non-binding instrument.[27]

The Commission has also described the outline content for the CFR. The proposed list of contents includes general principles, definitions, and then model rules both for contract law in general and for specific contracts. In short, the content of the CFR would imitate closely existing civil codes in the Member States. The European Union Committee of the House of Lords reported in 2005 on the close similarities between the proposed content for the CFR and existing civil codes, which rather undermined the Commission's claim that it was merely proposing a toolbox or a dictionary:

> [A]s Clifford Chance noted, [in its evidence to the Committee] the list of model rules reads like an index to a contract code (pre-contractual obligations, conclusion of a contract, form, validity, interpretation, contents and effects, performance, remedies for non-performance, plurality of parties, assignment, transfer and prescription) . . . As Professor Beale said, 'you will see that the possible contents are almost verbatim the chapter headings from the Principles of European Contract Law' . . . Mr Clark, for the CBI, noted the similarity between the contents of Annex I [the Commission's description of the content of the CFR] and the contents of a standard French textbook on the law of

[27] Communication, 1.10.2004 COM (2004) 651 final, pp. 3–5.

obligations . . . There would also be chapters devoted to special contracts, basically derived from the four types of Roman law special contracts. Sale and hire are examples.[28]

The House of Lords Committee recognised in its conclusions that whatever the true intentions of the Commission, undoubtedly the CFR had the potential to provide a model code of contract law that would be waiting on the shelf for when it could be implemented:

Once the CFR has been agreed it would not be a major task to convert or adapt it into an optional instrument. The CFR may turn out to be something of a Trojan Horse.[29]

Appropriately, in order to develop the content of the CFR, the Commission awarded a large research fund to a pre-existing network of legal scholars working under the title of the Study Group for a European Contract Code. This network, now renamed the Common Principles of European Contract Law Network, has carried out the work as described in their research contract to produce a formulation of the CFR. This work has continued even though for political reasons the Commission has recently tended to stress that its emphasis remains on tidying up the *acquis communautaire*, largely composed of consumer law, rather than on tackling contract law as a whole.[30] The emerging draft CFR,[31] as described by Brigitta Lurger, a member of the network, in its content is unmistakably a traditional national civil code in all but name:

Black letter rules without comments cover more than 500 pages. The rules are as detailed as the rules you would find in a traditional codification of civil law, while the vast majority deal with issues other than consumer contracts. The draft CFR includes general rules for obligations and contracts, as well as regulating a wide range of specific contracts, from sales and services to

[28] European Union Committee, House of Lords, 12th Report of Session 2004–05, *European Contract Law – The Way Forward? Report with Evidence* (5 April 2005) HL Paper 95 (London: HMSO), paras. 27–28.

[29] *Ibid* para. 141. See also: H. Collins, 'The Common Frame of Reference for EC Contract Law: A Common Lawyer's Perspective', in M. Meli and M. R. Maugeri, *L'Armonizzazione del diritto privato europeo* (Milan: Giuffrè Editore, 2004) 107, 124: 'The common frame of reference may, like a Trojan horse, smuggle into Europe a Code of Contract Law. In function, it is the same as a Code, in aspiration it is the same as a Code, and in its view of the methodology of legal reasoning it is that of a Code. Let's just call it a Code.'

[30] H. Beale, 'The European Commission's Common Frame of Reference Project: A Progress Report' (2006) *European Review of Contract Law* 303.

[31] *The Draft Academic Common Frame of Reference, Principles, Definitions and Model Rules of Private Law* (Munich: Sellier), January 2008: www.law-net.eu.

donating and leasing moveables. It covers tort law, benevolent intervention, unjustified enrichment, security rights in movables, acquisition and loss of ownership in movables, and trusts. Surely such a comprehensive instrument of private law rules is not necessary merely to improve the consumer acquis.[32]

Although one can appreciate the ingenuity of this proposal for a code of contract law that is not a Code because it is not a binding legal instrument, it is important not to be deceived by the form of the instrument and the constant repetition by Commissioners of the deceptive label of a 'tool box'. In its content, the CFR will resemble closely existing national civil law contract law codes, and in particular the German Civil Code.[33] For example, in the Draft CFR Book II is entitled 'Contracts and Other Juridical Acts' and speaks of 'party autonomy' rather than freedom of contract.[34] Needless to say, in the rules governing the formation of contracts (or juridical acts) there is no mention of the English concept of consideration or the French concept of *cause*, but rather simply the German requirement of intention to create legal relations.[35] It is clear that the Commission needs such a model code or blueprint ready in the wings in case the proposal for an 'optional code' or more general harmonisation is ever accepted by the Council of Ministers.[36] Hugh Beale, one of the most influential participants in the work towards the CFR, insists that the 'tool box' of the CFR will merely provide a description of the current national private law systems, noting their divergences where appropriate, but expressing the common view, or at least the majority or better view, in a system of rules.[37] He is correct to

[32] B. Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 177, 180–181.

[33] O. Lando, 'The Structure and the Legal Values of the Common Frame of Reference (CFR)' (2007) 3 *European Review of Contract Law* 245, 250.

[34] *The Draft Academic Common Frame of Reference*: – 'II.-1:101: Definitions (1) A contract is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement or declaration of intention, whether express or implied from conduct, which has or is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.'

[35] *Ibid*. Book II. – 4:101.

[36] Editorial Comments, 'European Contract Law: Quo Vadis?' (2005) 42 *Common Market Law Review* 1(4); M. Kuneva, 'Introduction' (2007) 3 *European Review of Contract Law* 239, 244.

[37] H. Beale, 'The Future of the Common Frame of Reference' (2007) 3 *European Review of Contract Law* 257, 268–269.

emphasise how useful such a comprehensive survey and comparative analysis could prove to be for the Community legislator. But he objects to any political interference with the content of the CFR as unnecessary and possibly harmful. On this view, the tool box should remain a purely scholarly exercise, a resource, with no legal effects.

In my view, however, most proponents of the CFR share a more ambitious agenda. What they expect is that once a final text of the CFR in the form of a body of rules has been agreed, despite only being 'soft law', it is likely to function in the European legal system almost exactly like a code of contract law. In particular, the CFR is likely to have indirect legal effects through interpretation of laws and will provide a discipline of concepts and categories that will structure and steer future developments in European private law.

The interpretive obligation

Unlike a Code, which creates directly enforceable individual rights, the planned CFR will only have the indirect legal effect of this interpretive obligation placed on courts. Yet it is important not to underestimate the potential force of this obligation. It involves an extension of the supremacy of European law, by achieving a tighter grip on how national courts interpret national laws that are intended to implement European Directives.

In national legal systems regulatory measures are typically understood and interpreted by reference to the background national private law. Legal concepts used in the regulation, if not expressly defined in the regulation, will be interpreted by the usage of those terms elsewhere in national law. For example, if a regulation applies only to 'contracts of employment', unless the term is comprehensively defined in the regulation itself, the meaning of the concept and thus the scope of the application of the regulation will be determined by reference to that concept as it is used in national private law. Following that interpretive method has the advantage of achieving clarity, predictability and coherence within the national legal system, though sometimes it may have the effect of defeating some aspect of the purpose of the regulation – if, for instance, the legislature intended the regulation to have a broader or narrower scope than the established legal usage. When applying and interpreting national law that implements EU Directives, national courts typically follow an identical legal method. Their assumption is that the national implementing measure should be interpreted by reference to the standard usage of those terms and

concepts in national law. Although this assumption is correct in principle, since the national legislature is given the power to mould the terminology of the Directive so that it fits into national law, in practice national legislatures often merely duplicate the language of the Directive for fear of being accused of not having implemented it correctly. As a consequence, national courts may attribute meanings to concepts in national implementing measures that do not match the meaning of those concepts when they were used in the original Directive. National courts may reduce that risk by engaging in comparative studies of the meaning of a legal concept used in a Directive in different legal systems, but it is difficult for them to escape the gravitational force of national law. As a result, although national measures may precisely implement EU Directives, in their interpretation of these measures the national courts are likely to achieve widely divergent results.[38]

The CFR offers an alternative to this approach to interpretation, thereby reducing diversity in interpretation of European law. When a national court has to confront a question of interpretation of a law that implements a Directive, instead of relying on domestic legal usages or comparative studies it will be expected to refer to the CFR. It does not matter that the CFR is not legally binding itself. For the interpretation of any European law, the European Court of Justice has established that regard should be paid to any relevant 'soft law' such as Recommendations for the purpose of elaborating the content of Directives. In *Grimaldi*, the Court stated in addition that national courts are 'bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EC measures'.[39] In order to achieve coherence in the *acquis*, which is the ambition of the Commission, it will be vital that this interpretive obligation should be observed. Thus national courts will be bound to have regard to the CFR when interpreting and applying European-inspired laws.

Within the text of the CFR a court should discover an elucidation of the relevant concept on which it can rely for its interpretation of the

[38] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[39] Case C-322/88, *Grimaldi (Salvatore)* v. *Fonds des Maladies Professionelles* [1989] ECR 4407, para. 18. See further: F. Beveridge and S. Nott, 'A Hard Look at Soft Law', in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union* (London: Kluwer Law International, 1998) 285.

national law. Notice the radical implications of this change in approach to interpretation. The national court must presuppose a new source of meaning for regulations and legislation that implements EU law. The court must try to interpret the regulations in a manner that is consistent with the CFR, not the national legal system. The national civil code ceases to be relevant once the field has been occupied by an EU Directive, even if that Directive is narrowly sector-specific. Similarly, in common law systems, national legal doctrine created by judicial precedent would have to be disregarded; instead, the meaning of the concepts in the regulation should be determined by reference to the CFR. Unless the CFR is to pose no challenge to the continuing diversity of interpretations of Directives by national courts, it must function in this way in order to exclude and replace national private law as the source of conceptual coherence.

Let me illustrate the force of this point with reference to an English case. In *Director General of Fair Trading* v. *First National Bank plc,*[40] English courts were required to apply for the first time the test of fairness in Article 3 of the EC Directive on unfair terms in consumer contracts, which states:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[41]

The trial judge had found the particular term in the contract under scrutiny to be fair; the Court of Appeal had declared the term to be unfair; but the Judicial Committee of the House of Lords (the highest national court of appeal) concluded unanimously that the term was fair after all. The disagreement between the courts turned on the meaning of the test of fairness, especially the requirement of good faith, and how it applied to the contract term in question.

The idea of 'good faith' in the Directive is familiar to most codified civil law systems,[42] but it is a relative novelty in English law. Although the common law uses the concept of good faith in some contexts, it

[40] [2001] UKHL 52; [2002] 1 AC 481; [2001] 2 All ER (Comm) 1000, HL.

[41] Dir. 93/13 OJ L95/29 of 5 April 1993; implemented by SI 1999/2083 (replacing SI 1994/3159).

[42] S. Whittaker and R. Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape', in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) 7.

usually has a relatively narrow meaning, one which refers to the subjective honesty of a person, rather than the broader meaning that the phrase entails in many European legal systems. In jurisdictions such as Germany and Italy, the idea combines procedural and substantive elements in a way which is similar to the complex idea of 'unconscionability' deployed in some equity cases in English law and other common law systems.[43] The good faith standard applies both to the conduct of negotiations and performance and to the substantive terms of the agreement. In each national private law system, no doubt, the concept of good faith has different nuances of meaning. Despite this diversity, in *Director General of Fair Trading* v. *First National Bank plc*, Lord Bingham offered a definition of good faith in this context, which he thought was a sufficiently transparent concept not to require any preliminary reference to the European Court of Justice for further clarification:

> The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in [the Recitals in the Preamble to the Directive].

The emphasis in this description of the concept of good faith lies upon unfair procedures leading up to the contract, especially those matters covered in English law by the equitable doctrine of undue influence. But it seems wrong to confine the idea of good faith merely to procedural matters regarding the conduct of negotiations. It is true that in the Recitals to the Directive, part of the suggested meaning of good faith offered there speaks of the duty of a seller or supplier to deal 'fairly and equitably with the other party whose legitimate interests he has to taken into account'. The good faith idea therefore certainly includes objective standards of procedural fairness involving fair and equitable dealing.[44] But the Directive also apparently contemplates an idea of good faith that involves a substantive evaluation of the terms of a

[43] R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003).
[44] M. Hoch, 'Is Fair Dealing a Workable Concept for European Contract Law?' (2005) 5(1) *Global Jurist Topics*, Art. 2.

transaction. The test of fairness in the Directive refers to the idea that the term in the contract is contrary to good faith. In the same case, Lord Steyn offered a contrasting view of the meaning of good faith in the Directive, which recognised this substantive dimension to the concept:

> Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.[45]

Applying these different definitions of good faith, however, the court concluded unanimously that the term in question was fair.

What is significant about this decision for present purposes is, however, not the result, but the way in which it was reached. Even in the United Kingdom, where the concept of good faith was relatively unfamiliar, the courts felt able to determine its meaning in this context by reference to national private law doctrine. The court was surprisingly confident in its assertion that the meaning of the notoriously indeterminate concept of 'good faith' was perfectly clear, so clear that there was no need to refer the issue to the European Court of Justice. Their confidence was even more remarkable given their inability to agree on what that plain meaning actually was. Since the Directive provided little further guidance as to the meaning of the test of fairness, the Court felt able to interpret the implementing national legislation that adopted the terminology of the Directive within the framework and concepts of national private law.

If the CFR were to be implemented, however, the reasoning process in such cases should alter dramatically. National private law would cease to be relevant to the interpretation of concepts in Directives. If the CFR provided some elucidation of the meaning of concepts such as good faith that are found in Directives, a national court would be expected to employ that meaning rather than rely upon a differing interpretation suggested by national law. National judges would probably remain influenced by their national legal traditions, but in principle the CFR would provide the dominant point of reference for the elucidation of the meaning of European legislative measures.

Political pressure for harmonisation

At the same time as being a tool of interpretation for the *acquis*, the CFR is held up as a kind of 'best practice' for EU legislative institutions and

[45] Lord Steyn, *Director General of Fair Trading* v. *First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481, HL; [2001] 2 All ER (Comm) 1000, HL, para. 36.

national legislators to follow. The Commission clearly intends to use the CFR to provide the context and meaning of all future Directives. In order to achieve consistency in the implementation of Directives, it expects national legislators to conform to the language, concepts and model rules of the CFR. They will not be compelled by the European Treaty to observe the CFR directly, but failure to so may provoke a complaint from the Commission that the national legislature has not properly implemented a Directive. In this way the CFR begins to function like a Code in disciplining a national legislature.

In codified systems it is normally expected that legal reforms should take the form of amendments to the relevant Code itself, in order to preserve its comprehensive and systematic nature. With the presence of the CFR, national legislatures will have the unenviable task of formulating legislation to implement Directives that both fits into the national code and at the same time remains consistent with the concepts and principles of the CFR on which the EC Directive depends. Given the supremacy of EC law, in the event of conflict the national legislature will have to give priority to the standards of the CFR as far as they are implicated in the Directive. One can anticipate, therefore, a gradual political drive towards harmonisation between national codes and the CFR in order for national legislatures to implement EC law properly.

4 A code that dares not speak its name

Our investigation of how the European Union has developed describes how the question of the harmonisation of civil law has always been marginalised or deferred owing to the limited competences of the supranational institutions. Close examination of the parameters of the internal market agenda reveals the absence of a clear mandate for the Commission to pursue full harmonisation of contract law, let alone private law more broadly. Although the diversity of national contract law systems clearly creates some obstacles to trade, most of these seem solvable by sector-specific measures rather than by more general rules about contract law. Yet the sector-specific measures that now constitute the *acquis communautaire* in this field do not appear to overcome the obstacles to trade, but rather seem to end up creating new ones. Without additional legal measures, the *acquis* itself becomes an obstacle to trade owing to its lack of coherence and full harmonisation.

The proposed solution of a CFR emerges from this history of the internal market agenda. In the absence of a clear legislative competence,

however, the proposal is necessarily for a measure of 'soft law', which scarcely acknowledges its potential legal effects. The justification for this measure lies in an acceptance of the deep flaws of the *acquis* as a technique of harmonisation. Yet in order to achieve its purpose of dealing with these flaws, the CFR must in function constitute a code, even if in form it appears to be something else. It must provide the coherent and systematic foundations for the interpretation and application of sector-specific measures.

Yet as a measure of 'soft law', one that has no direct legal effect, the introduction of the CFR does not require the Commission to follow a legislative process. This technique neatly avoids the dangerous topic of competence. At the same time, however, it relinquishes any semblance of democratic legitimacy. The ostensible status of the CFR as 'soft law' or just a recommendation permits the Commission to use a process for its creation that relies primarily on legal experts, combined with consultation with organised interest groups. The Commission does not have to seek approval by the European Parliament or even the Council of Ministers. In practice, no doubt, the Commission will seek broader consent to the CFR in order to lend the recommendation greater weight and influence. Yet, it does not apparently intend to create a similar open and deliberative process to that used for the construction of the Nice Charter of Fundamental Rights of the European Union.[46] It seems that in the final analysis, having obtained approval for work on the CFR from the Council, the Commission can simply produce the document and begin to use it. Shockingly, we therefore end up with a technocratic solution to a fundamental question about the future of Europe: the content of its private law rules.

Of course, the defects of this process have not gone unnoticed,[47] though the full implications of the indirect effects of the proposed CFR have rarely been fully appreciated. The Study Group on Social Justice in European Private Law first rang the alarm bells in its *Manifesto*, where it expressed deep reservations about the political process, or rather the absence of a legitimate political process, which seemed to be generating what in effect would amount to a code of contract law. In its concluding

[46] G. De Burca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26(2) *European Law Review* 126.

[47] E.g. M. Kenny, 'Constructing a European Civil Code: Quis Custodiet Ipsos Custodes?' (2006) 12 *Columbia Journal of European Law* 775; S. Weatherill, 'The Constitutional Competence of the EU to Deliver Social Justice' (2006) 2 *European Review of Contract Law* 136.

remarks, it questioned the validity of the whole approach of the Commission to the future of private law:

> This Manifesto argues that in the construction of a European private law system, we need to ensure that the political process is geared towards the achievement of ideals of social justice. It is a mistake to conceive of this project as a simple measure of market building, because private law determines the basic rules governing the social justice of the market order. We need to recognise that the institutional processes suitable for the construction of a Single Market by means of negative integration are no longer appropriate as the European Union strives to achieve justice for its citizens. In particular, since the market plays an increasingly important role in securing distributive justice for the citizens of Europe, it is vital that its basic regulatory framework – the private law of contract – should embrace a scheme of social justice that secures a widespread acceptance. The elements of such a scheme of social justice may be discovered in the Nice Charter of Fundamental Rights of the European Union, though the concretisation of those abstract principles into rules capable of providing guidance to participants in markets clearly raises many difficult questions about the balance to be struck between competing rights.
>
> The creation of that regulatory framework therefore requires a process that is not merely a technocratic attempt to secure harmonisation or uniformity. The process should rather become a political dialogue through which the conclusions reached about how to reconcile basic values achieve acceptance by mechanisms of democratic accountability. European citizens need to acquire faith and confidence in the new institutional arrangements, so that they embrace them as a legitimate way to achieve social justice. Attempts to conceal important decisions regarding the scheme of social justice in the market order behind technocratic processes will merely lead to widespread disenchantment with the ideals and the legitimacy of the European Union. We call on the Commission, the Council of Ministers and the European Parliament to redirect the project, to rethink the scope and direction of the *Action Plan*, and to recognise its responsibility to steer the process of constructing European private law in ways that will secure the legitimacy of its scheme of social justice.[48]

Whether or not they agreed with these sentiments regarding social justice, national governments also became increasingly aware of the possible invasion of their assumed sovereignty over private law by means of the CFR. While not dropping the idea of the CFR, the Commission certainly began to emphasise rather more the other strand in its *Action Plan:* to revise the existing legislation to achieve better

[48] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653, 673–674. (I was the rapporteur for the Manifesto.)

consistency and to fill in gaps. As the Commissioner for consumer affairs has observed:

> The Review of the consumer acquis is my priority project for the short term. I am committed to achieving results with this project, for the benefit of consumers and businesses, before the end of my mandate. The CFR is a more long term initiative.[49]

At the beginning of 2008, therefore, when the first, incomplete, academic draft of the CFR was produced, it is unclear how (and if) the Commission will proceed.

5 The way forward

In this chapter and chapter II, we have observed and criticised the progress of European institutions towards the development of European private law. It has become clear over the years that the *acquis communautaire* is becoming a mess. Sector-specific measures may fit within the competences established by the internal market agenda, but it has become evident that for these measures to function as harmonising laws, which in fact reduce barriers to trade, they must increasingly extend towards and develop more comprehensive private law principles to function effectively and consistently. Instead of addressing this problem head on, the Commission has sought to find a way around its lack of competence and expertise in the development of private law principles by devising the scheme of the CFR. This ingenious device, it seems, can be presented as both just a document providing an encyclopaedia of private law systems with regard to contracts and associated doctrines, and as a guide to the development of common principles and rules of private law. The fundamental flaw of this process is that it pretends that the selection or formulation of private law rules is merely a technical exercise, one needed to secure conformity and consistency, not one that involves contested political choices about fairness, responsibility and justice in civil society.

There is a very different way to think about these issues from that articulated by the Commission. Ignoring questions of competence under the Treaties for the time being, the case for developing common principles of private law in Europe need not be tied to the question of whether or not these uniform rules are needed to reduce barriers to

[49] M. Kuneva, 'Introduction' (2007) 3 *European Review of Contract Law* 239, 244.

cross-border trade. Instead, it becomes possible to imagine how common principles of private law might contribute more broadly to the aims of the European Union to secure peace, prosperity and respect for human rights. Chapter IV explores this alternative approach. It argues that common principles of private law are needed in order to help to construct the balanced Economic Constitution which, for so long, the European Union has lacked.

IV Private law and the Economic Constitution

At the end of the Cold War, in about 1989, the sharp and mutually reinforcing clash between capitalism and communism that had divided Europe for half a century lost its magnetic force on politics. Presented with a choice over the type of social and political order, citizens of former Eastern bloc countries opted to join the European club. They believed that the European Community offered both liberal democratic political institutions and a social model that controlled the market economy for the purpose of general welfare. Most importantly, the Community seemed to have found a way to avoid the damaging extremes of either unrestrained market capitalism or totalitarian communism.

Yet the European Community, as it had developed till then, could not fulfil that promise of setting a framework of laws and institutions that would secure a European social democratic model. In Europe's multi-level system of government, Member States retained control over crucial elements in this model. It was national constitutions that sustained and guaranteed liberal democracy. Even for the international protection of human rights, it was a different organisation, the Council of Europe, and not the European Community, which provided legal guarantees. Similarly, national laws and welfare systems performed the bulk of the tasks of securing social justice and social inclusion for citizens with only marginal inputs from the European Community such as regional support funds.

Indeed, as we have seen in chapters I–III, the allocation of competences between national and supranational institutions in Europe tended to confine European legislative measures to two principal tasks. The first concerned deregulation or anti-protectionism with respect to barriers to cross-border trade, in order to uphold the four fundamental freedoms expressed in the Treaty: free movement of goods, services,

capital and labour. We have observed how the European Court of Justice used these market freedoms to invalidate all national laws that interfered with the fundamental freedoms except those that could pass a strict test of proportionality. Although an apparently neutral rule of reasonableness, this test empowers the Court to elaborate a complex political vision regarding the appropriate balance to be struck between market freedom and social protection.[1] The second task for European institutions comprised regulation or the requirement of mutual recognition in fields such as product safety where transnational controls over the market were widely accepted as necessary. These two kinds of legislative measures were all that could be described as the European Economic Constitution.[2] Beyond these key measures, the European Treaties and the *acquis communautaire* only patchily expressed wider elements of an Economic Constitution or a social model, and had almost nothing to say about securing liberal democracy. This legal scheme could certainly not be described as an articulation of a European social democratic model. On the contrary, it looked like a set of rules designed by the board of a multinational enterprise, who wanted unrestricted access to capital, labour, raw materials and components, and who sought the ability to market products and services without restrictions.

Given the rather brief provisions in the Treaties regarding the Economic Constitution, much of the texture of the emerging legal framework was developed by the European Court of Justice. The evolution of the framework was fuelled mostly by business litigants who sought the aid of the Court to challenge national regulations on the ground that they interfered with economic freedom.[3] In this vein, for instance, the validity of national rules that prohibited trading on Sundays was effectively contested by big retailers.[4] The success of this strategy overrode national protections for labour with respect to working time and undermined the economic position of self-employed small traders who had been permitted to open shops on Sunday. Such

[1] D. Caruso, '*Lochner* in Europe: A Comment on Keith Whittington's "Congress Before the *Lochner* Court"' (2005) 85 *Boston University Law Review* 867.

[2] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart, 1998).

[3] M. P. Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 449.

[4] C-145/88, *Torfaen Borough Council* v. *B&Q plc (Sunday Trading)* [1989] ECR 3851.

decisions raised justified concerns that the emerging Economic Constitution in the judgments of the European Court of Justice was one that guaranteed economic freedoms but paid little attention to the social and economic rights of weaker economic actors such as workers and consumers.[5]

It is true that the Court did use the rare opportunities provided by the Treaties to create forceful protection for certain social and economic rights. Article 141 of the European Treaty that provides for equal pay for men and women was expanded from its function of protecting equal conditions of competition between employers to develop a broad norm of equal treatment for men and women with regard to work.[6] In some instances, the Treaty provisions on free movement of workers have been used to support aspects of the right to work.[7] But, in general, in the absence of concrete statements of social and economic rights, as opposed to grandiloquent statements about the general objectives of the European Union, the Court has not been an attractive forum for litigants to seek protection of their social and economic position against the forces of business and markets.

Yet during the decade after 1989 the European Union took considerable steps towards the construction of a richer tapestry of a social democratic model. Rapid changes in the governing Treaties and many other legislative and institutional developments began a process of building both a political constitution and an Economic Constitution for Europe. These changes were symbolised by the change of name from European Community to European Union. Having considered briefly the extent of these changes in this chapter, we will note their continuing severe limitations, particularly with respect to the construction of a comprehensive Economic Constitution. The chapter proceeds to develop the argument that private law is a necessary ingredient for any further progress in Europe towards the instantiation of a social model. In so doing, we examine the constitutional and regulatory character of private law and how it can contribute to the creation of a European Economic Constitution. First, though, it is helpful to specify exactly what is envisaged by the concept of a European Economic Constitution.

[5] P. Davies, 'Market Integration and Social Policy in the Court of Justice' (1995) 24 *Industrial Law Journal* 51; A. Somma, 'Social Justice and the Market in European Contract Law' (2006) 2 *European Review of Contract Law* 181.

[6] C-43/75, *Defrenne* v. *Sabena* [1976] ECR 455.

[7] C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman* [1995] ECR I-4921.

1 What is an Economic Constitution?

An Economic Constitution comprises the basic legal structure that shapes civil society. In its essentials, it comprises property entitlements, familial rights and obligations, and rules governing transfers of assets. In describing broad historical periods, it is common to classify societies by reference to a brief description of their economic constitutions, such as feudalism, capitalism and communism. In Europe today we tend to describe the Economic Constitution as a market society or a market order, but we also emphasise that it is a social market economy, one that is subject to constraints that steer its operations and outcomes.

Market orders can differ substantially, but elements of the basic framework are distinctive. Most assets are owned privately, as opposed to collective or state ownership, and these assets are well protected against seizure or impositions by others. The principal family rights and obligations arise through consensual arrangements such as freely chosen marriages or partnerships rather than being imposed by social hierarchies or status. A market order also recognises a broad discretion for individuals to transfer assets and to engage in exchange transactions to enhance their wealth. Within these parameters, however, there is wide scope for variation, such as with respect to the amount of assets under public ownership or restrictions and controls on trade in certain objects or services.

The law instantiates the market order of a society. Some foundations may be discovered in those provisions in the political constitutions that are designed to prevent the use of state power to undermine the market order. For example, political constitutions may protect private property by preventing the state from taking it without paying compensation, though by the same token these provisions are likely to determine the occasions when a government should be entitled to take property when it is necessary for the collective good. The political constitution may also set some basic parameters for the protection of families as a social unit. It often places implied limits on the scope of the market, such as a prohibition against slavery. But beyond this general political framework, the more detailed articulation of the market order is discovered in private law.

The rules of property law, contract law, domestic relations and so forth provide the details of the scheme for a particular market order. Private law specifies, for instance, what kinds of assets are susceptible

to private ownership, and how possession of those assets can be vindicated. The law of contract defines the scope of freedom to enter transactions and to choose the terms, and provides mechanisms for the enforcement of voluntary undertakings including the transfer of assets. The law of persons and capacity determines which individuals and organisations may own property, enter contracts and protect their interests. Particular branches of private law, such as employment law and consumer protection law, regulate and control the operation of those segments of the market.

It is often said that the rules of private law 'constitute' civil society. This claim is sometimes presented as a pragmatic observation – that without legal guarantees no one would perform contracts or respect the property rights of others[8] – and sometimes as a more epistemological claim – that we cannot imagine a market order without the concepts provided by private law regarding property, contract and persons.[9] However it may be intended, if this claim means that without private law a civil society is not possible, that seems to me to be an exaggeration. There is a great deal of evidence from both less developed societies and fringe markets in developed countries that markets can flourish without laws, without states and without European notions of contracts and property rights.[10] Exchange relations can certainly be established on a routine basis by the use of non-legal sanctions. But in a weaker sense of 'constituting civil society', the idea that the law can channel, facilitate, steer and reinforce social practices regarding market relations seems to me to be a plausible claim.

In a market order, a distinctive feature of the laws that assure its functions is their emphasis on the facilitation of individual actions and choices. Command and control by the law is limited in comparison to other kinds of social orders. The central dilemma in constructing this market order is to determine how to balance freedom of economic action with constraints that may be necessary both to protect the institutional framework of the market and to prevent deleterious consequences emerging. Employment law, for instance, both facilitates the operation of the labour market by permitting employers to hire

[8] T. Hobbes, *Leviathan* (Oxford: Oxford University Press, 1955) (first published 1651) 89–90; H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994), 196–197.

[9] A. Supiot, 'The Dogmatic Foundations of the Market' (2000) 29 *Industrial Law Journal* 321; J. Basedow, 'A Common Contract Law for a Common Market' (1996) 33 *Common Market Law Review* 1169, 1179.

[10] H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), chapter 5.

workers according to their needs and in the light of market conditions, but at the same time places constraints on the contractual arrangements to prevent the emergence of contracts that would, for instance, fall little short of servitude or risk the health and safety of the workers. The law expresses the balance that has been struck for the time being in each market society in resolving that central dilemma between freedom and necessary constraints.

An Economic Constitution for Europe would comprise an articulation of the broad parameters of how that central dilemma should be resolved. It would not be confined to the resolution of that dilemma in the context of cross-border trade, but rather describe principles applicable to every dimension of the market order. In chapter V, we will examine the important question of how much diversity to permit between national laws that provide the detail of this Economic Constitution. Certainly, it would be undesirable and impracticable for Europe to impose a detailed straightjacket on the market order in all countries and regions. An Economic Constitution would rather endorse and defend principles, basic rights and the essential controls over the market order, in order to express and uphold the general scheme of a European social model for its market order.

2 The emerging European Social Model

Treaty revisions in the 1990s took hesitant steps towards articulating more fully such a European social, economic and political model. The rhetoric of the new Treaties expressed the key ingredients of an Economic Constitution:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies . . . to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.[11]

Yet the detailed provisions of the Treaties, together with various opt-outs for some Member States, set strict limits on the extent of the

[11] Art. 2 EC (as inserted by the Treaty of Amsterdam).

elaboration of an Economic Constitution. For instance, the Treaties of Maastricht and Amsterdam established the idea of 'citizenship of the Union' for the purpose of protecting the rights and interests of individuals.[12] But the main substance of this European notion of citizenship was confined to the existing Treaty right of free movement and residence on the terms that it had already been established by European laws.[13] Similarly, those Treaties established the principle that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.[14] But this measure constitutes at most an instruction to the European Court of Justice to bear these principles in mind in its interpretation of Community law, a practice which had arisen in any case.[15] It does not provide a method for citizens to assert their rights and freedoms directly before a court.

These rhetorical steps towards the articulation of a European model of liberal democracy and social justice were responses to several forces. Critics from within the European Union emphasised the absence of a 'social dimension' to balance the deregulation of markets. Those critics also highlighted the lack of transparency and democratic participation in Community decisions. In order to gain the approval and respect of citizens of Europe, political leaders appreciated that the image of an unresponsive and unaccountable bureaucracy in Brussels, no matter how inaccurate and unfair, was damaging to the future progress of the European Community and needed to be addressed.

But pressures from outside the existing European Community also played a crucial role in steering the Union towards an articulation of principles of political and social justice. The accession of former Eastern bloc states was subjected to a requirement that they should abandon all practices associated with Communism and should conform to liberal democratic principles and a free market order. In setting this condition, these Western standards of liberal democracy, the rule of law, a market

[12] Treaty on European Union, Art. 2; Art. 17 EC.

[13] Art. 18 (1) EC: 'Every citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

[14] Treaty on European Union, Art. 6(2).

[15] C-11/70, *Internationale Handelsgesellschaft* v. *Einfuhr und Vorratselle für Getreide under Futtermittel* (*Solange*) [1970] ECR 1125.

economy and policies directed towards social inclusion had to be articulated by the European Union for the first time.

Less visible, but perhaps more important than these considerations in the long run, Europe needs to respond to the pressures emanating from the process described commonly as 'globalisation'. As international market competition becomes more intense, the European Community is likely to come under increasing pressure to deregulate markets and reduce welfare provision in order to compete with countries outside Europe. This response to globalisation is evident, for example, in the declaration of the Lisbon European Council in 2000 that set a strategic goal for the European Union to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion. This declaration was a response to persistent high levels of unemployment in many Member States, together with very sluggish economic growth compared to competitors such as the United States and China. The more detailed implementation of this policy resulted in the European employment strategy,[16] which comprises a set of principles, targets and guidelines, to be followed by Member States and monitored through the process known as the Open Method of Coordination.

One of these guidelines, for instance, concerns the promotion of adaptability and mobility in the labour market. It includes the following statement:

> Member States will facilitate the adaptability of workers and firms to change, taking account of the need for both flexibility and security and emphasising the key role of the social partners in this respect.
>
> Member States will review and, where appropriate, reform overly restrictive element[s] in employment legislation that affect labour market dynamics and the employment of those groups facing difficult access to the labour market, develop social dialogue, foster corporate social responsibility, and undertake other appropriate measures to promote:
>
> – diversity of contractual and working arrangements, including arrangements on working time, favouring career progression, a better balance between work and private life and between flexibility, and security.

This statement both recognises the need for amendments to regulations and customary practices in the labour market and yet also insists that Member States should retain the key elements of their existing social

[16] Council Decision, 22/7/2003, on guidelines for the employment policies of the Member States (2003/578/EC) OJ L 197/13 5.8.2003.

and economic model. It supports, for instance, both 'flexibility and security', ideas that are often assumed to be opposed to each other in the context of jobs. The European employment strategy is another example of tentative efforts to articulate a European social and economic model that both accepts the benefits of a competitive market economy while insisting on the possibilities of retaining and developing other social dimensions, such as security, corporate social responsibility and a better balance between work and private life.

In another crucial development in 2000, at the Nice intergovernmental meeting, the Member States approved the Charter of Fundamental Rights of the European Union.[17] This Charter collects together rights and general principles derived from international and European Conventions and Declarations that most Member States had acceded to on previous occasions. It includes both traditional civil and political liberties and social, economic and cultural rights. Among the social and economic rights it recognises, for instance, the freedom to conduct a business, the protection of property rights, the right of workers and employers to bargain collectively and for workers to take strike action and the right for workers to protection against unjustified dismissal. The Nice Charter does not create directly enforceable rights for European citizens. Yet the Charter does require the institutions of the European Union, including the European Court of Justice, to respect these rights, and it insists that any derogation from them should only be permitted in European law if they are necessary, proportionate and genuinely meet objectives of general interest.[18]

The Nice Charter of Fundamental Rights of the European Union can be read as the most comprehensive statement so far of the European political and social model. It responds to the pressures described above of both internal criticism and the need to provide a bulwark against the potentially harmful effects of globalisation. Yet the Charter remains limited in its legal effects and rather vague in its content. Where the Charter appears more specific, in fact it leaves all the crucial issues open for further discussion. With respect to protection for workers from unjustified dismissal, for instance, it states that the right exists only in accordance with Community law and national laws and practices. Thus the Charter probably has no direct legal effects on Member States and their citizens, and even if it has indirect effects on the interpretation of other laws, the rights it accords remain too vague and

[17] 2000 OJ C364/1. [18] Arts. 51, 52.

circumscribed to provide a way of controlling the law in those Member States. In the case of unjust dismissal, even if a Member State were to lack any law on the matter at all, there is no mechanism by which it could be compelled to do so. Alternatively, if a national law merely provided extremely weak protection against dismissal, again it would comply with the Charter, assuming that the rather basic European Directives on economic dismissals had been implemented.[19] The Charter sketches out a vision for Europe's economic constitution, but it lacks detail and legal force.

The proposed Constitutional Treaty sought to include the Nice Charter in the governing Treaties of the European Union, so that its statement of fundamental principles and rights would appear to be similarly privileged as those statements of human rights found in the constitutions of the Member States. But the precise legal effects of incorporating the Nice Charter were carefully circumscribed and left rather ambiguous. Some Member States, in particular the United Kingdom, wanted to ensure that the rights described in the Nice Charter could not become directly effective, in order to prevent individuals from relying upon them in courts. The Lisbon Treaty again states that the institutions of the European Union must respect the rights contained in the Nice Charter, but this time those rights are not incorporated into the text of the EU treaty and there is a clear statement that this requirement of observance of rights does not extend the competence of the European Union.[20] Neither the proposed Constitutional Treaty nor the Lisbon Treaty attempted to make substantial changes to existing laws regarding the evolving political and economic constitutions for Europe. In particular, they left untouched the legal position that, on the one hand, the fundamental market freedoms, such as free movement of goods and services, remained directly enforceable 'hard law', whereas, on the other hand, the principles of the social model articulated in documents such as the European employment

[19] Dir. 98/59 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16; Dir. 2001/23 on the approximation of the laws of the Member States on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings of businesses [2001] OJ L82/16; D. Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights' (2004) (1) *European Human Rights Law Review* 62.

[20] Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007, Art. 1.8, containing a new Art. 6 for the Treaty on European Union with regard to fundamental rights.

policy and the Nice Charter are still presented in the form of general aspirations and broad principles.[21]

This ghost of an Economic Constitution for Europe, in which free market principles appear fairly clearly defined but the surrounding social controls rather unspecific and aspirational in tone, seems to be as far as political agreement between Member States can reach in the near future. In chapter I, I argued that progress on an Economic Constitution for Europe depends not only on political agreement but also crucially on the underlying presence of networks of civil society. These networks can survive and prosper only if they can rely upon strong conventions and understandings of how the social model should work. The growth of these networks could provide the lubricant that would reduce popular resistance to and suspicion of the agenda of the European Commission and political elites. Although measures designed to promote the internal market certainly help to establish such networks of civil society – as, for instance, deregulation helping to increase cross-border trade – ultimately what is required is a richer set of understandings and rules that create mutual expectations and rights in civil society. European private law can assist greatly in helping to construct and protect those mutual expectations and rights that will supply the social foundations of a more integrated civil society in Europe. In short, the development of European private law is the next essential step towards building a European Economic Constitution.

To speak of private law as part of the Economic Constitution may seem odd to many readers. In the first place, private law certainly differs in appearance from documents that are generally labelled as constitutions. Whereas constitutions appear to provide a grand political settlement with respect to the allocation of power within the state, private law has the appearance of apolitical, or even pre-political, rules that have little bearing on the grand schemes of justice and power that provide a constitution for society. Section 3 argues that this contrast between private law and constitutional settlement misunderstands the fundamental constitutive role of private law in a society. A second reason for doubting the association between private law and an Economic Constitution consists in the perception that private law provides only one necessary ingredient for such a constitution. Although private law

[21] M. P. Maduro, 'European Constitutionalism and Three Models of Social Europe', in M. W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 125.

may be credited with supplying rules that help to facilitate the operations of a market economy by, for example, providing a general law of contract, it is commonly thought that the task of placing restraints and controls on the market order is performed by other parts of the law, particularly public law and regulation. From this perspective, private law has only a minor contributory role in the construction of a European Social Model. That view will be criticised in section 4, where it will be argued that private law has evolved regulatory characteristics that should place it in the forefront of establishing a European social model.

3 The constitutional dimension of private law

It may seem strange to refer to private law as comprising a 'constitution'. It certainly differs in many respects from political constitutions. Private law can seem much more detailed than aspects of the political constitution. Private law can usually be changed more easily by ordinary legislative mechanisms or judicial reinterpretation of precedents. It rarely states principles that appear to have a political importance. Unlike taxation and welfare payments, the rules of private law apparently lack distributive significance in the sense of clearly allocating or redistributing wealth and power. Although these differences can be observed, they are overstated and should not be permitted to obscure the other more constitutional qualities of private law through which it constructs and reinforces the foundations of civil society. Three of these qualities deserve particular emphasis.

Persistence

What provides persistence and continuity in a society? Besides the continuity of a culture, one element that supports the sense of a continuing identity is the legal order. Often the stability of a constitution or a basic law provides a symbol of continuity. For long periods a political constitution will determine the legitimate sources of binding law and the allocation of powers within the community. This framework provides continuity even though the details of the positive law and the personnel holding power are in constant flux. Yet political constitutions are changed, or unconstitutional reallocations of power occur, and in these instances it is often the case that the society nevertheless perceives that it has retained its continuity and identity. Does the legal order retain its identity during such ruptures and revolutionary moments, thereby helping to provide a stable cement for society?

As scholars of constitutional law have observed, it is hard to explain the continuity of the identity of the legal system in such revolutionary instances, when it is clear that the constitution or the 'rule of recognition' has been altered.[22] But turning our attention to private law instead, it becomes apparent that breaches in the continuity of the political order do not necessarily lead to variations in civil law. On the contrary, the basic rules about transactions, property and family relations may well remain the same. In Western Europe the private law that describes and protects a market order has often persisted while political constitutions come and go. The continental codes and the common law, though constantly changing in minor ways, provide the persistent foundation for market orders. In its essentials, the German Civil Code lasted throughout the tumultuous history of the twentieth century, and Napoleon's Civil Code persists in France after two centuries and five republican constitutions. The English common law similarly boasts the continuity of its private law, at least in theory, since 1066.

When one considers what gives an identity to a country, a people, or a polity over time, it seems clear that political constitutions can provide only part of the account. The persistence of a distinct culture and language also plays a vital role. But most important, I would argue, is the persistence of civil society, by which is meant a stable pattern of social relations between citizens. Private law provides continuity and support for civil society. One can understand private law as having constitutional properties in the sense that it provides a persistent foundation for the continuity of a society.

Social justice

Constitutions also typically provide in schematic form a plan for social justice for the community. They will indicate in broad terms the proposed distribution of wealth and power, and mechanisms for adjustment. For this purpose, a constitution may entrench political and civil rights, is likely to specify rules about ownership and control over private property and also place constraints on the power of governments to tax and to take property. Although private law does not provide a comprehensive scheme of distributive justice, it makes a crucial contribution. In particular, property and tort rules determine how entitlements will be protected, and contract law provides the rules and

[22] J. M. Finnis. 'Revolutions and Continuity of Law', in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence, 2nd series* (Oxford: Oxford University Press, 1973).

mechanisms for the alienation and transfer of property rights. Private law thus supplies many of the ground rules regarding allocation of wealth in a market society.

As general rules, private law does not determine specific allocations for citizens. Rather, private law sets the rules through which by trading and exchange an individual may lawfully improve her wealth or change her situation. By setting those general rules, however, private law establishes foreseeable and predictable patterns.[23] For instance, the rules will determine what market and bargaining advantages may be employed in order to obtain favourable exchanges. In contract law, rules determine whether or not one party may take advantage of another's state of necessity or ignorance of material information in order to obtain a favourable bargain. One can foresee the extent to which parties with strong bargaining power, plentiful resources and superior knowledge and expertise will be able to profit more than others from their market transactions. In tort, as well, the general rules fix distributive patterns. The system of compensation for damage to property determines the level of care required to avoid injury to another's interests: strict liability effectively makes others the insurer of the value of the property, whereas negligence liability distributes the risk according to such factors as the cost of precautions against unintended damage.

Private law thus describes a distributive scheme or pattern. By endorsing a particular design for a market economy, it shapes the distribution of wealth in a society. It is true that private law does not determine individual allocations. That task will ultimately be determined by the taxation and social security systems. Even so, private law provides the general rules for wealth distribution from which the tax and welfare system must subtract and make additions. Nor is it possible to predict in advance with great accuracy exactly how the general rules of private law will determine a distributive pattern. For example, the introduction of a measure to protect consumers against unfair contract terms is clearly designed to re-balance consumer standard form contracts. By reallocating risks it may affect the distribution of wealth between consumers and businesses at the margins. Yet businesses may

[23] From a large literature: R. L. Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 *Columbia Law Review* 603; A. T. Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472; Collins, *Regulating Contracts* 277 ff.; H. Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 *Michigan Law Review* 138; T. Keren-Paz, 'An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness' (2003) 16 *Canadian Journal of Law & Jurisprudence* 91.

find ways of achieving comparable profitable outcomes by other devices. Deprived of the ability to exclude liability for defective products, they may transfer the risk and cost through the sale of overpriced insurance against defects in products, so that the net result remains unaltered.

But this indeterminacy with regard to social justice in the general rules and procedures of private law is surely no greater than the vagueness of the scheme endorsed by constitutional rights and guarantees. Both the political constitution and private law help to shape the distributive scheme of social justice in a society. Indeed, it may be better to regard the contributions of constitutional law and private law as two sides of the same coin. General constitutional principles protecting private property and freedom of contract should be seen as closely connected with private law rules about circulation and protection of property rights, so that they are mutually dependent parts of a broader scheme of social justice. 'The wall separating rules (of circulation and protection) from systems (of constitutional relevance) is permeable.'[24]

It is true, of course, that much of the substance of private law rules comprises fairly technical rules, which do not have any obvious bearing on broader distributive patterns in society. Technical rules on when a contract is formed by correspondence or precise rules on what constitutes a defamatory statement are unlikely to have any significant bearing on the general distribution of wealth and power in society. It is rather the general framework of those rules, the underlying principles, which shapes the distributive pattern. However, those detailed technical rules seem often to betray deeper ideological convictions about social justice that shape social and political values more broadly. For instance, the precise moment when a contract has been formed by correspondence under the rules of contract law may reveal broader attitudes about when it is reasonable to rely on others, and the extent to which a person should take into account the economic interests of another in the conduct of a business. Following Duncan Kennedy, the suggestion here is that these technical discussions of private law have indirect effects on the persuasiveness and acceptance of broader political points of view in wider conflicts normally conducted in electoral and legislative organisational contexts.[25]

[24] D. Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) *European Law Journal* 751, 761.

[25] D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2001) 9 *European Review of Private Law* 7.

Citizenship rights

To understand fully the constitutional character of private law, however, it is necessary to appreciate its intimate relation with the political constitution, especially those parts that articulate citizenship rights. Private law presupposes the existence of those rights and one of its functions is to defend them. From time to time this relationship becomes more apparent when a court is confronted by an unusual claim where the rules of private law are contested by reference to the principles of the political constitution. Private law may be criticised, for instance, on the ground that it provides inadequate (or too much) protection for respect for private life or freedom of expression.[26] Similarly, the law of contract may be challenged for being either too restrictive or insufficiently tolerant in its definitions of what services and goods may be legitimately traded. When such questions arise, private law may have to be adjusted so that it is better aligned with citizens' rights.

A famous example of the interaction between private law and constitutional rights is the *Bürgschaft* case heard before the German Constitutional Court.[27] A bank offered a businessman a loan for DM 100,000 on condition that his daughter would provide a guarantee. This daughter was aged twenty-one, but was relatively uneducated, and was unemployed and lacked any property. She signed the surety contract having been told by a bank employee that she would not be incurring any significant obligation. Four years later the father's business experienced financial difficulties and the bank claimed DM 160,000 from the daughter under the guarantee. In the ordinary civil courts, the daughter ultimately lost her argument that the guarantee was invalid. Before the German Constitutional Court, however, she argued successfully that her rights to dignity and autonomy under the German Basic Law, read in conjunction with the principle of the social state in Articles 20(1) and 28(1), had been violated by the civil courts. The Constitutional Court insisted that in cases where a structural imbalance in bargaining power has led to a contract which is exceptionally onerous for the weaker party, civil courts are required to intervene through the mechanism of

[26] C. Beat Graber and G. Teubner, 'Art and Money: Constitutional Rights in the Private Sphere' (1998) 18 *Oxford Journal of Legal Studies* 61; O. Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 766.

[27] BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

general clauses in the Civil Code, namely the principles of good morals and good faith in Articles 138(1) and 242 of the Civil Code (*Bürgerliches Gesetzbuch*). What this decision recognises is that private law, in this instance the law of contract, articulates detailed aspects of basic constitutional rights, such as the rights to dignity and autonomy, with respect to their operation in civil society. Following a principle of the indirect effect of constitutions, private law has to be developed in a way that respects those constitutional rights and principles.

In the context of private law, it is important to appreciate that both parties have the same basic rights, and the duty of the courts is to ensure mutual respect for those rights. In the event of those rights conflicting, the court has to balance them against each other. The rules of private law can be understood as expressing how that balance should be struck in particular instances. In the *Bürgschaft* case, the civil court needed to restructure the rules of contract law so that they provided adequate support for the position of the weaker party. In the civil proceedings subsequent to the Constitutional Court's decision,[28] the Court insisted that the contract would be void only if its entire character, looking at its content, purpose and the circumstances surrounding the formation of the agreement, taken together, offended good morals. In balancing the rights of the parties, a court should respect the freedom to enter into risky transactions, and that therefore the inequality of burdens in a contract was not in itself a ground for invalidity. But this freedom of contract must be exercised under conditions where both parties are in a position to make the decision freely with correct information. Since that had not been the case, because the bank had not informed the daughter about the inherent risks of becoming a surety, the contract was contrary to good morals and invalid.

Many constitutions and charters that provide rights for citizens in Europe were devised primarily to control the abuse of state power. There is a consequent risk that the application of indirect effect may strengthen certain kinds of liberties, such as freedom of contract and sanctity of property rights, while diminishing the importance attached to the issues of fairness and social justice. In the *Bürgschaft* case, the German Basic Law could be interpreted through its provisions on the social state to require protection for weaker parties. In many other European countries, such as Italy and France, the references to social

[28] BGH 24 February 1994, *Neue Juristische Wochenschrift* 1994, 1341.

rights in the constitutions provide a counterbalance to the protections for liberty and property rights.[29] In the United Kingdom, however, where the Human Rights Act 1998 merely incorporates the European Convention on Human Rights and Fundamental Freedoms (ECHR), there are no social rights on which the courts may draw. The balancing process occurs rather through a test of proportionality in which the restrictions placed by civil law on fundamental rights are assessed by an enquiry into whether they pursue a legitimate purpose and, if so, whether the restriction is necessary and appropriate in the pursuit of that social goal.[30]

No matter how particular legal systems forge the links between private law and citizenship rights, the important point is that private law rests upon a foundation of civil and social rights and gives expression to those rights in the context of civil society. Some European lawyers speak of the recent 'constitutionalisation' of private law, but this linkage between private law has always been present, even if not always fully articulated.[31]

4 The regulatory dimension of private law

A second reason raised earlier for doubting the potential of private law to contribute substantially to the construction of an Economic Constitution was the point that while private law may facilitate a market order, it is weak with respect to the other critical dimension of an Economic Constitution, which is the need to control and restrict the operations of the market order. This latter role is generally performed by public law and regulatory law. In this section, this contrast between the character of private law and regulatory law will be challenged. It will be argued that the regulatory character of modern private law makes it an essential ingredient in the construction of a European Economic Constitution.

Simply stated, my contention about the regulatory character of private law is that the former contrasts drawn between private law and regulation no longer describe accurately the legal reasoning process

[29] M. J. Hesselink, *The New European Private Law* (The Hague: Kluwer Law International, 2002) 184 ff.

[30] *Wilson* v. *Secretary of State for Trade and Industry (No 2)* [2003] UKHL 40; [2004] 1 AC 816.

[31] O. Cherednychenko, 'The Constitutionalization of Contract Law: Something New Under the Sun?' (2004) 8(1) *Electronic Journal of Comparative Law*, www//.ejcl.org/. See chapter IX below.

involved in private law. Private law has become a hybrid model of reasoning that seeks to combine both the rights – oriented reasoning of private law with the policy – oriented, instrumental character of regulation.

Terminology in this discussion about the regulatory dimension of private law always proves troublesome. Concepts of private law and regulation differ in national legal traditions, and even within those traditions between different schools of thought. Nevertheless, the notion that regulation and private law comprise two radically different techniques of governance seems to be widely accepted as a reality in most Western systems of law. Scholars tend to regard regulation as a distinct method of governance, both narrower than law, in that only some parts of law may be described as regulation, yet also broader than law, because some regulatory measures may not formally qualify as laws under the tests of identity of a legal system, as in some instances of self-regulation.[32]

An explanation often given for this division in modes of governance is that private law is an older inheritance, part of the formal legal rationality associated with nineteenth-century liberal states, whereas regulatory law is the instrument of Welfare States for securing social goals such as the protection of the weak and needy. This story is popular in Germany, starting with Weber's concerns about the materialisation of law, in which he argued that instrumental law would undermine the integrity and legitimacy of formal rational law.[33] In France, social law was perceived as different in kind from traditional private law, because in form it was particularistic rather than general, and in substance because it pursued an agenda of social protection for particular groups rather than formal equality. Social law was also perceived to differ from private law because it pursued goals as opposed to providing a mechanism for protecting established rights, and because it was usually enforced by imposing mandatory duties as its medium of operation,

[32] J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-regulating World' (2001) 54 *Current Legal Problems* 103, 128–144; J. Black, 'Law and Regulation: The Case of Finance', in C. Parker, C. Scott, N. Lacey and J. Braithwaite (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004) 33–34.

[33] M. Weber, *Economy and Society*, G. Roth and C. Wittich (eds.) (Berkeley: University of California Press, 1968) vol. II, 880–895. For modern discussions of these contrasts, see: F. Wieacker, *A History of Private Law in Europe*, trans. T. Weir (Oxford: Clarendon Press, 1995); H. Willke, 'Three Types of Legal Structure: The Conditional, the Purposive and the Relational Program', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (New York and Berlin: de Gruyter, 1988) 280.

though social law could sometimes enhance compliance with its standards by granting legal rights to the weak to use against the strong.[34]

A rather different explanation of the separation of regulation and private law, always more popular in the United States, is that regulatory law arose to deal with problems that private law was unable to address. These problems are often described as 'negative externalities', such as damage to the environment, where private ordering through contracts and delict inadequately tackle problems such as pollution of the air.[35] From this point of view, competition or anti-trust law might be another example of private law weakness, because it addresses problems that arise when private actors use their freedom of contract and ownership of property – that is, their private law rights – to obstruct the operation of a competitive market. On this market failures perspective, regulation has different objectives from private law, and requires different techniques of governance to achieve those objectives.

Although this variety in concepts of regulation renders any simple contrast between regulation and private law difficult to maintain, in the context of the present argument the distinction between private law and regulation that matters most concerns a contrast between modes of legal reasoning. In this contrast, private law is principally designed to protect established economic rights such as rights under contracts and property interests. Legal reasoning in private law is concerned with the task of elucidating and vindicating those rights. In contrast, regulation is concerned with the promotion of a variety of policy goals, which may include correcting market failures and altering the distributive outcomes of the market (as established by the private law rules). In private law, for instance, the question may be whether there has been an interference with a proprietary right causing loss, for which, therefore, compensation should be paid; whereas in the context of regulation the question may be rather whether the interference with the property interest is justifiable by reference to some public policy goal, such as conservation or the creation of a public transport scheme and, if so, how the costs of this goal should be shared between private landowners

[34] Original French contributions include: L. Duguit, *Le droit social, le droit individuel et la transformation de l'état* (Paris: Alcan, 1908); G. Gurvitch, *L'idée du droit social* (Paris: Sirey, 1932); and, for a modern statement: F. Ewald, 'A Concept of Social Law', in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (New York and Berlin: de Gruyter, 1988) 40.

[35] E.g. S. Breyer, *Regulation and Its Reform* (Cambridge, MA: Harvard University Press, 1984).

and taxation. In short, private law is characterised as being concerned with the vindication of individual economic rights, and regulation is concerned with the promotion of social and economic policies.

Although this distinction has been drawn more sharply than in practice it is possible to make it, my point here is not so much to defend the precision of the contrast, but rather to insist that private law has been infected with the goal-oriented reasoning of regulation. As a result, reasoning in private law has become a hybrid, which seeks to reconcile the aim of vindicating established individual rights and at the same time to promote social and economic policies. (I think that the infection has also passed the other way, so that regulation has become much more concerned with thinking in terms of individual economic rights, but that is a different story.)

Let me give some examples of how the goal-oriented thinking of regulation has infiltrated the reasoning of private law. It is accepted today, for instance, that the scope of liability in tort or delict for personal injuries should reflect the patterns of social insurance developed in schemes such as workers' compensation, so that liability need not depend upon personal fault, but rather should depend on considerations concerning the sharing of risks through private liability insurance and state responsibility. Similarly, in contract law, the distributive concerns of regulation infiltrated private law doctrine, sometimes removing whole classes of contracts such as employment from the general law and at other times leading to revisions to the patterns of application of general doctrinal principles. Old doctrines such as good faith, abuse of rights and unconscionability have been re-oriented towards more instrumental and distributive purposes, such as helping the weaker party. Remedies were devised to implement those goals rather than merely being concerned with corrective justice; for example, defects in formalities aimed at consumer protection were remedied by permitting the consumer but not the professional to avoid the contract.

Yet private law did not become the same as regulation, because it remained oriented towards the resolution of disputes between individuals. Instead, private law became a synthesis, albeit a precarious one, which combines both its traditional concerns about corrective justice between individuals and instrumental ambitions about steering markets towards distributive justice.[36] A hybrid form of legal reasoning

[36] These suggestions are explained in greater depth in Collins, *Regulating Contracts* part 2, 'The New Regulation'.

developed, in which competing individual rights are assessed and developed against a touchstone of consequentialist policy considerations such as the competitiveness of the market, protection of weaker groups and sharing the risks of accidents broadly throughout the community. This transformation in legal thought was partly obscured by the conventions of legal argument in private law, which tend to reject open discussions of the economic and social consequences of decisions. Nevertheless, few could seriously doubt that, even within the most formal discussions of legal doctrine, the courts and scholars were manipulating private law in order to align its conclusions with the broader range of policy and distributive considerations that informed regulatory measures.

Under the traditional method of private law reasoning, the articulation and vindication of economic rights could be regarded by lawyers as an exercise in systematic reason. In resolving disputes between individual litigants, a lawyer or judge could examine the scheme of established rights in the code and precedents and, by using criteria of consistency and coherence, an outcome could be proposed. This was not a mechanical process, but it was a limited inquiry. In hard cases the legal materials would not provide determinate guidance even when applying rigorous criteria of consistency and coherence. Even so, the elaboration of private law could dispense with open policy debates concerning welfare, efficiency and social justice. Institutions with the limited competence of courts staffed by expert lawyers could provide as good an answer as anyone else to the questions posed by private law disputes.

By introducing the regulatory dimension of private law, however, courts increasingly encountered issues which they were poorly equipped to assess. They were asked to contemplate the consequential welfare effects of rival rulings. They were asked, for instance, to develop doctrines to protect consumers, but the courts lacked the capacity to assess which rule might serve the purpose effectively and efficiently as opposed to a rule that backfired and in practice harmed the consumer. It is hard enough to make such regulatory decisions with the benefit of extensive research and economic modelling;[37] to do so in the context of resolving a particular dispute quickly, and with only rudimentary economic insights, is well-nigh impossible.

[37] C. Sunstein, 'Paradoxes of the Regulatory State' (1990) 57 *University of Chicago Law Review* 407.

The courts required and received considerable assistance from the legislature in both reconfiguring private law and setting new standards. For instance, legislation introduced measures of consumer protection, which both separated out consumer contracts from the remainder of legal doctrine and provided a new standard by which to assess the validity of contract terms. The effect of these legislative interventions was to give further impetus to the evolution of the hybrid style of legal reasoning that characterises modern private law. It was insufficient to justify decisions merely by reference to their consistency with the past established rules; it became necessary to reconcile the result with the perceived policy objectives of that branch of the law. Courts felt obliged to behave like regulators in justifying their decisions by reference to both the rules and the welfare outcome. This drove courts and lawyers beyond the realms of their expertise.

In the United States, the courts have often sought refuge in a narrower and apparently more precise policy analysis provided by economics. It is possible to explain a great deal of private law as a mechanism to protect markets against various kinds of failures. For example, it is possible to explain the need for controls over unfair terms in standard form contracts on the grounds of either the absence of a competitive market for contract terms and/or the information asymmetry caused by the use of terms drafted in small print and full of technical jargon. Using these policy criteria it becomes possible to develop private law doctrine and apply the rules to those cases, and only those cases, where those types of market failure have occurred. It may not always be easy to assess the factual issue of market failure, but at least the court will have confined the relevant considerations that it needs to consider within more manageable bounds. Provided the court tries to follow the established law and its decision fits within the coherent goal of preventing market failure, it can provide a plausible justification for its decision.

The problem with this economic or market failure approach is, of course, that it limits the relevant policy considerations to a single option. In the case of standard form contracts, for instance, another policy might be simply to require that contracts made by businesses with consumers should represent a fair balance of advantages and burdens; in short, that the consumer should receive a fair deal for the price paid. The implementation of such a policy requires a far more wide-ranging policy investigation than the inquiry into market failure. National courts in Europe, though alert to the market failure analysis, have been unwilling to confine their policy enquiry in such a way. As a

result, they encounter more fiercely the problem of their weak institutional competence in handling the modern form of hybrid reasoning in private law.

Courts in Europe have, however, begun to reach out to a different discourse for the purpose of enabling them to cope with broader policy justifications. This discourse involves an appeal to human rights, broadly conceived, so that it includes not only civil liberties but also in some instances social and economic rights. This rights discourse chimes with the traditional private law analysis of economic rights, though in fact it presents a substantial challenge to it. For example, the traditional private law economic right of freedom of contract can be opposed by civil liberties concerning respect for the dignity and privacy of the individual, or by modern social and economic rights such as the right to work. Concern for the equality of citizens impinges on freedom of contract by ruling out invidious forms of discrimination in the formation and content of contracts. Although this entry of a broad range of rights into private law discourse therefore represents a major shift in legal reasoning, it is, I suggest, merely another technique for trying to address the complex policy questions that the hybrid reasoning of modern private law requires. Courts may feel more confident in fixing constraints on freedom of contract by reference to fundamental rights than by reference to broad policy goals such as fairness or efficiency, but the fundamental task remains the same, even as the rhetoric changes.

In national legal systems, the modern private law process seems to combine a number of elements. The courts remain central in their determination of particular disputes in the light of established law. Their process becomes increasingly complex as they open up private law reasoning to policy considerations and references to human rights. The courts may enable these considerations to be articulated better by opening the litigation process to collective action or interventions by third parties. The legislature intervenes with increasing frequency to redirect private law doctrine or to enable it to make fresh distinctions, such as the categories of consumer law and employment law. Scholarly discussion of results, sometimes benefiting from empirical assessment of the effects of rules, adds to the deliberative community. The evolution of private law is both provoked by litigation and constantly challenged by it, so that the effects of particular rulings can be constantly tested in the light of fresh claims.

Private law is therefore entirely suited to play a leading role in the construction of an economic constitution. It embodies both a concern

to protect entitlements or rights and at the same time recognises that it has to address the welfare consequences of its rules. It is precisely this balance that comprises the core of an Economic Constitution for Europe. The social market of the European model must combine the essential elements of a market order with the concern for distributive justice.

5 The hybrid character of the *acquis communautaire*

In the light of this discussion about the character of contemporary private law in Europe, we can reconsider the character of the *acquis communautaire*. In chapter II it was noted that the Commission presents these Directives as a form of re-regulation. The task is conceived to be one of reducing or eliminating the diversity in national regulations by replacing it with harmonised European regulations. Although the Commission concedes that some of this regulation impinges indirectly on private law, it maintains that it is not engaged in revising private law but is rather merely dealing with regulatory diversity. We can now see, however, how unconvincing this position has become.

Many Directives imitate closely modern approaches in private law, where the rules seek to combine both the protection of entitlements and to secure desired welfare outcomes. For example, the Directive on the sale of consumer goods and associated guarantees illustrates and embraces this modern style of private law reasoning.[38] It integrates traditional private law concerns about the balance between individual rights and obligations with modern regulatory concerns about the protection of competitive markets and sharing of risks. For instance, the Directive articulates the rights of the consumer and the obligations of the seller to provide conforming goods in the traditional manner of private law rules. At the same time, the Directive incorporates typical regulatory concerns. In order to promote accuracy in the supply of information in the market for goods, it holds the seller responsible not only for the correctness of its own statements about the product but also for those statements made by the producer through advertising and labelling.[39] Similarly, the right of the final retailer to have direct

[38] Dir. 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171/99, p. 12.
[39] Art. 2.2(d), Dir. 1999/44 .

recourse to the producer or another intermediary in the supply chain who may have been responsible for the defect in the goods, which is permitted though not required by the Directive, departs from the traditional private law framework of permitting contractual rights to control the possibility of recourse for the purpose of ensuring that the costs of defects are allocated to the business in the best position to avoid those defects at the least cost.[40] A similar concern for efficiency probably also motivates the introduction of a consumer's right to the replacement or repair of defective goods.[41]

From these examples we can observe that the *acquis communautaire* shares many of the characteristics of modern private law. It imitates the hybrid quality of contemporary private law in Europe. It remains true, however, as observed in chapter II that, unlike private law, the *acquis* avoids generality or a systematic approach in its provisions.

Most importantly, however, the *acquis* differs from private law in European national systems because it tends to be oriented towards one set of policy considerations. The emphasis in the justifications for the European legislation is always placed on varieties of market failure. In consumer law, for instance, the persistent theme of the Directives is on the need to prevent market failures resulting from asymmetries of information between businesses and consumers. If a consumer is misled about the qualities of a product, or is provided with insufficient information to make a reasonable judgment about the attributes of a product or service, there is a danger that the market will not operate competitively. This problem can be addressed by rules prohibiting the use of misleading information and the imposition of duties to provide material information. As we observed in chapter II, this strong orientation towards problems of market failure, or the tilt towards a 'market-functional approach',[42] seems to be linked to the necessary justification for European harmonisation in the first place, namely that there are barriers which prevent the competitive operation of the internal market. The desire to provide adequate consumer protection in the Single Market becomes reduced to the task of preventing market failures arising from deficiencies in information.

[40] Art. 4, Dir. 1999/44. [41] Art. 3.2, Dir. 1999/ 44.

[42] B. Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in T. Wilhelmmson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 177, 187.

Consider, for example, the decision of the European Court of Justice in the *Axa Royale Belge* case.[43] The Third Life Insurance Directive requires insurers to provide information to consumers about an extensive list of items regarding the transaction.[44] The Directive also provides that national laws may only require additional information to be supplied to the extent necessary to enable the policy holder to understand the essential elements of the contract. A Belgian law required life insurance policies to inform the policy holder that cancellation, reduction, or surrender of a contract before its end date would generally be financially detrimental. The question was whether this national law was incompatible with the insurance Directive, because it required information that was not specified in it. In holding that the Belgian law was incompatible with the Directive, the European Court of Justice was heavily influenced by the consideration that the national law might restrict cross-border sales by impeding foreign competitors from marketing their products as easily. The information regarding termination might also discourage consumers from examining the possible benefits of cancellation and taking another policy from a foreign competitor. These considerations plainly fit into the policy objectives of promoting market integration. Yet there is clearly a sound policy behind the Belgian law of warning consumers about the possible deleterious effects of premature termination of the contract. Christoph Schmid criticises this decision for emphasising the policy of promoting the integration of the Single Market, particularly the interests of foreign insurance companies, at the expense of ensuring contractual justice between the parties to the transaction.[45] In other words, the information duty in the Belgian law was designed to promote fairness in the transaction, not merely to avoid some kind of market failure. By evaluating the law through the lens of market integration, in its interpretation of the *acquis communautaire*, the European Court of Justice prevented the *acquis* from taking a broader range of values and policies into account.

The European Court of Justice has been aware of this tilt in its policy orientation. It has tried to correct it in numerous ways, most noticeably by insisting that its decisions should comply with the constitutional traditions of the Member States. For example, in *Herbert Industrie-Auktionen*

[43] C-386/00 [2002] ECR I-2209. [44] Dir. 92/96, (1992) OJ L 360/1.

[45] C.U. Schmid, '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* 211, 222.

GmbH Karner v. *Troostwijk GmbH*,[46] the Court had to consider the compatibility of an Austrian law on advertising with Article 28 EC that prohibits restrictions on the free movement of goods. The Austrian law prohibited an announcement that the goods originated from an insolvent business when they were not being sold by the insolvency administrator but rather by an auctioneering business that had purchased the assets from the administrator. The purpose of such a rule is to protect buyers against the possibly misleading impression that the goods are being sold in a hurry, at knock-down prices, to meet the demands of the creditors of the insolvent company. The European Court of Justice applied the principle in *Keck & Mithouard*,[47] and concluded that these 'selling arrangements' were not contrary to Article 28. The court proceeded, however, to observe that in the interpretation of community law it was always necessary to bear in mind fundamental rights, especially the European Convention on Human Rights:

> [F]undamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect . . .
>
> Further, according to the Court's case-law, where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures . . .
>
> While the principle of freedom of expression is expressly recognised by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued . . .
>
> It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question.

[46] C-71/02, *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GmbH* [2004] ECR I-3025; noted J. Stuyck (2004) 41 *Common Market Law Review* 1683.

[47] Joined cases C-267/91 and C268/91 [1993] ECR I-6907, discussed above at p. 36.

When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising . . .

In this case it appears, having regard to the circumstances of fact and of law characterising the situation which gave rise to the case in the main proceedings and the discretion enjoyed by the Member States, that a restriction on advertising as provided for in paragraph 30 of the UWG [the Austrian law] is reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.[48]

Although this discussion of the application of the right to freedom of expression to commercial advertising was strictly speaking unnecessary for the decision, the European Court of Justice is clearly going out of its way to inform national courts that even where European law may at first sight prohibit or invalidate a national law, it is necessary to consider whether that interpretation needs to be modified in order to ensure compatibility with fundamental rights.[49] In part, the Court insists on this approach in order to avoid coming into direct conflict with national courts, especially national constitutional courts, which may strongly resist any interference with their national constitutional traditions. But the Court is also recognising implicitly that it must balance the policies of the internal market against other values, the most important of which are fundamental human rights.

The *acquis communautaire* thus differs from national private law not because it is markedly different in form, but rather because its policy orientation is dominated by one type of welfare consideration, namely the prevention of market failures. In national private law systems, however, a broader range of welfare considerations are introduced. Sometimes these will be expressed by reference to broad principles of justice and fairness. Sometimes they will be articulated through the language of rights and social obligations. It is because the *acquis* lacks these richer dimensions of reasoning in private law that it provides a poor grounding for the evolution of an Economic Constitution. The

[48] C-71/02, *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GmbH* [2004] ECR I-3025; paras. 48–52, citations omitted.

[49] J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 *European Law Journal* 15.

European Court of Justice has tried to remedy these defects by its nebulous appeals to the constitutional traditions of the Member States, but this is a rather uncertain foundation on which to construct the elements of a European Social Model.

6 Towards a balanced economic constitution

A European Economic Constitution is a long-term project. It is required in order to forge a balance between the institutions of a liberal market order and the social protections that prevent social exclusion and undermine social cohesion. This Economic Constitution will be found in part in political constitutions that protect the rights of citizens, in part in the tax and spend arrangements of welfare states, in part in market regulation, but also in part in the principles and rules of private law. Indeed, in so far as the private law rules concerning contracts and property entitlements serve to constitute the market arrangements in detail, they provide the bedrock of the Economic Constitution that the regulatory and fiscal measures seek to adjust.

The danger that Europe must confront more openly is the risk that its emphasis on the creation of a Single Market and economic liberalism may undermine the fragile balance with social protection that has been achieved in Western Europe and prevent it arising in the new Member States of Eastern Europe. A good sketch of an appropriate Economic Constitution was drafted in the Nice Charter of Fundamental Rights of the European Union, with its combination of respect for human rights, civil liberties and social and economic rights. This Charter is likely to provide a loose steering mechanism in the development of European law as a result of its possible indirect effects on the interpretation of the law. But at present the balancing mechanism of social protection remains largely at the level of national law, where it is liable to be trumped by the hierarchy of European measures.

This risk of social protection measures being systematically undermined can be illustrated by many issues that the European Court of Justice must confront, not least in its application of Articles 28 and 30 following its decision in *Cassis de Dijon*.[50] Another example is the perennial clash in national legal systems between the principle of protecting competitive markets against cartels and abuse of market power

[50] C-120/78, *Rewe Zentrale AG* v. *Bundesmonopolverwaltung für Brantwein* (*Cassis de Dijon)* [1979] ECR 649, para. 14, see p. 37.

with the principle that workers should have the right to combine and use the threat of industrial action in order to secure better terms and conditions of employment.[51] National laws balance these principles by exempting strike action from competition law, though at the same time placing constraints on the timing and methods of industrial action. European law, however, lacks such an explicit balance between free competition and social protection. When organising industrial action, trade unions risk in some instances interfering with the employer's rights under European law to free movement of services and capital.

In the *Viking Line* case,[52] for instance, the International Transport Workers' Union and the Finnish Seamen's Union threatened strike action when a Finnish shipowner proposed to change the flag of the ship from Finland to Estonia for the purpose of avoiding a binding collective agreement under Finnish law. By changing the flag, the employer would be able to pay lower wages to a new Estonian crew under an Estonian collective agreement. The right to change the flag of a vessel is guaranteed under European law by Article 43 of the Treaty, the provision on freedom of establishment. This point was established in *Factortame*,[53] and is also reinforced by Regulation 4055/86[54]. The question before the European Court of Justice was whether European law permits an interference with the right to freedom of establishment on grounds of social policy, in particular the social right to take collective industrial action, a right which is not protected in European law other than the non-binding Nice Charter of Fundamental Rights of the European Union.[55] Advocate General Poiares Maduro offered the opinion that the shipowner can rely on Article 43 as a directly effective provision in disputes about the legality of industrial action, but that the right of establishment may be qualified by public policy considerations,

[51] S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge: Cambridge University Press, 2006).

[52] C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Esti*, judgment 11 December 2007; for the earlier national litigation, *Viking Line ABP* v. *International Transport Workers' Union* [2005] EWCA Civ 1299; [2006] IRLR 58; [2006] 1 CMLR 27; A. C. L. Davies, 'The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences' (2006) 35(1) *Industrial Law Journal* 75.

[53] C-221/89 *Secretary of State for Transport, ex parte Factortame* [1991] ECR I-3905, para. 22.

[54] Reg. 4055/86 of 22 December 1986 on applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

[55] Art. 28 of the Nice Charter protects the right to take collective action.

including support in national law for collective industrial action in order to protect workers' terms and conditions of employment.[56] In other words, in order to achieve the necessary balance of social protection, European law would have to be rewritten by the Court in order to introduce a measure of respect for the national legal compromises. The Court agreed that Article 43 should be regarded as a directly effective provision that could be used by the shipowner to challenge industrial action that placed a restriction on the right to freedom of establishment. The Court insisted, however, that the legitimate scope for industrial action should be set not by reference to national law but rather in accordance with Community law. The Court accepted, however, that such a restriction on freedom of establishment could be justified under European law by an overriding public interest, such as the protection of workers, provided that it is established that the restriction is suitable for the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective. It was for the national court to determine whether in the circumstances there was such a need for industrial action against all use of flags of convenience in order to protect the interests of workers.

In reaching this conclusion, the European Court of Justice stressed that it should strive towards a balanced interpretation of Community law:

> It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.
>
> Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[57]

These remarks indicate that the Court is acutely aware of the need to develop a balanced Economic Constitution. To do so, however, it must

[56] Opinion delivered on 23 May 2007, C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Esti*.
[57] Paras. 78,79.

rely on the scant and ambiguous materials provided by the Treaties, which frequently provide little beyond vague aspirations with regard to the social dimension of the Community.

To address this structural problem in the evolution of the European Union, what is needed is a consideration of the basic elements of the Economic Constitution provided by private law. European legislators cannot ignore much longer the constitutive role of private law in establishing a particular kind of market, because that market will always threaten to subvert any European measures of social protection. Sector-specific regulation merely provokes growth of business activity in a closely related, but unregulated sphere of activity. The history of regulation of timeshare ownership of holiday apartments reveals, for instance, how businesses can avoid particularistic regulation by introducing novel commercial arrangements for financing holiday apartments that neatly bypass those inconvenient or expensive regulations. More general rules and principles are needed to provide the necessary social protection. The development of an Economic Constitution therefore requires Europe to engage in building its own, effective, private law system. In short, Europe needs to move towards a civil code.

V Cultural diversity and European identity

Si c'était à refaire, je commençerais par la culture.[1]

Jean Monnet, an inspired founder of the European Economic Community, says that if he were to receive a second chance to build Europe, he would commence with culture. If he meant that Europe should have a uniform culture, thank goodness that second chance never came. Europe's continuing splendour and attractiveness springs from its cultural diversity. From art to cuisine, from music to sport, in the whole gamut of cultural practices there is amazing energy. Through cross-fertilisation, this rich heritage breeds ever greater variety and complexity. It is vital that Europeans should conserve this endowment and continue to aid the flourishing of cultural diversity.

Even so, it is undeniable that throughout the continent of Europe certain shared values and principles are acknowledged and cherished. To quote the Treaty on European Union again:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[2]

The European Union has proved rather successful in promoting these values. These rights and principles provide the essential elements of the common culture that perhaps Jean Monnet recognised was essential for

[1] 'If I were starting over, I would begin with culture', Jean Monnet, quoted in T. Judt, *Postwar* (London: Heinemann, 2005) p 701.

[2] Art. 1A, Treaty on European Union, as amended by Art. 1 of the Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

his project of securing peace and prosperity. Beyond these shared political and ethical values, we can also point to a common heritage in much of Europe in the fine arts, music, religion and the natural and social sciences.[3] It is because Europeans have so much in common, a shared epistemic community, that we can enjoy and feel comfortable with the significant differences which remain between nations and regions.

Nevertheless, any proposal to enhance the powers of the European Union, to introduce new laws, and to eliminate the significance of national borders inevitably provokes questions about the appropriate balance between centralised uniformity and national diversity. How does the desire to preserve and enhance the artistic, literary and intellectual diversity of European countries and regions fit with the ambition to evolve towards an ever-closer Union? Does the European Union serve to strengthen or damage the many cultures of the peoples of Europe? In particular, is there a danger that the project for the creation of a European Civil Code might inflict serious damage on the cultural diversity of Europe? To address these questions adequately, we need to commence by clarifying these apparently contradictory or at least confusing objectives of simultaneously promoting ever-closer union between the peoples of Europe while at the same time respecting and preserving the differences in culture, language and heritage.

1 Solidarity

In some quarters, any extension of the powers of European institutions is regarded as a threat not only to national sovereignty, but also to national and regional cultures. Indeed, the regulations necessary for the Single Market are often challenged in popular newspapers as a mechanism that insidiously undermines the integrity of local cultural practices, especially with respect to food and drink products. When the European Court of Justice decided that Italian authorities could not forbid noodles not made from Duram wheat from being marketed as 'pasta' in Italy, the judgment was vulnerable to patriotic claims that the internal market was undermining the integrity of the national

[3] Preamble to the Treaty on the European Union, Recital 2, inserted by the Lisbon Treaty Art. 1: 'DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.'

dish.[4] Of course, such claims about the suppression of regional cultures by European Institutions are grossly exaggerated. The effect of the Court's decision in this case was merely to permit other, cheaper, imported wheat-based noodles to be marketed in Italy, thereby establishing competition in prices and the variety of products in the shops to the benefit of the Italian consumer, while leaving those who insisted on traditional Italian Duram wheat products to enjoy them as before, though perhaps at a lower price. Market integration permits the dissemination of products and services, thereby promoting the wealth of cultural experiences for all Europeans; it rarely, if ever, suppresses established cultural practices. Yet European integration does certainly pose a more tangible threat to certain cultural traditions associated with nationalism or patriotism with respect to the nation state.

For many Europeans, their national identity provides a vital aspect of their cultural orientation. Citizens of nation states are proud of their national traditions and use nationality as a major criterion for defining 'us' and 'them', or the 'community' and 'others'. Within the politics of the European Union, the persistent importance of vested interests as the dominant guide to action in the Council of Ministers is revealed by the self-interested bargaining over finance and allocation of resources. When concluding an agreement at European level, Ministers invariably claim to be acting in the national interest and to have succeeded in winning vital concessions. They rarely crow that they have achieved a vital pan-European goal, even if it was at the expense of some painful concessions. On crucial political issues such as tax, national political leaders have insisted on retaining national veto powers over any proposals to expand the competence of the European Union, in order to ensure priority of national over community-wide interests. Resistance and scepticism about the role and institutions of the European Union is constantly fed by appeals to the need to preserve the integrity and identity of nation states. In this vein, Prime Minister Margaret Thatcher once famously observed:

> To try to suppress nationhood and concentrate power at the centre of a European conglomerate would be highly damaging . . . Europe will be stronger precisely because it has France as France, Spain as Spain, Britain as Britain, each with its own customs, traditions and identity.[5]

[4] C- 407/85, *Drei Glocken GmbH and Gertruad Kritzinger* v. *USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR 4233.

[5] Margaret Thatcher, British Prime Minister, speech to the College of Europe in Bruges, 20 September 1988.

Not everyone agrees fully with this view, of course. Some would prefer to confine the jingoism of nationalism to fans and chauvinistic television commentators on soccer matches. Yet any brusque dismissal of the significance of national identity seems unrealistic. Territorial entities rely on appeals to a common national identity to support social cohesion. Any political unit needs to establish the idea that it forms a community in which mutual support and cooperation is necessary. The sentiment of feeling British, French, German, or Italian helps to cement a polity together.

It is undoubtedly true, however, that the European Union has weakened the traditional exclusive sense of national identity and the hegemony of the nation state. Through the notion of a European citizenship, which is held alongside national citizenship, the European Union has encouraged the development of a rival social identity. It has attempted to persuade citizens to believe that they are members of a wider group of Europeans, and to foster the development of cognitive, evaluative and affective meaning for the notion of being a European.[6] It is hoped that this social identity of being a European will strengthen a sense of political identity, which will enable the institutions of the European Union to operate more effectively without the constant hurdles presented by nationalist sentiment. The aim is to encourage a sense of 'country first, but Europe, too', an attitude towards social identity that is demonstrated to increase individual willingness to support further European integration.[7]

Paradoxically, however, this supranational identity has also encouraged the strengthening of regional cultures in some respects. Once we view the nation state as merely one level of government, inferior in some respects to a supranational organisation, it also becomes easier to recognise the validity of claims for greater political autonomy at smaller regional levels. As a result, separatist and regional movements within nation states, such as the Scots, the Flemish and the Catalans,

[6] R. Herrmann and M. B. Brewer, 'Identities and Institutions: Becoming European in the EU', in R. K. Herrmann, T. Risse and M. B. Brewer, *Transnational Identities: Becoming European in the EU* (Lanham and Oxford: Rowman & Littlefield, 2004) 1, 6.

[7] T. Risse 'European Institutions and Identity Change: What have We Learned?', in R. K. Herrmann, T. Risse and M. B. Brewer, *Transnational Identities: Becoming European in the EU* (Lanham and Oxford: Rowman & Littlefield, 2004) 247, 249, discussing J. Citrin and J. Sides, 'More the Nationals: How Identity Choice Matters in the New Europe', in R. K. Herrmann, T. Risse and M. B. Brewer, *Transnational Identities: Becoming European in the EU* (Lanham and Oxford: Rowman & Littlefield, 2004) 161.

have often been able to achieve greater autonomy within the nation state, while at the same time forging some links, particularly regional financial support, with the European Union itself. The umbrella of the European Union prevents these regional and cultural movements from being interpreted as revolutionary challenges to the nation state and social order. Devolution can be presented rather as quests for the application of the principle of subsidiarity – that is, the location of institutions of government as close to the people as possible in view of the functional task to be performed.

What emerges in Europe from the development of the integrated Union is, therefore, both the construction of a common transnational identity and the encouragement of centrifugal forces that cherish regional identities. These identities concern not only political loyalties but also the whole gamut of cultural ideas and practices. At the southern extremity of Europe, in Sicily, all three levels of governance – regional, national and European – provide vital political identities for members of the society, and there is a healthy competition between these levels of governance for loyalty and support. Equally, in everyday cultural practices, the local remains as important as ever despite the integration of markets. Asking for Italian wine in a Sicilian restaurant is as likely to be met with a look of blank bemusement from the waiter as would an attempt to order English wine in a French restaurant from the *sommelier*.

In this post-nationalist configuration of European governance, it is hard to find adequate words to express the ambition of both achieving a closer union of peoples while respecting the diversity of national, regional and local cultures and political identities. The Treaty on European Union expresses the idea as the desire of Member States:

> 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.'[8]

This declaration seems to claim that the peoples of Europe seek solidarity but not unity or uniformity. They can appreciate the benefits of cooperation, mutual support and protection that arise from integration and common European policies. They want to eliminate for ever the nationalist and ethnic wars that have disfigured the continent. Yet, at the same time, they want to preserve local autonomy, both for the purpose of self-determination and for the preservation of local cultures and identities.

[8] Treaty on European Union, Preamble, Recital 5.

Joseph Weiler once drew a helpful contrast between two visions for Europe.[9] In the first vision, the ambition is to move progressively towards a federal state, in which the different levels of government would have their exclusive functions and commensurate range of powers. Similar to the United States, there would be a supranational entity, which as a federal government could operate independently of the nation states, but at the same time would be restricted in its functions, so that states could operate independently within their own spheres of competences. In the areas of federal government, strict uniformity and compliance with federal laws would be required throughout Europe.

In a second vision for Europe, the ambition is to establish a community of shared values and aspirations between the peoples of Europe. The emphasis is on creating a European polity: an acceptance of the interdependence and shared interests of the peoples of Europe. Here, the crucial goal is to steer the cultural and political identities away from their nationalist traditions towards a sense of broader, shared values among the community. Weiler argued that the laws of the internal market, by assisting interaction across frontiers, contribute to the formation of this community:

> Moreover, the idea of Europe as community not only conditions discourse among states, but it spills over to the peoples of the states, influencing relations among individuals. For example, the treaty provisions prohibiting discrimination on grounds of nationality, allowing the free movement of workers and their families, and generally supporting a rich network of transnational social transactions may be viewed not simply as creating the optimal conditions for the free movement of factors of production in the common market. They also serve to remove nationality and state affiliation of the individual, so divisive in the past, as the principal referent for transnational human intercourse.[10]

In this second vision for Europe, the facilitation of the development of shared values is regarded as a distinct project from that of the imposition of uniform federal rules and government. The peoples of Europe can agree on common principles, such as respect for human rights, democratic government and the principles of a social market, and insist that all levels of government must observe those principles, without

[9] J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) chapter 2, a revised version of J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 403.

[10] Weiler, *The Constitution of Europe* 93.

constructing a centralised federal state that would impose a detailed interpretation of those principles on every state or region.

This second vision of Europe may be described as community or solidarity. The first vision for Europe of federalism, with its supranational entity, insists upon a high degree of uniformity, for every competence awarded to the central power will justify the imposition of uniform rules and standards. In contrast, the notion of solidarity is suspicious of any kind of hegemony from the centre, preferring a looser association of national and regional groupings. Solidarity can support and cherish cultural differences provided that they do not develop the aspect of the centrifugal forces of nationalism or other dimensions that reject ideas of community and shared interests and values. An Economic Constitution is a way of expressing the shared values that bind the peoples of Europe together.

Following on from the argument developed in chapters I–IV, where it was suggested that a civil code provides a vital ingredient of this Economic Constitution, this chapter argues that a European Civil Code provides a vehicle for expressing this aspiration towards solidarity without imposing uniformity. A European Civil Code would help to establish solidarity without forcing the societies and peoples of Europe to adopt uniform cultural practices.

2 Code and culture

At first blush, the contention that a European Civil Code would promote solidarity but not uniformity may seem surprising. When national codes were established in European states, such as Napoleon's Civil Code in France in 1804 and the German Civil Code (BGB) in 1900, the event was correctly understood as the imposition of a uniform law from the centre over the regions and localities. The national codes of the nineteenth century were intended to express the integrity and fundamental importance of the nation state as the dominant political unit. Equally, at the beginning of the twenty-first century, the Catalans expressed and celebrated their independence from centralised Spanish rule by enacting a new civil code. This code symbolised both the separateness of the region and the united local identity of Catalonia. How, therefore, could a European Civil Code avoid the same destiny? Surely it would be correctly perceived as an instrument of federalism, a technique for the imposition of uniformity from the centre, and the destroyer of local cultures?

A European Civil Code would certainly have an impact on national cultures. The important question is whether it threatens unattractive uniformity or enables the growth of greater solidarity between the peoples of Europe. To make that assessment, we need a more detailed analysis of the likely effects of a European Civil Code. For that purpose, it is useful to distinguish between three different aspects of cultural diversity between Member States and the regions of Europe.

One aspect of this cultural matrix concerns political identity. It is certainly correct that ideas of a European Civil Code necessarily pose a challenge to the tradition of political identity being exclusively founded in the nation state. As happens with regard to other major EU developments, questions will be raised about the sharing of sovereignty in the field of civil law and the impact of this extension of competences of Europe on attitudes towards political identity. In this connection, the most pertinent questions concern the issue of how powers will be allocated between the Member States and the European Union. If European institutions were to take over all aspects of lawmaking and adjudication in connection with civil matters, these measures would certainly pose a significant challenge to political identity grounded in nation states. On the other hand, if European institutions merely provided a framework for civil law and left its implementation to the Member States, the challenge to national identities would be greatly diminished.

A second aspect of cultural diversity concerns the broader moral and social values of a community. The principles of civil law articulate moral and social values. The rules require citizens to comply with basic standards such as a requirement to respect each other's property, privacy, peace and quiet, and to honour their own promises and undertakings. The courts provide a mechanism for vindicating rights and obligations that arise under these principles. Through the enforcement of these principles private law affirms conventional standards of fairness, justice and respect for the dignity of others. If a European Civil Code were to change these established rights and obligations, it could be criticised for interfering with local or national values regarding fairness, social justice and the expected standards of social solidarity. A new code might be charged with attempting to impose alien standards. Some may accuse it of permitting much greater freedom in markets to drive hard bargains, thereby undermining accepted standards of fairness and social solidarity. Others may accuse the code of imposing excessively paternalistic measures or interfering unnecessarily with

the efficient management of businesses. Whatever the line of attack, the underlying criticism of the code would be that it deviates from and seeks to alter the moral and social values of the local community. In other words, the code would be indicted for imposing uniformity in cultures rather than helping to build solidarity between the peoples of Europe.

A third aspect of cultural diversity that is especially pertinent in this context concerns what is sometimes called 'legal culture' or 'legal consciousness'. The legal systems of the Member States differ in numerous ways, from the organisation of the legal profession to the teaching of law. The legal systems also differ markedly with respect to how legal reasoning is conducted, which is especially obvious in connection with the contrast between codified systems of civil law and those, like the common law in the United Kingdom and Eire, which are based upon judicial precedents. In a codified system, every judicial decision must be justified by reference to the text, whereas in a common law system a decision must be grounded in principles derived from an interpretation of the precedents (or based on the text of parliamentary legislation). In this context of legal cultures, a European Civil Code apparently presents a substantial threat to the practices and operations of national legal systems, not the least of which is the obliteration of uncodified common law systems.

In all these three aspects of cultural diversity – political identity, moral values and legal traditions – the enactment of a European Civil Code appears to threaten the imposition of uniformity on Europe. The issue in relation to each aspect of cultural diversity is how significant the challenge posed by a civil code is. Is there a substantial danger that a civil code will remove valued cultural diversity with respect to political identity, moral values and legal traditions? Or, can the proposal for a civil code enable the building of solidarity in a transnational civil society without imposing unacceptable measures of conformity to federal standards? Before assessing in any more detail the likely impact of a civil code on these different aspects of cultural diversity, it is important to make one further general point.

3 A code of principles

As we observed in chapter II, under the internal market agenda pursued by the European Commission, the rationale for legislative measures is necessarily one to remove the diversity of national laws. It follows that

any proposals for a European Civil Code arising from this agenda would have to be justified on the ground that they would succeed in achieving a high degree of uniformity or harmonisation in private law. If the harmonising measures fail to secure a high degree of uniformity, they cannot serve the avowed purposes of reducing transaction costs and eliminating barriers to trade.

The Directives already enacted in the field of civil law encounter this problem constantly. Although they are justified on the ground of the need to harmonise laws in order to overcome barriers to cross-border trade caused by regulatory diversity, in practice they do not eliminate all differences between national legal systems. Many differences survive because normally European legislative measures merely establish minimum standards, rather than full harmonisation. In these instances of minimum harmonisation, it remains open for national legislatures to preserve more protective measures for consumers and workers than those required by a Directive. For example, though the control of unfair terms in standard form contracts required by the European Directive excludes from its scope any review of the fairness of the price of the goods or services, national laws can preserve such protections for consumers if they enhance consumer protection.

Even in the case of full harmonisation measures at European level, uniformity of national implementing laws is not secured for a number of reasons. In particular, national courts differ in their interpretations of the broad concepts in the Directives, with the consequence that the precise content of the law differs from jurisdiction to jurisdiction. We noted earlier an example of this problem of diversity in the interpretation of European measures by national courts in the case of the interpretation of the concept of 'good faith' in the Directive on unfair terms in consumer contracts.[11] Furthermore, as Directives typically tackle only a narrow topic, the remaining national law that is unaffected by the harmonisation measure may have an important impact on the outcomes of cases before national courts. For instance, national law may determine the character of the remedies available for breach of the obligations contained in the Directive and its implementing national legislation, and the nature of those remedies often differs between national legal systems. In one legal system, the remedy may be confined to compensatory damages, another may provide for a criminal offence

[11] Above, p. 84.

and yet a third may insist upon some form of specific relief under which the wrongdoer must rectify the problem.

On this internal market agenda, the promise of a European Civil Code is that it would tackle these flaws in the European harmonisation measures. It would help to establish a uniform interpretation of the concepts used in Directives. It would also establish more general rules that should ensure a coherent and consistent approach to all related matters such as remedies. We noted in chapter III how these arguments have been used by the Commission to justify the creation of the Common Frame of Reference (CFR). Following this agenda, therefore, the more comprehensive and detailed a European Civil Code, the better it would achieve the result of uniformity, which in turn would serve the goal of the completion of the internal market.

In contrast, if the justification for developing a European civil code lies primarily in the need for a European Economic Constitution, as the argument has been presented here in chapter IV, the need for strict uniformity in rules and outcomes in Member States diminishes. What is far more important to this conception of the project of a civil code is agreement on the general principles of the European Social Model in its application to social and economic relations in civil society. An Economic Constitution can tolerate local diversity provided that there is no breach of its principles or core values. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides a useful analogy here.

The Council of Europe, formed after the Second World War in response to the horrendous misuse of state power, created a legal mechanism for the protection of human rights that is binding on all signatory states. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides individuals with rights that can be vindicated against their own national governments before the European Court of Human Rights in Strasbourg. The Convention describes these rights in broad terms, such as the right to a 'fair trial' or 'freedom of expression' and, where appropriate, acknowledges that the rights may be qualified by reference to the rights of others and collective interests such as national security. Although this legal framework is not detailed and specific, it does provide a statement of principles and core values to which every legal system of the signatory states aspires to conform. The Convention shapes national legal systems but leaves them a 'margin of appreciation' when balancing rights and determining the legitimacy of qualifying rights by reference to

political and social considerations. Similarly, a European Economic Constitution could tolerate diversity between national legal systems, provided that core principles were observed and that any qualifications to rights and obligations were properly justified. In the pursuit of solidarity among the peoples of Europe, common principles are what matters most, not relentless uniformity in rules.

This analogy drawn with the European Convention on Human Rights points the way forward for this examination of the challenge presented by a European Civil Code to cultural diversity. The nature of this challenge depends considerably on the content of the code. If a code of detailed rules were enacted, it seems likely to create much greater friction with cultural values and legal cultures. In contrast, if a code of more abstract principles were enacted, Member States would have a much greater margin of appreciation for accommodating these principles within the cultural traditions of that particular community. Whereas the internal market agenda drives relentlessly towards a detailed code, the justification for a civil code in terms of promoting a European Economic Constitution may be satisfied with a much looser framework of principles.

A code of principles does not rule out the possibility of more concrete agreements between Member States in particular fields of regulation. Where agreement can be obtained on detailed rules, a civil code could encompass them as part of its scheme. A European Civil Code could vary in the level of detail in which it articulates its principles. In some fields, such as rules governing consumer contracts where the Commission has secured considerable agreement on common standards, the code could provide relatively detailed guidance. In other fields, the code could restrict itself to the statement of key principles. The detail would then be provided from national legal traditions.

Such a code of principles of private law would nevertheless still pose a challenge to cultural diversity. By describing in a fairly comprehensive way the appropriate standards of justice and social solidarity in civil society, these principles would have an impact upon the content of the private law systems of Member States. Consider, as a hypothetical example, a principle contained in the code that required business to disclose material information to consumers prior to their agreement to a purchase of goods or services. In following this principle, there would clearly be scope for disagreements about what information might be regarded as material for particular transaction: in one jurisdiction it might be accepted that the consumer should be entitled to information

about the fuel consumption of a car, whereas in another this information might not be regarded as so essential. Yet, the principle would constrain divergences between national jurisdictions. It could not be argued, for instance, that a business had no duty to disclose some information to a consumer. Moreover, in disputes about this matter, every court would have to ask the same question: was the omitted information material to the decision of the consumer to make the purchase? For those legal systems that had not previously recognised such a duty to disclose material information, this new European principle would certainly require a significant adjustment of the rules governing trading practices. At the same time, however, for those legal systems which already acknowledged such a duty and had given it an established content through judicial precedents and doctrinal writings, there would be no requirement to adjust their particular interpretation of the content of the duty, merely one to reconsider its extent in the light of the European principle.

This distinction between a uniform civil code of rules and a code of principles explains why the project for a European Civil Code does not necessarily present a threat to cultural diversity in Europe. Unlike the nationalist civil codes of the nineteenth century, a code of principles does not set out to achieve uniformity in the details of the legal rules and remedies across all the national legal systems. It represents rather an agreement on principles as a symbol of solidarity between the peoples of Europe, as a shared commitment to shared values, much like the European Convention for the Protection of Human Rights and Fundamental Freedoms. Where agreement on greater specificity in the rules is possible, as has proved to be the case in aspects of consumer law and other market regulation, a code of principles can incorporate the more detailed rules. But detailed uniform laws are not necessary for the project as a whole, once they are understood not as part of the internal market agenda but rather as a step towards a European Economic Constitution and the strengthening of solidarity between the peoples of Europe.

4 Political identity

When pointing out earlier the potential challenge of a European Civil Code to the aspect of culture that has been described as political identity, we made two observations. The first was that any expansion of EU powers was bound to raise questions about national sovereignty and

challenge the role of nation states as the primary source of political identity. But our second observation was that the precise effect of a European Civil Code on the political identity of citizens would depend on its reach and content. Our discussion of a code of principles rather than detailed rules suggests a way in which it might be possible to avoid the imposition of federal uniformity while encouraging solidarity among the peoples of Europe.

A code of principles of civil law would certainly help to establish a European polity. That is an intrinsic and essential goal of the proposals ventured here to develop a European Economic Constitution and to support the broad project of closer union between the peoples of Europe. The aim is to increase the extent to which citizens from all Member States recognise each other as part of a large community – a transnational civil society. To that extent, a civil code would challenge the exclusivity of nation states as the primary source of political identity. The objective is to help people to feel partly European as well as French, German, British and so forth.[12] It is the combination of a denser network of links in a transnational civil society and a perception on the part of citizens that they share a common identity that will create the necessary foundations for greater solidarity in Europe.

Yet a code of principles of private law would avoid the imposition of detailed uniform rules. These principles, as we have seen, would be open to a variety of interpretations according to national traditions. Sovereignty over private law would become a shared competence of the European Union and the Member States. The principles would provide a framework rather than a straitjacket. They would assist the establishment of a sense of solidarity and shared identity without imposing detailed regulation of every aspect of civil society.

5 Moral values

A code of principles would, in contrast, deliberately challenge the traditional values found in many of the private laws of nation states. Its purpose of seeking to articulate a European Social Model through the private law would necessarily compel an engagement with the underlying values in the legal systems of Member States. A code of principles involves a discussion in depth about the appropriate standards of social

[12] R. K. Herrmann, T. Risse and M. B. Brewer (eds.), *Transnational Identities: Becoming European in the EU* (Lanham, MD: Rowman & Littlefield, 2004).

justice that should guide the principles of private law. It is not merely a technical exercise to discover efficient regulation. And it is certainly not an exercise in drafting an Economic Constitution with the sole purpose of removing barriers to trade. Instead, the major purpose of creating a code of principles in private law would be to articulate the core values of an Economic Constitution that expressed shared aspirations with respect to a Social Model for Europe.

It is precisely because a code of principles of private law would raise broad questions about fairness, justice and moral standards that it would prove controversial and hard to reach agreement on common principles. Disagreements would arise not only because of differences in moral and political values, but also because principles might be understood to have differing implications in the context of diverse economic institutions and social structures. This issue is not the same as asking whether the existing national laws share the same moral values underlying their civil law. It can be conceded that considerable diversity in values exists at present. The issue is rather whether agreement may be reached on a new set of principles.

Some reason for optimism in an assessment of whether agreement could be reached on new common principles can be garnered from recent events in Europe. Consider the history of the Directive of unfair commercial practices.[13] This proposal was initially greeted with considerable scepticism in many countries and outright rejection by the United Kingdom.[14] Over the course of several years, however, attitudes began to change. In Germany, national legal reforms were provoked even before the Directive was agreed,[15] partly no doubt to put pressure on the Commission to produce legislative proposals that would cohere with German law. In the United Kingdom, the government eventually recognised that the Directive might enable a beneficial simplification of domestic laws while probably improving the strength of consumer protection provided by the law against rogue traders. It was even

[13] Dir. 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

[14] H. Collins, 'EC Regulation of Unfair Commercial Practices', in H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Implications* (The Hague: Kluwer Law International, 2004).

[15] Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition) of 3 July 2004; F. Henning-Bodewig, *Unfair Competition Law* (The Hague: Kluwer Law International, 2006) 124; R.W. de Very, *Towards A European Unfair Competition Law: A Clash Between Legal Families* (Leiden and Boston: Martinus Nijhoff: 2006) 147.

possible to reach agreement between the Member States on the vexed question of when a failure to disclose material information could be regarded as an unfair commercial practice, where traditionally there has been a significant divergence of views between national legal systems.[16]

In many cases of European Directives, though the Member States reach agreement, the new Directives are not properly integrated into existing national law. The Directive is enacted into national law as merely an additional piece of legislation or administrative regulation, without fitting it into the existing codes and regulations. This practice produces complex and sometime incoherent national law. For agreement on more general principles to be worthwhile, it would be essential for these principles to become fully integrated into national legal systems. Some European Directives have, however, already provoked significant reforms in some national codes such as that of Germany in response to the Directive on consumer guarantees in sales law.[17] In countries located in the former Eastern bloc, the requirement of accession to introduce the existing European legislation, the *acquis communautaire*, has forced them to introduce dramatic changes to their civil codes[18] – for example, the notion of special rules for consumer protection was largely unknown in those countries prior to accession. It is probably correct that the profound changes necessary to re-orient these former communist countries towards the principles underlying a market economy will take a generation to complete, but there seems to be willingness to strive towards that goal in order to integrate those countries into the European Union. These developments suggest that it is possible for European measures to provoke more fundamental reconsideration of the principles of private law.

In assessing the chances for agreement on a civil code in Europe, it is also important to remember that a code of principles does not require precise uniformity in the interpretation of values. Like the protection of

[16] For commentary on the Directive: G. Howells, H.-W. Micklitz and T. Wilhelmsson, *European Fair Trading Law* (Aldershot: Ashgate, 2006).

[17] S. Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002', (2005) 1 *European Review of Contract Law* 128. See Dir. 1999/44 on the sale of consumer goods and associated guarantees [1999] OJ L171/12.

[18] N. Reich, 'Transformation of Contract Law and Civil Justice in New EU Member Countries – The example of the Baltic States, Hungary and Poland', Riga Graduate School of Law Working Papers 21, www.rgsl.edu.lv/index.php?part=publications&page=publications.

human rights by the law, the civil code expresses the rights and obligations that are important to the Economic Constitution, but in the detailed balancing of competing rights and their application to the variety of factual situations there will inevitably be a margin of appreciation for the local adjudicators. If the code requires parties to contracts to perform their undertakings in good faith, for instance, the interpretation of what amounts to 'good faith' would no doubt reflect local perceptions of the requirements for fair dealing. If the European Civil Code required courts to assess the fairness of terms in standard form contracts by reference to certain criteria such as good faith and imbalance of obligations, it would not be acceptable for courts adjudicating disputes in such a context to decline to consider these criteria, or to give them any substance. The code would require conformity to that extent. But the precise understanding of the requirements of good faith and what tips the obligations out of balance could remain a matter of local judgment. Similarly, in determining the legitimacy of dubious marketing techniques by reference to the standard whether or not the 'average consumer' would be misled or confused, the European Court of Justice has permitted diversity in the application of the concept by national courts by reference to social, cultural and linguistic differences.[19] In the *Estée Lauder* case, for instance, the issue was whether the description of a firming cream for the skin as 'lifting' might mislead consumers into believing that it had a permanent effect like a surgical nip and tuck. The European Court of Justice accepted that the description of the product might mean different things to a German consumer as compared to nationals of other Member States, so the national court should consider whether the label, when considered in the context of the instructions for the use of the product, might have that misleading effect in this particular national context.[20] Owing to the imprecision of language and the need for contextual interpretation, cultural diversity with respect to values and customary standards would inevitably survive the enactment of a European Civil Code.

It also seems possible to exclude certain kinds of especially sensitive issues from the scope of the civil code altogether. On matters of taste and decency, for instance, the code could expressly devolve the setting

[19] T. Wilhelmsson, 'The Average European Consumer – A Legal Fiction', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 243.

[20] Case C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG* v. *Lancaster Group (Lifting)* [2000] ECR I-117.

of standards to national legislatures. This practice already happens in connection with Directives. To achieve agreement on full harmonisation of the rules governing unfair commercial practices, the Commission had to concede the exclusion of certain cultural aspects of marketing. In the recital, this limitation of the scope of the Directive is explained:

> It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice.[21]

We can observe this sensitivity to taste also in the application of Articles 28 and 30 of the European Treaty with respect to the justifications for obstacles to trade. In a case concerning the import of electronic games to Germany, the authorities sought to ban games where the players engage in fairly realistic tasks of killing other people. Although these games were marketed perfectly lawfully in their country of manufacture, the European Court of Justice permitted the German restrictions on free movement of goods on the grounds of social, cultural and linguistic factors.[22] This stance of the Court may have been motivated by a recognition that German culture and collective conscience is particularly sensitive to issues concerned with indiscriminate killings.[23]

Many Member States may feel that they have rather antiquated civil laws, well overdue for reform. They may wish to embrace a new set of principles that will assist in thinking through this reform. As The Netherlands has discovered, however, a full-scale reform of the civil code involves a protracted political process,[24] the prospect of which tends to deter or stifle national reforms. An initiative from Europe might unlock the reform process, thereby enabling national legal systems to revise their private law systems more speedily.

[21] Recital 7.

[22] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

[23] S. Sanchez Lorenzo, 'What Do We Mean when We Say "Folklore"? Cultural and Axiological Diversities as a Limit for a European Private Law' (2006) 14 *European Review of Private Law* 197.

[24] M.J. Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675, 689.

National pride and sentiment may nevertheless cause many countries to be reluctant to acknowledge any weaknesses in their current laws. The development of a European Civil Code is bound to prove a lengthy, fractious process. Yet the ultimate prize of both establishing the ground rules of a social market and modernising private law systems across Europe is surely a goal well worth striving for.

6 Language

Before concluding this chapter, it remains necessary to consider the issue of linguistic diversity in Europe and its relevance to cultural diversity. Languages provide a criterion of membership of a community. The modes of expression favoured by a particular language are often viewed as part of the cultural heritage of a society. For this reason, ever since its inception, the European Union has acknowledged the importance of linguistic diversity and has recognised that each language spoken by significant communities within the territory must be accorded official status. Although this need for translation of European legislation and other instruments of government creates enormous costs, significant complexity and no little confusion, this high price has always been accepted as necessary to fulfil the project of constructing the European Union.

With regard to the project for a European Civil Code, it is no doubt tempting to abandon this commitment to linguistic diversity. In practice, no doubt, work within the European institutions of government is confined to the languages of French and English, with the latter predominant these days outside the European Court of Justice. Work on the text for a European Civil Code is likely to be conducted in English, as has been the case for the earlier projects conducted by legal scholars and in discussions and drafts regarding the CFR. Furthermore, within the framework of the internal market agenda and the quest for uniform laws, the adoption of a single language would significantly reduce the possibilities for diversity in interpretation of the laws by national courts.

This temptation to devise a European Civil Code in one language must be resisted. To achieve its purpose of providing the ground rules for civil society, private law must be expressed in the language used by ordinary people in their everyday dealings. In order to obtain legitimacy and respect, the law must be comprehensible for the most part by those who seek to regulate their affairs under it. No doubt lawyers sometimes

have to express unfamiliar technical concepts or use ordinary words in a specialised way. Legal discourse is not ordinary speech, but it is recognisable as part of the linguistic identity of the community. Laws expressed in foreign languages are immediately perceived by people as imposed from outside by others, and therefore of questionable legitimacy. For this reason, it is essential that the project for a European Civil Code must respect linguistic diversity. It must be composed in all the official languages eventually, even if working drafts are limited to one or two languages for ease of communication.

Having insisted on the preservation of linguistic diversity for reasons of legitimacy and confidence in the law in the legal system, it is worth adding that the other principal reason commonly put forward for preserving linguistic diversity in private law seems less compelling. Alain Supiot sums up his rejection of a civil code expressed in the English language in these terms:

> S'en tenir à l'anglais dans les institutions communautaires, ce serait programmer la liquidation de l'héritage du droit romain de la tradition juridique continentale.[25]

In other words, he fears that by using English as the language in which to express the law, what will happen is that Europe will also adopt the ways of the common law of England (and, more worryingly, America), with the result that the continental civil law tradition, which claims its origins in Roman law, will be gradually eviscerated. This linkage between language and legal traditions seems to be overstated. It is possible, though with some difficulty in translation, to explain the legal concepts used in other legal systems in one's own native language. Comparative lawyers do that all the time. Oddly, Supiot recommends that the European Civil Code should be presented instead in three languages (English, French and German). This recommendation seems to undermine his argument. If a text can be stated in three languages satisfactorily, that possibility suggests that the linkage between language and legal culture is not sufficiently strong to require us to ignore legal traditions when they are represented in a novel language.

Nevertheless, my original point regarding the importance of linguistic diversity for the purposes of transparency, legitimacy and acceptance, remains vital to observe. It is not enough for that purpose

[25] A. Supiot, 'Cinq questions pour la constitution d'société européenne' (2003) *Dalloz*, No. 5, 289, 290.

to reduce the European Civil Code to a handful of languages. On the contrary, it will be important to preserve linguistic diversity even as private law becomes more closely harmonised. In chapter VII, we will consider solutions to that problem. Before then, however, in chapter VI, we need to examine more closely the fear expressed by Supiot and many others that a European Civil Code will lead to the destruction of important private law traditions in Europe, whether they are inspired by Roman or common law. Many fear that the project for a European Civil Code may lead to the loss of great amounts of knowledge and expertise built up over centuries.

7 Conclusion

As this book has been arguing, the purpose of proposing the enactment a European Civil Code is not to worship the false god of full harmonisation. Although that image is graven on countless proposals emanating from the Commission, complete uniformity of laws in private law is both undesirable from the point of view of cultural diversity and impracticable as a goal. The more important purposes behind the project to construct a European Civil Code are to breathe life into the ideal of a European Social Model and to help to construct a sense of a European political identity which will help to unify and empower Europe.

This chapter has argued that a European Civil Code would help to create a sense of a common European identity. Like the great national civil codes of the nineteenth century, the creation of a common framework of laws will serve to strengthen a belief in a European community – what we have described, following the Treaty of European Union, as solidarity. Principles of social justice articulated as general rules applicable to civil society will help to construct the foundations of the deeper networks of a transnational civil society. Those general rules would set limits in principle to unfair commercial practices, to techniques of exploitation and improper expropriation, and unacceptable interferences with the interests of others. It is agreement on those principles which will provide the basis for solidarity among the peoples of Europe.

Out of respect for cultural diversity among the peoples of Europe, however, it is important not to insist upon uniformity in private law. It is possible to obtain the necessary level of shared identity without requiring agreement on exactly the same detailed rules. A European

Civil Code stated at the level of general principles would be sufficient to provide the common standards for the foundation of a transnational civil society and a shared European identity. Agreement on more detailed legislative proposals would always be welcome as a way of both supporting the goal of enhancing a shared identity and at the same time contributing to the internal market agenda.

This conclusion ignores, however, a third concern raised earlier in this chapter regarding the need to respect diversity. There remains the question whether a European Civil Code would damage national legal cultures and, if so, whether that matters from the point of view of supporting solidarity while not imposing federal uniformity. It is to this much-debated question that we turn in chapter VI.

VI Respecting legal diversity

> In some European academic bedrooms, dreams are dreamed not only of a European *ius commune* but even of a European Civil Code. It is thought that such a Code could build bridges between Member States and support a common European identity. It is, however, generally agreed that no legal basis exists for such a European Code[1]

With these pithy remarks, Cees van Dam, an expert in comparative tort law in Europe,[2] dismisses the various projects for a European Civil Code. He rejects these proposals as completely impracticable because of the diversity of current private law systems. He is right to stress that currently European private law systems differ significantly. We can also acknowledge that some of this divergence between laws may be linked to broader cultural, social and economic differences at the national level. But my argument has been that at the level of principle, there is sufficient common ground to permit further progress towards building a common European identity around general laws. The fact that there is no agreement on the details and even some broader standards at present does not necessarily preclude the possibility of future rapprochement and a developing unity of principles.

Yet it must be admitted that legal diversity between national private law systems does pose some serious questions about the viability of the project of developing a European Civil Code. By creating a common set of European rules and principles in private law, a civil code would confront every national legal system with a serious challenge. The

[1] C. van Dam, 'European Tort Law and the Many Cultures of Europe', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 57, 79.

[2] C. van Dam, *European Tort Law* (Oxford: Oxford University Press, 2006).

European rules and principles might call into question values and concepts that had been perceived by lawyers in a particular national tradition to comprise central elements of the legal system. In such circumstances, lawyers might voice the concern that this European initiative was threatening not merely the settled rules of their society but, more fundamentally, what is sometimes called the 'legal culture' of their society. In so far as a European Civil Code would necessitate the reform and replacement of national law, it might even be perceived as a transplant of major proportions, replacing one of the vital organs of the legal system, the national civil code, with an alien or artificial product, with the ensuing risk of major organ failure of the legal system as a whole. Does the project of developing a European Civil Code really pose a threat to the continuity of traditional national legal cultures? If so, how much does this threat to this elusive idea of legal culture matter? What concerns should we have, and how might they be addressed?

Even if the European Civil Code were confined to broad principles, as argued in chapter V, the presence of those principles might at the very least irritate established legal doctrine and provide a source for legal controversy in national legal systems. Some lawyers who are understandably attached to their national traditions in which they have been immersed for their professional lifetime may regard any comprehensive intervention from Europe in the field of private law as a step too far, as a substantial threat to a vital part of national traditions and culture. But is this reaction merely a conservative attachment to tradition that can be safely ignored, or is it a correct assessment of the threat posed by a civil code to the European commitment to respect the cultural diversity of European countries and regions?

For a common lawyer in the United Kingdom, Eire and other smaller Member States, the perceived risk of shocks to the legal system looms even larger. The introduction of a code of rules and principles to replace the leading cases that provide the foundational precedents for private law involves not only a challenge to familiar precepts but also to the recognised sources of law and the character of legal reasoning and legal knowledge itself. For centuries common lawyers have resisted the introduction of a civil code, preferring instead to keep their familiar legal methods based upon precedents, reasoning by analogy and principle, and cautious evolution under the stimulus of litigation. A European Civil Code lurks like an ominous weapon of mass destruction before the unique achievement of the common law. The final question addressed in this chapter is whether common lawyers should fear the

project for a European Civil Code to such an extent that they should feel compelled to reject the proposal outright.

Not everyone accepts that the project for a European Civil Code presents a serious problem in these respects. Some deny that there are fundamental differences between the private law systems of Member States because they share a common heritage, or even a common 'European culture'.[3] Others may concede that differences exist, but argue that these contrasts are insignificant, since in their outcomes, though not their reasoning and methods, national legal systems are similar, and that these results are increasingly converging in practice. Another view doubts that there is a significant connection between the culture of a community and its legal culture, so that changes in the latter will have no impact on cultural diversity in the sense intended in the European Treaties. Indeed, on this latter view it is unclear that one should speak of legal cultures at all, as opposed to various traditional craft techniques used by lawyers. It is worth assessing these arguments closely at the outset because, if correct, they considerably reduce the problems for respecting cultural diversity and overcoming settled legal differences that are apparently posed by the project for a European Civil Code.

It will be contended that none of these arguments is entirely convincing. A uniform civil code, even a code of principles, does present a challenge to the goal of respecting the cultural diversity of Europe. As a result, we need to assess in more detail the nature of this challenge, and how it might be addressed. Part of the answer lies in appreciating properly the force of the point that despite the diversity of national private laws there are important common values that shape private law reasoning. It will be argued that these common values, which will be described as a form of perfectionist reasoning, enable lawyers from different legal traditions to find common ground in the ways in which they analyse and assess issues arising in private law. A second point involves questioning the view that contemporary private law systems are any longer correctly perceived as hermetically sealed legal orders. Although in the nineteenth century national private law systems insisted on their separation and distance from those in other nation states, in recent times it will be suggested that national courts have revealed an increasing disposition to acknowledge foreign laws as a source of guidance and inspiration. This dialogue between legal systems

[3] O. Lando, 'Can Europe Build Unity of Civil Law while Respecting Diversity?' (2006) *Europa e diritto privato* 1.

again reduces the challenge to legal cultures and diversity posed by the project for a European Civil Code. A third, and perhaps the most important, part of the answer to the concerns related to legal diversity, lies in understanding the mechanisms by which a European Civil Code would function in the context of the governance arrangements of the European Union. That investigation of the operation of a multi-level system of private law will be deferred to chapter VII.

1 Common heritage

The notion of the *ius commune* is a powerful myth about Europe's past.[4] Legal scholars keep alive the memory of a common private law that operated throughout Europe in the middle ages. The rediscovery of comprehensive texts of Roman private law in the twelfth century, notably the Digest compiled at the behest of Emperor Justinian in the twilight of the Roman empire, provided the trigger for systematic study of law. This renaissance of legal studies occurred first in northern Italian universities and then subsequently spread to other universities and the Catholic church throughout Europe. Oriented by religious sentiment and humanist values, scholars analysed, annotated, glossed and quarrelled incessantly over interpretations of the Roman texts. In turn, their refined and elaborate learning was eventually plundered to provide many of the basic categories and ideas of the civil codes enacted in nineteenth-century Europe. For some scholars, particularly those from the French and German civil law traditions,[5] it is tempting to view the idea of creating a European Civil Code as a continuation of that tradition, even a renaissance of a pan-European legal science founded on Roman law, a rediscovery of a common European heritage that had been almost lost during the violent competition between nation states in the modern period. As Reinhard Zimmermann makes the point:

> The unification of European Law should not be left to an institutionalised Europe which merely reacts to specific needs and aims at implementing economic policies . . . European legal unification is in the first place a task for legal scholarship – a scholarship which could almost be described as a revived 'Historical School' of jurisprudence; and which therefore, 'progressing organically' (Savigny) from the common roots of the modern European legal systems,

[4] R. C. Van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992) 45–85.

[5] P. Legrand, 'Are Civilians Educable?' (1998) 18(2) *Legal Studies* 216, 219.

once again sets out to design a *ius commune Europaeum* around the core of general private law – and in so doing may or may not level the ground for unificatory legislation. For this purpose, knowledge of Roman law and its influence on the formation of the European legal mind is still today indispensable.[6]

The idea that there was once a common European private law must, however, be severely qualified. It is true that scholars and jurists attached to universities were able through the medium of the common language of Latin and the shared acceptance of the foundational quality of the Roman texts to create a pan-European dialogue about private law. Yet we need to understand that this dialogue was often more of a philosophical enquiry than a set of proposals for practical laws. The scholars debated the correct interpretation of the texts in the light of the ebb and flow of intellectual ideas and moral perspectives.

In particular, this scholarly tradition established the notion of private law itself. The scholars supposed that the appropriate rules for governing civil society could be constructed by reason and systematic logic from a few basic moral principles. This intellectual construct facilitated a sharp distinction to be drawn between private law and policy-oriented regulation and, more deeply, helped to embed the assumption of lawyers that private law eschews broader questions of distributive justice. Although such notions about private law are still harboured in some ancient seats of learning, these assumptions and distinctions about the character of private law no longer seem tenable. Through the enactment of codes and legislation, political leaders and legislators have since the Enlightenment used private law instrumentally to serve social and economic goals. Today it seems almost impossible to ignore the articulation of the policy objectives of private law and to fail to notice and react to its distributive effects. The authority of private law no longer rests entirely on its origins in antiquity, moral precept and tradition, but also on the manner in which it is democratically chosen and its success in achieving social desired outcomes.[7]

Although this scholarly tradition regarding a *ius commune* was undoubtedly influential within doctrinal writings across Europe, it is also important to remember that it did not necessarily have much impact in practice in civil society. Legal scholarship was certainly not the only

[6] R. Zimmermann, 'Roman Law and European Legal Unity', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), 2nd edn, *Towards a European Civil Code* (The Hague: Kluwer Law International, 1998) 21, 39 (notes omitted).

[7] J. Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *Common Market Law Review* 1169, 1170.

source of law considered by courts and lawyers. In practice, customs and local laws were usually of equal importance in most civil courts: there was pluralism of legal sources. Moreover, political authorities – lords, princes, parliaments – all enacted and enforced their own laws, which were unlikely to reflect much of the learning of the scholars except to the extent that Roman law endorsed their aspirations to absolutism and authority through principles such as 'what pleases the emperor has the force of law' (*quod principi placuit legis habet vigorem*). Outside church courts and perhaps some northern regions of Italy and southern France, the *ius commune* might be read as a reference point, but certainly not as the determinative legal order. Even at the time when the *ius commune* flourished in the universities and the church, the effective private law in all the regions of Europe demonstrated at least as much diversity as it does today.[8]

In some legal systems such as Italy, the remaining influence of Roman law and the medieval *ius commune* may still be felt to be strong, but in most European systems its influence is merely a shadow that sometimes influences the way in which the modern law is constructed. The notion that a European Civil Code would merely be a rediscovery of ancient harmony and uniformity seems far-fetched once one looks beyond the universities. It cannot be maintained that such a code would not significantly contest the national traditions and legal cultures that have evolved independently for many centuries. A modern European Civil Code would not be so much a renaissance as a reformation.

2 Convergence

A second view argues that a European Civil Code would disturb national private law traditions only at the margins. It insists that, though differences exist at the level of legal reasoning and concepts, in practice the outcomes are much the same. This homogeneity in outcomes can be explained in two broad ways. One account indicates that convergence

[8] Views differ on the strength of the *ius commune* in practice, with van Caenegem emphasising the authority of the 'legists', men learned in Roman law (R. C. van Caenegem, *Legal History: A European Perspective*, London: The Hambledon Press, 1991) while others point to the continuing significance of local laws and customs (e.g. O. F. Robinson, T. D. Fergus and W. M. Gordon, *An Introduction to European Legal History*, London: Professional Books, 1985). See also: B. S. Jackson, '*Ius Gentium, Ius Commune*, European Law', in B. S. Jackson and D. McGoldrick (eds.), *Legal Visions of the New Europe* (London: Graham & Trotman, 1993) 3.

is the result of a process of mutual learning between legal systems, facilitated by the work of comparative lawyers.[9] An alternative account explains the similarities as a consequence of the content of private law necessarily adjusting to the underlying economic structures of society, which in Western Europe are broadly similar market systems. The need for functionally equivalent rules to regulate similar market systems explains why legal systems become similar. It was this view regarding the functional equivalence of rules that inspired a group of legal scholars, led by Ole Lando and latterly Hugh Beale, calling themselves The Commission on European Contract Law, to devise the 'Principles of European Contract Law'.[10] These proposed rules and principles for contract law, though not corresponding exactly to any particular legal system, are presented as capable of achieving much the same results in cases as are produced by national legal systems, albeit using different modes of reasoning. Although both mutual learning and similar functional needs may account for a degree of convergence between national legal systems, the underlying question is whether the phenomenon of homogeneity in outcomes really exists.

Convergence in outcome is difficult to measure. The best method by which to test this proposition comprises the identification of a number of factual situations for which national experts would describe the likely outcomes in the national legal systems. If the vast majority of national legal systems reach the same result, despite differences in the reasoning towards that result, we could conclude that there is homogeneity in results. This conclusion is sometimes expressed in terms of 'functional equivalence': legal rules and concepts differ considerably, but in their different combinations they function to achieve similar results.[11] Considerable amounts of excellent work of this kind has been done by scholars. For example, a series of texts have been published by Cambridge University Press entitled 'The Common Core of European Private Law' under the general direction of Mauro Bussani and Ugo Mattei, in which there is a systematic attempt to compare outcomes in relation to particular legal issues.

[9] B. S. Markesinis, 'Learning from Europe and Learning in Europe', in B. S. Markesinis (ed.) *Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford: Oxford University Press, 1994) 1.

[10] O. Lando and H. Beale (eds.), *Principles of European Contract Law, Parts I and II* (The Hague: Kluwer Law International, 2000).

[11] The best-known example of this approach is K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford: Oxford University Press, 1998).

In the first volume in the series, entitled *Good Faith in European Contract Law*, scholars assess the similarities and differences regarding fifteen national legal systems with respect to thirty factual situations. The editors, Reinhart Zimmermann and Simon Whittaker, conclude that for eleven of the hypothetical factual situations the results were the same in all the jurisdictions, in nine there was a broadly similar result and in ten there was a considerable variety in outcome.[12] This interpretation of the results of the research no doubt could be contested, since even in cases where the results seem very close there are nuances and technical differences. But even taking these numbers at face value, it is hard to conclude that they reveal homogeneity of results. Depending on how one counts the evidence, one could say that on one-third of the issues the legal systems diverge, or even nearly two-thirds, if one insists on very proximate outcomes. The study also reveals major differences in legal reasoning, principles and concepts between legal systems. It is hardly surprising that if a legal system asks a different question, it issues a different answer.

Similar results are repeated in countless other studies. Divergence rather than uniformity is the standard discovery. Significant differences emerge even between legal systems with a common historical origin, such as France and Belgium, or England and Eire. These differences can be exaggerated. In whatever part of Europe a consumer goes shopping, the legal system is likely to examine a transaction within the shared Roman category of sale of goods, in which the principal legal requirements such as a transaction comprising the exchange of goods for a price will also be formulated in similar terms. The point is rather that as soon as one ventures into territory that is likely to be disputed between the parties, such as the seller's responsibility for defects in the goods, national legal systems begin to diverge. This diversity in national private law provided the European Commission's case for the need for a uniform law on consumer sales.[13] Without significant divergence in

[12] R. Zimmermann and S. Whittaker, 'Coming to Terms with Good Faith', in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Law* (Cambridge: Cambridge University Press, 2000) 653. See also: J. Gordley (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge: Cambridge University Press, 2001).

[13] Dir. 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12, Recital (3): 'Whereas the laws of the Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted.'

national laws even in such a mundane case as a consumer's complaint about defective goods, the alleged obstacles to cross-border trade could not be substantiated and the need for harmonisation could not be justified under the internal market agenda.

This evidence strongly supports the view that a European Civil Code could not comprise some kind of synthesis of existing national laws which, though expressed in slightly different terminology, would not alter the outcomes produced by national private law. It has to be accepted, on the contrary, that a European Civil Code would both challenge established doctrinal reasoning and require alterations in outcomes. The problem is not simply that at present the outcomes in private law differ across countries, but more deeply the differences in approach to the issues in the styles of legal reasoning, what are acknowledged as sources of law and what counts as a relevant and effective argument, obstruct any forces that may tend to encourage homogeneity in results.[14]

However one examines the evidence about common origins or gradual convergence of outcomes, the inescapable conclusion is that diversity between national legal systems is strong and deeply ingrained. It is therefore not possible to dismiss the challenge to the diversity of legal cultures presented by proposals for a European Civil Code on the ground that the differences in outcomes are neither substantial nor significant in practice. Cees van Dam is correct to that extent at least.

Yet, we still need to ask how much the challenge to legal cultures really matters in the broader scheme of cultural diversity. It may discomfort lawyers to find that their traditional learning is no longer pertinent or reliable. Law professors will be forced to rewrite their lecture notes. All lawyers will have to become familiar with this new source of law in a European Civil Code. But do those changes really violate the ideal of the European Union to preserve cultural diversity? How closely related is legal culture to the broader cultural practices of the national communities?

3 Autonomy of legal culture

It is possible to minimise the apparent threat posed by a European Civil Code to national legal cultures by insisting that legal culture is unconnected to the general culture of a community such as its politics,

[14] P. Legrand, 'European Legal Systems are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52.

arts and social customs. On this view, legal culture concerns the practices of an elite group, which have developed their closed culture separately from other parts of society. Law comprises a system of thought that became differentiated from other modes of discourse such as morality and religion as a result of the social practices of a professional corps of lawyers and legal scholars in universities. These groups established institutions such as professional bodies, courts and university faculties, within which a distinctive expert discourse could flourish and be reinforced through teaching and repetition. Through the development of processes, procedures and texts, lawyers created and sustained a mode of analysis of social and economic problems that promised simultaneously both to solve practical problems in the resolution of disputes and to articulate standards of fairness or justice in society. This elite culture, though certainly of practical importance to a society, is hard to present as an important dimension of popular culture, of the national spirit, or of part of presuppositions of everyday life. Challenges to national legal traditions, including their private law systems, can therefore be dismissed as only minor and unimportant interferences with the diversity of the European cultural sphere.

It is certainly correct that a sharp differentiation of law and legal culture from other parts of society has been a distinctive hall-mark of European societies for many centuries.[15] The idea that law could be and should be separated from political power or religious authority was not a path followed till quite recently in Asia and Africa. This idea of the autonomy of law gained its initial strength in the development of the governance of the relations of civil society, as in disputes over property rights between private individuals before courts provided by political authorities. Judges claimed to be applying neutral rules in a disinterested way in order to achieve justice. But in the seventeenth century, under the influence of humanism, the idea was applied to public law with notions such as constitutional monarchy and the Rule of Law, a development that was greatly accelerated by Enlightenment thinkers. This notion of law being a distinctive system of thought, with

[15] This claim was first investigated by Max Weber, *Wirtschaft unde Gesellschaft*, trans. in English as M. Weber, *Economy and Society* (G. Roth and C. Wittch eds) (Berkeley: University of California Press, 1968). Modern discussions include: R. M Unger, *Law In Modern Society* (New York: Macmillan, 1976); K. Tuori, 'Legal Culture and the General Societal Culture', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 23–35.

its own integrity, together with claims to practical supremacy over other discourses, has formed a central part of the culture that is shared (though not always rigorously observed) in Europe. To that extent, it must be accepted that the law in Europe has become a differentiated aspect of society, an autonomous social system, which certainly loosens its links with other aspects of a society's culture. In each society one can identify a distinct legal culture, with its particular institutions and practices.

But the further step of denying the presence of any significant links between this legal culture and the broader culture of society has to overcome substantial objections. It is not difficult to detect links between, for example, changes in the economic relations of production or in philosophical ideas, on the one side, and new legal concepts or principles, on the other. Any thorough and contextual history of a legal system will reveal interactions between changes in society and changes in the law. The process may be slow sometimes, but we can observe, for instance, the impact of the development of a free market society on many legal institutions, such as contracts for the personal performance of work. The move from servitude or serfdom under feudalism to contracts for work in the nineteenth century, followed by contracts of employment linked to institutions of the Welfare State was a pattern followed in all Western European countries.[16] Here we see the law being influenced by the practices and culture of the society that it regulates.

Similarly, it is possible to detect the influence of broad philosophical ideas on patterns of legal thought, be it Cartesian logic in France or utilitarianism in the United Kingdom. Yet, given the autonomy of legal reasoning, these influences are always translated and adapted by the legal system into its own modes of discourse.[17] In French legal thought we may discern detailed, rigorous attention to the analysis of concepts and the relation between concepts, in imitation of a particular philosophical style, but these are legal concepts, not philosophical ones, and the analysis is concerned with the operation of the legal system, such as the application of rules to a particular dispute, not with a more rarefied philosophical enquiry. Similarly, the evaluation of rules by reference to their outcomes for society as a whole appears as a frequent theme in

[16] B. Hepple (ed.), *The Making of Labour Law in Europe* (London: Mansell, 1986); S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2004).

[17] This account is influenced by G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993).

the private law of common law countries, at least in comparison to continental civil law countries such as France.[18] Sometimes this welfarist analysis is expressed in terms of policy considerations and sometimes as economic analysis. But there is no rigorous utilitarian calculus that dominates the law, because the question is always an independent legal question, such as the meaning of a rule and the consistency of the precedents, not simply what will maximise utility or welfare. In this example, the broader philosophical culture influences the form in which legal reasoning takes, though of course the law does not simply imitate the language of philosophy.

Equally, of course, it is possible to detect the influence of lawyers and legal scholarship on the broader cultural and political traditions of a society. Although lawyers may not be able to lay much claim to be innovators and creators of significant cultural and political ideas, legal discourse provides the opportunity to find ways to express general ideas in a more precise and rigorous manner, which then can become part of the more general values of the community. For example, ideas about freedom of individuals from unnecessary and oppressive interference by agencies of the state such as the police may not have been invented by lawyers, but lawyers have provided detailed articulation of these ideas through rules of criminal process and the protection of human rights, which in turn have infused popular discourse and political debate. Similarly, it seems unlikely that lawyers invented the idea of binding contracts, but they have certainly provided a conceptual framework that provides the presuppositions of most economic exchanges. It follows that a tampering with legal discourse by replacing it with a novel set of European ideas at least creates the risk of an ensuing interference with the diversity of cultures in Europe.

Gunther Teubner provides perhaps the most acute analysis of this complex interaction between legal culture and broader cultural, economic and social practices through his employment of the idea of 'co-evolution'.[19] On this analysis, changes in social practices or cultural ideas will be observed by the legal system, and in the event of social conflict or other perceived difficulties, the legal system will respond by adapting to the change. But this adaptation must fit within the existing

[18] R. Sefton-Green, 'The European Union, Law and Society: Making the Societal-Cultural Difference', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 37.

[19] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

law or represent a coherent evolution of the existing legal doctrines and concepts. The resulting change in the law is likely to have an impact on the social practices themselves, steering them in particular directions or favouring one kind of practice over another. This process of interaction and co-evolution is recursive.

Returning to the earlier example of the advent of a market economy and industrialisation on contracts for the personal performance of work, what we can observe is the law responding to the market by recognising that the relation between worker and employer was better characterised as a contract than a status relation, but this contractual analysis adopted by the law then suggested certain kinds of implications for the operation of the social practices, such as the freedom of the worker to change jobs at will. The exercise of this freedom, particularly in the form of migration to cities and in collective industrial action, provoked further social conflict, to which the law was called on to respond by curtailing the freedom entailed by the contractual analysis.

The co-evolutionary theory explains how divergences between legal systems emerge, even those sharing a common heritage, as the law responds to local variety in practices and conventions in civil society. In commerce, for instance, businesses develop new projects and novel kinds of transactions, and establish conventions between themselves on how these economic arrangements should be sustained. Typically, the law becomes involved only later, when disputes arise about the conventions and the allocation of responsibility for losses. At that point, the law accommodates these developments in civil society by articulating new rules. In this way, the law reflects actual business practice, and evolves alongside it. Each national legal system responded to national or local social and business practices as they evolved, so that the divergences in laws between nation states were not merely the product of different intellectual traditions, such as the influence of Roman law, but more fundamentally mirrored divergences in the social organisation of business and other private relations. In short, the variation in laws reflects and sustains the variety of capitalisms in Europe.[20]

On this co-evolutionary theory, there is a complex, recursive interaction between the legal system and various aspects of its environment. It is, therefore, not possible to claim that changes in the law will leave a society's culture untouched. That may sometimes prove to be the

[20] P. A. Hall and D. Soskice (eds.), *Varieties of Capitalism* (Oxford: Oxford University Press, 2001).

case, but when the changes concern some of the basic principles of civil society, as laid out in the civil code, it seems likely that they will at least interfere or create new tensions in the conventional standards and expectations of civil society. As a consequence, we cannot dismiss the possibility that a European Civil Code may, by changing private law, have an impact on the cultural and social practices of national communities. On the contrary, following the theory of co-evolution, it seems likely that there will be an impact arising from alterations in the law. Yet the co-evolutionary model of interaction between law and society explains how difficult it is to predict the effects of changes in the law on the evolution of the law itself, let alone any subsequent effect on the broader culture and social conventions of the community.

Following the theory of the co-evolution of law and other social systems in society, we cannot argue that the law is outside the culture of the community and therefore not a matter of serious concern when we consider the preservation of cultural diversity in Europe. Although the legal system is separate from other cultural aspects of society, it forms part of the society, and is an expression of part of the distinctive heritage and tradition of that society just as much as other social practices and cultural values. We cannot simply dismiss the complaints of lawyers about challenges to their traditional ways as the reactionary grumbling of an elite group who want to preserve their exclusive turf and antiquated folk-ways.

Again, therefore, we should not ignore the potential challenge posed by a European Civil Code to the legal culture of the community and its broader cultural dimensions. Although legal systems have evolved into distinctive aspects of their societies with considerable autonomy in their processes and operations, they are clearly still embedded in those societies and are influenced by, and themselves have an impact on, the broader culture of the local community. If a European Civil Code were to replace or supplant the existing domestic legal orders, it would inevitably challenge traditional legal values and customs, which in turn might lead to displacement and pressures towards homogeneity in broader cultural values.

4 Perfectionism and welfarism

Our discussion so far in this chapter has reached the conclusion that the challenge posed by a European Civil Code, even a code of principles, to the cultural diversity represented by the diversity of private law

systems should be taken seriously. It represents a possible threat to the fundamental commitment in the Treaties to respect the cultural diversity of European countries and regions. But now I want to make an argument that a code of principles, though posing a challenge to diversity, presents an acceptable intervention at a European level. This argument suggests that despite the divergences between national private law systems, in an important sense still to be explained there is a common culture shared by these different legal systems. A European code of principles could rely upon and develop this shared legal culture. By building upon this shared tradition, the threat posed by uniform laws to cultural diversity, and in particular to national legal traditions, would be diminished, though not eliminated altogether.

To develop this contention about the existence of a shared legal culture with respect to private law, we need to draw a distinction between 'welfarist' and 'perfectionist' arguments about social justice. A welfarist argument is ultimately concerned with the satisfaction of the preferences of individuals. It measures the justice of institutions and rules by reference to the degree to which they satisfy the preferences of a particular group or of society as a whole. From this perspective, the justice of private law rules can be measured by reference to their capacity to satisfy the preferences of members of a society. In the context of market transactions and business associations, these preferences are frequently closely linked to concerns for wealth maximisation or efficiency. The idea of social justice in private law can also be interpreted in a rather broader way. From this perfection perspective, social justice is concerned about all the qualities of the community in which one lives and the extent to which any individual can participate in all the benefits of that community. On this broader view of social justice, it is not only wealth or preference satisfaction that matters, but also, and perhaps more fundamentally, 'well-being'.[21]

Consider the example of work. Having a job usually provides an individual with sufficient material wealth to obtain necessities such as food and shelter, and often provides a comfortable level of material existence. In the event of unemployment, given sufficiently high levels of taxation, the state can provide financial support in order to replace entirely the income produced by work. To that extent, redistributive

[21] For the notion of 'well-being', see: J. Gray, 'Inclusion: A Radical Critique', in P. Askonas and A. Stewart (eds.), *Social Inclusion: Possibilities and Tensions* (Basingstoke: Macmillan, 2000)19, 28; J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) chapter 12.

policies can assure equivalent levels of wealth and welfare for those in work and those who are unemployed. Rules that ensure that workers either have a job or receive adequate social security support are likely to be regarded as adequate and just from a welfarist perspective. But from a different point of view, performing a job has value in itself. A job provides the opportunity to acquire knowledge and skills, to participate in the workplace community, to achieve meaningful goals, to acquire status or identity in the community and to form friendships. To achieve well-being as opposed to welfare, what is important is not only the income produced by work, but also these other aspects of social life enjoyed by those in work. Social justice, viewed as securing well-being for members of a community, is not merely about material wealth and the satisfaction of preferences, but more deeply about identity, self-worth and social inclusion.[22] On this perspective, a just society would be one that aims through its rules and institutions for full employment in jobs that enable workers to develop all these capacities, with the consequence that everyone feels valued and the society achieves social cohesion.

Although mostly oriented towards economic interests such as transactions and property rights, the rules of private law are as much concerned with issues of well-being as material welfare. For instance, this idea of well-being seems to provide the moral foundation for many of the rules governing the limits of the capacity to enter binding contracts. The invalidity or ineffectiveness of contracts of slavery, servitude, prostitution and gambling seems to be best explained as the private law response to a perception that none of these transactions is likely to contribute to the well-being of the participants, even though they might improve the material welfare of some. Similarly, rules concerning capacity to own property and to enter contracts seem to try to ensure that private ordering promotes well-being as well as protecting individuals against the exploitation of their weaknesses. Although private law is certainly concerned about material welfare in its rules protecting freedom of contract and private property, its rules and principles seem to be equally concerned about the broader dimension of the well-being of individuals.

Similarly, modern regulatory interventions that adjust the rules of private law in particular classes of cases are also concerned with both material welfare and well-being. In the case of employment, for instance, as well as rules such as minimum wages that are directed towards

[22] I. M. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

material welfare, modern laws protect many dimensions of well-being: extensive anti-discrimination laws combat both explicit and hidden devices for excluding certain groups from the opportunity to work in fulfilling jobs; and laws governing unjust dismissal reflect the need to protect the non-material benefits obtained from stable employment. These anti-discrimination laws and unjust dismissal rules modify private law so that it can address the task of promoting 'well-being' more directly, thereby contributing to this deeper goal of social justice.

Perfectionist arguments regarding social justice do not count the total preferences of individuals, but rather claim to provide reasoned grounds for the principles based upon objective ideas of how best to achieve well-being. What is regarded as well-being is not simply a matter of the satisfaction of a preference. On the contrary, rules designed to protect well-being may frustrate preferences. I may dearly want to gamble on the Internet, but the constant exercise of this preference will probably not lead to my well-being unless I get uncharacteristically lucky. Similarly, I may want to drink vodka all day long, but my well-being is likely to suffer if I exist in a permanently intoxicated state. When we make judgements about well-being, our deliberations may not pay much attention to the counting of preferences. Even if a majority of people would like to gamble on the Internet or live mostly on vodka, that information would not affect our view that their well-being would be better served by desisting from such activities. Judgements about well-being and laws based upon those judgements are not primarily governed by the examination and counting of preferences. They rely, instead, upon a different style of moral and political reasoning. This reasoning contains two dimensions, which can be called 'perfectionism' and 'conventionalism'.

The dominant perfectionist strand in the reasoning argues that some activities or practices will not contribute to a person's well-being, even though they may think so. Someone may achieve excitement, thrills and intense emotions through gambling, and be prepared to risk all their material wealth in order to do so. The legislator may decide from a paternalistic perspective, however, that this way of leading one's life, which in almost every case ends in penury and misery, is not the way to achieve well-being, and so measures may be adopted to deter gambling. Such judgements involve the construction of views about what kind of life is worth living, what amounts to a good life. In designing the laws and regulations, the lawmaker takes a view about how one ought to lead one's life, or at least how one ought not to behave towards others.

This process involves overriding personal preferences in favour of the legislators' conceptions of what will achieve well-being. It is perfectionist reasoning in the sense that judgements rest on a view about what can be regarded as a good life, a dimension of moral reasoning that was once called 'virtue'.[23] This perfectionist strand draws on the long tradition in Western philosophy, from the ancient Greek philosophers to modern natural law theorists, which asserts the possibility of identifying what is right and good through rational reflection.

In practice, no doubt, legislative judgements regarding prohibitions about ways of leading one's life may be heavily influenced by the preferences of the majority, who may dislike or find offensive the sight of people gambling or lying on the streets in a drunken stupor. But in liberal democratic societies, this personal dislike or 'external preference'[24] is regarded as a dubious reason in itself to justify the creation of a prohibition against particular conduct. In modern liberal political culture, social cohesion can be preserved only by recognising that there will inevitably be many partially conflicting views regarding justice and how one should lead one's life.[25] In more practical terms, respect for liberty or the rights of individuals mandates a degree of tolerance for unappealing preferences. Under this liberal principle, the majority cannot easily justify the prohibition of an activity merely because they dislike it. They must have a sufficiently strong reason to overcome the presumption of the liberty for every citizen to lead their own lives as they choose. This presumption in favour of liberty and privacy is embedded as a constraint on political discourse by the law in national constitutions and the European Convention for the Protection of Human Rights and on Fundamental Freedoms.

Philosophers debate what kinds of reasons are sufficiently strong to justify these paternalist measures. Following J.S. Mill, some liberals insist that an individual's conduct should by controlled by law only if it harms others – or, in legal language, interferes with the rights of others.[26] But that view experiences difficulty in explaining and justifying the full range of regulatory measures that one discovers in modern liberal states, where restrictions are frequently imposed on apparently self-regarding actions, such as looking at pornography and drinking

[23] A. MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981).
[24] R. Dworkin, 'Do We have a Right to Pornography?', in R. Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986) chapter 17.
[25] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).
[26] E.g. H. L. A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963).

vodka. Within the utilitarian or welfarist approach to social justice, it is always difficult to explain the validity of these paternalist measures that apparently override the preferences of individuals. Another type of justification for restricting liberty may be a considered judgement that a particular chosen way of life is not one that will be worthwhile or conducive to well-being.[27] From this perfectionist viewpoint, where a judgement is made that an activity such as taking addictive and harmful drugs cannot be conducive to well-being, considerations of personal freedom and preferences can be overridden in order to discourage and deter such bad choices. Such perfectionist arguments seem to play an important role in practice in justifying regulation that interferes with individual liberty.

At the same time as these debates on matters of principle take place, however, it is clear that in each society there are different traditions and conventional and cultural assumptions about what kind of life is worth living and the proper role of the state in deterring bad choices. These conventional attitudes guide and inform legislation and regulation. In one country, the sale of alcohol may be forbidden; in another, tight controls may be applied only to hard liquor; and in a third country, all drinks may be obtained readily and cheaply in the local shop. These differences in laws can be explained by divergence in culture, religion, political tradition and so forth. In all these countries it may be widely agreed as a matter of principle that spending all one's days in an alcoholic stupor is not a good idea, not a worthwhile or meaningful way in which to live one's life, but the regulation of the activity differs according to the strength of conventional and historical views against alcoholism, diverse appreciations of the extent to which the state should constrain the liberty of the individual and, no doubt, views regarding which kinds of constraints are likely to prove effective to achieve the end sought. The European Court of Justice, when assessing the legitimacy of national regulations on marketing, such as those regarding the sale of alcohol, permits variation in national restrictive measures without imposing a strict test of proportionality, in part out of respect for these conventional standards and in part perhaps out of a sense that national governments are in a better position to assess the effectiveness and appropriateness of controls.[28]

[27] E.g. J. Raz, *The Morality of Freedom*.

[28] C-434/04, *Criminal Proceedings* v. *Jan-Erik Anders Ahokainen and Mati Leppick* [2006] ECR I-9171.

Judgements about well-being typically combine the deliberations of perfectionism, which are then modified or directed by references to convention. The perfectionist strand provides the criteria of principles; the conventional element directs the methods of implementation. On the ground of promoting well-being, for instance, a government decides to provide subsidies to artistic productions, but judgements about which particular activities count as 'art' and how best to subsidise them will depend rather more on conventional practices influenced, no doubt, by efficiency considerations. This distinction between welfarist and perfectionist approaches to social justice now enables us to discern what is common (and what is different) in the diverse traditions of European private law systems.

5 Private law and perfectionist principles

As we have already observed in chapter IV, private law plays a role in constructing the principles of social justice in a society. The laws of property, delict and contracts provide the framework for a pattern of distributive justice and social inclusion. Those rules certainly have welfarist consequences in the sense of promoting and sometime preventing the satisfaction of preferences. Now it is convenient to advance the further claim that private law rules tend to emphasise rather more strongly than other regulatory measures the dimension of well-being. In order to explore and develop ideas of well-being, private law also tends to emphasise the mode of moral discourse that has been labelled here as 'perfectionism'.[29]

The tradition of private law reasoning throughout Europe has been embedded in the perfectionist idea that it is possible to discover what is right and good by means of a rational enquiry. Reasoning in private law, whether conducted by judges, lawyers, or scholars, emphasises how it rests on principle and achieves a coherent moral vision. These concerns for principle, coherence and consistency are the hall-marks of this perfectionist approach to issues of social justice. It is also true, however, that private law reasoning is influenced by welfare considerations and will be assessed in part by the consequences of its rules on social welfare. Nevertheless, private law has traditionally relied upon its rationalist

[29] For a more detailed and most insightful discussion of the perfectionist thinking underlying modern contract law: M. R. Marella, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 *European Review of Contract Law* 257.

and perfectionist foundations in making its claims for achieving justice. Legal language may declare a contract ineffective for a variety of technical reasons – illegality, public policy, *bonos mores*, *absence de cause*, contrary to good faith – but legal reasoning in private law is always concerned to find its roots in an elaboration of perfectionist standards and principles. A contract of slavery or servitude, for instance, will be denied enforcement on the formal legal grounds of 'public policy' or *bonos mores*. Yet, whatever the label chosen by a particular legal system, they all share the perfectionist motivation for their conclusion of the invalidity of the transaction that the condition of slavery cannot be conducive to the well-being of an individual, even though the transaction may to some degree have been based on consent or preference (presumably when the alternative was even worse).

My suggestion is that national private law systems in Europe share in common this strong commitment towards a perfectionist style of reasoning in order to secure social justice in the sense of well-being. This underlying perfectionist approach may be expressed in a number of overlapping ways, including respect for rights, the need for a coherence of principles and a requirement of rational justification for all the distinctions drawn by legal materials. Legal systems may differ in how they express the perfectionist approach, but the basic idea of promoting well-being through rational examination of principles provides a common core. In addition to contrasts in modes of expression between legal systems, differences between national private law systems arise in a number of ways. In some instances, though these seem relatively rare, there may be divergences in views about the outcome of the perfectionist style of reasoning. But it is more likely that the differences can be explained by other variables. In some instances, conventional standards and degrees of tolerance for behaviour judged not to enhance well-being may account for divergences in the rules of private law. In other instances, the disagreement may be explained by differences in collective judgements about how best to achieve welfare aims through private law.

Of these explanations for divergence, the most prominent seems to be the last concerning methods for achieving welfare aims. Here we will encounter different political choices regarding the extent to which weaker parties should be protected in a market economy and what restrictions should be placed upon property rights for the common good.

Perhaps more significantly, when observing differences between national private law systems, we also need to take into account the

evolution of different techniques of intervention for the sake of achieving more or less identical goals. Two countries may actually agree on the degree to which weaker parties should be protected from improvident bargains, for instance, but their private laws may differ substantially. It is only possible to discern the exact pattern of distributive justice chosen by a society by putting together the three strands of governmental steering in a market economy: private law rules, mandatory social regulation, and tax and spend arrangements. The discovery that one national legal system has different rules in one category, such as private law, does not provide a full comparison of welfare standards of social justice, since one also needs to know whether the two other modes of intervention – regulation and tax and spend – are applicable.

Consider, for example, three hypothetical legal systems, each of which seeks to secure to every family a 'living wage'. Each national legal system, however, employs a different method: in one, the private law rules invalidate unfair contracts and impose a restitutionary obligation on employers to pay a fair price for goods and services; in another, private law upholds the contract, but mandatory regulation imposes a minimum wage on the parties as a term of the contract or an independent statutory right; and in a third, the contract of employment remains valid and unaltered by private law and regulation, but the government provides 'in-work benefits' or 'negative income tax' in order to increase the take-home pay of the worker. The end result in each legal system is approximately the same – the worker receives a living wage – even though the method of delivery differs considerably. To say that the private law rules of each system differ substantially in this example is, of course, true. But it would be wrong to infer that the standards of social justice regarding welfare and well-being in these three hypothetical countries diverge. The distinctions concern techniques for delivery of welfare and well-being rather than deeper disagreements about social justice.

It has been acknowledged that the values and principles of substantive law regarding the well-being dimension of social justice are clearly influenced by the conventions and customary practices of the community. To that extent, substantive legal rules form part of the cultural fabric of the community. But these values and principles also rely upon reasoned argument, the rationalist project of a search for coherent principles of social justice that will protect and promote well-being. In this regard, substantive values and principles escape from local cultural

perspectives and seek to establish more universal values based upon perfectionist styles of moral reasoning.

This search for more universal values in private law through rational argument has been sustained through the centuries by an epistemic community among lawyers in Europe. Although the strength of this legal community has waxed and waned over the years, at present, with the provocation and encouragement of the European Union, it seems to be in a particularly rich and productive period. In this regard one could mention many groups and associations, such as the Commission on European Contract Law,[30] the Study Group on a European Civil Code,[31] the Society of European Contract Law[32] and the Study Group on Social Justice in European Private Law.[33] Lawyers from different national legal traditions in Europe have sought to understand what principles and values are broadly shared between them. They examine critically their own and other national traditions with a view to promoting more rational and coherent private law systems. This work helps to sort out the difference between disagreements in principle and disagreements based upon local conventional standards and approaches.

Although disagreements in principle regarding issues of well-being arise from time to time, these seem to me to be less pervasive than disagreements about welfare issues. Debates regarding issues of well-being seem to be grounded in a consensus about relevant values and principles, unlike disagreements about welfare where sharper political divisions regarding goals emerge in disputes about private law rules. The consensus of values about well-being is typically expressed in the language of rights, both civil and political rights and also social and economic rights. Rules of private law can often be regarded as more detailed articulations of those different types of rights, though stated in the form of principles as well as entitlements of individuals.[34] Evidence of a broad consensus about those fundamental values in Europe today can be found in many international charters and treaties, particularly those emanating from the Council of Europe and the European Union,

[30] See *Principles of European Contract Law, Parts I and II*, O. Lando and H. Beale (eds.) (The Hague, Kluwer Law International, 2000).
[31] Website of the Study Group, www.sgecc.net.
[32] Website of the Society, www.secola.org.
[33] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653.
[34] A. C. Ciacchi, 'The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice' (2006) 14 *European Review of Contract Law* 167.

not the least being the Nice Charter of Fundamental Rights of the European Union.[35]

Consider a particular issue, such as the validity of a contract under which a dwarf consents to be thrown about as part of a public entertainment in return for remuneration.[36] Lawyers in Europe can agree upon the relevant principles and have a reasoned disagreement about the application of those principles. Some lawyers may argue that the case for invalidating or prohibiting such contracts is not made out because it interferes too greatly with the freedom of the individual, in this case the dwarf seeking to make a living (the right to work); others may find convincing the argument that such an activity cannot contribute to well-being because it undermines human dignity and that the state is justified in prohibiting the transaction.[37] My point is that any disagreement about the appropriate outcome of this case is about how to weigh different competing principles and rights; it is not because lawyers have different starting-points or look to different principles when they try to articulate what I have called the 'well-being' dimension of social justice.

Consider another example proposed by Ruth Sefton-Green, though she employs it primarily for the opposite purpose of stressing the difference in cultures between legal systems. She compares the handling of claims for compensation for medical negligence in France and the United Kingdom.[38] There are important technical differences between the two systems, such as the point that French law regards medical liability as contractual whereas the common law handles it normally through the law of negligence in tort. Apart from those formal differences, she detects a divergence in results, with the French courts being more willing to find grounds for providing compensation to patients who have suffered losses arising from medical interventions. Yet, she also notes important common ground in the legal reasoning used by the courts in both systems. In particular, it is worth highlighting the strong

[35] 2000/C 364/01.

[36] Drawing on the example in: Conseil d' État, Ass, 27 October 1995, *Ville d'Aix-en-Provence* (1996) *Dalloz* 177; Conseil d' État, Ass, 27 October 1995, *Commune de Morsang-sur-Orge* (1995) *Dalloz* 257.

[37] The latter view seems predominant in this particular instance: Marella, 'The Old and New Limits to Freedom of Contract in Europe' 257, 271.

[38] R. Sefton-Green, 'The European Union, Law and Society: Making the Societal–Cultural Difference', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 37, 43.

emphasis of the judges in both legal systems on the right to patient autonomy and choice, which is supported by a duty placed on the medical professions to provide information to patients so that they can give informed consent.[39] These principles should be understood as a form of perfectionist reasoning in which patients ought to be accorded respect and dignity to control their own lives. They conflict with a more welfarist perspective under which the doctor is required and expected to act in the best interests of the patient, subject to the consideration of effective use of health care resources, even if the patient does not understand the procedure or is unable to give informed consent for some reason. The common ground between the legal systems is represented by this concern for patient autonomy and informed consent, though these principles may be qualified in slightly different ways as a result of divergences in regulatory techniques, slightly different welfare emphases, or perhaps cultural conventions regarding attitudes towards the medical profession.

Across different legal systems there is common ground regarding how issues should be framed, even if there can be divergence in outcomes. For the sake of social justice it is important that these disagreements should take place, because it is only by means of rational debate, as opposed to the application of conventional values, that we are likely to improve the legal framework that supports the values of well-being. Respect for tradition and convention is the enemy of any kind of perfectionist project, including the ambitions of private law systems in Europe.

Against these arguments for the existence of a common core of values in European private law systems, it may be objected that value pluralism and moral relativism has become normal in modern societies. The perfectionist projects of nineteenth-century civil codes relied upon unacknowledged assumptions about the importance of tradition and convention. It was perhaps only possible to reach consensus in the civil codes precisely because the middle classes shared common commitments and norms. In the contemporary world, however, that consensus perhaps no longer exists, and even if it does persist, leaders are reluctant to impose majority views on vocal minorities. On the basis of such

[39] E.g. (France) Civ 1, 9 October 2001 (2001) *Dalloz* 3490, rapp. Sargos, note Thouvenin; cf. M. Fabre-Magnan, *Les obligations* (Paris: PUF, 2004) 441 *et seq.* (UK) *Chester* v. *Afshar* [2004] UKHL 41; cf. E. Jackson, *Medical Law* (Oxford: Oxford University Press, 2006) chapter 5.

arguments, for instance, Thomas Wilhelmsson rejects projects for comprehensive traditional codes in a European context.[40]

Although these sharp observations are probably correct, the question is whether they still leave open the possibility for the project for a European Civil Code described here. Wilhelmsson rejects the possibility of a traditional detailed code, but may it be feasible to have a code of principles, as in the proposal described here? Private law is primarily concerned with creating opportunities, though it has to place limits on positive freedom in order to protect the liberties and interests of other citizens. This system can tolerate considerable value pluralism. The legal framework provides some limits, but the principles of private law provide a common language to discuss and resolve the harder and intractable conflicts of interest that emerge in everyday life. A code of principles at the European level would provide a discursive medium to address these problems which would be only loosely attached to the moral certainties that may have underpinned the nineteenth-century codes. Such a civil code comprising principles would in fact satisfy the prescription for the future of private law advocated by Wilhelmsson:

> Offering a medium for moral communication, law becomes a part of the continuing and infinite learning process that is typical of moral building in late modern society. This requires a law that is sufficiently open towards moral assessments and does not close its eyes to the inevitable moral judgments that have to be made. At the same time the law has to recognise the individual moral responsibility of those using and applying the law.[41]

To conclude this argument, despite their differences, national private law systems in Europe share this commitment to the development of a perfectionist discourse regarding the support and promotion of the values of well-being. This shared commitment provides the foundations for agreements on the common core of principles and values that will shape private law. In this sense, we can discern unity despite evident diversity. The diversity in national legal systems springs in part from differences in the nuances of interpretations of those values regarding well-being, but more substantially from differences in evaluations of welfare consequences and the best mechanisms for achieving those outcomes. The project for a development of a European Civil Code will

[40] T. Wilhelmsson, 'The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law', in J. Smits (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Gronigen: Europa Law Publishing, 2005) 121.

[41] Wilhelmsson, 'The Ethical Pluralism of Late Modern Europe' 121, 136.

certainly encounter substantial disagreements regarding the welfare dimensions of justice, such as how much protection to afford weaker parties to contracts. The need to address such issues arises precisely because private law creates the foundations for the social market and the Economic Constitution for Europe.

While not diminishing the significance of those political conflicts regarding welfare in any way, what we may be able to say is that work towards a European Civil Code does not represent a fundamental challenge to the diversity of legal cultures represented by the diversity of private law rules. That legal culture has always been dominated by the perfectionist strand in its moral and legal reasoning, which is part of the common heritage of private law systems throughout Europe. The project for a European Civil Code, conceived as a code of principles that articulate this perfectionist argumentation regarding well-being, builds on what the national legal systems share in common rather than seeking to destroy their traditional identities.

6 Legal networks and sources of law

There is a second, important, argument for rejecting the concerns expressed about the damage to cultural diversity posed by the project of a European Civil Code. The claim here suggests that we can detect an evolution in the sources of private law in the national legal systems. In the nineteenth century, private law systems insisted upon their differentiation and their close attachment to the nation state and the national culture. Each continental country had its code of laws, which provided a symbolic point of difference. That code provided the unique source of law for judges in resolving questions of interpretation and application. The legal system viewed itself as hermetically sealed from other legal systems, at least with respect to private law. Similarly, the common law was regarded by lawyers as an autonomous system, developed in each country, though colonies, of course, borrowed extensively from English traditions before evolving their own norms and practices. In contrast to the former transnational circulation of legal ideas idealised in the notion of the *ius commune*, the Westphalian system of sovereign nation states introduced what Lord Bingham has aptly described as the 'balkanisation' of legal systems.[42]

[42] Lord Bingham of Cornhill, 'A New Common Law for Europe', in B. Markesinis (ed.), *Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Oxford: Hart Publishing, 2000) 27.

The separation between legal systems is clearly no longer so watertight. Although not always welcomed by the courts, lawyers engaged in human rights law constantly seek to use the interpretations placed on similar rights in other jurisdictions to help to elaborate legal principles. We can observe similar practices in relation to private law, where lawyers and judges in Europe frequently observe and cite the laws of other countries in support of arguments regarding the proper interpretation and development of national law.[43] Is this increasing use of comparative legal materials merely a rhetorical flourish, or does it have a deeper significance in betraying changing perceptions of the autonomous character of national legal systems?

Certainly, these developments can be fitted into a broader picture regarding a global communications network between lawyers, judges and legal scholars. In this vein, Gunther Teubner detects the forces of globalisation at work in breaking down the autonomy of national legal orders:

> The primary unit is no longer the nation which expresses its unique spirit in a law of its own as a cultural experience which cannot be shared by other nations with different cultural traditions. Rather, national laws – similar to national economies – have become separated from their original comprehensive embeddedness in the culture of a nation. And globalising processes have created one world-wide network of legal communications which downgrades the laws of the nation states to mere regional parts of this network which are in close communication with each other.[44]

But we need not go so far as to view national legal systems as regional parts of a global network in order to explain and understand these phenomena.

Concentrating on Europe alone, it is possible to explain the development of extensive use of comparative legal materials in legal reasoning, including judicial reasoning, as having been provoked and sustained by the adoption, either consciously or unconsciously, of an agenda to harmonise private law systems. For that purpose, lawyers and judges will prefer to adopt legal principles that seem common to other legal

[43] B. Markesinis and J. Fedtke, 'The Judge as Comparatist' 80 *Tulane Law Review* 11; G. Canivet, 'La pratique du droit comparé par les cours suprêmes' (2005) 80 *Tulane Law Review* 221.

[44] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 15–16.

systems and to achieve similar results where possible within the constraints of the national legal tradition. Of course, the courts must consider the importance of harmonisation when interpreting European treaties and legislation, and national legislation derived from Community law. The courts understand that a uniform interpretation for European law is desirable and recognise the authority of the European Court of Justice as the highest court for settling such issues. When explicit instruments of European legislation are not involved, however, so that the issue before the court turns solely on national private law, the question is whether the interest in harmonisation forms part of the process for resolving the dispute by encouraging comparisons between private law systems.

The principal evidence for such a development occurs when the highest appeal courts engage in comparative law investigations with a view to discovering a solution which not only fits into a coherent national law system but also accords with the solutions and doctrines developed in other European jurisdictions. In the case of English law, the growing practice is to extend the comparative perspective beyond those countries which share similar doctrinal traditions to that of England, such as Australia, Canada, and the United States. It becomes important in the interests of harmonisation for the English courts to compare the reasoning and results of the courts of other European states such as Germany and France. The introduction of such foreign materials represents a significant change in judicial practice – or, at least, it revives a practice which had long since been abandoned.

For example, in *White* v. *Jones*,[45] a leading decision concerning the claim of an intended beneficiary under a will against an allegedly negligent solicitor for failure to draw up the will before the testator's death, Lord Goff, giving the leading majority judgment in the House of Lords, not only considered English legal doctrine and the doctrine of other common law countries, but also compared French, Dutch and, at considerable length, German law on the issue. The point of this exercise was both to demonstrate the convergence of the legal systems towards a similar result, and to consider the possibility that some of the doctrinal concepts drawn from German law (*Vertrag mit Schitzwirkung für Dritte* and *Drittschadensliquidation*) might prove of assistance in providing a coherent conceptual explanation within English law. These references to

[45] [1995] 2 AC 207; [1995] 2 All ER 691 (HL).

comparative law perspectives mainly occur in the highest appeal courts when national private law doctrine appears unclear or confused.

Occasionally the comparative process in European courts is more indirect. The European Court of Justice has developed and endorsed principles derived from national legal systems, but which then become part of European law itself. Once inserted into European law, this principle then spreads throughout the Member States under the influence of the supremacy of European law. Just as the concept of 'proportionality' in administrative decisions approved by the European Court of Justice is increasingly influential in English public law, so too we discover equivalent doctrines in private law. One notable example has been the development of a defence to a claim to recover overpaid statutory charges. Under English law, it was uncertain whether a person who had paid charges to the state which were not in fact due could be prevented from recovering the sum of money in an action for restitution on the ground that the charges had been passed on down the line to the payor's customers, with the result that the payor had not in fact suffered any loss resulting from the improper charge. (Under the common law, without the jurisdictional divide between public and private law, the private law of unjust enrichment applies to state agencies as well as private individuals.) The European Court of Justice had expressed an opinion on the point in several cases.[46] The court had acknowledged that such a defence might be available. This opinion was then influential in the development of the same passing-on defence to some restitutionary claims for money against public authorities in the leading English decisions commencing with *Woolwich Building Society* v. *IRC (No. 2)*.[47]

These examples of the influence of comparative law and national laws via the mediation of European law on the development of English private law symbolise a fundamental re-orientation of national private law systems. The immediate cause of this development is explicable by reference to the recognition of the importance of harmonisation of private law in Europe. The modern globalised communication system undoubtedly facilitates these comparative law studies and enables

[46] C-199/82, *Amministrazione delle Finanze dello Stato* v. *San Giorgio* [1983] ECR 3595 (ECJ); C-331/85, *Les Fils de Jules Bianco SA* v. *Directeur General des Douanes et des Droits Indirects* [1988] ECR 1099 (ECJ); C-104/86, *EC Commission* v. *Italy* [1988] ECR 1799 (ECJ).

[47] [1993] AC 170, at 177; [1992] 3 All ER 737, at 764 (Lord Goff) (HL); Law Commission, *Restitution: Mistakes of Law and ultra vires Public Authority Receipts and Payments*, Report No. 227 (London, 1994); for the limited application of this defence, see: *Kleinwort Benson Ltd* v. *Birmingham City Council* [1996] 4 All ER 733, at 740 (Evans LJ) (CA).

national courts to observe the arguments developed by each other on similar issues.[48]

As this practice evolves, however, the former clarity regarding sources of law becomes blurred. Formerly, the national court would understand that the sole valid source of law lay in national codes and other sources, and that comparative legal materials from foreign laws, though interesting, had no normative force. Today, however, the weight to be attached to foreign legal materials is more ambiguous. The decisions of foreign courts may not be authoritative in any formal sense, but they provide in their discussion of principles what is sometimes described as 'persuasive authority'.

If this description of the evolution of modern views on the sources of private law is correct, it is evident that the walls that formerly surrounded national private law systems from each other are becoming permeable. Though national legal systems certainly remain diverse, they are no longer hermetically sealed from each other. On the contrary, the higher courts, with the assistance of scholars, have begun to communicate with each other, both on matters touched on by European law and on matters that still remain within the exclusive competence of national private law systems. In this context, a concern that a European Civil Code might damage the distinctive legal culture of a national legal system begins to appear rather belated and overstated. The courts have already moved substantially in this direction by developing new, transnational views regarding the sources of law. No doubt a European Civil Code would accelerate this evolutionary process, but it certainly would not create it.

7 Common law and codes

We turn finally to the issue that will certainly worry English lawyers the most. In the context of considering the need to protect the diversity of legal cultures, we need to consider the predicament of common lawyers. Originally, their private law was constructed largely by judges through the technique of following and developing precedents over many centuries. In the modern period, judges reconfigured feudal customs to meet the demands of a market society without drawing extensively on the *ius commune* and Roman Law, which had so influenced the

[48] Teubner, above n. 44; H. Collins, 'The Voice of the Community in Private Law Discourse' (1997) 3 *European Law Journal* 407.

evolution of legal thought in continental Europe. Legal scholars contributed to the process by suggesting ways of systematising the precedents, though ultimately the judges, through their reasoning in cases, provided the most authoritative doctrinal exegeses. Any project for a European civil code presents a significant challenge to this legal culture represented by the common law.

A Civil Code demands that all legal reasoning should be grounded in its principles. The appearance of legal reasoning must always fit the model of deduction of a particular result from application of the principle or rule of the Code to the facts of the particular case. In a civil law system with a Code, precedents can be examined as important guides to the appropriate interpretation of provisions. But the precedents themselves, though perhaps treated as persuasive authorities or even in some sense 'case-law', cannot ultimately bind the courts when a better interpretation of the Code is accepted. In France, for instance, from time to time the higher appeal courts place a fresh interpretation on an article of the Civil Code without even mentioning the fact that they are deviating from a line of earlier decisions that adopted an opposing view of the meaning of the provision. A Civil Code also aspires to provide a systematic and coherent body of principles and rules for the governance of civil society. Lawyers, judges and legal scholars endeavour to explain and develop this architecture of a code in which every provision should fit into a logical and rational façade. Authority for propositions of law must always be discovered within this framework provided by the code.

These fundamental contrasts between legal reasoning in common law systems and codified systems are linked to many other institutional and procedural divergences. For example, the tradition of dissenting judgments in the common law is almost unknown in codified systems.[49] This contrast is symptomatic of the divergent legal cultures. An English judge, trained as an advocate, expects to respond to the oral argument, and to express his or her unique interpretation of the precedents, which will have the force of law based upon the personal authority of the judge. The career service of the judiciary in civil law systems emphasises instead the value of consensus and certainty in the interpretation of the civil code, the importance of confining decisions

[49] Lord Goff of Chieveley, 'Coming Together – The Future', in B. Markesinis (ed.), *Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Oxford: Hart Publishing, 2000) 239.

to the task of applying the law to the facts rather than developing new legal principles and the desirability of impartiality and neutrality in adjudication.

It is possible to link the contrast between codified systems and the common law with divergences in broader philosophical ideas, epistemologies and culture. The attention to precedent and the detail of particular cases found in the common law can be seen as homologous to intellectual traditions that emphasise empiricist philosophies which stress the importance of observation, particular facts and even common sense. The idea of a civil code can be linked equally to more idealist philosophical traditions, which develop general and systematic theories by methods of exploration of concepts and deductions from basic precepts. Civil codes were also originally products of the Enlightenment period in European intellectual movements. These intellectual movements involved the rejection of custom, tradition and the arcane hierarchies of the Ancien Régime. They relied instead on a belief in the possibility of using rationality to devise institutions of governance that would promulgate clear, systematic rules for society.

It has also been suggested that civil codes are attractive to cultures that, as response to social and political upheavals, have a strong need to avoid uncertainty and ambiguity in their laws. In particular, the emphasis within German legal culture on the need for systematic legal arguments based upon a comprehensive civil code can be attributed to the need to avoid uncertainty.[50] These values may also account for the intense support for a European Constitution and the way in which German legal scholars have taken the lead in attempts to draft a European Civil Code.

Using such contrasts, some scholars have argued that any projects for a European Civil Code are necessarily linked to that particular civil law tradition of understanding the nature of law and legal reasoning. The danger presented by a civil code, on this view, is that it would obliterate the common law tradition of legal reasoning, with its emphasis on the particular, reasoning by analogy rather than deductively from abstract rules and concern for remedies rather than systematic abstract principles. Pierre Legrand, the most outspoken representative of this critique, puts the matter in these terms:

[50] C. van Dam, 'European Tort Law and the Many Cultures of Europe' in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 57, 73.

The communion assumed to be epitomised by a European civil code would in effect represent, beyond the sum of words, the excommunication of the common law way of understanding the world and the relegation to obsolescence of its particular insights. The repudiation of the common law would also leave common law lawyers at odds with the culture they inhabit which would continue to articulate its moral inquiry according to traditional standards of justification. In effect, common law lawyers would find themselves compelled to surrender cultural authority and to accept unprecedented effacement within their own culture.[51]

In short, from this critical perspective, the advent of a European Civil Code would cause the demise of the common law and the destruction of the common law tradition and perhaps important aspects of civilisation as we know it in England.

In response, critics and advocates of the project for a European Civil Code minimise these vivid and fundamental contrasts between legal reasoning in common law and civil law countries.[52] They point out correctly that increasingly parliamentary legislation occupies the field of private law, so that judges in the common law have become familiar with reasoning processes based on rules. Moreover, despite the contrasts between the legal traditions, it has undoubtedly been the case that the European Council of Ministers has been able to agree legislative instruments, which seem to be assimilated into the different legal traditions through national legislation. But that argument, though correct up to a point, misses the crucial difference between the treatment of statutes by common lawyers and the use of codes by civil lawyers.

Legal reasoning by reference to a Code regards the Code not merely as a source of rules, but also as a source of principles. These principles, either stated explicitly as general clauses in the Code or implied from the basic structure of the rules, can be used by civil lawyers to develop private law. A systematic view of the principles can be used to fill gaps, to adjust the code to modern circumstances and to qualify the more detailed rules. In contrast, common lawyers treat legislation as a text that can achieve no more than is explicitly stated in the words of the

[51] Legrand, 'Are Civilians Educable?' above n. 5, 222; see also: P. Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44.

[52] E.g. M. van Hoeke, 'The Harmonisaton of Private Law in Europe: Some Misunderstandings', in M. van Hoeke and F. Ost (eds.), *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000) 1; A. Chamboredon, 'The Debate on a European Civil Code: For an "Open Texture" ', in M. van Hoeke and F. Ost (eds.), *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000) 63.

document. Admittedly, linguistic ambiguity permits interpretations that may stretch the words of the legislation, but this process of interpretation is different from using the statute as a source of principle that can be developed and extended to handle novel problems. Common lawyers must turn to the precedents in cases decided under the common law to find principles suitable for such purposes. When interpreting national legislation that implements European Directives, the common law can generally simply refer to the text and the purpose of the particular provision. In contrast, the civil lawyer wants to know where the new legal rules fit into the scheme of the civil code and whether or not the new legislation has implications for the meaning of existing provisions in the code.

Given these significant contrasts in the traditional methods of legal reasoning, and the associated divergences in procedures and institutions, there seems little point in denying that the project for a European Civil Code presents a significant challenge to the legal traditions of common law jurisdictions. But this challenge should not be exaggerated. My argument has been that in the field of private law national legal systems share some crucial starting-points in common. They share a strong emphasis on perfectionist reasoning concerned with the well-being of the individual. This mode of reasoning relies upon arguments of principle and acknowledges the constraints of consistency and coherence of moral principle. These common foundations enable all European lawyers to understand and to be able to operate a code of principles of private law. The details of their methods may differ, but it is possible for them to recognise that they are bound together in a common project.

If the project for a European Civil Code were confined to a code of principles, except where more detailed agreement could be obtained, the apparent challenge posed to the diversity of cultural values exhibited by national legal systems would be greatly diminished. For common lawyers, the most revolutionary aspect of this proposal would be the notion of treating legislation as a source of principle, not merely a directing text. Judges in common law jurisdictions such as Eire and the United Kingdom have demonstrated the capacity for generating such an interpretive approach in the context of constitutional statements of human rights and fundamental freedoms. What would be required is the extension of this mode of interpretation to private law matters, such as contracts and torts, in the light of the principles of a European Civil Code. Beyond that revolutionary change, however, common lawyers need not feel that their legal culture is seriously threatened by

proposals for a European Civil Code. What common lawyers share with civil lawyers remains the crucial characteristic of private law: the commitment to a scheme of social justice based on perfectionist principles. Where common lawyers differ, they can assimilate the different modes of reasoning without abandoning traditional elements of their legal practices and institutions. The opportunities for preserving considerable diversity between national legal systems, notwithstanding the presence of a European Civil Code, become fully apparent only when we consider how it would function in the context of the constitutional structures of the European Union itself.

VII Multi-level private law

1 An impossible necessity?

The European Union is a supranational legal order that can function effectively only in cooperation with national legal systems. Laws enacted within the powers of the European Union, as specified in the intergovernmental treaties, claim supremacy over national laws. Yet the effectiveness of European law depends upon the willingness of national governments and courts to observe its provisions in good faith. When enacted in the form of Directives, even the supranational laws themselves only become fully effective following re-enactment and implementation by national legislatures. The European Union differs sharply in these respects from a complete federal system of government.

In a fully federal structure, a federal legislature would determine the precise content of its laws, with the same rules being applicable throughout the territories. Such a federal system would also comprise a central government, enforcement agencies and federal courts to compel compliance with its legislation. Unlike the European Union, a full federal system of government is with respect to its institutions of government much like a nation state. In contrast, the competence of the European Union is partial, and depends heavily on national governments and institutions to perform its functions and for its effectiveness. Unless the national authorities of the Member States enact the Directives as national laws and the courts insist upon compliance with those laws, the European Union would struggle to render any of its measures effective. These distinctive characteristics of the European legal order have a striking and frequently overlooked implication for the project of a European Civil Code.

A European Civil Code appears to be an impossible necessity. It is necessary, according to my argument in chapter VI, because a code is an

essential element in the goal of building a European Economic Constitution, which in turn is a vital step towards augmenting the solidarity of the peoples of Europe. But, given the institutional arrangements of the European Union, especially its functional interdependence with national governments, a civil code along traditional lines seems impossible. Traditional national codes are instruments of central governments. They are enforced by a hierarchical national court system that ensures conformity to the rules throughout the legal order. But the European Union lacks this centralised enforcement mechanism. No system of federal courts exists to ensure compliance with European law. There is no hierarchical court system or other governance mechanism that could effectively police conformity to the code throughout Europe. EU institutions might choose to promulgate a civil code, but without it being implemented at national level, it would have little or no effect.

It does not follow, however, that the project for a European Civil Code must be rejected as a chimera. Rather, we must recognise that a European Civil Code will not be exactly the same kind of beast as traditional national legal codes. A European Union Code has to be constructed within a multi-level system of governance.[1] It will share some features of traditional codes, but significant differences must be acknowledged. It will resemble national codes in its systematic articulation of principles governing fair dealings and respect for the interests of others in the relations of civil society. But as a practical instrument of government, it must differ from national codes. In particular, in the absence of a federal court system, it will not be possible to ensure consistent interpretation, application and enforcement of a European Civil Code.

All these problems of consistency and effectiveness are, of course, exacerbated by the fact that Europe is a multilingual territory. Although some languages of the larger countries predominate in European legal and governmental discourses, particularly French, German and English, the European Union officially recognises twenty-three languages. If

[1] C. Joerges, 'European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a New Constitutional Perspective' (1998) 18(2) *Legal Studies* 146. This article was perhaps the first (in English) to draw on political science understandings of multi-level governance to reflect on the future of European private law, though the conclusions drawn differ from those presented here; cf. C. Joerges, 'On the Legitimacy of Europeanising Europe's Private Law' (2002) 2 *Global Jurist Topics* Art. 1; C. Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, EUI Working Papers in Law No. 2004/12 (Florence: EUI, 2004); C. Joerges, *On the Legitimacy of Europeanising Private Law*, Ius Commune Lectures on European Private Law 6 (Maastricht: METRO, 2003).

a European Civil Code were presented in these twenty-three languages, the opportunities for misunderstanding and mistranslation would be manifold. Legal language is often quite technical, obtaining its meaning from a particular usage and tradition, so that it is often impossible to provide an exact translation of a concept in one language into the terminology of another. These problems have often been illustrated by translation difficulties in narrowly circumscribed and technical Directives. A more ambitious comprehensive set of principles dealing with fundamental concepts and abstract principles would encounter much graver obstacles to the provision of satisfactory translations.

It is, of course, conceivable that the text of the European Civil Code could be presented in a single language. But political agreement on the choice of that language seems unlikely. In any case, language is an intrinsic part of culture, and respect for cultural diversity in Europe surely requires respect for linguistic diversity in the language in which law is expressed. Surely no one would want to repeat the experience of English-speaking Anglo-Saxons being ruled by reference to Norman French laws? We need therefore to accept the necessity of linguistic diversity, even while striving towards greater harmonisation.

Fortunately, those differences of a European Civil Code from traditional national codes and federal laws seem, on further reflection, to be desirable in principle, even though they create considerable practical difficulties. To achieve the goal of building a European Economic Constitution for the purpose of developing the solidarity of the peoples of Europe, it is unnecessary to require strict uniformity of the laws. Indeed, as argued in chapter VI, any attempt to impose strict uniformity would damage the cultural diversity that should be a cherished aspect of the Union. Chapter VI concluded that a code of principles rather than detailed rules would fully satisfy these ambitions. Strict uniformity in the details of at least some parts of the civil law such as contract law might be an intrinsic aspect of the internal market agenda, but is neither necessary nor desirable for the project of developing a European Economic Constitution. What is required is a formal consensus on common principles that will then be given precise substantive content by becoming embedded in the different national and regional private law traditions.[2]

Although, for these reasons, the differences in a European Civil Code necessitated by its situation in a system of multi-level governance do

[2] A. de Moor, 'Contract, Justice and Diversity in the Remaking of Europe' (1993) 15 *Rechtstheorie* 71.

not present a fatal objection to the project, there is certainly a risk that a European Civil Code would become so watered down and inefficacious that it would fail to achieve its objectives to any significant degree. If a civil code is to contribute to the construction of a European Economic Constitution, the fundamental task of securing agreement on common principles and ensuring compliance with those general principles must be realised.

This chapter and chapter VIII therefore address the issue of how to make a European Civil Code effective in the context of a multi-level system of governance. What kinds of institutional arrangements, supplementary rule systems and connections between different elements in the multi-tiered system of governance would best achieve the objectives of a European Civil Code? In short, what kind of beast is a multi-level private law system?

The first task is to consider what kind of code is appropriate for Europe – or, indeed, whether an instrument like a traditional code, as opposed to some other kind of legislative instrument, is desirable at all. The exploration of that question in this chapter broadens into a consideration of the relation between European law and national law and how the court systems could manage that interdependence. That discussion leads to a conclusion that inevitably, despite the presence of a European Civil Code, considerable diversity between national private law systems will and should persist.

In chapter VIII, we proceed to consider how different forms of governance that aim to coordinate rather than control may be used to strengthen patterns of convergence in private law in Europe. In particular, we address the concerns of commercial businesses regarding the obstacles to trade presented by the diversity of private law systems and the difficulties they encounter in using their standard terms of business throughout Europe. It will be argued that a more effective solution to that problem arising in cross-border trade can also be found in coordinating mechanisms of governance rather than the imposition of uniform laws.

2 Rigidity of codes

Traditional civil codes invariably promise more than they can deliver. They promise citizens a high level of transparency in private law. The ideal is that citizens should be able to consult the code to discover their rights and how to construct binding arrangements with others. At the

same time, codes promise lawyers a systematic and coherent foundation for the legal system and legal reasoning. With its general part comprising principles and basic concepts, followed by detailed rules on particular kinds of interests and relationships, the structure of the code suggests that it provides a comprehensive, internally coherent, set of rules for private law. The ideal, for lawyers, is that it should be possible to deduce solutions to any kind of dispute from the reasoned application of the principles of the code.

Unfortunately, there is an inevitable tension between these twin ambitions of transparency and systematic legal reasoning. Coherence and systematic reasoning can be achieved only through complex technical doctrinal development, which provides the necessary distinctions, concepts and exceptions. Such detailed elaboration, fine distinctions and technical jargon, however, place the code well beyond the comprehension of most citizens. Even with this technical complexity and accomplishment, most European lawyers will acknowledge that their national civil codes lack precision and coherence at many points. Added to these disappointing results from traditional civil codes, many other criticisms of these instruments of governance can be made.

Codes are necessarily living documents. The legislature needs to adjust the rules in the light of changing social and political values. These adjustments may involve complex amendments to the code – or, where more radical change is required, a rewriting of large parts of the code or even the creation of a separate new code, such as a consumer law code. The presence of more than one code provokes uncertainty about the respective scope of their ambit and problems of overlap. The constant need for adjustment tends to undermine whatever transparency and coherence the original formulations of the code once offered.

Moreover, changing the code is a complex task. If new rules are going to be fashioned so that they fit well within the existing framework of principles and concepts, great care and attention to their formulation and positioning in the code will be required. Critics of codes can fairly allege that the preservation of the integrity of the code inevitably places a brake on the necessary reforms and adjustments: 'Codes stand still, while life moves on.'[3] Alternatively, a busy legislature may make a mess

[3] Pietro Coglio, *Filisofia del diritto privateo* (Philosophy of Private Law) (Firenze: Barbera, 1891) 65, quoted and translated by G. Alpa, 'The British Contribution to Italian Legal Thinking' in B. S. Markesinis (ed.), *The British Contribution to the Europe of the Twenty-First Century* (Oxford: Hart Publishing, 2002) 37, 54.

of private law by simply passing legislation without explaining how the reform fits into the remainder of the civil law. Perhaps even more common is the result that the judges are left to twist the meaning of the articles of the code to make them fit modern circumstances and values. Though necessary, this judicial practice may wreak havoc with both the ideal of transparency in the law and its systematic coherence, which discourages judges from engaging in this kind of activism. Given these problems of adaptation to changing circumstances and values, codes are liable to become out of date: their provisions survive long after the social context for which they were designed.

Furthermore, a code presents a subtle but persuasive obstruction to learning from comparative legal studies. Similar social and economic problems often arise more or less contemporaneously in several national legal systems. For these novel disputes, courts will be invited by the advocates for the litigants to forge a solution to the dispute from the existing legal materials. If the problem has already arisen in another jurisdiction, lawyers can point to instructive foreign decisions as a guide. Yet these comparative examples are necessarily grounded in a different code. In order to solve a problem, a foreign legal system might take advantage of a general clause in its code such as 'good faith', or might seize on an ambiguity in a particular article of its code in order to apply it to a novel or unforeseen situation. Unless the domestic code contains a similar clause or article, the comparison with foreign law, though interesting with respect to the outcome, is not particularly helpful to the court in finding a satisfactory solution within domestic law. The foreign case will point to a possible outcome for the dispute, but in the absence of identical legal provisions in domestic law, it offers little assistance in pointing to an appropriate line of systematic legal reasoning that fits well within the domestic legal framework. The rigidity of the articles of the code and the need for a court to ground every decision on its text obstructs the ability to copy promising solutions from one legal system to another.

Similar criticisms concerning adaptation and the capacity for mutual learning can be made with regard to common law systems which rely on judicial precedent rather than a legislated code. In some respects the common law may prove inferior: transparency and coherence are not obvious attributes of a system based upon judicial precedents. In other dimensions, however, such as innovation, transplants of legal concepts from foreign systems and adaptation to changing social conditions, a common law system may have a slight advantage compared

to civil law systems. Because the rules in the common law must always be inferred from previous decisions rather than from a fixed text, the rules can be reformulated in slightly different terms at any time, thereby facilitating adaptation and permitting mutual learning from other legal systems. But in essentials, similar criticisms regarding adaptation, innovation and coherence can be made equally with regard to both codified and common law systems of private law. The nineteenth century's emphasis upon system integrity in the quest to establish the autonomy of law from politics infused both civil and common law systems in Europe, with the consequence of diminishing the adaptive capacity of private law.

Any proposal to introduce a European Civil Code seems likely to encounter a similar barrage of criticisms. Such a code, based on existing models of civil codes in nation states, might equally prove incapable of adaptation, obstruct innovation and prevent coherence. Critics of codes are unlikely to favour a common law system instead. The common law is regarded as probably equally defective in these respects. In most European countries, a legal system based exclusively on judicial precedent is likely also to be regarded as illegitimate because, being judge-made, it lacks democratic authority. Rather, the resistance to a code leads to a preference for circumscribed legislation which is modest in its scope and ambitions. Such legislation can be altered more easily, without the need to place great weight on the value of systematic coherence. Such particular legislation would encourage mutual learning between European institutions and national legal systems as well as between national private law systems.[4]

While acknowledging the force of these criticisms of traditional codes as opposed to other kinds of legislative instruments, ultimately they have to be rejected as grounds for objecting to a European Civil Code. The project of a European Civil Code, as described here, consists of an attempt to articulate a coherent set of principles to govern civil society. This code is not required for the purpose of making European law more effective or adaptable. Rather, the aim is to construct common principles for social and economic relations between citizens, which can be accepted and followed by all citizens of Europe. Isolated pieces of legislation, focused on a particular type of transaction or social

[4] T. Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 10 *European Review of Private Law* 77.

relation, can contribute to that goal, but they cannot complete it. As a constitution for everyday life, a European Civil Code must strive towards a comprehensive and fairly permanent articulation of principles and standards.

Although that ambition requires a legislative instrument that resembles a code, the force of the criticisms of traditional codes discussed above is greatly weakened once it is also accepted that a European Civil Code will not require the detail of the rules of national private law systems. A code of principles rather than detailed rules presents a lower obstacle to adaptation and innovation. Change is often possible through a rebalancing of competing principles, without the need to rewrite the law itself.

Critics of a European code might acknowledge the flexibility obtained by the use of general principles rather than detailed rules, but then argue that such a code would be too vague to provide adequate guidance either to citizens about their rights or to courts about how to resolve disputes. It is at this point in the debate, however, that we need to appreciate fully the significance of the multi-level system of governance in Europe.

3 Code as directive

In a multi-level private law system, a European Civil Code would not comprise the sole source of private law. On the contrary, national private law systems must continue. A European code of principles would not and could not replace national private law systems. Instead, it would introduce a requirement of conformity to the principles of European private law. National laws would have to be adapted and interpreted in ways that ensured their conformity to the European Civil Code. The code would have only indirect effect.

This implication of the multi-level governance structure has not been widely appreciated. Most advocates of a project for codification at European level assume that any code must exclude and replace all relevant national private law. On this view, the legal instrument would have to take the form of a Regulation, with direct legal effects:

> The form of such a European act would by necessity be a regulation, the adoption of a directive must be excluded. For a civil code or a code of obligations is the core of a private law system, it inspires the systematic structures of a legal system. It must therefore be directly applicable and is incompatible with the peculiar characteristics of the directive which allows each Member

State to implement its content in the form which best can be reconciled with the systematic structures of its own legal order. A European code is not meant to fit into a national system but to shape a European system.[5]

But are these conclusions by Jürgen Basedow so self-evident as he assumes? Demanding a Regulation or directly applicable rules to supplant national law makes quite a lot of sense when the task is conceived as smoothing the functioning of the internal market. But when the purpose of the project for a European Civil Code has the broader aims that have been advocated here, strict uniformity can be traded off against other values such as respect for diversity. Let us consider how an indirectly effective European Civil Code would function, and whether it would be unable to achieve the inspiration for systematic structures so much cherished by German legal scholars.

Indirect effect

The task for the courts would be to adjudicate disputes according to national law, but also to consider the interpretive arguments advanced that in some respect national private law has failed to conform to the principles of the European Civil Code. Usually, it should be possible for a court to interpret national law in a way that would coincide with the principles of the European code. A national court might sometimes be required to depart from established interpretations of national law in order to achieve compliance. In such cases, an article of the national code would receive a fresh interpretation, but the article itself would remain undisturbed. In rarer instances, a court might have to use the principles of the European Civil Code to construct an innovatory doctrinal development with which to adjust the national law. This innovation could almost certainly be justified by reference to a general clause in the national code or some other general principle of private law acknowledged by the courts.

This kind of interpretive obligation is already familiar to modern courts with their experience of international human rights law, national constitutions and European Treaties and Directives. In these contexts, courts understand the possible need to re-visit national law in order to ensure its compliance with these other statements of principles. In connection with the European Convention for the Protection of

[5] J. Basedow, 'Codification of Private Law in the European Union: The Making of a Hybrid' (2001) 8 *European Review of Private Law* 35, 47.

Human Rights and Fundamental Freedoms, for instance, national courts are familiar with the task of trying to resolve disputes in accordance with those civil liberties by means of particular interpretations of the national law. Similarly, in some jurisdictions where there is a written constitution, a private law court will often try to ensure that the legal doctrines it enunciates fit into the more fundamental constitutional scheme. Where a European Directive applies, courts are bound by European law to interpret national law so that it complies with the principles contained in the Directive.[6]

An interpretive obligation of this kind, though increasingly familiar, creates a puzzling heterarchical system of law. In the case of European Directives, both national law and European law have validity, but in the event of conflict there is no clear hierarchy between them, whereas within a single legal system it is always clear which rule will trump the other.[7] A national court is required to apply national law, but that national law must be understood if at all possible in a way that is compatible with European law.[8] If it is hard for the national court to interpret the particular legislation in a way that is consistent with the Directive, because the words used in the implementing legislation seem to contradict the European principle, a national court should then turn to the remainder of national law to find another route to comply with its interpretive obligation:

> The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it . . .
>
> Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the Directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the Directive . . .
>
> In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it

[6] C-14/83 *Von Colson and Kamann* [1984] ECR 1891.

[7] M. Amstutz, 'In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Law Journal* 766.

[8] C-106/89, *Marleasing SA* v. *Las Comercial Internacionale de Alimentacion SA* [1990] ECR I-4135.

only insofar as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the Directive.[9]

In describing this interpretive obligation placed on national courts, the European Court of Justice seems to press the case for believing that with suitable ingenuity and flexibility a national court should always be capable of finding a way in which to achieve a result that is consistent with the aim of the relevant European Directive. It should be possible in civil law always to defer the moment when a national court would have to interpret national law in a manner that contradicts the meaning of that law, *contra legem*.[10] The resources of national law to bring itself into a position that is compatible with European law are never completely exhausted.

If we imagine that a European Civil Code, or at least a partial code such as the law of contract, had been enacted as a Directive with indirect effects, how would private law reasoning be conducted? A national court seised of a dispute would initially apply the traditional national rules from a civil code, legislation, or judicial precedents, as appropriate to the recognised sources of law in that jurisdiction. The court should then examine national law to determine its compatibility with the principles of the European Civil Code. Where national law appears to deviate from those principles, the national court would reconsider its initial view – asking, for instance, whether a general principle, such as a principle of good faith contained in the national law, might be employed to re-arrange national law to render it more consistent with the European principles. A national court might also create new distinctions to bring the law into alignment with the European principles. The interpretive obligation of indirect effect imposes on national courts a critical and constructive task: they must both examine national laws against the demanding backdrop of European principles, and they must reconstruct national law to render it compatible with those principles. It is not a hierarchical process, where the national

[9] Joined cases C-397–403/01, *Pfeiffer and Others* v. *Deutsches Rotes Kreuz* [2004] ECR I-8835, paras. 114–116.

[10] The court has acknowledged that this interpretive obligation should not in principle justify an interpretation *contra legem* (C-334/92, *Wagner-Miret* v. *Fondo de Garantia Salarial* [1993] ECR I-6911), and has been wary of national courts justifying new criminal offences on the basis of improperly implemented Dirs. (C-168/95, *Arcaro* [1996] ECR I-4705).

court merely applies supranational European norms, as interpreted ultimately by the European Court of Justice. Rather, national courts, no doubt with legislative assistance through reforms of national law, are challenged to develop their own national laws to bring them into concordance with the principles of European law. Marc Amstutz, though not appreciating that a civil code itself could take the form of a Directive, explains the potential width and radical operation of indirect effect in provoking a reconstruction of national private law systems:

> The rather harmless-sounding formula of 'interpretation in conformity with directives' buries the fundamental, indeed well-nigh subversive, nature of what is really going on: should the self-reflexivity 'ordered' actually produce 'normative compatibility', then accustomed legal structures are dissolved and new ones created. What is happening here is far-reaching rearrangements of normative equilibriums that have settled down in Member State private law systems in the course of time, in order to interweave these systems into the heterarchical network of European private law.[11]

Why not direct effect?

A more troublesome issue is whether or not the European Civil Code should have direct horizontal effect. In other words, should litigants be permitted to rest their case entirely on a principle of the European Civil Code, without the need to refer to national private law whatsoever? Such cases would be rare, because for the most part a national court should be able to adapt national law by interpretive methods. Nevertheless, there might be a few cases where a national court would feel unable to distort national private law in order to comply with the European Civil Code. Should a national court in such instances apply European law directly?

In relation to some provisions of the European Treaty, the European Court of Justice has held the provision to be directly applicable in this sense.[12] In a claim for equal pay, for instance, using Article 141 EC, a woman can bring a claim against her employer which disregards national legislation entirely and relies instead on the Treaty provision directly.[13] Should the principles of the code share that quality of providing an alternative and independent legal ground for argument?

[11] Amstutz, 'In-Between Worlds' 766, 769.
[12] C-26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1.
[13] C-43/75, *Defrenne* v. *Sabena* [1976] ECR 455.

In my view, granting the European Civil Code direct horizontal effect would be a mistake. The possibility for every litigant to point directly to some broad principle of the European code and argue that it provided a new, and presumably completely different right, would create a rather dangerous instability in the private law systems of Europe. The interpretive obligation placed on the courts would create a degree of uncertainty and instability in itself. Established national laws would inevitably have to be revised to bring them into conformity with the principles of the European code. But those revisions could be achieved through considered legislative action or careful re-interpretation by the courts of national private law systems. The ability to step outside these constraints on lawmaking by invoking a directly applicable European code would invite many unpredictable challenges to national private law.

The experience of the European Court of Justice in its jurisprudence that makes some Treaty provisions directly applicable has not been an entirely happy one. It is clear that some national courts have used this device as an indirect way of trying to change national law.[14] If national law on equal pay does not produce the result sought by the court, for instance, it can make a reference to the European Court of Justice based on Article 141 in the hope that the court will in effect rewrite national law. Given that the Articles of the Treaty are necessarily stated in broad terms, in order to respond to such requests the Court has to begin to create what is in effect detailed legislation. In the case of equal pay, for instance, the Court invented the idea that some inequalities in pay might be justified on objective grounds, and applied the test of proportionality to determine whether or not the justification was sufficient to permit the inequalities.[15] It was only subsequent to these judgments that European Directives were introduced to consolidate and explain the court's jurisprudence.[16] Although the outcomes in these cases were no doubt widely approved, there remains much doubt about whether the Court really had the competence and legitimacy in effect to impose

[14] C. Kilpatrick, 'Gender Equality: A Fundamental Dialogue', in S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice* (Oxford: Hart Publishing, 2001) 31.

[15] C-170/84, *Bilka-Kaufhaus GmbH* v. *Weber von Hartz* [1986] ECR 1607.

[16] Dir. 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6; Dir. 2006/54 of 5 July 2006 on the implementation of the principles of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L204, 26.7.2006, p. 23.

detailed equal pay regulations on all Member States solely on the basis of a general clause in the Treaty.

Once the Court had taken this step in relation to equal pay, it seems to have realised how dangerous this course might become. In order to put a brake on this development, it insisted that only a few Treaty provisions were directly applicable in this manner. It also resisted suggestions that provisions in Directives could be directly applicable. The Court maintained the orthodox view that Directives imposed interpretive obligations, might have direct effects in claims brought against the government or 'emanations of the state',[17] but individual citizens and businesses could not rely upon them directly and independently in private claims. Their remedy lay in a claim against the government for failure to implement European law properly into national law.[18] In upholding this interpretation of the European Treaty, the Court implicitly recognised that it lacked the capacity to write the detailed laws and adjudicate over all the potential claims that might arise from directly applicable articles of the Treaty or Directives.

These observations suggest that similarly a European Civil Code comprising principles rather than detailed rules should not become directly applicable. Without the introduction of an extensive federal court system, it would not be possible for the European Court of Justice to cope with the demands of developing the law based upon directly applicable rights. The principles of a European Civil Code would influence the interpretation of national law, but should not themselves become the source of directly applicable rights.

Implementing a Directive

In this description of how a heterarchical system of private law could be created by using a European instrument with indirect effects, it has been suggested that the appropriate legislative instrument would be a Directive. This description needs to be qualified in some respects.

The proposed multi-level system articulated here fits the general idea of European Directives. They are intended to articulate the goals and principles of the Community legal order, but they can be implemented within the established patterns of national legal systems.[19] Yet the

[17] C-188/89, *Foster* v. *British Gas* [1990] ECR I-3313.
[18] C-6/90 and C-9/90, *Francovitch and Bonifaci* v. *Italy* [1991] ECR I-5537.
[19] S. Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 2005) 82.

European Commission has often pressed for rather detailed content for Directives and then demanded in the European Court of Justice that Member States should enact in their domestic laws rules which replicate that detail and transparently copy the European standards. It is not enough that the results of judicial decisions correspond to the standards required by a Directive:

> Even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. That, moreover, is particularly true in the field of consumer protection.[20]

Using this argument, the European Court of Justice observed that even though Dutch law might comply in practice with the Directive on unfair terms in consumer contracts,[21] this effect could be achieved only by using provisions drawn from different parts of the new civil code, both the general part and particular rules on consumer contracts. The Court insisted that for proper implementation of the Directive, it was necessary for the government of The Netherlands to pass legislation that transparently reflected the precise purposes and standards contained in the Directive. As a result, the domestic law had to be altered in minor respects.[22]

This aggressive stance adopted by the Commission toward the implementation of Directives has led to the practice of national legislators simply copying the text of the Directive into national law. The unfortunate consequence has been that often one finds two laws on the same topic present in a national legal system, one being the existing national law and the other duplicating the Directive, without any guidance on how they interact. This is the unsatisfactory and confusing position in English law, for instance, with respect to the Directive on unfair terms in consumer contracts.[23]

It is clear that such an approach towards a European code of principles of private law would frustrate the objective described here. For the

[20] C-144/99, *Commission* v. *The Netherlands* [2001] ECR I-3541, para. 21.
[21] Dir. 93/13 on unfair terms in consumer contracts [1993] OJ L95/29.
[22] M. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanization: The Dutch Experience' (2006) 12 *European Law Journal* 279.
[23] Unfair Contract Terms Act 1977, Unfair Terms in Consumer Contracts Regs. 1999; Cf. Law Commission, *Unfair Terms in Contracts*, Report No. 292 (London: Law Commission, 2005).

sake of respecting the diversity of national legal systems, it is important that they should not be required to implement this code of principles by simply enacting it as a rival code to existing national law. That would be a recipe for chaos in the legal system. Instead, it is important that the code of principles should apply an interpretative obligation rather than a legislative obligation on the Member States. No doubt national legislators would from time to time wish to reform the domestic private law to harmonise it more closely with the principles of European law, especially where judicial decisions illustrated the difficulties of securing a close correlation between the two sources of law. But a code of principles should not be regarded as the same kind of legal instrument as the existing sector-specific Directives. It would provide a framework, a reference point of principles, standards and aims, but not the detailed rule system of the national civil codes.

Linguistic diversity

Finally, it is perhaps worth making one last obvious point about a code of principles enacted as a Directive. It is also possible to accommodate linguistic diversity to the fullest extent. As the code is constructed, it can be expressed in all the official languages of the European Union. National courts would then interpret national private law by reference to the relevant provisions of the code. It would not be necessary to have a single approved text in one language, because the aim is not to create uniform law in its details. A code of principles would serve to approximate laws, but doctrinal differences and nuances of different meanings arising from the diversity of languages would continue to flourish.

4 Optimal level of specificity

There is a danger that a discussion of a code of principles of private law, enacted with only indirect effect, may give the incorrect impression that it would solely comprise vague general standards such as statements like 'the parties to the contract should perform their obligations in good faith and with reasonable care'. The question of whether or not to include general clauses such as 'good faith in performance' is certainly one worth considering in detail, but that is a separate issue. What is important to appreciate here is that the notion of a code of principles certainly does not imply that there should be no clear rules or specific standards that would constrain national courts in their reasoning with respect to disputes concerning private law.

A multi-level system of private law needs to construct a level of precision for the European code that constrains and guides national legal systems without forcing them to reconstruct the conceptual framework of their legal doctrine to any great extent. A rule could be specific without dictating precisely how it should be expressed in national law. For instance, a rule might state that consumers should have the right to cancel agreements of certain types such as credit arrangements and purchases away from business premises for a period of two weeks following the conclusion of the agreement. This rule has concrete elements which would be binding on national legal systems, but at the same time the detailed arrangements for cancellation and the legal consequences of such a cancellation could be realised through the principles and procedures of the national legal framework. There is clearly a spectrum of possible degrees of specificity that can be employed in legislation. The challenge for a European Civil Code would be to be as specific as possible without colliding with the structural framework of national private law systems.

Much of the Lando Commission's proposals for *Principles of European Contract Law* seem to achieve approximately this optimal level of specificity. Consider, for instance, their proposal on the controversial topic of the revocation of offers. The relevant proposal in Article 2:202 states:

> (1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205 (2) or (3).
> (2) An offer made to the public can be revoked by the same means as were used to make the offer.
> (3) However, a revocation of an offer is ineffective if:
> (a) the offer indicates that it is irrevocable; or
> (b) it states a fixed time for its acceptance; or
> (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[24]

These rules do offer fairly precise answers to much-debated issues. They insist, for instance, contrary to the predominant weight of authority in

[24] O. Lando and H. Beale (eds.), *Principles of European Contract Law Part I and II* (The Hague: Kluwer Law International, 2000). Art. 2:205 (2) proposes a general rule, subject to business custom, under which acceptance by conduct becomes effective to conclude the contract only when notice of the conduct reaches the offeror. *The Draft Academic Common Frame of Reference, Principles, Definitions and Model Rules of Private Law* (January 2008) repeats this provision in art. II-4:202: www.law-net.eu.

English law, that an offer can be made irrevocable merely by stating that it is such an irrevocable offer. Because all western private law systems have adopted the framework of analysis for the formation of contractual obligations in terms of offer and acceptance, this level of specificity in the rules should not interfere significantly with their general approach to such issues. The important ambiguity here is whether or not the phrase 'a revocation of an offer is ineffective' necessarily means that a purported acceptance of an offer that had been described as irrevocable, but which had in fact been revoked, would create a binding contract, or whether it would be possible to comply with the standard merely by providing compensation for any losses incurred by the offeree. Provided the latter interpretation is available, the major divergences between the legal systems could be accommodated, so that Italian and German law might conclude in such circumstances that a contract had been formed, French law that liability to pay compensation in tort will arise and English law that perhaps an equitable use of estoppel might be employed to protect the offeree. The need for these variations to be permitted arises because of the differing conceptual frameworks and surrounding rules in the national legal systems. In English law, for instance, the doctrine of consideration is believed to prevent unilateral promises or donative promises from being legally binding, and an irrevocable offer seems to fall within that category. It would be hard to fit the notion of an irrevocable offer into domestic English law without re-thinking doctrinal cornerstones of the national system of contract law.

Although this brief discussion of irrevocable offers merely provides one example of what might be the optimal level of specificity for a European code of principles, it illustrates two important points. The first is that the degree to which a European rule may be made more concrete depends in the first instance on whether the legal systems share a similar conceptual framework to address the issue concerned. This is not a question of whether or not agreement can be reached on a particular detail. The optimal level of specificity must be one that does not subvert the basic doctrinal cornerstones of national legal systems. The second point is that there is no suggestion here that the chosen rule should be consistent with all the laws of the Member States. On the contrary, the development of European private law provides the opportunity to re-consider issues afresh and to fashion new solutions. Although the aim of a code of principles is not to replace national legal systems with a federal structure, it is a central ambition to steer European

private law towards harmonisation around similar solutions to practical problems.

5 Reference procedure

What role would the European Court of Justice have in this multi-level private law system? If a litigant was disappointed by the outcome of national law, would it be possible to bring a claim before the European Court of Justice? Under the current preliminary reference procedure of Article 234 EC, it is not open to a litigant simply to appeal against a decision. It has to persuade the national court to refer an issue of interpretation of European law to the European Court of Justice. If the national court believes that the Directive is clear in its meaning and that it has been interpreted correctly, it can decline to make a reference to the Court. As the European Court of Justice has observed:

> it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[25]

National courts therefore control the gateway to the European Court of Justice. They can use this power in different ways. Some courts decline to make references, thereby insulating national law from inspection of its compatibility with the European code by the European Court of Justice. Other courts employ the reference procedure liberally with a view to encouraging challenges and reforms to national private law. The reference procedure permits this diversity. It allows each national legal culture to choose its own pace and path towards conformity with European law. That tolerance of national diversity seems advisable in relation to private law, at least for the foreseeable future. Over time, the European Civil Code should place subtle pressures on national legal systems to converge around its principles. Replacing the reference procedure with a procedure more akin to normal appeals to a higher court would place a much greater strain on national private law systems.

The European Court of Justice has exhibited sensitivity to the need to respect the diversity of private law systems in its application of the

[25] C-350/03, *Schulte* v. *Deutsche Bausparkasse Badenia AG* [2005] I-9215 ECJ, para. 43; cf. C-341/01 *Plato Plastik* v. *Caropack* [2004] ECR I-4883.

reference procedure in connection with private law matters. In examining these so far fairly few references, the Court has tried to avoid becoming a court of appeal by the back door. It insists that the application of European law to the particular facts of the case should be a matter for the national court. Its own job should be confined to providing authoritative interpretations of the relevant provisions of Directives. This distinction between interpretation and application proves hard to maintain, however, and in some instances the Court may have overstepped the line.

An example of the Court insisting upon the line being preserved arose in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG* v. *Hofstetter*.[26] Mr and Mrs Hofstetter, who were dealing as consumers, entered into a contract to purchase a parking space located in a multi-storey car park that Freiburger Kommunalbauten was planning to build. Under Clause 5 of the contract, the whole purchase price was payable in advance on the delivery of a bank guarantee to meet any claims of the purchaser against the builders, including a refund of the purchase price. Although this bank guarantee was delivered, Mr and Mrs Hofstetter refused to pay the purchase price until the parking space was finished. The builder claimed interest for late payment. In defence, the Hofstetters argued that Clause 5 was unfair and unenforceable. The alleged unfairness lay in the deviation from the normal principle that payment for services such as building work falls due only when the task has been completed without defects. But the issue of unfairness was unclear owing to presence of the bank guarantee and the possibility that the price had been reduced because the builder did not require credit. The German Appeal Court, the Bundesgerichtshof, was inclined to the view that the clause was not an unfair term under German law, though the matter was not free from doubt, but that the clause might be regarded as unfair within the meaning of Article 3(1) of Directive 93/13 on unfair terms in consumer contracts. The Bundesgerichtshof stayed the proceedings and referred to the European Court of Justice the question of the unfairness of the clause under the Directive. But the Court insisted that its role was confined to the interpretation of general criteria used in Community legislation, such as a definition of the concept of unfair terms; it should not rule on the application of these general criteria to a particular term of a contract,

[26] C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG* v. *Hofstetter* [2004] ECR I-3403.

which must be considered in the light of the particular circumstances in question.

It is hard to reconcile that conclusion with an earlier decision of the European Court of Justice. In *Océano Grupo Editorial SA* v. *Rocio Murciano Quintero (and Others)*,[27] the seller's standard form contract provided that all disputes arising under the contract must be heard by a court in the territorial jurisdiction in which the seller had its principal place of business. The effect of the clause was that these sellers of encyclopaedias could bring actions for debt in their local court, and the consumer from another region of Spain had to incur the additional costs of appearing and defending the case at a distance. In practice, consumers did not put in an appearance. The Spanish court thought that the jurisdiction clause might be unfair under both Spanish and European law, but under Spanish law was unable to raise the point of its own motion. On a reference to the European Court of Justice, it decided that a national court should raise questions of unfairness of its own motion in order to render the Directive properly effective, and that therefore, if this clause was unfair, the Spanish court should have declined jurisdiction. The Court also stated that such a jurisdiction clause in a standard form contract was unfair in so far as it caused contrary to good faith an imbalance to the detriment of the consumer. The Court pointed to the list of terms in the Annex to the Directive that are likely to be regarded as unfair, which includes in para. (q) terms that have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy'.

Was the European Court of Justice in the *Océano* case applying general criteria to a particular term of the contract rather than merely interpreting a general principle? In the later *Hofstetter* case, the Court seemed to accept that in *Océano* it had applied the law to a particular term. It argued, however, that the difference was that the term in the *Océano* case conferred no benefit in return on the consumer, whereas in the *Hofstetter* contract it was possible that the price had been reduced and the bank guarantee provided security. This distinction is unconvincing: every advantage in a contract, including a jurisdiction clause, may lead to a benefit to the other party in terms of the price.[28]

[27] Joined Cases C-240/98–C-244/98, *Océano Grupo Editorial SA* v. *Rocio Murciano Quintero (and Others)* [2000] ECR I-4941, ECJ; J. Rutgers, 'Note' (2005) 1 *European Review of Contract Law* 87; S. Whittaker, 'Judicial Intervention and Consumer Contracts' 2001 117 *Law Quarterly Review* 215.

[28] M. Hesselink, 'Note' (2006) 2 *European Review of Contract Law* 366.

In distinguishing the cases, the Court in *Hofstetter* also suggested that the term of the contract in *Océano* undermined the effectiveness of the legal protection of the consumer's rights under the Directive, because it created a complex jurisdictional obstacle. This point was similar to the basis of the decision in *Confidis SA* v. *Fredout*.[29] In that French case, national law prevented a consumer or a court from raising the question of unfairness on the expiration of a two-year limitation period, even though the seller or supplier could still bring a claim for payment against the consumer under the contract. In effect, the seller could wait two years to bring a claim, and then any unfair terms could not be impugned. The European Court of Justice held that the national limitation period in this instance rendered the application of the protection intended to be conferred on the consumer excessively difficult. Similarly, the European Court of Justice declared in *Elisa María Mostaza Claro* v. *Centro Móvil Milenium SL*[30] that in order to render the consumer protection intended by the Directive effective, a national court must raise the question of the validity of an arbitration clause in a consumer contract even if the consumer was precluded from so doing under the normal rules governing arbitration proceedings by having submitted the merits of the issue to the arbitral tribunal. The lesson that can be drawn from these puzzling decisions seems to be that, under the general principle of the need for the effectiveness of European law, contract terms or rules of civil procedure that significantly impede the enjoyment of rights conferred by a Directive should be regarded as contrary to European law.

It is certainly arguable that the Court in *Océano* overstepped the complex boundary between interpretation and application. Yet it is also possible to interpret the case as not having decided whether the term in question was unfair. The reference to the Court did not ask whether or not the term was unfair, but merely whether the national court should raise the issue of its own motion. The court answered in the affirmative and insisted that the question of unfairness should be considered in the light of the provisions of the Directive. It is true that the Court ventured the strong opinion that the jurisdiction clause was

[29] Case C-473/00, *Confidis SA* v. *Fredout* [2002] ECR I-10875, ECJ; J. Rutgers, 'Note' (2005) 1 *European Review of Contract Law* 87.

[30] C-168/05, *Elisa María Mostaza Claro* v. *Centro Móvil Milenium SL* [2006] ECR I-10421 (ECJ); noted M. B. Loos (2007) (4) *European Review of Contract Law* 439.

almost certainly unfair under the concept of unfairness in the Directive, but technically it did not decide the point. On this interpretation of *Océano*, the distinction drawn in the later *Hofstetter* case between terms that confer no benefits and those that require an assessment of the benefits and burdens between the parties is unsound as well as being unworkable.

It is clear that the preliminary reference procedure to the European Court of Justice does not ensure harmonisation or uniformity of laws. The supremacy of European law is qualified in the multi-level governance system by the power of the national courts to decide whether or not their interpretations of the law are satisfactory. Even when a national court makes a reference, the European Court of Justice is reluctant to engage in detailed interpretations of Directives. It may be willing to consider references concerning fundamental issues about the scope of Directives and the general obligations they contain, but it does not encourage references concerning the detailed application of provisions of Directives to particular kinds of factual situations. The Court provides guidance about which principles should be applicable, but does not act like a court of appeal in applying the principles to particular situations.

If we apply these ideas more directly to the mechanism of the application of the reference procedure in the presence of a European code of private law, the type of issue that might arise is the question whether or not a particular interpretation of national private law is compatible with a principle stated in the European code. The parties to the case would be presenting arguments for and against the proposition that the national law, as interpreted by the national court, is congruent with the principles of European private law. Assuming that the court would remain reluctant to entertain disputes regarding the application of the European law to a particular factual situation, the central task for the court would require an exegesis of the language of the European principles. It would involve an exploration of the values and underlying principles of the European Civil Code in order to determine their expected reach and the appropriate types of qualifications to be placed on standards and rules. In effect, the court would have to decide whether the stance of a particular national private law system represented a tenable understanding and concretisation of the European principles. Provided that the national law satisfied that test, it would not matter that other national laws might propose slightly different interpretations and applications.

This process seems to comprise an example of what Christian Joerges calls 'deliberative supranationalism'.[31] It is not a hierarchical process whereby the European Court of Justice determines the content of private law. Rather it invites the parties to justify and to contest the interpretation placed on European principles by national courts, and then indicates where the balance of the argument lies and how national law, at least as it has been provisionally interpreted, might conform or conflict with European principles. The dialogue is then taken up by the national court, which can interpret and apply national law in the light of the guidance provided by the Court.

If this type of reference system were preserved for cases involving private law disputes that might be affected by a European Civil Code, the practice would entail that full harmonisation or unity of private law would not be achieved. Instead, the national laws would be adjusted from time to time in accordance with the principles of European civil law, so we might expect to discern convergence between national private law systems, but not uniformity or full harmonisation. Although this outcome would certainly disappoint those who are committed to the internal market agenda, under which only full harmonisation and the abolition of legal diversity will really suffice for their purposes, it is not troubling for the agenda described in this book. The absence of uniformity, while encouraging convergence around common principles, fits well into the ambition of establishing greater solidarity between the peoples of Europe through the acknowledgement of common principles for governing everyday life. At the same time, the weakness of the reference procedure in securing harmonisation of laws also provides the necessary protection for cultural diversity. Each national private law system preserves its independence and integrity, but there is an indirect pressure arising from the interpretive obligation placed on courts and Treaty obligations placed on legislatures to try in good faith to secure the conformity of national law to the European principles of private law.

6 Mutual learning

This continuing diversity of private law in Europe should also be regarded as an advantage in aiding the continuous improvement of the law. For some critics of the proposal for a European code, perhaps even

[31] Joerges, *On the Legitimacy of Europeanising Private Law* above n.1.

worse in the long run than its rigidity is the possibility that the development of uniform law in Europe might prevent the experimentation, innovation and testing of different possible rules that occurs at present in Europe as a result of the presence of numerous national law systems. Regulatory competition and evolutionary pressures to discover the best solutions to problems would be diminished through the absence of comparative private law systems. Uniform law would deprive Europe of the opportunity for mutual learning through the variety of doctrinal reasoning and judicial decisions.[32]

By regarding the European Civil Code as a type of Directive, albeit one that is extremely ambitious in scope, we would secure the position that national legal systems would still be permitted to diverge in their interpretations of the relevant principles. The convergence required by the presence of the European code will no doubt render some kinds of solutions improper and illegitimate. But within a broad margin of appreciation, national legislatures and courts will be able to experiment with different rules that seek to implement the general principles of European law. For example, European law might require that businesses should disclose material information to customers prior to entry into a transaction, and it might indicate further what kinds of information might usually be regarded as material, such as the nature of the goods and the full price that will become due in a sale of goods transaction. Within this general framework, national legislatures and courts would have the opportunity to develop the notion of what counts as 'material information' in relation to different types of transactions. The European law would rule out the possibility that the national law would reject a duty to supply information to a consumer, but different legal systems might strike the balance between the advantages of accurate information and the costs for businesses in slightly different ways. From this national experimentation, it would be possible to continue the mutual learning between national legal systems that already exists in Europe to some extent.

Indeed, the European Civil Code would actually facilitate mutual learning. Earlier it was noted how the distinct national codes present an obstacle to mutual learning and transplants of legal doctrines, because

[32] This argument is an application of the economics of federalism to the question of harmonisation of European private law: see S. Grundmann and W. Kerber, 'European System of Contract Laws – A Map for Combining the Advantages of Centralised and Decentralised Rule-Making' in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 295.

the divergences, the rules and concepts prevented in most instances the direct import of foreign legal ideas. Although that problem would persist, the background presence of the European Civil Code would provide a common language of concepts and ideas that might facilitate closer comparisons and easier imports. The presence of common concepts and principles would facilitate the diffusion of legal ideas and the cross-fertilisation of legal reasoning by reducing the normal barriers to comparative law presented by the formal closure of national private law systems.[33]

7 Multi-level governance and harmonisation

This brief description of a proposal for a European Civil Code as a Directive, applied by national courts according to the established interpretive obligation for Directives, describes a route towards building common principles of private law while at the same time respecting legal cultural diversity. In describing this proposed solution to the development of a European Economic Constitution in the context of a system of multi-level governance, other possible routes have been implicitly rejected.

One of those possible routes would be to make a European Civil Code a Regulation under the European Treaty. The effect would make it a directly applicable legal code. As European law is superior to national law within its field of competence, the European code would then impliedly override national private law systems. This route might be supported on the ground that it would better ensure harmonisation of the law, thereby fitting better into the internal market agenda.[34] The full implications of this proposal are, however, unclear.

If the code purported to provide comprehensive principles and rules, it would seem that it should be regarded as pre-empting all national private law. National courts would be obliged to ignore national law entirely, and drink from the pure and untested waters of the European code. That revolutionary development would inevitably cause considerable uncertainty about the details of private law for many years to come. Even more crucially, a regulation seems unlikely to achieve

[33] On the important question of mechanisms of diffusion of laws: W. Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 1.

[34] J. Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *Common Market Law Review* 1169, 1189.

harmonisation of the law. Each national court would place its own interpretation on the European Civil Code, no doubt influenced by the legal traditions of the country. The result would almost certainly produce different interpretations of the same European principles. Diversity might be reduced by greater detail in the Regulation, but it is clear from the experience of national application of European law in the last twenty-five years that greater detail does not ensure uniformity of outcome. As we have noted before, Teubner was correct to observe in the light of the discussion regarding legal transplants that even uniform laws merely seem to create new differences.[35]

These problems of legal diversity could be solved to a much greater extent by the introduction of a federal court structure in Europe. In such a structure, there would be a hierarchy of courts, enabling litigants to appeal against divergent interpretations. At the apex of the system, a final court of appeal would provide the ultimate authoritative interpretations of the European Civil Code. By relying on the supremacy of European law, a federal court system might quickly come to dominate all others. In addition, it would be possible to require federal courts to adopt a system of precedent through which they were bound by the interpretations of higher courts or courts of appeal. This pan-European federal court system might be organised by supranational regions rather than nation states, with the precedents binding outside the region as well as within it.

Although such a federal court system might ultimately achieve close harmonisation, it seems clear that it would also prove unacceptable on grounds of cultural diversity and betray the European commitment to multi-level governance, to what we described in chapter V as solidarity rather than federalism. It would represent another radical transfer of power to the supranational government in a political context where many Europeans already exhibit a concern about the growing power of European institutions. It would also not prove practicable in terms of institutional capacity. Even in the United States, with its strong federal system of government, the disputes arising between citizens in everyday life, such as breach of contract and property damage, remain the subject of state law and state courts. Ugo Mattei, one of the most forceful advocates of a European code and a federal court system to

[35] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

enforce it,[36] argues in favour of such federal measures in order to control effectively the behaviour of international corporate capital. This important consideration is outweighed though, surely, by the difficulties (which he acknowledges elsewhere)[37] of securing the legitimacy of such federal courts in the context where national traditions differ significantly with regard to such matters as the selection of judges, their authority to develop the law, their degree of independence and their civil procedures.

Full harmonisation of private law in Europe is impracticable, unachievable, illegitimate in the eyes of many citizens and ultimately undesirable on the ground of cultural diversity and the potential for mutual learning. A European Civil Code, though needed to build a European Economic Constitution, should not be assigned the impossible task of securing full harmonisation of private law or parts of it. We should expect to have and welcome continuing diversity in European private law systems, not with regard to general principles, but in the detailed resolution of disputes of everyday life.

[36] U. Mattei, *The European Codification Process* (The Hague: Kluwer Law International, 2003) 121.
[37] *Ibid*., chapter 2.

VIII Strengthening convergence

In chapter VII, it was acknowledged that the project for a European Civil Code in a multi-level system of government would not secure full harmonisation of private law. It was argued that such a result was desirable on several grounds, including innovation and respect for cultural and legal diversity. Nevertheless, the general ambition of building a European Economic Constitution does encourage steps towards a more detailed articulation and closer observance of principles of civil justice. Although a code of principles, enacted as a Directive, will take important steps in that direction, on its own it may provide insufficient impetus. To address that issue of the potential ineffectiveness of a European Civil Code to establish common principles that are routinely observed throughout Europe, this chapter considers further measures designed to strengthen convergence around the principles of a civil code as the foundations of an Economic Constitution.

These proposals do not primarily concern legislation and courts. Rather they employ alternative governance mechanisms that rely on cooperation and mutual learning. They do not try to impose uniform rules, but rather encourage participants to develop shared understandings of common principles.

Besides the particular proposals considered here, no doubt many other measures will contribute to convergence between national legal systems. As many law teachers have observed, the basic legal education of students will no doubt play an important role in encouraging a more comparative and transnational perspective on the interpretation of legal principles.[1] The creation of textbooks and casebooks that explore

[1] B. De Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992); K. P. Berger, 'The Principles of European Contract Law and

the convergences and divergences of national private law systems and how they have adapted to European legislation will enable students to appreciate how foreign legal systems think about issues and how unified approaches might be developed.[2] The Academic Common Frame of Reference, especially when it includes not only rules but also the background comparative law investigations on which it is based, will provide a particularly valuable resource for those interested in promoting convergence under the umbrella of a European Civil Code. Without detracting from the important contribution of such initiatives in any way, this chapter is concerned with the examination of further institutional structures that might serve to promote the ambitions of a European Civil Code.

1 European Private Law Institute

Uniform interpretation of laws is desirable on grounds of predictability of the law and fair treatment or equal treatment before the law. The European Civil Code as a Directive, as described above, could be criticised on both of those grounds. It may reduce the predictability of national private law systems as a result of the interpretive obligation placed on courts, while not having a strong supranational appeal court mechanism to promote transnational consistency in outcome. In addition, European citizens may regard the code as not treating them fairly if it leads to the conclusion that nationals of one Member State have a particular right, but the national courts in another Member State conclude that their nationals do not have the same right. This perception of unfairness or inconsistency might even undermine the ultimate aim of promoting solidarity between the peoples of Europe through the acceptance of common principles to govern everyday life.

As we have noted already, national private law systems rely heavily on a hierarchical court structure to secure uniformity of interpretations of the national civil code. But national legal systems also have other

the Concept of the "Creeping Codification" of Law' (2001) 9 *European Review of Private Law* 21; W. Van Gerven, 'Codifying European Private Law: Top Down *and* Bottom Up', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 405, 427.

[2] See for example the Casebooks for the common law of Europe, published by Hart Publishing: e.g. W. Van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000); H. Beale, A. Hartkamp, H. Kotz and D. Tallon (eds.), *Contract Law* (Oxford: Hart Publishing, 2001).

mechanisms designed to ensure predictability and equal treatment under the law. Formal and informal systems of precedent tend to increase the predictability of interpretations of the code. Perhaps more important than conformity to judicial precedents in securing predictability and fairness in the application of legal rights and principles is the contribution provided by legal doctrine or legal scholarship.

The role of doctrinal scholarship

One central goal of most legal authors is to reveal patterns of coherence and system in the law. A book on the law of contract typically tries to state the law in a way that appears to the author to render the rules, judicial decisions and other legal sources consistent and internally coherent. The author may conclude that in parts the law fails to achieve this consistency and coherence, but the writer's objective remains to make as much sense of the law as may be possible. Different authors propose a variety of solutions to perceived problems of inconsistency and incoherence. Eventually, through a process of criticism and judicial experiment, one of these proposed views may become accepted as the settled law. This process of critical examination of the law, debate about interpretation and rival proposed solutions to perceived problems of incoherence and inconsistency, provides a vital element in the rationalising processes of the legal system. Without this doctrinal work, which is both critical and constructive, national private law systems would experience much greater difficulty in achieving predictability and equal treatment before the law.

In the development of European private law, we need to learn from that experience of national law. Yet we also need to recognise that a multi-level system implies important differences of approach to securing the assistance of doctrinal work in promoting predictability and consistency. At a national level, this doctrinal work could continue as before, except that the principles of a European Civil Code would have to be introduced into the legal analysis. But the discussion of the principles of the European code would be unsatisfactorily narrow if the doctrinal work concentrated solely on national law. To obtain the potential benefits of promoting a European Economic Constitution and mutual learning between legal systems, doctrinal writers would have to become aware of developments in other legal systems with respect to the interpretation and application of the European Civil Code.

Such a task is rarely straightforward. First, language barriers often impede comparative work; few authors can master all the official

European languages, let alone all the linguistic diversity of Europe. Second, as we have noted already, national codes provide a structure for legal thought in each system, so that only those with intimate familiarity with that structure can properly appreciate how the law has been interpreted in that system. It can be highly misleading to view one judicial decision or one stated interpretation outside of the context of the remainder of the private law system concerned. Third, there is a practical issue of the time and expense involved. Even to consider, for instance, how one principle of a European Civil Code had been interpreted in different private law jurisdictions might occupy the labour of a scholar or team of scholars for several years. By the time their work received the light of day, it might already be out of date in some respects.

New governance mechanisms

Within Europe's multi-level system of governance, there have been many other occasions when new kinds of institutional arrangements have had to be constructed in order to assist in coordination between national governments without the imposition of uniform laws. Indeed, discussion of 'New Governance' in Europe has proliferated since the Commission's White Paper of 2001.[3] The combination of legislative deadlocks in the Council of Ministers and popular complaints about the 'democratic deficit' in all the operations of the European Union caused the Commission to publish an examination of its decision-making processes and techniques for securing progress in European initiatives. The Commission argued for the greater use of participatory techniques of cooperative governance without necessarily using the law to impose uniform solutions.

The 'Social Dialogue' between European-level associations of trade unions and employers' organisations was an example of how agreement might be reached on basic labour standards, which could then be

[3] European Commission, *European Governance: A White Paper* COM (2001) 428. The adequacy of the proposed measures is effectively criticised in C. Joerges, Y. Mény and J. H. H. Weiler (eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01, European University Institute, Florence, 2001, http://www.iue.it/RSC/Governance. Among many other contributions to the debate about New Governance are: J. Scott and D. M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8(1) *European Law Journal* 1; C. Scott, 'The Governance of the European Union: The Potential for Multi-level Control' (2002) 8 *European Law Journal* 80; G. de Burca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28(6) *European Law Review* 814.

followed either by techniques of self-regulation such as collective bargaining or, if the parties wished and the Council of Ministers approved, through an implementing Directive.[4]

To tackle the most pressing economic problem of high levels of unemployment in the late 1990s, the Commission devised the 'Open Method of Co-ordination' in economic policy.[5] Through a recurrent dialogue at ministerial level, the Member States would agree the aims of their employment policies, fix national targets to meet and share ideas and good practice about ways in which an active labour market policy might reduce long-term unemployment and help to create good jobs. Versions of the Open Method of Co-ordination have been applied to other issues such as social exclusion.

A more recent and untried technique of cooperative governance is the idea of a 'common platform' for professional qualifications.[6] If the relevant professional associations can agree on a common benchmark for qualification criteria to practise a profession, after the standard has been adopted following a consultation process organised by the Commission, compliance with this common platform, the rules of which may not correspond exactly to the rules of either the home state or the proposed host state of the professional, should entitle migrating professionals to almost automatic recognition of their qualifications in the host state.

In reviewing these techniques of 'New Governance', some doubt whether they really achieve very much. The absence of legal sanctions and coercion permits Member States to miss their targets and ignore their undertakings with no adverse effects. Others doubt whether these techniques really address the problem of the democratic deficit at all. The new procedures seem rather more like an opportunity for powerful interest groups to steer the direction of technocratic controls rather than to open up Europe to transparent, participatory democracy. On the other hand, in some other areas such as fiscal governance, the use of a combination of a legal framework with processes resembling an open

[4] Arts. 138, 139 EC; B. Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23 *Industrial Law Journal* 1.

[5] D. Hodson and I. Maher, 'The Open Method as New Form of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 *Journal of Common Market Studies* 719; D. M. Trubek and L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 343.

[6] Dir. 2005/36, Art. 15, using the 'comitology' consultation procedure in Council Decision 1999/468.

method of coordination seems to have secured more effective and predictable governance arrangements than formal and rigid legal controls.[7] Nevertheless, even though many criticisms of 'New Governance' techniques may be sound, in the field of private law they prove less disturbing.

The problem of governance in the arena of private law, as described above, is how to coordinate the activities of an acephalous court system charged with adjudication according to established national law read or interpreted in a way that conforms to broad principles of a European Civil Code. The objective is not to impose uniform solutions on national courts. The aim is rather to find ways in which courts can coordinate their interpretations of the European Civil Code. For this purpose, national courts require the opportunity to observe the activities of other courts performing the same function, and to consider the different possible interpretations of the European code, and to assess their likely effects or outcomes in particular cases. These tasks do not require the participation of ministers, commissioners, stakeholders and parliamentarians. What is required instead is a facilitation of a dialogue between the courts.

Dialogue between the courts

To some extent, such a dialogue between the courts already exists. Lawyers sometimes direct the attention of judges towards comparative law materials in which foreign courts have tackled a similar problem. Although there is no obligation on national courts to copy the doctrines of other jurisdictions, there seems to be a willingness to try to harmonise the results of the cases even though the legal reasoning necessarily differs because of the different national systems of private law. But this dialogue is inevitably haphazard, depending on the time and energy of lawyers and the courts to acquire information about and understand the reasoning and results in foreign jurisdictions. Consider, by way of comparison, how the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted in national legal systems. Although national courts are likely to pay close attention to how the European Court of Human Rights has interpreted the Convention, they are much less likely to be interested in how other national courts have interpreted the Articles of the Convention. Even in

[7] W. Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?' (2007) 13 *Columbia Journal of European Law* 705.

relation to the interpretation of European Directives, it is uncommon for a national court to refer to decisions of the courts in other Member States. In such cases, the national court tends to confine its attention to its own jurisprudence and the pertinent decisions under the reference procedure of the European Court of Justice.

To improve the quality of this dialogue and to promote transnational discussion of legal principles, many initiatives may prove necessary. It will no doubt require revisions in legal education.[8] Even with a more European or comparative approach to legal studies, however, the evolution of a European dialogue is likely to be slow and patchy. It seems evident that for a European Civil Code to achieve its objective, we need to kick-start a transnational dialogue regarding the interpretation and application of the European Civil Code. It would be necessary to establish a source of comparative legal material to which lawyers and judges could easily refer when issues concerning the interpretation and application of the code arose.

Private Law Institute

There is a striking similarity between this task and that embraced by the American Law Institute.[9] In the United States at the beginning of the twentieth century, each state was developing and elaborating its private law systems independently of the others. Although nearly all the states derived their laws from the single source of English common law, the courts in each state began to evolve their own independent developments of that common law. State courts no doubt sometimes observed the results and reasoning of judges in other states, but given the large number of courts and reported cases, it could prove a mammoth task to achieve a systematic survey of all the jurisdictions, and then, having considered them and the precedents in the local jurisdiction, to reach a final conclusion. The American Law Institute was founded to help to address this problem.

The Restatements produced by the American Law Institute provide a synthesis of the rules, reasoning and outcomes produced by the state

[8] Cf. J. Basedow, 'The Case for a European Contract Act', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 147, 153; Van Gerven, 'Codifying European Private Law' 405, 426.

[9] C.U. Schmid, 'Legitimacy Conditions for a European Civil Code', European University Institute, Robert Schumann Centre for Advance Studies 2001/14 (Florence: EUI, 2001); W. Snijders, 'The Organisation of the Drafting of a European Civil Code: A Walk in Imaginary Gardens' (1997) 4 *European Review of Private Law* 483.

courts in fields of private law. In the Second series of Restatements care is taken to note the variety of approaches between the state courts, while at the same time proposing what the Institute regards as the best interpretation of the law. The American Law Institute has also helped to write Model Laws, such as the Uniform Commercial Code, which often influence legislation in the different states. The work of producing these Restatements begins with detailed studies by legal scholars of the judicial decisions in all the different states. These reporters then propose a synthesis. This synthesis is subject to detailed review and criticism by a variety of other distinguished and expert lawyers, judges, legislators and scholars. The final result is therefore not the product merely of academic research, but is tested against the different perspectives of practitioners and other stakeholders.

Although the Restatements do not prevent divergence between state-level private law systems, they compel thoughtful and reasoned divergence. If the California courts decide to break away from the orthodox view and award punitive damages for breach of contract, they will do so in the knowledge of the experience of other state legal systems. Similarly, when the same question arises in another state, such as New York, it can evaluate the Californian experience. This mutual learning between states in the United States is possible because of the common ground provided by the adoption in both jurisdictions of the common law, so that the terminology and potential implications of developments can be readily understood. A similar, dynamic learning process could take place in Europe, provided that the terrain covered by harmonised rules became broader and ceased to be restricted to particular sectors.

A European Private Law Institute that functions along similar lines is what is required for a European Civil Code to help to achieve what has been described as solidarity between the peoples of Europe. It could provide accessible information in an appropriate language about the different possible interpretations of the articles of the European Civil Code. These judicial interpretations could also be subject to critical comment, with the report ultimately preferring one particular interpretation over others. In this accessible form, national courts could, when adjudicating issues covered by the European Civil Code, become quickly informed about the existing range of interpretations in different national courts and how an informed opinion suggests these interpretations should be evaluated. The national court would remain free to adopt its own solution. But if it chose to venture off down its own

path, it would at least appreciate what it was actually doing, and would be aware of possible reasons for not doing so.

Unlike the American Restatements, however, the European Institute should not be expected to produce a synthesis of the national private law systems. Even with the pressure for convergence arising from a common code of principles, national private law differences would undoubtedly remain significant. Just as it was not possible for the authors of the *Principles of European Contract Law* to discover a synthesis of the rules of the different national legal systems, but rather had to create, in the words of Hugh Beale, a kind of Esperanto,[10] so too a European Institute should not attempt to discover or propose a uniform interpretation. Instead, it can illustrate, examine, compare and assess the different possible interpretations that may emerge in their different contexts.

For Europe to begin to colonise this private law field, it requires an institutional framework that can provide an equivalent or superior dialogue for the production and continuous assessment and improvement of private law to that offered by national private law systems in the forms of systems of reported judicial precedents and doctrinal elaboration. A European Private Law Institute could provide a ready source of material for the promotion of such a transnational dialogue. The objective would not be to secure uniformity of interpretation and outcome. Although convergence of national private law systems would be promoted by the work of such an Institute, perhaps its more valuable contribution would lie in the explanation and assessment of the continuing variety in European private law systems.

Its work would promote dialogue between scholars and judges regarding possible interpretations of the principles of European private law. These comparative studies would also be evaluative in the sense that they would assess their practical implications, either as a result of experience from concrete disputes, or through the application of tools of policy analysis such as economic efficiency analyses. Given that a European Civil Code would achieve some approximation between national private law systems as a result of the interpretive obligation, it would become more interesting and profitable for national lawyers to

[10] O. Lando and H. Beale (eds.), *Principles of European Contract Law* (Parts I and II) (The Hague: Kluwer Law International, 2000); H. Beale, 'Towards a Law of Contract for Europe: The Work of the Commission on European Contract Law', in G. Weick (ed.), *National and European Law on the Threshold to the Single Market* (Frankfurt am Main: Peter Lang, 1993) 177, 196.

take an interest in how European laws have been interpreted and developed in other Member States. Once there are common principles, comparisons between developments in different national legal systems become easier to make and to assess.

A proposal for a European Private Law Institute sounds like an appeal for jobs for lawyers, particularly legal scholars. In part that accusation is fair, but it should also provide an interdisciplinary forum, which might include economists and other policy specialists. The need for other disciplines arises from the purposive or regulatory dimension to private law. The task of such an Institute is not merely to observe variations in the interpretation of European law between national legal systems, but also to learn about the reasons for the variations and their effects. For instance, some Member States have implemented the Directive concerning unfair terms in consumer contracts by restricting it to consumer transactions, whereas others have applied it to all standard form contracts. This divergence provides the opportunity to examine through comparative studies the validity of objections to regulatory controls over the content of commercial transactions, and how those objections might be addressed. Such studies involve legal skills, but also engage other social science disciplines.

It is also important to reassert that the objective of such a European Private Law Institute is not to ensure the uniformity of private law in Europe. The purpose of such an Institute is to encourage evolution of national private law systems towards similarity but, equally importantly, it is to consider and disseminate best practice in securing the regulatory goals of private law. Without divergence between the routes adopted by national legal systems, we will lack evidence from which to evaluate best practice. In short, Europe requires harmonisation of private law not to achieve uniformity of laws, which is not practicable, but to improve and modernise its laws.

2 Standard form contracts

The preceding discussion has argued for a loose form of harmonisation of private law through an instrument of a Directive, but supplemented by other forms of cooperative governance in order to promote convergence of national legal systems towards common understandings of general principles. That approach applies to private law as a whole. It is arguable, however, that a special approach is required in order to facilitate cross-border trade. This task concerns primarily the law of

contract, and in particular the use of standard terms of business in both consumer and commercial transactions. In this commercial context, considerations of access to markets, efficiency and transaction costs are particularly significant. It is worth considering whether additional governance mechanisms might contribute to the internal market agenda while at the same time confirming and reinforcing the principles of social justice contained in the proposed European Civil Code.

Regulating standard forms

The task of legal regulation of contracts has altered fundamentally during the twentieth century. In the nineteenth century, the paradigm contract in legal thought and social practice was a sale of goods such as a horse or a barrel of grain between face-to-face traders on the basis of an oral agreement. Today, however, the paradigm contract must surely be a standard form document, adopted by a business, following advice of lawyers or a trade association. This document will be used by the business as the standard contract on which it will do business with others. The document is likely to seek to regulate every aspect of the transaction that might present difficulties for the business. The standard terms are likely to try to specify and limit the obligations of the business under the transaction while at the same time trying to ensure that it will receive full payment for its goods and services. The prevalence of standard form contracts is not always fully appreciated. Often the standard form is hidden from view, since it is the terms on which a consumer uses a credit card to purchase groceries, or the terms of employment fixed by collective agreement, that in reality determine the content of the contract, even though the transaction may appear informal.

In the nineteenth century, private law evolved to regulate informal agreements produced by negotiation between the parties. Informality itself could be the source of disputes, so sometimes the law of contract insisted that transactions had to be written down or in some other way evidenced by documents in order to become legally enforceable. Most of the legal rules, however, could be described as 'default rules'. The rules filled in the gaps of the transaction in the absence of express, detailed agreements. The growing prevalence of standard form contracts, first in commercial transactions and later in contracts with consumers, rendered these rules inappropriate. The problem confronting courts in disputes about performance of contracts was not one of filling in the gaps of the agreement in order to ensure a fair allocation

of risks. Rather the problem became that the courts were apparently obliged under the principles of nineteenth-century contract law to apply the express terms of the contract, as recorded in the standard terms of business, even though the terms might produce a grave imbalance in the obligations of the parties. This problem was particularly acute in consumer transactions.

Modern contract law has evolved to tackle the task of regulating standard form contracts. One of its central tasks concerns the facilitation and control over the use of standard form documents by businesses as an instrument of self-regulation of their market relationships. The purpose of these legal rules has never been to prevent or deter the use of standard documents. On the contrary, the savings on transaction costs and the building of trust through familiar documentation favour general legal support for the facilitation of trade through this kind of self-regulation. What the modern law of contract does for the most part is to facilitate and enforce this business practice. At the margins, however, national legal systems use a variety of procedural and substantive tests to prevent perceived abuses of the business practice. One regulatory strategy has required certain mandatory obligations to be included in transactions, thereby ensuring, for instance, that consumers have a legal right to claim compensation for personal injuries caused by a defect in a product which they have purchased. Another kind of response has been to empower courts to invalidate unfair terms in standard form contracts. With these and other regulatory techniques, modern contract law has become rather less facilitative of freedom of contract and more mandatory in its insistence on fair standards of dealing. The standard form contract, though in general legally binding, may prove invalid in some respects and cannot exclusively determine the obligations owed by the parties to the contract.

Legal diversity

This mandatory regulation of standard form contracts has diminished their utility to business as an instrument of self-regulation, particularly in the context of consumer transactions. Nevertheless, standard terms of business remain prevalent. Businesses can either continue to use the standard form, while appreciating that not all its terms may be enforceable, or they can try to modify the terms in order to bring them into compliance with the mandatory rules of law. The latter task is not easy, especially in those legal systems where courts exercise a broad discretionary power to invalidate terms in contracts that they find to be

unfair and unreasonable. Even the best lawyers find it hard to predict how a court will exercise its discretion. But the utility of standard form contracts becomes even more diminished in the context of cross-border transactions.

In cross-border transactions, businesses may be required to comply with the mandatory rules governing standard form contracts of more than one national legal system. In the case of consumer contracts, usually the standard terms must conform to the mandatory rules of the country of residence of the consumer. As a result, even though a business may have ensured that its standard terms of business comply with the laws of its home state, it cannot be sure that the same terms will also prove valid when it sells its products and services abroad. Legal diversity between the mandatory rules of national legal systems presents a grave risk that all or part of the contract will prove ineffective in foreign jurisdictions.

In pursuance of the internal market agenda, the European Commission tried to assess whether legal diversity in contract law presents an obstacle to trade. In preparing its *Action Plan*,[11] the Commission asked participants in cross-border trade to identify the obstacles to trade that they had experienced. The evidence produced by businesses and lawyers was not substantial and was often merely anecdotal. These stakeholders did point to a number of predictable difficulties such as lack of clarity and certainty in European law,[12] and the added transaction costs of taking legal advice when engaging in cross-border trade. The Commission used this evidence to suggest that legal diversity was a general problem for business. But closer inspection of the findings reported by the Commission suggests that the central and dominant problem for business was the high risks attendant on the use of a single standard set of terms on which to do business throughout Europe. These comprised the legal risks of invalidity or ineffectiveness of all or part of the standard form contract, which were risks that varied across jurisdictions.

The complaint of businesses that mandatory national laws override standard form contracts in diverse ways can be understood as an expression of their uncertainty that all the terms of their normal standard form contract will be valid and enforceable throughout Europe.[13] A choice of law clause will not solve the problem of mandatory national

[11] EC Commission, *A More Coherent European Contract Law: An Action Plan* (Brussels, 12.2.2003) COM (2003) 68 final.
[12] *Ibid*., paras. 16–24. [13] *Ibid*., para. 27.

laws. In any case, a business recipient of the standard form may be in a position to insist upon the choice of its own national law, which leaves the legal effect of the standard terms unclear to both parties. The contract may be written in English using standard technical terms derived from the common law, but the applicable law chosen by the commercial parties may be French or German, where these terms lack points of reference in the national private law. The result will be complicated questions of interpretation if something goes wrong with the performance of the contract.[14] In practice, no doubt, parties who are negotiating contracts will not wish to become mired in such details for fear of losing the deal, so they will not resolve any uncertainties concerning the applicable law and the mandatory effects of other laws.

With respect to the formation of contracts, the Commission notes that problems arise with regard to the issue of who can validly represent companies for the purpose of signing contracts, diversity in requirements of formalities such as notarisation and authentication of documents and, predictably, the issue of the incorporation of standard business terms within the contract.[15] Whereas some countries permit the parties merely to refer to documents for them to be included in the contract, others insist that good faith requires that surprising terms should be negotiated and agreed expressly,[16] or even that the standard forms must be signed and attached to the remainder of the contract.[17] The English practice of sometimes permitting standard terms of business to be incorporated as a custom of the trade is unlikely to be accepted elsewhere in Europe.[18] All these difficulties mentioned by respondents to the Commission concern obstacles caused by legal diversity to the use of standard business practices involving documents.

The business respondents voiced similar complaints against legal diversity in the range of controls over the content of standard form contracts. Although most legal systems have developed judicial or administrative controls over unfair terms buried in the small print of standard forms, the range of terms covered, the types of contracts included

[14] G. C. Moss, 'Harmonised Contract Clauses in Different Business Cultures', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 221.
[15] EC Commission, *A More Coherent European Contract Law*, para. 35.
[16] BGH 4 June 1970, BGHZ 17, 1.3.
[17] EC Commission, *A More Coherent European Contract Law*, para. 36.
[18] *British Crane Hire Corpn Ltd* v. *Ipswich Plant Hire Ltd* [1975] QB 303, CA.

and the applicable standards all differ between legal systems.[19] For example, suppliers of goods may be unable to restrict or limit liability for latent defects under some national laws, whereas under others the courts may be awarded discretion to determine whether the exclusion clause was fair and reasonable. The uncertainty of the legal effect of such an exclusion clause prevents a seller of goods from taking out appropriate levels of liability insurance against potential claims in cross-border trade. In this example, not only is the standard form sales contract an unreliable tool of self-regulation, but also any associated liability insurance contract cannot provide the necessary assurance of protection against legal claims.

One of the principal purposes of standard form contracts consists in the construction of effective remedies against breach of contract. Instead of being limited to a claim for compensatory damages to be pursued through the court system, businesses seek the assurance of obtaining or retaining security rights in personal property. One example is a term that provides for retention of title to goods until the debt has been paid in full. Terms that provide security rights intersect with mandatory national laws on the rules concerning the permissible types of proprietary interests and their transfer.[20] As a consequence, these security rights may prove ineffective in cross-border trade, even though they represent standard terms of doing business in the country of the supplier of the terms. The holder of the security interest may have calculated prices and credit terms on the basis of a term that may prove ineffective. Again businesses cannot use their normal methods of doing business through standard forms without incurring unexpected risks.

The problem of obstructions to the use of standard forms becomes particularly acute where the business is concerned with the sale of contractual documents themselves, as in the case of sale of insurance policies and certain kinds of financial services.[21] Here the potential

[19] EC Commission, *A More Coherent European Contract Law*, paras. 37–39.

[20] *Ibid.*, paras. 41–46. On the limits of the competence of the EC with respect to proprietary rights, see: D. Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) 10 *European Law Journal* 751.

[21] EC Commission, *A More Coherent European Contract Law*, paras. 47–48; Basedow, 'The Case for a European Contract Act' 147, 149; H. Collins, 'Transaction Costs and Subsidiarity in European Contract Law', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 269, 271; D. Weber-Rey, 'Harmonisation of European Insurance Contract Law', in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law* (Oxford: Hart Publishing, 2006) 207.

invalidity or ineffectiveness of some of the terms of the contract destroys ingredients of the subject matter of the transaction. The result is as if the law itself caused the defectiveness of the product.

What all these examples of obstruction to trade have in common, it is suggested, is that they concern the standard business practice of using documents for regulating transactions. National legal systems have observed this practice and have adapted private law to channel and control it by a diversity of regulatory measures. Owing to the mandatory nature of these rules, business cannot in general use choice of law provisions to avoid their application in cross-border trade. The question posed by this evidence is how to facilitate cross-border trade using standard form contracts without subverting the important policies represented by the mandatory rules. Freedom of trade requires the freedom to circulate documents (including 'e-documents' or 'dematerialised' documents) across borders in the internal market. Experience of the misuse of documents to secure unfair advantages requires also that regulation must provide procedural and substantive controls over this practice in order to prevent abuses. These controls need to be as clear and certain as possible, so that businesses can be assured of the effectiveness of their standard business terms. To enable cross-border trade using these standard terms, it is also necessary that the controls should provide a transnational regulatory system. How can Europe achieve this goal of promoting the free circulation of fair documents in the Single Market? Without that freedom being more effectively realised, the market will remain 'balkanised' and less competitive.

Harmonisation of principle

Unfortunately, harmonisation of private law through a civil code seems unlikely to deal adequately with this problem. European legislation has already attempted to secure harmonisation of legal principles governing standard form contracts in consumer transactions. This experience provides evidence for the view that these measures of harmonisation have not succeeded in securing uniform rules which are uniformly applied. The problem for business arising from legal diversity and the uncertainty about the validity of their standard form contracts remains largely unaltered. In order to discover a better solution, we need to understand the reasons for this failure, which would also apply equally to a European Civil Code along the lines proposed above.

National private law systems met the challenges presented by the misuse of standard form contracts primarily by conferring on courts the

power to invalidate particular terms in standard form contracts retrospectively on vague grounds such as unfairness, unconscionability and good faith. This regulatory technique has the advantage that it is sensitive to the problem that unfairness and distributive effects of contracts always need to be examined closely in the particular context in which they occur.[22] A term in a contract that on its face looks harsh and oppressive may, on closer inspection, turn out not to be an unfair transaction. The open-textured standard has the potential to address the problem of precise rules that they may prove insufficiently responsive to the particular market conditions of a transaction. Furthermore, the discretionary standard also has the potential to recognise that fairness in contract terms must depend ultimately on the balance struck between the reciprocal obligations: an onerous obligation may turn out to be fair, if a high price is paid for it, and vice versa.

Nevertheless, such judicial review powers based on a private law model could be fairly criticised from all sides as both inefficient and ineffective. Businesses could object that the legal regime created considerable uncertainty about whether or not the standard forms in use were legally effective.[23] Their legal validity would ultimately turn on the exercise of an unpredictable judicial discretion. It is likely that different judges will apply the general standards in different ways. Furthermore, courts do not have access to reliable information about the operation of particular markets in practice, so that in concentrating on the balance of the formal terms they may not understand the idiosyncratic conditions under which the market sector has to operate.[24] The business can never be sure that its standard terms of business will be an effective instrument of self-regulation. There will be a constant need to review the terms in the light of speculative predictions about how courts might view the fairness of the reciprocal obligations. By creating legal uncertainty, the legal framework of general clauses begins to undermine the efficiency obtained from standardised business practices.

From the consumer's point of view, this regulatory mechanism could be criticised for failing in practice to curb the misuse of standard forms documents. If the worst that might happen is that in a particular case

[22] H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) 266–267.
[23] M. J. Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability', in B. J. Reiter and J. Swan (eds.), *Studies in Contract Law* (London: Butterworths, 1980) 379.
[24] Collins, *Regulating Contracts* 233, 273.

a court might declare that the business could not rely on a particular term, there is little incentive for businesses to refrain from using unfair terms. Even when a business suffers an adverse judgment against its standard terms, it can continue to use the offensive terms, because few consumers will appreciate their invalidity and, in any case, another judge might reach the opposite conclusion on a future occasion.[25] Furthermore, the regulatory power over standard forms is exercised only on those rare occasions when a dispute goes so far as litigation before a court and the person subject to the standard form has had access to the necessary legal expertise to challenge the offensive term in the standard form contract. And courts, if they are required to reach a determination of the application of a general standard, will no doubt be influenced by the ability of the parties to the litigation to present their case, which tends to favour businesses against consumers, and repeat players against small businesses.[26] One suspects that this private law regulatory model of judicial review of unfair terms in standard form contracts has had little impact on the conduct of business in practice.

These observations suggest the conclusion that the consequence of using the private law regulatory technique of general clauses has been that the price of obtaining an appropriate and nuanced result in particular cases has been both to create inefficiencies in the use of standard form contracts and to cause the ineffectiveness of regulatory controls over the abuse of standard forms. It seems likely, moreover, that these criticisms of the private law technique of regulating standard form contracts would only become stronger in the context of similarly constructed transnational law.

With respect to the unpredictability of the interpretation of general clauses, there seems to be a serious danger already that national jurisdictions will each develop rather different conceptions of open-textured standards employed in Directives. This diversity already seems to be happening with respect to the test of fairness used in the Directive on unfair terms in consumer contracts.[27] The concepts of good faith and substantial imbalance employed by the legislation are plainly susceptible to a wide variety of judicial interpretations. There must be a good chance that the same term will be regarded as fair in one national

[25] D. Yates, *Exclusion Clauses in Contracts*, 2nd edn. (London: Sweet & Maxwell, 1982) 19–23.
[26] M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974–5) 9 *Law and Society Review* 95; M. Galanter, 'Afterword: Explaining Litigation' (1974–5) 9 *Law and Society Review* 347.
[27] Dir. 93/13 [1993] OJ L95/29.

jurisdiction and unfair in another. National courts seem unlikely to refer these discretionary decisions to the European Court of Justice.[28] As we have noted, the Court itself seems to have rejected the use of the reference procedure in order to impose its own judgment about the meaning of good faith and substantial imbalance in relation to particular contract terms.[29] Teubner's prediction that such instances of harmonisation will merely produce new divergences between national legal systems may prove correct.[30] Vague concepts and phrases may assist the process of reaching agreement on transnational legislative texts, but they seem destined to fail to achieve substantial uniformity in the regulatory framework. If copied in a European Civil Code, these principles cannot secure the degree of uniformity and predictability sought by business.

Preventive injunctions

Learning from the experiences of national private law systems, European legislation on standard form contracts has also adopted another regulatory technique. This innovation empowers public authorities and consumer associations to challenge terms in standard form contracts in advance with a view to obtaining an injunction against the use of unfair terms.[31] This mechanism addresses the correct target: the circulation of documents. It responds in part to the concern of businesses that they wish to know in advance whether or not their standard terms of business are legally binding. It also responds to the needs of consumers to have offensive terms banned from the marketplace before they even encounter them. This European legislation, modelled closely on preceding German law, has created a more effective and appropriate regulatory mechanism to handle the business practice of using standard documents to regulate transactions. A similar approach has also been constructed with respect to unfair marketing practices.[32]

[28] In the first major case on the issue in the United Kingdom, the Court declined to make a reference: *Director General of Fair Trading* v. *First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, HL; [2001] 2 All ER (Comm) 100, HL, above, p. 83.

[29] Above p. 84.

[30] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[31] Dir. 98/27 on consumer injunctions, 1998 OJ L166/51. See also Commission, *Proposal for a Directive on injunctions for the protection of consumers' interests (Codified version),* Brussels 12.5.2003 COM (2003) 241 final, 2003/0099 (COD).

[32] Dir. 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Art. 11, OJ L149/22.

Although certainly an advance on the simple private law model of judicial review of unfair terms and marketing practices, this regulatory scheme adopted in recent European consumer legislation is still seriously defective in two respects. In the first place, the enforcement mechanisms remain oriented towards separate national supervisory systems. As a consequence, the problem remains that terms of standard form contracts regarded as fair in one jurisdiction may be challenged successfully in another. It is clear that, in order to achieve full harmonisation and the complete removal of obstacles to trade, this regulatory scheme also requires some kind of integration of enforcement authorities. This form of integration can be achieved either by the creation of transnational enforcement bodies or, in current policy, by tight coordination of the enforcement authorities of Member States.[33]

The second defect in the regulatory scheme from the point of view of the free circulation of documents is that businesses still cannot be sure in advance that their standard form documents will be effective, and nor can consumers and small businesses be confident that the terms will pay due respect to their interests. The absence of prior vetting of standard form contracts still leaves open the possibility that some terms will be declared retrospectively to be invalid or ineffective. This consequence flows from the residual attachment to the private law regulatory method of retrospective judicial review and the basic disposition towards freedom of contract. But is there any alternative?

Collective self-regulation

Many European countries have tried with partial success to facilitate and control standard form contracts through corporatist techniques of co-regulation. Under this regulatory method, the government encourages or requires representatives of both parties to a common standard form contract to negotiate a model set of terms. This model standard form contract can then be required or approved as the normal contract to be used in the particular trade. Each market sector has to negotiate its own standard terms, which can take into account the idiosyncrasies of the products and services transferred under the contracts. The model terms will no doubt incorporate any relevant technical standards,

[33] Reg. 2006/2004 on consumer protection cooperation OJ L364/1. H. W. Micklitz, 'Transborder Law Enforcement – Does it Exist?', in S. Weatherill and U. Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Oxford: Hart Publishing, 2007) 235.

which themselves will have been set by processes of self-regulation.[34] In other words, the model standard form contract would be 'reflexive',[35] owing to its origin in negotiation by participants in the market and, owing to the experience of the parties in the trade, should approximate to the optimal level of precision.[36] Moreover, unlike the typical experience of one-sided business self-regulation,[37] the model contract should achieve a fair balance between the competing interests of both sides to the standard transaction. To produce that fair outcome, it is necessary, of course, to ensure that the parties adequately represent the economic interests of their side. Many national governments also believe that it is necessary to retain the power to review or agree the final outcome through a process of co-regulation, in order to ensure fairness and adequate protection of the public interest. Although such public intervention is needed in instances of business self-regulation, it is unclear what benefits might be afforded by public scrutiny of the outcomes of collective negotiations where consumers or other weaker groups are properly represented.[38]

Provided that agreement is reached under these conditions of fair procedure, the model standard form contract can then be employed by businesses with the assurance that it will largely escape subsequent administrative and judicial scrutiny with respect to the fairness of its terms. Equally, consumers and small businesses can be assured of the fairness of the terms of a standard form contract that has been produced according to these procedural standards. In other words, this style of negotiated self-regulation has the potential to meet the normal objections to private law regulatory techniques applied to standard form contracts that they serve business interests, undermine the

[34] H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

[35] On the nature of this requirement for regulation: G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239; R. Rogowski and T. Wilthagen (eds.), *Reflexive Labour Law* (Deventer: Kluwer Law and Taxatron, 1994); Collins, *Regulating Contracts* 65.

[36] C. Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *Yale Law Journal* 65.

[37] C. Scott and J. Black, *Cranston's Consumers and the Law*, 3rd edn. (London: Butterworths, 2000) chapter 2.

[38] Comparable issues of representativeness have been explored in the context of the Social Dialogue in European Labour law under Arts. 138 and 139 EC: Case T-135/96, *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME)* v. *Council* [1998] ECR II-2338; B. Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 *Industrial Law Journal* 153.

competitiveness of markets and escape public scrutiny with respect to their observance of individual rights and fairness between the parties.[39]

This regulatory approach produces what has been described as an 'autonomous agreement'.[40] It is autonomous in the sense that public authorities would not be a party to the agreement. It could also be autonomous in the sense that the agreement need not be endorsed or legitimated by a public authority. Furthermore, the agreement could be autonomous in the sense that legal mechanisms would not be used in order to compel the use of or require compliance with the model contract. Representatives of the business sector might be able to ensure that the standardised terms were adopted by all or most traders by means of harnessing the powers of national trade associations to enforce and encourage compliance by their members. In this manner, the adoption of the model contract might become widespread without any legal compulsions.

Indeed, any legal compulsion to use the model contract seems both unnecessary and probably undesirable. The regulatory technique envisaged here is one of 'opt-in' to the rule framework with the carrot of a safe harbour of protection against challenges to the validity and effectiveness of the terms of the model contract. That incentive might be enhanced by the representatives of both collective parties to the autonomous agreement promising not to initiate challenges to the fairness of standard form contracts provided that they conformed to the approved model. Individual litigants before courts should still, however, be permitted to challenge the fairness of such documents, in order to permit ultimate judicial oversight of this self-regulatory approach. But if the standard form contract in question conformed to the approved model, which had been negotiated according to a fair process by representative parties, judges would surely be highly unlikely to endorse such claims.

[39] For a general examination of the issues, see essays in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (The Hague: Kluwer Law International, 2006).

[40] This terminology is used by D. Schiek, 'Autonomous Collective Agreements as a Regulatory Device in European Economic Law: How to Read Article 139 EC' (2005) 34 *Industrial Law Journal* 23; D. Schiek, 'Private Rule-Making and European Governance – Issues of Legitimacy' (2007) 32 *European Law Review* 443. An example of an autonomous agreement in the field of employment law is the *Framework Agreement on Telework* (Brussels, 16 July 2002) made between the social partners under Art. 139 of the Treaty of the European Community, which the partners themselves propose to enforce through a reporting system conducted by the relevant organisations in the Member States.

The potential attractions of this regulatory strategy employing collective self-regulation have already been noticed by the EC Commission in its *Action Plan*, where it suggests as a possibility the strategy of the promotion of the voluntary adoption by businesses of EU-wide general contract terms.[41] Since then, however, the Commission seems to have put the project of developing standard terms of business for particular sectors on hold somewhat.[42] This approach to regulating standard form contracts does, however, encounter a number of objections.[43]

At first sight, such a regulatory strategy appears to pose a potential threat to competition in the market. It would require or induce all businesses in a particular trade sector to use the same standard form contract, thereby removing the possibility of competition between contract terms. But it seems unlikely in fact that there would be any significant anti-competitive effects caused by the use of standardised terms. The model standard form would not determine the price and the nature of the main subject matter of the contract, but would merely supply all the other standard terms of the transaction. For these ancillary terms, there is unlikely to be a competitive market, since consumers and small businesses normally concentrate their attention on the principal features of the transaction rather than the small print of the standard form contract. In general, neither consumers nor businesses have the time or expertise to go around comparing the small print of standard form contracts in order to determine which one offers the best deal. It is this lack of competition in the market for contract terms that facilitates the abuse of standard form contracts. In the case of credit cards, for instance, although the issuers need to retain control

[41] EC Commission, *A More Coherent European Contract Law*, paras. 81–88. The Commission has conducted similar explorations of the use of Codes of self-regulation for regulating unfair market practices: Commission, *Green Paper on European Union Consumer Protection*, COM (2001) 531; Commission, *Follow-up Communication*, COM (2002) 289; G. Howells, 'Co-Regulation's Role in the Development of European Fair Trading Laws', in H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices* (The Hague: Kluwer Law International, 2004) 119; E. Hondius, 'Self-Regulation in Consumer Matters on a European Level', in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (The Hague: Kluwer Law International, 2006) 239.

[42] Commission, *First Annual Progress Report on European Contract Law and the Acquis Review*, COM (2005) 456 final, para. 4.1; criticised in U. Bernitz, 'The Commission's Communications and Standard Contract Terms', in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law* (Oxford: Hart Publishing, 2006) 185, 190.

[43] S. Whittaker, 'On the Development of European Standard Contract Terms' (2006) 2 *European Review of Contract Law* 51.

over such matters as interest rates, credit limits and benefits to the user, the remaining terms could almost certainly be standardised without any loss of competitiveness, since there is unlikely to be significant competition in the market for contract terms with respect to ancillary terms governing the use of credit cards. Similarly, for everyday sales of goods to consumers by retailers, the standard form contract would determine all the ancillary terms such as detailed rules about quality, payment and methods for redress. The elimination of the possibility of competition in the market for contract terms would merely recognise what is in fact already the case in most instances.

Another objection to this regulatory strategy of formulating model standard form contracts raises the problem of the enormity of the task.[44] Unlike a single law enacting a general standard, the creation of model standard forms requires the construction of a multiplicity of standardised documents across market sectors. National authorities have experienced considerable difficulty in coordinating all these private actors to reach agreement on model contracts. This problem would obviously be exacerbated if agreement were sought at a transnational level. Though serious, this objection draws its strength from two misconceptions.

In the first place, this objection assumes that public authorities need to be involved, in order to coordinate the collective bargaining procedures leading to the creation of model standard form contracts. Although assistance from public authorities is no doubt helpful, it does not seem to be essential, provided that the private actors have sufficient incentives to bring themselves together. The potential incentive for business is the certainty of the legal enforceability of the standard form contract in cross-border trade. Provided that this incentive is largely assured, representatives of business will recognise that the expense and difficulties of combining together will be outweighed by the advantage of forging a practical solution to the problem of legal risk throughout the internal market. Small businesses or consumers will have considerable powers of 'hold-up' because, without their consent, the model contract cannot be used by businesses with the assurance of legal validity. Small businesses and consumers will be able to use this bargaining power to obtain acceptable terms and, in the long run, they have the incentive to agree a model contract that will provide them with a

[44] H. Beale, 'Unfair Contracts in Britain and Europe' [1989] *Current Legal Problems* 197, 210, referring also to E. Hondius, *Unfair Terms in Consumer Contracts* (1987) 224–225.

reliable guarantee against nasty surprises in the small print of standard forms.

The second misconception about the enormity of the task is that the procedures for the creation of model standard form contracts will require a final stage where a public authority vets the outcome of the collective bargaining to ensure its fairness. It would clearly be impracticable in terms of both cost and competence for a public authority or a court to attempt to vet the fairness of all the different documents produced by a wide variety of market sectors in advance. But this regulatory technique using autonomous agreements does not require public supervision of outcomes, merely of the process leading to the construction of the collectively agreed standard form. This procedural approach would need to ensure, for instance, the 'representativeness' of the parties to collective bargaining.[45] In some market sectors, doubts may arise about the sufficiency of the bargaining power of one side to the negotiation owing to structural features of the market.[46] In such cases, public authorities might need to intervene to provide assistance to the weaker party. For example, public authorities might help to organise consumer groups and to provide them with technical expertise.[47] These tasks for public authorities seem manageable without great expense.

A third kind of objection to this regulatory strategy is that it is illegitimate, because it effectively devolves lawmaking powers to private actors. This objection raises many fascinating questions, which cannot be fully explored here. It is true that, if the agreement between representative groups produces a model standard form contract that cannot in practice be challenged for legal invalidity, the private actors are effectively determining the content of the standards of fairness or good faith. On the other hand, it should be observed that in practice the unilateral imposition of standard terms by businesses often has the same effect, unless and until those terms are challenged through a retrospective judicial review. Whether this retrospective judicial review process has any greater legitimacy than autonomous agreements must

[45] The requirement of 'representativeness' applies to the social partners in the context of employment law if the Council is asked to implement an agreement through a Directive: T-135/96 *Union Européene de l'Artisinat et des Petites et Moyennes Entreprises (UEAPME)* v. *Council*, [1998] ECR II-2338.

[46] G. Howells and T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (2003) 9 *European Law Journal* 370, 386.

[47] H. Collins, *The Law of Contract*, 4th edn. (London: Butterworths, 2003) 266–269.

also be doubted. Judicial review may lack expertise, may fail to take adequate account of the different interests at stake and certainly is weak in comparison with autonomous agreements with respect to the element of democratic participation. It is true that judicial intervention is legitimated by reference to a legislative general standard such as fairness, but one could counter this point by stressing that autonomous agreements produce their own standards only after following fair procedures mandated by the law.

More generally, we need to place these issues about legitimacy in the broader context of debates about the political structure of Europe. The techniques for securing legitimacy in government in nation states, such as parliamentary representative democracy, have not been used in Europe at a federal level to a significant extent, in order to preserve a degree of sovereign independence for Member States. The ensuing system of multi-level governance in Europe requires a search for alternative methods for securing the legitimacy of transnational governance. Moves towards this goal involve greater transparency, more participatory processes and the employment of less coercive regulatory techniques. Autonomous agreements fit into these transnational governance techniques by encouraging participation, openness and respecting pluralism. They avoid the imposition of a single European solution from on high, but rather encourage different trading sectors to produce their own solutions from the bottom up. By encouraging autonomous agreements, the European institutions can steer the regulatory process through procedural requirements, but do not impose substantive solutions.

The potential advantages of using this regulatory technique for market integration in Europe are numerous. First, the use of the model standard form would produce predictability and certainty in the sense that the parties will be assured that all the terms of the transaction will almost certainly be legally valid and enforceable even in cross-border transactions. A rule of strict enforcement of the standard form would be required throughout Europe, regardless of the differences in background legal doctrine. Second, the technique of using agreements between stakeholders to determine the standard forms ensures that the terms will be sensitive to the particular interests of the parties and contexts of transactions, because the stakeholders are more likely to be fully aware of these than judges or government administrators. Third, this regulatory technique overcomes problems of securing harmonisation in the context of regulatory diversity in Europe. For example, we

noted before how a term might be regarded as unfair in one jurisdiction but not in another when the courts apply general clauses such as fairness or good faith. In contrast, if the parties used the approved standard form contract, there would usually be no plausible legal basis for impugning the validity or unfairness of its terms (other than the price and other unregulated terms). Use of the approved model contract would function like a European passport in order to gain entry to markets; there may still be some checks and border controls, but a valid document should secure entry eventually. Fourth, this regulatory technique addresses the widely perceived problem of there being a democratic deficit in the processes of European governance by encouraging a participatory process in self-regulation in markets. Its legitimacy relies upon fair procedures, participation and consent. It is not a case of markets governing the law,[48] but rather, in a pluralist and post-nationalist framework,[49] of markets being steered by governments towards regulating markets. In short, it uses contracts to regulate contracts.

3 Deliberative supranationalism

The central theme of this chapter and chapter VII has been to explore the implications for the project of a European Civil Code of the insight that the European Union comprises a unique constellation of supranational and multi-level governance systems. These constitutional structures prevent, even if thought desirable, the enactment of a binding, detailed, comprehensive civil code. Instead, it has been argued that what best fits the European governance arrangements and what will best promote the aims of the European Union is a novel type of legal instrument. It would comprise a code of principles, enacted as a type of Directive, with only indirect effects so that individuals and businesses could not rely directly on its statements of law in formulating legal claims. National private law would remain the primary point of reference, but those laws would have to be interpreted by the domestic courts and tribunals in ways that approximated as far as possible to the principles of the European Civil Code. This framework

[48] H. Mattei, *The European Codification Process: Cut and Paste* (The Hague: Kluwer Law International, 2003) 113.

[49] D. Chalmers, 'Post-Nationalism and the Quest for Constitutional Substitutes' (2000) 27 *Journal of Law and Society* 178.

would clearly permit considerable diversity between national legal systems.

In order to promote closer harmonisation of laws, a host of additional measures could be added to this configuration. Most of these steps should concern legal education for students, lawyers and judges, which would re-orient them towards a transnational perception of private law and enable them to re-think the conventional wisdoms of their national legal training. But to tackle the much greater obstacles to the evolution of coherent and consistent legal doctrine encountered by a multinational system in comparison to a single legal order, it is necessary to consider additional, novel governance structures to those employed traditionally by national legal systems, such as reliable reporting of judicial decisions, systematic treatises and critical evaluations of the laws. This chapter has considered two such possibilities: a European Private Law Institute and the use of autonomous agreements for establishing standard terms of business for particular sectors. No doubt others could be proposed. The important point to recognise is that traditional methods of securing coherence and dynamic development will not function adequately in the novel context of the European multilevel system of governance. Instead, what are required are institutions and procedures that will facilitate deliberative supranationalism in regard to issues of private law.

IX Exploring the European Social Model

> Those who favour a European Code should not despair. The Frame of Reference will be the first step. When it is there one can imagine as a next step an Optional Instrument which will begin as an opt-in model and eventually become an opt-out model. After some time the Code of Obligations will become a reality.[1]

This prediction made by Ole Lando, a distinguished founder of the modern movement for harmonisation of European contract law, may well prove correct. Despite its denials that it is doing any such thing, it is possible that the European Commission favours this strategy. There is certainly evidence to support the claim that the Commission has embarked on the project by constructing this code in a hidden way as the 'soft law' of the Common Frame of Reference (CFR). But Professor Lando's positive evaluation of this path towards a European Civil Code is surely misguided.

Creeping, surreptitious codification, as it has been labelled,[2] is precisely the wrong way to bring this project to a successful fruition. Many arguments against this particular course of action have been explored in the course of this book. The first concern stems from the distortions in the content of a civil code likely to be generated by the current limited competence of the institutions of the European Union. The internal market agenda drives the project towards a focus on reductions in obstacles to cross-border trade rather than a consideration of the deeper issues regarding the European Social Model and an Economic

[1] O. Lando, 'Can Europe Build Unity of Civil Law While Respecting Diversity?' (2006) *Europa e diritto privato* 1, 8.

[2] K. P. Berger, 'The Principles of European Contract Law and the Concept of the "Creeping Codification" of Law' (2001) 9 *European Review of Private Law* 21.

Constitution which a civil code inevitably raises. The dangers of this approach are revealed starkly by the manoeuvre to focus on an Optional Code of contract law, itself forced on the Commission owing to the lack of evidence of systematic obstacles to cross-border trade caused by the diversity of national private law systems. It seems likely that this proposal for an Optional Code will prove popular with businesses and their legal advisors only if it enables them to avoid the application of more costly national protective measures such as consumer laws. Having disguised the construction of a code behind the metaphors of a dictionary or a tool box that are used to characterise the CFR, it will then need to be shorn of some of its protective measures in order to have any chance of success as a viable option in regulatory arbitrage or the competition for choice of law.

Those who favour a European Civil Code need also to ponder longer and harder about how best to fit a legislative instrument into the European system of governance. In contemplating a European measure, we must reject as a model the nineteenth-century codes of the nation states of Europe. Those symbols of nationalism and centralised authority, with the ambition of comprehensive detailed regulation of civil society, are inappropriate for the multi-level governance system of the European Union. It seems clear that principles-based regulation at the European Union level is the most viable method for harmonising the rules governing markets, thereby leaving the national legal systems scope for tailoring the rules to work effectively and efficiently with local customs, practices and functional needs.

Nor should we simply dismiss concerns about cultural diversity as irrelevant, unfounded, or anti-European. National private law systems have co-evolved with the social, economic and cultural aspects of their respective societies. To become an accepted, workable and legitimate source of law, a European Civil Code needs to steer the difficult path between promoting unity with respect to common principles while tolerating considerable local diversity. This path, it has been argued, requires a code of principles that can be inserted into a multi-level system of private law. Unlike civil codes of the past, a European code should not pre-empt all previous national private law. On the contrary, a European code should operate more like a constitution that steers and places limits on national private law systems. By constructing the code as a Directive rather than a comprehensive Regulation or federal law we leave open the possibility of national divergence, mutual learning and cultural independence. While the code should not be an instrument for

coercing unity in the details of civil law, it can provide the basis for convergence around common values and principles. The potential for convergence can be strengthened by additional, non-legislative measures, such as better dialogue between the national courts facilitated by scholarly studies and collective self-regulation in some spheres of business activity.

Having recognised the impossibility and undesirability of complete uniformity within the European multi-level system of governance, we must then address the question posed by Pierre Legrand:

> What good is a common text of reference if it is internalised differently by the two legal traditions which it claims to unify – that is, if it is ascribed a different meaning because of the incompatible styles of interpretation and application at work?[3]

Disagreeing with Legrand's own answer, which, in brief, is that a common text is not merely no good at all but worse is 'oppressive' and 'antihumanistic',[4] the response provided here has stressed the potential contribution of a European Civil Code of principles to the construction of a European transnational civil society based upon values that articulate a European model of social justice. The purpose of harmonisation is not to impose federal uniformity but to promote solidarity between the peoples of Europe. Far from being a backward reversion to nineteenth-century, authoritarian, centralising modes of governance, the project for a European Civil Code creates the opportunity to refresh the foundations of the original mission of the European Union to promote peace, prosperity and respect for human rights in Europe.

It follows that the better way forward for the project of a European Civil Code is to begin with a transparent and public exploration of what we mean and what we aspire towards when we speak of the European Social Model.[5] To seek common legal principles that already are observed in Europe contributes in many ways to that task, but in the final analysis this comparative synthesis is inadequate. We have the opportunity with a project for European Civil Code, an opportunity that

[3] P. Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44, 60.
[4] P. Legrand, 'Antivonbar' (2006) 1 *Journal of Comparative Law* 13, 27.
[5] This is one of the central themes of the Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653, though its moderate, 'third-way' approach is regarded as too timid by some: U. Mattei and F. G. Nicola, 'A "Social Dimension" in European Private Law? The Call for Setting a Progressive Agenda' (2007) 7(1) *Global Jurist*, www.bepress.com/gj/vol7/iss1/art2.

few generations enjoy, to reflect on first principles, to construct a new vision of civil society, one that learns from past experience but which is not ultimately constrained by its legacy. That legacy must be interrogated and, where it is found inadequate, novel solutions need to be considered.

It is this political challenge which confronts national governments and makes them wary of any project for harmonisation of the law of obligations. As Daniela Caruso presciently observed in discussing the early Directives which had an impact on national private law systems:

> Harmonisation, however, has progressively driven home to Member States how much of their sovereignty is at stake in the surrendering of national control over private law. Integrationist pressure from Brussels is increasingly shaking the presumption of the neutrality of private law. It is forcing national legislators to engage in debates and make choices on subjects that were once the prerogative of civil courts with their piecemeal adjudication. It is pressuring national law-makers to rethink aloud, in politically accountable parliamentary arenas, the underlying goals of their private law doctrines. It is this pressure, more than anything else, that Member States are resisting.[6]

The breadth of coverage of private law, from family relations to complex business transactions, further explains why this task of developing a European Civil Code should be expected to occupy many years, indeed decades. Yet it is certainly possible and appropriate to commence this ambitious project by identifying segments of divisions of the code that can be considered to some extent independently. That strategy of piecemeal work building up to a complete code in turn poses an important initial question about the divisions or structures of the proposed code.

1 Structures

Legal categories and classifications perform hidden but monumental work in legal reasoning. In the law of obligations, for instance, the division between contract and tort (or delict) sets boundaries for the scope of principles within each field. The classification of a dispute as contractual or tortious is likely to determine such issues as the criteria for responsibility, the range of liability towards others and the standard of care required. Usually, the application of tort law, as opposed to contract law, will create better opportunities for the law to force businesses

[6] D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3, 29.

to internalise social costs. On the other hand, the application of contract law will often permit the parties to allocate risks and costs in the most efficient manner as between themselves. Vital legal implications similarly turn on the distinction between personal property and real or immoveable property. An important question facing drafters of the European Civil Code is what categories and classifications should provide the organisation of the code and, by implication, the field of application of the principles particular to that category of law. Europe has inherited a classification system for private law, with its roots stretching back to Roman law. Is that system suitable for a modern expression of the European Social Model?

Consider, for instance, the category of the law of contract as part of the law of obligations. Existing civil codes share the feature of presenting a general part of the law of contract, which is supplemented by special rules applicable to some standard types of transactions such as sales. During the twentieth century, this scheme came under pressure because of the increasing significance of cross-cutting classifications such as consumer contracts, standard form contracts and commercial law. A typical contract today may fall within all these classification structures: a contract of sale, made by a consumer on the standard terms provided by a business, drafted in accordance with the customs and rules of a particular trade association. Furthermore, the special categories of contracts drawn from Roman law no longer seem to identify all the major vehicles of economic exchange. Both the shift to the predominance of service economy and the development of evermore complex methods of providing finance for businesses present new kinds of transactions that are fundamental to modern market operations, but which hardly figure at all in traditional systems of lists of special contracts.[7] The question for drafters of a European Civil Code must be whether to retain the traditional scheme or create a new classification system. Is it time to leave the nominate contracts of Roman law and the general principles of nineteenth-century codified contract law behind us and create new European structures?

It might make sense, for instance, to create a sharp division between consumer contracts and commercial contracts. Instead of the

[7] M. B. M. Loos, 'Towards a European Law of Service Contracts' (2001) 9 *European Review of Private Law* 565. M. Fontaine, 'Codifying "Modern" Contracts', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), *Towards a European Civil Code*, 2nd edn. (Nijmegen: Ars Aequi Libri and The Hague: Kluwer Law International, 1998) 371.

conventional assumption that certain general rules and principles apply to both sorts of contracts, the law could commence with the opposite starting point. We could have two (or more) codes of contract law, one in business-to-consumer relations and the other for business-to-business relations. Both codes would require principles concerning formation, performance, breach and remedies, but there would be no need for these rules to be the same or to be reconciled with some overarching general principle. Some rules or principles might appear in both codes, but in this eventuality there would be no reason to presume that they would necessarily mean exactly the same thing in practice. Both the consumer and the commercial code might contain, for instance, a duty to perform the contract in good faith or a duty to disclose material information prior to the formation of the contract, but the content of those duties might prove significantly different in the context of consumer transactions compared to that of commercial deals. In many instances, particular rules would apply to only one of the classifications; for instance, the opportunity to withdraw from the contract during a cooling-off period might apply only to consumer contracts.

If such a sharp division between consumer and commercial contracts were chosen as an organising system for a European Civil Code, it would mark a decisive break from the Roman legacy. It would liberate the law of contract from the stifling and often inconvenient assumption that all general contract law rules apply to all types of contracts (though subject to special exceptions). This sharp distinction between consumer contracts and commercial contracts is already present in the *acquis communautaire*, perhaps in part for reasons of legislative competence as well as the need to secure political support, but it fits appropriately into the more regulatory character of modern private law systems. This characteristic of Community law has been criticised as imposing a 'distressing split in the national legal systems'.[8] It has even been smeared as 'reminiscent of the socialist legal systems',[9] though this judgement seems historically inaccurate, because ideas of consumer protection were pioneered in the United States, whereas in Eastern Europe consumers had few rights on the theory that the economic planning system rendered them unnecessary. Ugo Mattei is right, however, to warn of

[8] J. Basedow, 'A Common Contract Law for the Common Market' (1996) 33 *Common Market Law Review* 1169, 1176.

[9] H. E. Brander and P. Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 *Common Market Law Review* 647, 648.

the risk created by bifurcations of codes of a 'comedy of errors' arising from the lack of coordination between parts of the law and the costs generated by having to distinguish the relevant law on the basis of concepts such as a 'consumer'.[10] But he reserves his most urgent fear for the possibility that outside consumer contract law, the bifurcation of the codes would lead to the absence of mandatory rules in a commercial code to control the behaviour of merchants, banks and businesses towards each other.

In a similar vein with regard to structural issues, Thomas Wilhelmsson has argued that efforts to produce a European Civil Code in the traditional form of a general part containing broad principles supplemented by particular rules for special contexts will inevitably tend towards the construction of private law based upon liberal rather than more welfarist principles.[11] Why would the principles of a European code be bound to favour liberal principles such as freedom of contract and minimalist obligations of good faith and protection of reliance?

One reason seems to be that when legal scholars try to find common principles on which they can concur, agreement is far easier to reach on the general part that favours broad liberal principles and default rules subject to contrary agreement, rather than the more idiosyncratic protective and welfarist regulatory aspects of private law. Scholars can probably agree, for instance, on the conditions for the incorporation of standard form documents into a binding contract. They are likely to share common principles on the need for notice and transparency in the formation of contracts. The reason for this consensus is that both liberals and consumer welfarists share the concern that parties to contracts should be properly informed about the proposed transaction, the former group for reasons of respecting liberty and promoting competitive markets, the latter group in order to prevent consumers from being duped into bad bargains. It will be far harder to obtain agreement between these groups, however, on the level and nature of the controls to be exercised over standard form contracts. The European Directive on unfair terms in consumer contracts probably illustrates the outer limits of possible agreement: there is no agreement on the appropriateness of controls over commercial contracts, or on individually

[10] U. Mattei, *The European Codification Process* (The Hague: Kluwer Law International, 2003) 140.

[11] T. Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 10 *European Review of Private Law* 77.

negotiated contracts, or on a wide range of financial transactions.[12] Furthermore, by imposing only minimum standards, the Directive permits national diversity in the form of greater protection for consumers, which was necessary to make even this limited consensus possible. This inability to agree on detailed protectionist measures is also illustrated by the *Principles of European Contract Law*,[13] which studiously avoids discussion of any special measures for protected groups such as consumers and workers. As Wilhelmsson observes:

> The local, political and experimental nature of consumer law will easily convince drafters of such restatements to leave out the 'specificities' of consumer law, being regarded as more 'political' and as more geared to actual and local problems. The resulting solution in fact means that while the set of principles is proclaimed to be general, the traces of consumer law thinking are relatively scarce.[14]

Another reason why general codes seem to be tilted in favour of liberal principles, according to Wilhelmsson, is that the complex regulatory and interventionist material of modern private law is hard to consolidate into a coherent and systematic code. In France, for instance, consumer protection measures have been put together into a code, but this code is really just a collection of legislative measures rather than a systematic exposition of the field. Like the European *acquis communautaire*, these regulatory measures tend to be sector-specific and particularistic in the problems which they address. Codes find such material hard to incorporate into their normative structures, so it tends to be marginalised. The effect is that while the general parts of the code endorse liberal principles, the counter-principles concerned with fairness, welfare and protection tend to be shunted into remote sidings.

These two reasons for rejecting the project of a European Civil Code are powerful, but not ultimately persuasive. They certainly highlight real dangers and indicate the difficulties of the project. One should certainly be suspicious about the content of a civil code drawn up in a hurry on the basis of common elements found in national private law systems. It is likely to be unbalanced in the way Wilhelmsson suggests,

[12] Dir. 93/13 on unfair terms in consumer contracts.

[13] O. Lando and H. Beale (eds.), *Principles of European Contract Law* (The Hague: Kluwer Law International, 2000); H.-W. Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party' (2004) 27 *Journal of Consumer Policy* 339.

[14] T. Wilhelmsson, 'International Lex Mercatoria and Local Consumer Law: An Impossible Combination?' (2003) VIII *Uniform Law Review/Revue de Droit Uniforme* 141, 153.

and ultimately this distortion will render it unhelpful either for the modest tasks suggested for the CFR such as helping to achieve a more coherent civil law, or for the more ambitious role proposed here of developing a European Social Model.

Yet, the proposal for developing a European Civil Code in the form of a code of principles is not necessarily committed to copying the grand designs of the classification schemes of nineteenth-century civil codes. On the contrary, we can imagine rather different classification schemes – for instance, dividing the law of contract into a number of distinct compartments such as consumer, commercial, employment and so forth. In the words of Guido Alpa:

> A code of this type and for certain purposes cannot be conceived like the codes of the last century. It will be constituted by rules intended for individual sectors provided by an internal coherence. It will not be complete, but concern only economic relationships. It will contain rules of wide extent, rather than rules applying only to narrow circumstances. A European Code will contain rules situated in dynamic reality, not a static reality.[15]

It is not my aim here to advocate any particular structures or classifications for European civil law in the future. My point is rather that we should not assume that the structural arrangements should be the same as those from the past. In particular, we must question the utility of the dominant model in contemporary legal doctrine of general principles governing a wide range of social phenomena such as exchange transactions, albeit subject to exceptions in particular contexts. This model may provide some kind of pleasing superficial coherence to the doctrinal system, but at the expense of all kinds of tensions and confusions. Despite these problems, this model seems to be the working assumption of those scholars working on the development of the CFR.[16] Even those scholars who are trying to devise general principles from the *acquis communautaire* have seemed determined to reject any challenge to the dominant model,[17] despite the fact that their legislative material

[15] G. Alpa, 'European Community Resolutions and the Codification of "Private Law"' (2000) 2 *European Review of Private Law* 321, 332. See also: G. Alpa, 'Harmonisation of and Codification in European Contract Law', in S. Vogenauer and S. Weatherill (eds.), *Harmonisation of European Contract Law* (Oxford: Hart Publishing, 2006) 149.

[16] Draft Common Frame of Reference: *Principles, Definitions and Model Rules of European Private Law* (Munich: Sellier, 2008), www.law-net.eu.

[17] R. Schulze, 'European Private Law and Existing EC Law' (2005) 13 *European Review of Private Law* 3; R. Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 13 *European Review of Private Law* 841.

of consumer protection measures seems much more appropriately understood as a distinct code for mass consumer transactions. In contrast, the European Commission has hinted at the possibility of bringing the consumer law *acquis* together in a more comprehensive legal instrument,[18] though the details and purpose of these proposals remain unclear.[19]

2 Substantive principles

Of course, as well as the structure and categories of the European Civil Code, the substance of the standards will lie at the heart of the task of the exploration of the European Social Model. The code will have to address the core issues of modern private law. In contract law, for instance, a central question is the conditions under which freedom of contract may be exercised. Is it, for example, sufficient that a party to a contract did not engage in fraud or coercion, or should duties of fair dealing requiring disclosure of material information be preconditions for the power to determine the content of a contract? Similarly, what justifications should be sufficient for courts to invalidate terms of standard form contracts on grounds of fairness: is the objective of such controls the correction of market failures, the efficient allocation of risks, the provision of guarantees of private law rights on grounds of social policy, or to ensure that the balance of obligations under the contract achieves a fair equilibrium?[20] How far can and should private law seek to help the position of the socially excluded, the marginalised and the disempowered in modern society? In the context of EU institutions dedicated to steering society by means of market regulation rather than redistributive taxation, how can private law as an instance of market regulation be employed to serve social welfare goals?[21]

In the course of answering these questions, we will begin to elaborate elements of what has been called here a European Economic Constitution. For this purpose of elaborating principles of social justice, we

[18] Commission, *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final.
[19] C. Twigg-Flessner, 'No Sense of Purpose of Direction? – The Modernisation of European Consumer Law' (2007) 3 *European Review of Contract Law* 198.
[20] H. Beale, 'Unfair Contracts in Britain and Europe' (1989) *Current Legal Problems* 197.
[21] For a broad discussion of this question, see: T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot: Ashgate and Dartmouth, 1999).

can obtain some guidance from existing provisions in the European Treaty. For example, Article 153 sets out some principles regarding protection of consumers:

> (1) In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

This brief statement sets some parameters, in which a civil code (or that part of it which provides a code for consumer law) can fill in more detailed principles. For example, the Treaty speaks of the consumer's right to information, which suggests that duties of fair dealing with consumers should require businesses to supply, or be willing to supply, material information. It also suggests that the consumer's right to information should not be suppressed by the law for such reasons as protecting the consumer from confusion.[22] In the context of consumer law, the Treaty and the existing *acquis communautaire* provides relatively rich guidance on how to develop private law in accordance with the implicit European Social Model. In other fields, however, particularly those barely within the penumbra of the competences of the European Community, a much more creative development of principles will be required.

What will be important to remember is that this task differs from the search for common principles in the existing private law systems of European Member States. That comparative private law exercise will certainly prove useful, but it is liable to distract from the search for a more detailed expression of the European Social Model through principles of private law. The purpose of developing a European Civil Code includes the refreshment of legal traditions, and their adaptation to modern values and perspectives. Three examples reveal how this task of developing a modern European Civil Code should differ from the deliberations of the past.

[22] J. Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' (2000) 37 *Common Market Law Review* 367, 384, discussing as well in this context Case C-362/88, *GB Inno BM* v. *CCL* [1990] ECR I-667, in which the European Court of Justice invalidated Luxembourg prohibitions on sales offers claiming reductions on previous prices on the ground that the consumer's right to information was protected by Art. 28 against such mandatory requirements.

Integration of externalities

In economic analysis, an 'externality' is an interest or policy that parties to private transactions and similar arrangements do not take into account in determining their arrangements. Pollution provides an example. A car dealer sells a car to a consumer. These particular parties may not be concerned at all about the adverse environmental effects of this transaction. They may not care, for instance, that this gas-guzzling vehicle produces five times as much harmful emissions as a standard type of small vehicle. The parties may be solely interested in the price of the car and the quality of the product, not on its impact on global warming or air pollution in the city. In economic analysis, these excluded considerations or interests are labelled as 'externalities'. Governments can use regulation and tax indirectly to compel the parties to the transaction to consider externalities such as pollution. By increasing the sales tax on this type of car or petrol, the demand for such cars should be diminished, thereby reducing the negative impact on the environment. Alternatively, a government can regulate the market for cars in order to forbid the sale of products with excessive emissions.

This approach to dealing with externalities through tax and regulation leaves out another possibility. Private law can play a role. Traditionally, private law has given priority to private autonomy or the freedom of actors in civil society. They are permitted to judge what interests are relevant to themselves. If they are not concerned about global warming, for instance, then they need not take that aspect into account when deciding on a particular transaction. Yet even the most liberal systems of private law have never ignored externalities entirely. Where the result of a private arrangement involves the infliction of harm on the person or property of others, the law of tort often permits recovery of compensation by the third party, provided that the harm is foreseeable and the injured party not too remote. Private law protects personal and proprietary interests of individuals, but its protections are usually limited to externalities comprising material damage inflicted on identifiable proximate individuals. General pollution of the air from car emissions does not fit this model, so that affected third parties are unlikely to be able to receive compensation or secure an injunction against the polluting activity.

In constructing a new Civil Code for Europe, it will be possible to revisit the question of what externalities should be integrated into the calculus of private law reasoning. In relation to the sale of goods, for

instance, it might be possible to include within the protected reasonable expectations of consumers certain expectations regarding the environmental qualities of the goods.[23] Breach of a reasonable expectation regarding the emissions from a new car might entitle the consumer to reject the goods. Such a private law remedy would run parallel to any regulation or tax intervention. A similar approach might be used with regard to compliance with minimum labour standards. It could be argued that a reasonable expectation of consumers is that the goods they purchase have not been produced under conditions of servitude or severe exploitation. Another weaker remedy might be to provide the consumer with the right to withdraw from the transaction for a period of time if it is discovered that the goods have been manufactured under unacceptable labour conditions.[24] In relation to the law of tort, the development of a new code of principles would afford the opportunity to re-visit questions regarding the scope of protected interests. For example, it would be possible to consider whether in a broader range of instances there should be recovery for pure economic loss. If a business closes down its operations and moves a plant to another location, it will have to pay compensation to those with whom it has binding contractual relations, such as workers and suppliers, but these rules take into account only the economic damage inflicted on a narrow range of those affected adversely. Other local businesses such as shops may well be able to point to damage to their interests resulting from plant closure. In this review, the question would be whether or not these other businesses which have relied on the operation of the plant should receive some kind of compensation for the ensuing economic dislocation.

Effectiveness

As described in chapters V and VI, the private law tradition in Europe has focused on principles based upon perfectionist reasoning. The central question in determining the appropriate principle has been

[23] T. Wilhelmsson, *Twelve Essays on Consumer Law and Policy* (Helsinki: University of Helsinki Press, 1996) 269, 276.

[24] A. Somma, 'Exporting Economic Democracy – Social Justice and Private Law from the Point of View of Non-European Countries', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 201, 215; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) *European Law Journal* 653, 666.

what is right or what is just. The law has articulated what aspires to amount to a coherent scheme of principles for the resolution of disputes between individuals. As we noted before, however, increasingly during the twentieth century private law rules were interrogated with respect to their ability to promote social and economic policies. Social and economic regulation often supplanted traditional private law principles with respect to certain issues or particular relations. But private law also evolved to adjust towards these welfarist concerns.

These shifts towards goal-oriented reasoning in private law pose new questions about the effectiveness of private law. The issue becomes not only what is right between the parties to the litigation, but also which decision is likely best to further relevant social policies. In the case of a transaction induced by fraud, for instance, the issue to be considered is not simply what in justice should be the rights and obligations of the parties, but also what legal measures might deter more effectively fraudulent marketing practices. With regard to corrective justice, private law is likely to conclude that the transaction should not be binding on the deceived party (and perhaps on both), but the purposive or regulatory role of private law also demands that we should consider what further remedies might serve to discourage fraudulent behaviour that undermines confidence in markets. Should the deceived party be awarded damages, for instance and, if so, should these damages have a punitive element designed to deter fraudulent conduct? Alternatively, should a court have the power to issue injunctions against the fraudster in order to protect other potential victims?

Answers to such questions require an assessment of the effectiveness and efficiency of private law measures. In particular, remedial options need to be investigated fully in order to assess whether or not they are adequate to address the problems encountered. These challenges apply not only to traditional private law mechanisms for achieving justice between the parties, such as the award of compensation or the declaration of the invalidity of a transaction. We need to consider the effectiveness of more novel remedies such as the right of a consumer to cancel a contract in certain circumstances, such as contracts formed away from business premises in the consumer's home. Does the right to cancel help to protect the consumer against unwise decisions in such circumstances, or does it in fact lower the consumer's guard and make them more willing to sign up to purchases that do not really fit their needs or their budgets? Similarly, does a consumer's right to ask a retailer to repair non-conforming goods help to reduce the quantity of

shoddy products in the shops, or does it in fact back-fire and permit retailers to prevaricate endlessly when consumers complain about the goods they receive? Such questions as these become important when devising a modern code of private law that embraces not only perfectionist principles but also desires to secure broader social policies.

Human rights and private law

As we noted in chapter IV, the principles of private law are rooted in the liberal values that today are typically expressed in declarations of human rights to be found in constitutions and international conventions. The European Union has recognised that ultimately all its laws and institutional practices must be aligned with these values. The European Court of Justice announced early on that in its interpretation of Community law it would bear in mind fundamental rights, such as those found in the European Convention for the Protection of Human Rights and Fundamental Freedoms and other principles common to the constitutional traditions of the Member States.[25] Much later, the Nice Charter of Fundamental Rights of the European Union 2000[26] provided a text containing an extensive description of rights and fundamental principles to which the Court could refer when interpreting Community law. The Lisbon Treaty 2007 clarifies the point that, although the Charter does not create a new jurisdiction for the European Court of Justice to adjudicate on claims regarding violation of human rights, it is bound to interpret European laws in a manner which is consistent with the Charter in the same way as it is bound to interpret particular laws in a manner which is consistent with the treaties which create the European Union. It creates a new Article 6 for the Treaty of European Union:

> 1 The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due

[25] C-35/67, *Van Eick* v. *Commission* [1968] ECR 329; C-29/69, *Stauder* v. *City of Ulm* [1969] ECR 419; C-11/70, *Internationale Handelsgesellschaft* v. *Einfuhr und Vorratselle für Getreide under Futtermittel (Solange I)* [1970] ECR 1125.

[26] 2000/C 364/01.

regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2 The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3 Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[27]

Many national private law systems now take for granted that it is appropriate explicitly to measure the principles of private law against such fundamental values. Differing court structures and traditions of legal reasoning lead to divergences in how this alignment between fundamental rights and principles of private law are achieved. But it is widely accepted in European legal systems that private law adjudication must also encompass references to the requirements of these constitutional and international standards regarding human rights, social and economic rights, and basic liberal values.[28]

It is hard to be sure why greater attention to human rights has evolved in the national private law systems. No doubt part of the explanation is the strong international movement developed since 1945 for the protection of human rights. National constitutions have also become more explicit in their attachment to human rights and have empowered courts to adjudicate more extensively claims regarding violations of human rights. These developments have no doubt encouraged national

[27] Article 1 of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community 13/12/2007, OJ C306, 17.12.2007.

[28] From a wide literature: M. Hesselink, *The New European Private Law* (The Hague: Kluwer Law International, 2002) chapter 6; H. Collins, 'Social Rights, General Clauses, and the acquis communautaire', in S. Grundmann and D. Mazeud (eds.), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006) 111; H. Collins, 'A Workers' Civil Code? Principles of European Contract Law Evolving in EU Social and Economic Policy', in M. W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 55; A. C. Ciacchi, 'Horizontal Effect of Fundamental Rights, Privacy and Social Justice', in K. S. Ziegler (ed.), *Human Rights and Private Law* (Oxford: Hart Publishing, 2007) 53; O. O. Cherednychennko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, 2007); M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law' (2006) 7(4) *German Law Journal* 341; C. Mak, *Fundamental Rights in European Contract Law* PhD thesis (Amsterdam: University of Amsterdam, 2007).

courts to feel more confident in making assessments about the compatibility of private law rules with the demands of fundamental liberal principles and human rights.

A more recent impetus for the emphasis on the relevance of human rights to private law may be a sense that the courts need to find better ways to balance the interests of individuals against the demands of social and economic policy. In some instances, consideration of human rights law and constitutional principles may point towards the need to develop private law so that it affords greater protection to weaker parties. In Germany, for instance, Articles 20 and 28 of the Basic Law which describe the social dimension of the constitutional framework (the *Socialstaatsklausel*) are regarded as the normative basis for controlling unfair terms in contracts, and they also provided the basis for the Constitutional Court to reject the lack of protection in private law for a daughter in unwisely becoming a surety for her father's business.[29] Equally, human rights considerations may call into question the validity or the correct application of social regulation in private law. In connection with consumer protection measures, for instance, at what point does the protection of the consumer go too far in the sense that it disproportionately deprives a business of protection of an aspect of its fundamental interests, such as its property rights? This question was posed in an English case concerning a consumer credit transaction where the legislation deprived the lender of the right to enforce the contract and recover its loan as a result of a technical mistake. Eventually, the courts decided that the consumer protection measure satisfied a test of proportionality: it was a necessary and appropriate device to achieve a legitimate goal of transparency in consumer credit transactions.[30] In the context of the complexities of the hybrid character of reasoning in private law today – reasoning that integrates both traditional perfectionist principles and social policy objectives – the resort to fundamental principles and human rights enables courts to obtain a broader perspective and to adjust the evolution of legal doctrines.[31]

For the task of developing a European Civil Code, the relevance of human rights law and fundamental constitutional principles is twofold.

[29] BverfGE 89, 214, *Neue Juristische Wochen schrift* 1994, 36; Hesselink, *The New European Private Law* 184–186.

[30] *Wilson* v. *Secretary of State for Trade and Industry (No 2)* [2003] UKHL 40; [2004] 1 AC 816.

[31] H. Collins, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalisation' (2007) Law Society Economy Working Papers (Department of Law, LSE), www.lse.ac.uk/collections/law/wps/WPS06-2007Collins.pdf.

It will be necessary to consider the question of the compatibility of provisions of the code with contemporary understandings of human rights in Europe. More crucially, perhaps, it will also be necessary to consider the mechanisms by which the courts can employ the principles and rights contained in the Nice Charter when interpreting the principles of European private law. For instance, would the Nice Charter become relevant only when a court has to apply a general or open-textured principle in the civil code, such as a requirement to negotiate in good faith, or could the principles of the Charter be used more strongly to justify supplementing and qualifying the principles of the civil code itself? These kinds of issues were not at the forefront of the minds of those scholars and legislators who constructed the great national codes of the nineteenth century, but they are crucial questions for the project to develop a European Civil Code in the twenty-first century. This project, by aiming towards the better articulation of a European Economic Constitution, needs to rest on these fundamental rights and principles which provide the foundations for the common elements of the cultures of Europe.

3 The way forward

In the course of this lengthy discussion about the prospects for a European Civil Code, numerous alleged problems, objections and misconceptions have been assessed, restated and addressed. Without wishing to dismiss in any way these obstacles to the project for a European Civil Code, my underlying stance has been the hope that we can find ways to overcome them. That hope is inspired more generally by the possibilities that the European Union has revealed, though so far not delivered to its citizens, with regard to building solidarity between its diverse peoples and establishing social justice through an Economic Constitution.

Yet, as my discussion has revealed, the route towards a European Civil Code will be long and tortuous. Temptations for quick fixes motivated by deregulatory agendas or nostalgic reversions to nineteenth-century private law frameworks should be resisted. The great differences that separate national private law systems in Europe have to be acknowledged and accommodated with the use of more subtle legal interventions, such as my main proposal for a code of principles with only indirect legal effects, commencing with those areas of civil society where agreement on a full scheme of principles seems most likely to

occur. The opportunity presented by a European initiative to revise the structures, principles and doctrines of the past should be seized with both hands. But even in those areas where national laws closely approximate already and agreement may be more readily achieved on common principles, we will still encounter substantial problems of communication between the national legal traditions.

In recent years, I have attended many conferences and symposia where the prospects for harmonisation or codification have been investigated by scholars and lawyers from different Member States. One is struck not just by the national differences in the legal analyses, but more fundamentally about how differently lawyers from diverse traditions talk and think about the law. German professors typically present systematic lists of rules or events, the longer the better; French lawyers explore abstract concepts, ideally through binary oppositions; and English legal scholars, if they bother to come at all, mostly tell stories. My contribution to this conversation here is not to add to the lists, the oppositions, or the infinity of contexts for legal issues, but rather to propose a way forward for purposeful and productive discussions about the project for a European Civil Code.

Index

Entries in **bold** denote main entries
The following abbreviations are used:

CBI	Confederation of British Industry
CFR	Common Frame of Reference
CT	Constitutional Treaty
EC	European Community
EC Treaty	European Communities Treaty
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECm	European Commission
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
ICC	International Chamber of Commerce
NATO	North Atlantic Treaty Organisation
Nice Charter	Charter of Fundamental Rights of the European Union
NSSM	Non-sector-specific measure
SEA	Single European Act 1986
UK	United Kingdom
USA	United States

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