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The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration

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Abstract: *The traditional partition between public and private law continues to reinforce the belief that public law is the only proper realm of political debate, where decisions having redistributional consequences are and should be taken. This allows for a seemingly minor role of private law in the debate on European integration. This article challenges such a traditional image by noticing the central role of private law in the several legal systems of the European Union, and by analysing a few instances of resistance to private law integration. The analysis suggests that, while fully engaged in debating the public law implications of integration, Member States strive to keep civil adjudication within their control and to protect the self-contained, autonomous structure of their codes (or sets of private law doctrines) from the disruptive impact of European legislation. Integrationist pressures compel national legal actors to make explicit the social and economic choices underlying private law rules. Against such pressures, States' resistance may take the shape of formalist entrenchment.*

I Introduction

This paper is a preliminary attempt to analyse the process of European integration from a private law perspective, rather than through the more customary public law lenses[1].

* Associate Professor, Boston University School of Law. An earlier version of this paper, part of an ongoing research, was presented at Boston University School of Law during a faculty workshop on 11 January 1996, and subsequently appeared as a work in progress in the *Harvard Jean Monnet Working Papers Series* (J.H.H. Weiler, ed.) While all errors of fact and weaknesses of opinion are my own, I am especially indebted to critical feedback from Joseph Weiler. Warm thanks also to Mark Devlin, Duncan Kennedy, Roberto Pardolesi and Anne-Marie Slaughter for their constructive criticism. Insightful comments and encouragement came from the participants in the BU workshop (in particular, Hugh Baxter, Jack Beerman, Ronald Cass, Jane Cohen, David Dana, Alan Feld, Betsy Foote, Keith Hylton, Pnina Lahav, Fran Miller, Maureen O'Rourke, Rusty Park, Dan Partan, David Seipp, Kate Silbaugh and Manuel Utset) as well as from Luisa Antoniolli, Marlo Fogelman, Anne Gowen, Ugo Mattei, Sarah Robinson and Michael Spence.

[1] Legal categorisations along conventional, public/private lines, as well as arbitrary partitions between law and politics in the process of integration, are neither fashionable nor correct. This paper endorses neither formalist partitions nor pure legalism (see Part IV). Yet it does explore an area of law marked, in the European legal experience, by a high degree of formalism. This stylistic and substantive choice serves to highlight the unexplored impact of allegedly self-referential legal discourses (the private laws of the several Member States) upon the general dynamics of integration.

The integration project and the concomitant layering of Europe-wide legislation over the various civil codes have affected some basic features of civil adjudication in the courts of Europe. This part of the story rarely makes it across the Atlantic, partly because of its uninspiring baggage of technicalities, and partly because of the structural differences between the discourses of civil and common law. Conventional academic partitions have, moreover, traditionally placed international legal studies in the hands of public lawyers, leaving private law scholars to speculate on purely intranational transactions[2]. Against this background, this paper aims to bridge the gap between the institutional, public law discourse on Europe – where the value, indeed the very legitimacy of the integrative enterprise are vigorously debated – and the often opaque literature on the Europeanisation of private law.

From the rapprochement of the two discourses stems an unintuitive reading of contemporary European developments. In spite of Europe's transformation, the core of Member State private law remains guarded in the jealous hands of national institutions, and these institutions are quite conscious of their 'national' character. Furthermore, in spite of the effort to harmonise the black-letter law of the different legal systems and – where possible – to bring them into complete uniformity, the procedural rules and judicial remedies of each state retain diverse national features. The system allows local judicial traditions to survive, and these have so far shown no intention of fading away.

This stubborn clinging to the local dimension of private law is of utmost relevance to an understanding of European integration, particularly against the background of Joseph Weiler's conceptualisation of contemporary European law[3]. In his 'Transformation of Europe', Weiler explained the complex reasons why the seemingly unassuming 1957 Treaty of Rome – the original charter of the EEC – could trigger rapid and radical change in the institutions of the Old World, and even erode, without the trauma of subversion, the very core of Member States' sovereignty. In the following analysis, I suggest that the retention in national hands of most of the tools of private law is a key factor which is making possible the States' ultimate acceptance of Brussels rule. Because of the lasting centrality of civil codes in most Member States' self-perception, control over civil adjudication may be the one national border that Brussels does not, and indeed must not, cross. In the legal culture of Europe, private law is perceived as and may actually function as a bulwark against the flood of European regulation, a sort of antidote to the dilution of regional identities.

In light of the foregoing remarks, I shall aim, in the first place, to highlight the tension between the Union and the Member States over the control of private law. Because this tension is not always perceptible, and indeed at times not even consciously perceived by the legal actors involved, bringing it to light is a complex chore in itself. I shall illustrate some features and peculiarities of private law in the main legal systems of the Union (Part II). I shall then provide examples from statute and case law of private law integration, as promoted – forcefully or subtly – by the Union, and as received – or opposed – by the Member States (Part III). These examples, which are culled from different areas of civil adjudication – product liability,

[2] Cf Gerber, 'European Law: Thinking About It and Teaching It', (1995) 1 *Columbia Journal of European Law* 379, 381: 'The law professors who initially shaped issues for U.S. observers were virtually always public international law specialists, and thus they used concepts and categories from this area of law in dealing with the EU.'

[3] Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2043.

private antitrust actions and contracts – provide empirical evidence for the entire analysis. Subsequently, I shall attempt a preliminary conceptualisation of the game of private law integration and of the idiosyncrasies of the game's many players.

In Part IV, I shall provide one possible explanation for the tension observed between States and central authorities in matters of private law. Each modern nation in the Old World displays simultaneously two distinct attitudes towards its own set of private law rules and doctrines. In a purely intranational, self-referential setting, legal actors usually perceive their municipal private law as an ideologically neutral set of adjudicatory rules and principles, so much so that even very dramatic changes in political regimes may leave civil codes and private law doctrines fundamentally untouched. On an international stage, by contrast, a State's control over its private law is laden with ideological significance and tied historically to the very notion of sovereignty.

The innovative constitutional structure of the Union, however, is such as to blur the distinction between the national (internal, self-referential) and the international dimension of its modern States. Brussels-mandated harmonisation of private law takes the force of international obligations well into the self-referential frame of national private law. Consequently, the myth of private law's neutrality, held up so far at least for intranational consumption, is beginning to be questioned by national actors. The tension which is the subject of this paper stems from the fact that European integration is slowly permeating the consciousness of municipal law-makers and exposing, within each Member State's borders, the value-laden nature of private law.

II National Private Law and European Integration

The following illustrates why the integration of private law, as opposed to public law, administrative or regulatory integration, is a relatively late development in the history of the Union, and one likely to encounter substantial resistance from certain actors in the Member States. In order to define the scope of this paper, I identify tort, property and contract as the private law fields where pressure towards Europeanisation is strong and traditional state-specific doctrines unlikely to yield. I also describe how, in the culture of European jurists, private legal science has aspired for centuries to one form or another of conceptual wholeness. This point is essential to an understanding of how the current process of integration, parcelled as it is in bits and pieces of legislative intervention, may be perceived as disruptive of code systems.

A Private Law in Continental Europe: A Definition

In the legal tradition of continental Europe, private law consists of an integrated system of rules, standards and principles, which together form an autonomous subset, conventionally severable from the rest of the legal regime of which they are part[4]. To

[4] For the sake of simplicity, we shall focus here on the continental version of the private/public distinction, as exemplified by the basic institutional models of France, Germany and Italy. Unlike the civilians on the Continent, British and Irish lawyers have never adopted a highly developed scheme of rigid classifications. Still, they may sufficiently share with their continental colleagues the tacit assumption that tort, contract and property law do belong to the same conceptual category. This conventional assumption relies on rather pragmatic grounds: all of these subjects originated in the common law courts of England; all relate to the private enjoyment of commodities; and all involve the dispersed adjudication of individual disputes, as opposed to centralised regulation and legislative fiat addressed to the public at large. It seems plausible, therefore, to conflate civil- and common-law perspectives when discussing the impact of European legislation on the national private law of all Member States.

be sure, in the sixth-century document that is still identified as the original source of civil law – Justinian's *Corpus Juris Civilis* – private law doctrines did not display any real internal consistency[5]. It was only in the Middle Ages that the philosophical yearning for a coherent system of knowledge entered the minds of continental legal scholars, who then spent centuries binding the many doctrines of Roman law into a unified framework[6]. These immense classificatory efforts would allow the packaging of private law in modern legal history as an autonomous sub-universe. As such, private law could be exhaustively reproduced in the civil codes of modern Europe, develop its own conceptual categories, and lend itself to the ideology of new-born nation-states. As a result of these developments, both the *Code Napoleon* and the German *BGB* – as well as the other European codes which, to a greater or lesser extent, model themselves after the French or German framework – could be conceived and drafted as self-contained systems, internally coherent and self-referential. In the drafters' mind, nothing left outside a code should be necessary and nothing necessary should be left outside. The 'private law' enshrined in the codes did not mean simply 'law that is private,' but stood for a huge theory-machine into which jurists could feed raw fact patterns and subsequently retrieve finished judgments.

That civil codes constitute an autonomous portion of the legal universe is still a widespread belief in present-day Europe. Contemporary private law is supposedly concerned with the horizontal dimension of citizens' interaction, based on a presumption of the formal equality of individuals[7]. By contrast, whenever private citizens engage in vertical legal relationships with public institutions, which are meant to pursue the public good and are therefore endowed with sovereign power, private law doctrines fade from view, replaced by doctrines arising in other legal spheres.

Relying on the horizontal nature of the interaction between, say, sellers and buyers, landlords and tenants, or victims and tortfeasors, private law codification encompasses mainly such subjects as contract, property and tort. Most civil codes are also the primary source of law on such matters as legal capacity and family and inheritance law. These subjects, often covered by private international law conventions, exceed the scope of this research. As it happens, European integration relies most visibly on market forces and economic drive. Personal status and family ties matter only insofar as they have market-related ramifications and, at least for the time being, have not been subject to perceptible control by EC supranational legislators. The game of integration, therefore, affects primarily the realm of private commodities, as enjoyed or transferred by individual actors against a background of tort, contract and property rules. This narrow tripartite version of private law defines the scope of the following analysis and controls the agenda of this research.

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[5] W. Kunkel, *Römische Rechtsgeschichte. Eine Einführung* (1972) [*Linee di storia giuridica romana*, Napoli, 1973, 225].

[6] By the end of the twelfth century, the School of the Glossators began to apply formal logic to the *Corpus Juris*, just as scholastic theologians did to the Scripture. Cf R.C. van Caenegem, *An Historical Introduction to Private Law* (1992) 48–49.

[7] *Ibid* at vii ('Private law is concerned with individual men and women whose relations, one hopes, will be harmonious; otherwise the courts intervene and settle their disputes peacefully and authoritatively.'). 'Formal equality' pertains only to the lack, on both parties to a private law relationship, of sovereign power. It has nothing to do with 'substantive equality', i.e. equality of bargaining power or of access to commodities.

B The Doctrinal Autonomy of Private Law

Foreign observers have wondered how such simple overarching partitions as the public/private distinction could survive the social and political changes of the last two centuries. A brief explanation of this phenomenon is due at this point, as this entire paper assumes the persistence, in the legal world-view of European jurists, of some formal autonomy of private law and civil adjudication[8].

The rhetoric of private law coherence, as expressed through comprehensive codes and satellite statutes, rests on the above-mentioned horizontal nature of interaction between private persons. Private law endows individuals with rights that their fellow citizens are supposed to respect. The State too must respect individual entitlements, both contractual and proprietary, with the sole exceptions provided for by constitutional principles (e.g. the taking of property for social use) and by the legitimate administrative pursuit of public welfare (involving vertical, asymmetrical relations between sovereign and subjects).

As it happens, this basic construct has remained the same in the face of the major social changes European society has undergone since the drafting of the codes. Some reforms of private law took place discretely, through judicial interpretation of existing provisions, or through constructive amplification of any paternalistic nuances in the original codes. At times, when the necessary presumption of equality amongst private actors became untenable, legislators would intervene to 'level the playing field', allowing private law doctrines to remain unchanged. For instance, by specifying and proscribing abusive clauses in contracts of adhesion, law-makers attempted to equalise the bargaining power of the parties to a consumer transaction and thereby make it socio-politically acceptable for ordinary contract doctrines to continue to apply as default rules. Similarly, rent-control legislation was meant to restrain the ability of landlords to increase rents arbitrarily and to restore the conditions for the workability of private law principles in the housing context.

At times, the impact of regulation on private autonomy was so intense as to exceed the conventional scope of private law. New subject matter would then simply grow forth out of the civil codes to be formally subsumed, in whole or in part, into the public realm of administrative law or criminal sanction. Labour contracts – which, like so many other private transactions, have their origin in the Roman law of obligations – provide an outstanding example of such a development. They are heavily wrapped in administrative regulation, fenced in with special rules of procedure, surrounded by constitutional guarantees and, at some points in history, reinforced by criminal sanctions. But even within such multiple layers of public law, courts are supposed to resort to ordinary private contract rules where any room exists for a formally equal relationship between labour and capital.

C The Public/Private Distinction: Self-reinforcing Mechanisms

On a practical level, most continental systems reinforce the public/private dichotomy by keeping public law out of their courts of ordinary jurisdiction. The judicial review of

[8] Parallel attempts to reduce private law to one form or another of conceptual wholeness are to be found in pre-realist American law. Cf Horwitz, 'The History of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1423. The sense of the private/public distinction has survived legal realism and is still visible in US law, although along lines quite different from the European ones. Cf Barnett, 'Foreword: Four Senses of the "Public-Private" Distinction', (1986) 9 *Harvard Journal of Law and Public Policy* 267.

administrative acts is in the purview of an autonomous system of courts, formally belonging to the State's executive branch. In no way can the judiciary check the civil servants' use of administrative discretion. This stark distinction between administrative and civil jurisdiction, reifying Montesquieu's separation of powers in a most rigid fashion, is regularly highlighted in comparative law treatises as an outstanding peculiarity of the civil law tradition[9]. Less well-known is the fact that this jurisdictional division often entails, for all practical purposes, a parallel division of practising lawyers into specialists in either public or private law, and that legal academia mirrors this dichotomy to an extent unthinkable in any school of law in the United States[10].

A further descriptive approach to the private/public distinction is of an institutional nature. Some recent literature on neo-institutional economics shows how given sets of laws, rigid judicial structures, legal patterns arising from culture or tradition, and even the most informal constraints that shape the interaction of legal actors, may result in institutional inertia. This literature suggests that path dependence – in our case, the perpetuation of an obsolete dichotomy in terms of practice, language and collective psychology – may be the outcome of self-reinforcing institutional mechanisms, such as large fixed costs, learning effects, and adaptive expectations[11]. Many mechanisms of this sort do work and thrive in the aforementioned European traditions of judicial organisation, academic training and legal practice. The descriptive category of path dependence helps, therefore, to explain the astonishing longevity of the private/public distinction[12].

As it happens, the obsolete public/private distinction, rather than simply ruling European scholars from its grave, is forever reincarnated in new forms and never fails to shape legal theory and practice. To be sure, the fact that private law rules are, in fact, forms of public regulation is, in some cases, so obvious as to shake the doctrinal foundations of the private/public distinction. But just as artificial dams do affect the way rivers flow, the synthetic partition of the law into 'public' and 'private' realms does have an impact, as we shall see, on the direction and rhythm of European integration, and cannot be dismissed merely because it is theoretically unconvincing.

D Private Law Autonomy and European Integration

The six European nations that signed the Treaty of Rome in 1957 each had an autonomous, self-contained and functionally independent civil code, applied and

[9] 'In a civilian mind, all law is automatically divided into private law and public law. This dichotomy, recognised by Ulpian (d. 223 A.D.) and reflected in Justinian's Digest (Dig. 1, 1, 1, 2), was never questioned by Roman scholars from Irnerius to Savigny and was left intact by the codifiers. . . . The codes, if anything, deepened the chasm between the two spheres of law. . . . From a practical standpoint, the great importance of the dichotomy lies in its jurisdictional aspect.'R. Schlesinger *et al*, *Comparative Law. Cases-Text-Materials* (Foundation Press, 1988) 300. Cf Merryman, 'The Public Law-Private Law Distinction in European and American Law', (1968) 17 *Journal of Public Law* 3.

[10] Cf Lonbay, 'Differences in the Legal Education in the Member States of the European Community', in B. de Witte and C. Forder (eds), *The Common Law of Europe and the Future of Legal Education/Le droit commun d'Europe et l'avenir de l'enseignement juridique* (1992) 75, 84 (describing the division of French law students into public and private law streams after completion of the basic legal education).

[11] Cf Arthur, 'Self-Reinforcing Mechanisms in Economics', in P. W. Anderson *et al* (eds), *The Economy as an Evolving Complex System* (1988).

[12] Cf D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990), 92–104 (discussing path dependence as a factor in the development of legal and economic structures).

interpreted by a distinct national judicial system. Even where the codes of two nations, for historical reasons, shared identical black-letter law, there was no reason to assume that the two nations' courts would follow identical patterns or even borrow from each other's experience in adjudicating analogous cases.

The national nature of private law was the product of more than simply a history of parallel legislative enactments by different States. Rather, it derived from the historical identification of civil codes with the political and ideological birth of the modern European nation-states. The 1804 *Code Napoleon* survived its spiritual father's military and political destruction, and later withstood the shattering blows of the twentieth century, yet continues to proclaim the libertarian conquests of French citizens – property and contract – and to guard individual rights and privileges against *anciens régimes* of all sorts. In a different but no less dramatic historical context, the *Bürgerliches Gesetzbuch* of 1896 realised Bismarck's nationalist dream of a united Germany in the legal sphere. In similar fashion, Italy's 1865 civil code set forth the uniform rights and duties of citizens under the newly-united Italian sovereignty that replaced the earlier patchwork of minor peninsular statelets. The civil codes reified the very existence of nation-states as political and legal units, and, in this sense, bore the symbolic weight of constitutional charters[13].

Given this background, it should come as no surprise that the Treaty of Rome was exclusively public in inspiration and scope. At least in principle, the four freedoms the Treaty was meant to ensure – namely, the free transborder movement of goods, services, people and capital – could be achieved without reference to the substance and structure of the civil codes. The designation of the six founding States as a single free trade area, for example, would imply the abolition of tariffs and custom duties – public law subjects traditionally handled by executive *functionnaires*. The requirements for establishing one's profession in a foreign country were also a matter for administrative rules and governmental agencies, while banking regulations and taxation of financial transactions were part of the quintessential domain of state sovereignty: fiscal and monetary legislation.

This reassuring breakwater, sheltering the national codes from Europeanisation and restricting EEC law-making to the regulatory realm, would not hold long; the public/private distinction, to which the architects of the European Communities had paid such homage, began to buckle under heavy functionalist pressure.

The progressive abolition of interstate barriers hindering the free flow of goods throughout the Community best illustrates how European regulation would soon spill over into the domain of private law. The framers of the Treaty of Rome, in order to promote and establish a seamless market for goods, had expressly prohibited any 'quantitative restrictions on imports and all measures having equivalent effect'. This sweeping prohibition allowed the European Court of Justice to outlaw many obvious physical trade barriers mandated by Member State regulatory authorities, such as sanitary inspections by customs officials of perishable goods, or certification-of-origin requirements. Many aspects of state regulation, however, could pass muster under Article 30, and yet still operate as a hindrance to interstate trade. Some States, for example, imposed particularly stringent safety requirements for industrial machines or consumer products, and justified them with unobjectionable data on a state-specific work ethic or habits of consumption. In such cases, Community institutions had to

[13] For critical remarks on this point cf Gambaro, 'Codes and Constitutions in Civil Law', in A. Pizzorusso (ed), 2 *Italian Studies in Law* (1994) 79–104.

rely on a different Treaty provision in order to promote free trade: Article 100 empowered the Council to 'issue directives for the approximation of such [Member States' laws] as directly affect the establishment or functioning of the common market'. Many standards for industrial production fell clearly within the scope of Article 100; thus by means of harmonising directives, the Community could require Member States to agree on a mutually satisfactory level of product safety, or at least not to oppose imports of foreign goods on safety pretexts.

Through the mid-1980s, such harmonising efforts had been slowed down by the need to reach unanimous consensus in the Council in order to enact any directive. But the 1986 Single European Act (SEA) brought some major changes to the 1957 Treaty of Rome. In particular, a new Article 100A did away with the requirement of unanimity in most matters of harmonisation. As a result, in many crucial areas, one single State could no longer veto the enactment of EC legislation agreed upon by a majority of Council Ministers. Article 100A was successfully advertised as a merely technical instrument to the achievement of a goal – the abolition of internal trade barriers – already agreed upon by all Member States. The new provision would yield the scarcely objectionable result of regulatory uniformity concerning, for example, safety requirements for industrial machines[14] or educational prerequisites for the exercise of certain professional activities[15]. The practical, and by then politically neutralised, nature of technical harmonisation posed no particular threat to the Member States' sovereignty and enabled them to accept with little objection this crucial modification to the decision-making structure of the Treaty.

Thanks to the new provision, a plenitude of directives allowing for the harmonisation of (legal) rules and (technical) standards throughout the common market could at last be swiftly passed. And along the conceptual avenue of harmonisation, conveniently paved by the SEA reform, Brussels found its way into the realm of private law.

E Community Legislative Powers in Private Law Matters

Community legislation draws its legitimacy from that partial surrender of national sovereignty enshrined in the founding Treaty. The list of enumerated Community powers, however, although sensibly enlarged by the Maastricht Treaty, does not explicitly include private law. In order to tinker with civil- or common-law rules, therefore, Community legislators needed to show how the very task of achieving a common market required them to harmonise the private laws of the several Member States. In the words of Article 100A, they had to state, persuasively, that national private laws did 'directly affect the establishment and functioning of the common market', so that they could legitimately 'issue directives for the approximation of such laws'.

Consumer protection proved to be one legitimising device. In the early 1970s the Commission began, with questionable but effective syllogisms, to explain that consumer interests were unavoidably affected by common market regulation, and

[14] Council Directive 89/392, OJ L 183/9 (29 June 1989).

[15] Council Directive 89/48/EEC of 21 December 1988, OJ L 19/16 (Jan. 24, 1989) (establishing 'a general system for the recognition of higher-educational diplomas awarded on completion of professional education and training of at least three years' duration').

therefore their protection had to be a prime objective of the Community[16]. This rhetoric of necessity, supported by functionalist literature and worded in the trendy language of consumerism, served to expand the scope of Community powers well into the domain of national contract and tort laws. 'Purchasers of goods or services', the Commission went on to explain, 'should be protected against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling methods'[17].

The goal of levelling the playing field of competition, with which the Community was entrusted by the Treaty itself, was also to reinforce the functional connection between EC harmonisation and private law. In fact, not only did that goal call for some degree of public market regulation, it also required a general legal regime that would afford competitive business opportunities to all manufacturers. Impediments to the free interstate trade of goods were soon found lurking in private law, as for example in the imposition of different sales rules on merchants in different States, or in the different allocations of production risks between manufacturers and consumers. As one reads in the preamble to the product liability directive (requiring all Member States to shift from the traditional fault-based regime to a consumer-friendly rule of strict liability for defective products), '[a]pproximation of [Member State] laws . . . is necessary because the existing divergencies may distort competition and affect the movement of goods within the common market . . . .'[18]

Such examples indicate that, in so far as Brussels derives its functional competence from the goal of establishing an internal market, it enjoys potentially unlimited powers in private law subjects. Turning functional competence into active harmonisation, however, is a task of uncertain feasibility, depending on the existence of given circumstances[19].

First, harmonisation is a viable option in matters in which Member States have already achieved full consensus and will freely assent to a European fiat. Consensus is to be found, in the first place, where the States' doctrinal and jurisprudential traditions happen to be sufficiently similar. Alternatively, consensus may stem from a shared need for regulation in new areas, such as Europe-wide protection of emerging forms of intellectual property. Rather than having developed essentially identical individual legal traditions in such matters, here the Member States are as one in their utter lack of tradition. When any rule is better than no rule at all, consensus is easy to achieve.

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[16] Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ C 92/2 (25 April 1975), at § II.14 ('Given the tasks assigned to the Community, it follows that all action taken has repercussions on the consumer. One of the Community's prime objectives, in general terms, is therefore to take full account of consumer interests in the various sectors. . . .').

[17] *Ibid* at § II.B.19. (a) (i).

[18] Council Directive 85/374/EEC of 25 July 1985, 1985 OJ (L 210) 29.

[19] Uniformity, in an ideal EU, would be both substantive and procedural. Not only would black-letter law be the same in all Member States, as if diligently copied or faithfully translated from a single private law code, but judicial remedies would reflect an identical sense of procedural justice as well. Damage awards, for instance, would look alike in like cases, as they would stem from analogous doctrinal guidelines and uniform computational methods. Identical criteria would govern the allocation of legal expenses among private litigants, and identical canons would govern the ethics of their counselors. On the need for homogeneity of remedies W. van Gerven, 'Bridging the Unbridgeable: "Who, then, is my neighbour?" in Community Tort Law', Durham European Law Institute, European Law Lecture, 24 November 1995. In the real world, however, the EU strives towards less ambitious goals.

When neither situation obtains, the EU must aim a little lower. As it happens, Member State legal systems do deal with most subject matters, and do so in doctrinally sophisticated ways marked with all the idiosyncrasies of the fifteen nations. In such cases, the institutional channels of private law harmonisation may simply not be viable. The Union may then engage in less explicit forms of legal integration. One form of 'oblique' integration, which deserves separate and more extensive research than this paper allows for, lies in the ECJ's role as interpreter of conventions of private international law[20]. Another indirect path towards private law harmonisation is to be found in the increasing accumulation of cross-national academic consensus.

F The Indirect Promotion of Private Law Harmonisation: A Hypothesis on the Role of Legal Scholars

Active promoters of private law integration may be found amongst legal scholars. The movement is by no means a sweeping one in Member States' academia. On the contrary, focusing on private law scholarship only, and overlooking a few notable exceptions, one may observe a general reluctance of law professors to put the primary emphasis of legal studies on the European level. This attitude may be explained by resorting, once again, to the motives underlying the public/private distinction: the doctrinal, the practical and the institutional. EC law was born to academic life from the womb of public international law, and very recently at that. Its inroads into private law are still rare and of a technical, uninspiring nature. The internal coherence of civil law courses – or common law courses, on the other side of the Channel – still rests entirely on national foundations. The learning costs necessary to master the doctrinal refinements of EC law are prohibitively high. In other words, most private law scholars display a serious degree of path dependence. Yet it is precisely among their ranks that the Union needs to recruit its workforce: specific knowledge and doctrinal sophistication are, in fact, essential to produce a European civil code of saleable quality. The following is a plausible path for recruitment.

Private law departments throughout the Union are the home of Cinderellas of an intellectual type, whose esoteric expertise in either legal history or comparative law used to be rather tangential to mainstream legal education[21]. Their role is now bound to be much more important.

Historians allow the Union to rediscover its private law roots. They remind lawyers of all jurisdictions that, during the first five centuries of this millennium and until the dawn of the modern nation-state, legal science had been transnational (pan-European) in nature. The *jus commune*, uniformly taught in Latin in the universities of the Continent as well as at Oxford and Cambridge, consisted of Justinian's restatement of Roman Law – the *Corpus Juris Civilis* – as polished, annotated, modernised and eventually brought to internal consistency by several generations of mediaeval scholars. The itinerant nature of university students in the Middle Ages facilitated the spread of the *jus commune* throughout Europe; and its prestige often allowed it to prevail over local customs. Further vehicles for uniformity were canon law, consistently applied by

[20] Cf Caruso, 'Note in margine al convegno: The Common Core of European Private Law, in The Trento Common Core Project: Papers and Comments', (1995) *Cardozo Electronic Law Bulletin* [WWW.gelso.unitn.it/card-adm/Common.core].

[21] Cf Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', (1985) 26 *Harvard International Law Journal* 411, 416–421 (characterising comparative law scholars as 'Cinderellas' in the step-family of legal academia).

ecclesiastical tribunals wherever the jurisdiction of the Roman Church was recognised; and the law merchant, applied by guilds and merchants' associations to govern business transactions wherever Roman or other customary law proved inadequate, and which eventually developed into a set of transnational legal rules.

Until recently, arcane subjects of this sort were merely ancillary to basic legal education. But the ongoing project of European integration is now transforming the rediscovery of the *jus commune* from a mere intellectual curiosity to fashionable political discourse. Obviously, the notion of a unified European private law may draw legitimacy from its own ancient roots. From their remote perspective, legal historians may deem the nineteenth and twentieth century partitions erected among Member States by positivist legislators a parenthetical accident, an ephemeral misstep in the march of progress.

Legal history happens to be also a precious ally of comparative law. History highlights the contingent nature of States' boundaries, as well as the fact that, as time goes by, legal models circulate and migrate from one country to another[22]. Such data have always provided comparativists, once uneasy in the step-family of legal academia, with some tangible justification for their fondness for non-municipal law. For many decades these scholars have compared, say, French and English contract law, German and Italian transfers of real property, or civil- and common-law approaches to fiduciary obligations. But only if able to contribute immediately to the jurisprudence of their own legal systems could they win the recognition of mainstream lawyers. Recently, however, their expertise has increased enormously in value. In fact, the harmonisation of private law requires control of several (legal) languages, general understanding of foreign legal systems and sensitivity to their many idiosyncrasies, highly technical knowledge of given subject matters and, not least, personal acquaintance with foreign lawyers. By definition, comparativists possess all these qualities.

The European Commission – notoriously the most Eurocentric institution of the Union – benefits from the spontaneous contributions of both historians and comparativists, usually in the form of scholarly writings illustrating a number of viable paths to private law integration[23]. Occasionally, however, the Commission engages in indirect forms of recruitment. For instance, it promotes, with rather generous funding, comparative research projects on given subjects, harmonisation of which seems technically difficult or politically controversial. Such projects are indeed welcome in legal academia, and even more so in traditionally marginal areas. They revive intellectual debate, sharpen the competitive edge of once-peripheral subjects and allow academia to participate, more or less directly, in the task of drafting European legislation. Most importantly, such projects are not result-oriented: scholars of the utmost integrity are asked to search for the differences, as much as for the similarities, of the various European systems on given legal topics, and they do so with truth-seeking, insightful methods[24]. This is, for the time being, enough for the Union: all

[22] Cf A. Watson, *Legal Transplants. An Approach to Comparative Law* (1974).

[23] See publications such as the *European Review of Private Law* and the *Zeitschrift für Europäisches Privatrecht.*

[24] The University of Trento, Italy, is currently running a research project seeking to define 'The Common Core of European Private Law'. The project is conducted by academicians from all Member States and enjoys the contribution of non-European comparativists. On the result-free approach of the Common Core project, Mattei and Bussani, 'The Trento Common Core Project', (1995) *Cardozo Electronic Law Bulletin* [WWW.gelso.unitn.it/card-adm/Common.core]. It has been noted, however, that '[l]egal comparativists have often very strongly argued in favour of [. . .] European harmonization of private law'. T. Wilhelmsson, *Social Contract Law and European Integration* (1995), p 2.

that matters is that intellectuals are engaged in the task of private integration, detecting technical barriers or ideological difficulties, and elaborating practical solutions in all possible directions[25]. After all, the chasm separating private lawyers from public international lawyers allows the former to work independently of any institutional agenda.

III Private Law Integration: Instances of Resistance

The resistance of Member States to private law harmonisation does not mobilise *en bloc* all components of each legal system (courts, legislators and legal scholars). Rather, it takes unpredictable, uneven forms and is, therefore, much harder to detect. Resistance is, moreover, often bypassed or neutralised by the strategic choices of EU law-makers, who engage in direct harmonisation of private law only after taking measures to win the hearts and minds of the Member States. What resistance remains is, however, sufficient and sufficiently consistent to signal some national discomfort with any European attack on the 'internal coherence' of the civil-code structure (or of its equivalents in non-codified systems). This section shows how Member State resistance may materialise into instances of national law-making and civil adjudication intended to preempt interference from the centre.

The following paragraphs provide three different examples of private law integration. The first one concerns the harmonisation of the product liability regime throughout the EU and focuses, in particular, on France's failure to implement the Product Liability Directive of 1985. This is an instance of legislative resistance to harmonisation. Judicial resistance is, instead, the focus of the second example in this Part. We shall observe how and why national courts have mostly resisted, in fact if not in principle, the European urge for a private enforcement of antitrust claims. The third example looks at the impact of EU directives on the adjudication of contract controversies. Encompassing both judicial and legislative resistance, it explores, on the one hand, how the process of harmonisation requires legislators to rediscuss the (often unspoken) value choices underlying national private law rules. For this reason, harmonisation often faces one form or another of passive resistance by national law-makers. On the other hand, the subject of contract law harmonisation shows how the celebrated compliance of national courts with the cause of European integration may fade when control over private law adjudication is at stake.

A Harmonisation through Directives and Legislative Resistance: The Example of Product Liability

As observed, EC directives are tools particularly well-suited to the task of harmonisation. Although directives provide a legislative framework and mandate a basic core of uniformity in a given sphere, they leave the details, and the choice of

[25] In 1990 the EC Commission requested a group of experts, including well-known scholars of comparative procedural law, to draw up a study on the approximation of procedure in the then twelve Member States. The group, which shared the Commission's concern that 'the existing divergencies in the field of civil procedure directly and most seriously affect the establishment and functioning of the internal market', proposed that the Commission create a greater uniformity through a series of directives. M. Storme (ed), *Approximation of Judiciary Law in the European Union* (1994).

For all this dynamic towards a unified European procedural code, however, the Brussels Convention remains the most thorough attempt to coordinate Member State civil procedure to date.

means to achieve the stated objectives, to Member State law-makers to flesh out in ways compatible with each of the fifteen legal systems.

In 1985, the Community enacted a product liability directive with the stated goals of providing consumers with a uniform degree of protection and of creating a level playing field for consumers and producers[26]. This harmonising measure required all Member States to shift, where necessary, from a traditional fault-based rule of liability for defective products to a more consumer-friendly regime of strict liability. The directive constituted Brussels' first serious attempt to wrest from the Member States a measure of their previously undivided control over their respective tort law. Perhaps the States might have been expected to balk at Brussels' move; but by the mid-1980s, all Members had already developed some sensitivity towards the problem of product liability and determined individually to provide accident victims with strengthened legal protection. The directive was able, therefore, to obtain unanimous approval in the Council.

Implementation of the directive, however, proved rather a more difficult task. In both the civil and the common law, tort liability was, as a general principle, fault-based, and plaintiffs bore the burden of proof. To be sure, the judiciaries of the different nations had found one way or another, within their respective private law systems, to mitigate the harsh traditional rules and impose somewhat stricter standards of liability for defective products. Such judicial solutions, however, were often incoherent, rooted as they were in a variety of doctrines, and bore the stigma of case law fragmentation. Implementation of the product liability directive required an enormous effort to rationalise this disaggregated body of national private laws, and the governments of Member States had to summon well-known scholars to perform it.

More than ten years have passed since the EC Council enacted the product liability directive; in that time, every nation in the Union has implemented it, save France[27]. The reasons why the French National Assembly has failed to produce implementing legislation are complex and make an outstanding case of resistance to private law integration.

When the Commission first sued France before the ECJ for failure to implement the product liability directive, the French tried – if only feebly – to justify the delay. As the inefficiencies of national political mechanics hardly make for a good excuse in such cases, the French government did not plead at length the heavy workload of its deputies. Rather, it asserted doctrinal motives, claiming that the directive was irreconcilable with French law and posed problems of integration in the current code-based system. The doctrinal argument is worth exploring.

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[26] Solente and Claret, 'France: Recent Developments through Court Action', (1994) *Lloyds Product Liability International*, 30 September 1994: 'a more lenient regime relating to product liability in one Member State would unfairly prejudice manufacturers of other states (whose product costs would reflect higher insurance premiums), thereby distorting competition between manufacturers'.

[27] A *projet de loi* on implementation of the product liability directive underwent two readings in the National Assembly in 1992, but was then withdrawn from the Assembly's agenda right before a final vote could take place. The ECJ has already condemned France's breach in an opinion rendered on 13 January 1993 (C-293/91, *Commission v. France*). In 1995, the Commission inititated new proceedings against France for failure to comply with the ECJ's decision. Cf Davis, 'European Union. Liability for Defective Products', (1996) 4 *Consumer Law Journal, Current Survey* 15–16. Cf also the first report of the Commission on the application of Council Directive 85/374 [COM(95) 617 final, 13 December 1995]. In general, the litigation on product liability has not increased in national courts since the enactment of the directive. Most interestingly, no question of interpretation ex Art. 177 has been submitted to the ECJ concerning Directive 85/374.

Existing French law already embodied a *de facto* regime of strict liability for defective products. French courts have long relied on the code provisions on sales contracts in order to provide strict liability protection to victims of product-related accidents. In particular, courts have construed out of the seller's obligation to deliver conforming products, and to guarantee the goods against hidden defects, a manufacturer's obligation to provide a safe product. To be sure, this construction of private contract rules has required a few interpretative stretches, such as a loose application of time-barring provisions, and the attribution to the final buyer of a defective product of an action directed against the manufacturer, despite the lack of contractual privity between the two[28].

In any case, victims other than purchasers cannot avail themselves of contractual warranties, and must resort to tort doctrines. In general, fault-based remedies for tort would require plaintiffs to demonstrate negligence on the part of manufacturers – a notoriously heavy burden of proof. However, the *Code Napoleon* also mandates strict liability for things in one's care[29]; by far-fetched interpretation of this provision, French courts have often found producers to retain control over the 'dangerous dynamism' of their products[30].

A comparative assessment of the current French regime and a regime that would satisfy the demands of the EC Directive yields ambiguous results. On the one hand, the French government may well consider its national provisions more consumer-friendly than the directive: because French product liability doctrine has its roots in the contractual warranty against latent defects, it encompasses the liability of both seller and manufacturer, whereas the directive only provides for manufacturer liability. The directive, moreover, covers only certain damages, and relates only to defects affecting the safety of goods. The French warranty against latent defects covers, by contrast, any flaws in the product, and mandates the total redress of a plaintiff's losses. Most importantly, the directive permits Member States: to exclude agricultural products from the strict liability regime; to accept as a valid defence the state-of-the-art exception, i.e. to exempt producers from liability for risks not yet detectable at the time in which products were put into commerce (so-called development risks); and to impose a cap on recoverable damages. States taking advantage of such options could install a considerably less consumer-friendly regime than the one currently in place in France[31].

On the other hand, the directive does contain mandatory provisions that would raise the standard of legal protection for accident victims. Implementation would, for instance, eliminate differences between purchasers and third parties; relieve plaintiffs from the burden of proving that the product was already defective at the time of sale; and relax the code's 'statute of limitation' for damage claims. From this perspective, the French system may still be too rigid and require substantive change to provide

[28] And even so, implied sales warranties may prove difficult to enforce, as they are, according to code prescription, narrow in scope and easily time-barred.

[29] Article 1394, para. 1.

[30] Cf. C.A. Versailles, 5 February 1988 (1988) *Recueil Dalloz IR* 103.

[31] French courts have rejected the state-of-the-art defence, holding the producer responsible for so-called development risks (see C.A. Paris 28 November 1991, 1992 *Recueil Dalloz* 85, *7ème Cahier*, holding in a blood transfusion case that, because of the irrebuttable presumption that a seller in the course of business is aware of the defect, the supplying organisation is responsible for the defect in the blood, even if it was undetectable), and have treated agricultural products as any other products (Cass. Civ., 14 January 1965, 1965 *Recueil Dalloz* 389). As for the damage cap, France would most probably reject this option. Cf Solente and Claret, *loc cit*, n 26.

protection to injured victims which meets EU standards. Even the French judiciary seems to endorse this viewpoint and to be growing less and less tolerant of the doctrinal requirements of the French code[32].

Why, then, resistance? Brussels' mandate might have been welcomed as an opportunity to rationalise, at last, within a general no-fault system, the maze of doctrines currently governing product liability[33]. Why, then, did it bring about instead a veritable paralysis in the National Assembly?

The doctrinal difficulties invoked as excuses by the French government do not suffice as exhaustive explanations. Rather, parliamentary inertia may be explained by a lack of political consensus on crucial aspects of the directive: should farmers incur no-fault liability for primary agricultural products? Should haemophiliacs infected by the AIDS virus have full recourse against pharmaceutical companies, even when the latter could not possibly have detected the presence of the virus in their products? The directive imposes an obligation upon the National Assembly to legislate actively on the basis of – and thereby to make explicit – economic choices concerning the allocation of production risks[34]. The current regime leaves it instead to the civil courts to adjudicate, in a piecemeal manner and behind the ideologically neutral screen of code provisions, the most sensitive issues of product liability.

B Private Antitrust Claims: A Case of Judicial Inertia

In the original framework of the Treaty, the EEC would have to take on the macro-regulation of competition within the common market. A coordinated effort to break monopolies and make market entry possible for small enterprises was, in a sense, the necessary precondition to an integrated Europe and went hand in hand with the desired free flow of goods, services, capital and people[35]. What was less obvious, and

[32] Pending legislative implementation, some courts have recently sought to align the provisions of French law with the EC Directive by enforcing a general 'safety obligation' in favour of consumers: see *Albespy*, *RJDA* 6/93 no. 488. This new, judge-made doctrine seems strikingly independent of the requirements for torts- or sales-based claims and has been phrased in quite sweeping terms. The *Albespy* doctrine covers 'any defect which could give rise to danger in respect of persons or goods', whereas traditionally defects had to be defined in relation to intended use and specification. There is no limit to the recovery of damages to property, and the time-barring provision of Article 1641 does not apply. No defences need be read into the doctrine, nor does the victim need to be the actual purchaser of the product. Plaintiffs must, however, still prove that damage resulted from a defect in the product. Cf Solente and Claret, *loc cit*, n 26.

[33] The draft bill proposed by Professor Ghestin suggested, in fact, the introduction of a new title in the civil code, specifically concerned with 'liability for defective products' and doctrinally severed from general torts or contracts law.

[34] For an account of the political debate in the National Assembly cf Franck, 'Product Liability: Incorporation into National Law Impossible?', (1994) 2 *Consumer Law Journal* 83.

[35] The key principle of European antitrust, at least in its conception, was not so much economic efficiency, but rather integration. Hawk, 'Antitrust in the EEC – The First Decade', (1972) 41 *Fordham Law Review* 229, 231. The Commission – the EU institution most directly involved in antitrust enforcement – was put in charge of dismantling all undertakings' agreements (whether horizontal or vertical) which produced or sclerotised the partitioning of Europe along Member States' borderlines. The task was, on its face, one for the Community as a whole. Moreover, national anti-monopoly laws were mostly undeveloped; and in an early case of conflict with Germany – the only Member provided with a specific statute on the matter (*Gesetz gegen Wettbewerbsbeschränkungen [GWB]*, 1957. On its genesis cf. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe', (1994) 41 *American Journal of Comparative Law* 25, 64–66) – the ECJ made clear that local antitrust authorities were not to prejudice the uniform application of the Commission's policing guidelines (*Walt Wilhelm v. Bundeskartellamt*, Case 14/68, 1969 ECR 1.)

difficult to foresee in the dawning days of the Union, was the fact that EU antitrust enforcement would avail itself of national private law remedies to afford victorious plaintiffs monetary recovery. Private actions can be grounded either on Article 85 of the Treaty (concerning anti-competitive agreements) or on Article 86 (prohibiting monopolistic conduct of single enterprises)[36]. Both the Commission[37] and the ECJ[38] have repeatedly asked national courts to assist such private actions with adequate private remedies. But what are the odds of obtaining direct monetary recovery in a private antitrust suit?[39] How willing are national courts to enforce EC competition law? Do they really comply with the obligation to enforce private claims stemming from EC law just as effectively as if they were founded upon national provisions?[40]

National courts have mostly proclaimed, in principle, the availability of damage awards in EC antitrust cases[41]. In practice, however, there are virtually no such awards[42]. To begin with, private antitrust cases are rarely filed. Potential private plaintiffs, when assessing the pros and cons of the 'domestic strategy' (suing misbehaving competitors in national courts) *vis-à-vis* the 'Brussels strategy' (filing a complaint with the Commission), are led to choose the latter alternative[43]. To be sure, the Commission may only fine the undertaking in breach of EC law; in no way can it grant the complainant monetary compensation. Domestic courts, at least in principle, can[44]. On the other hand, domestic courts mostly lack the powerful tools of discovery and the investigative resources of the DG IV; therefore they experience difficulties in

[36] A number of Treaty articles, including Articles 85 and 86, may serve as immediate sources of private claims. The doctrine of direct effect relies on the existence, in each Member State, of a set of private law rules and remedies. The effectiveness of the antitrust provisions of the Treaty, for example, presupposes public, regulatory enforcement by state authorities on the one hand, and the availability of private antitrust actions on the other. Such private actions sound primarily in tort, and occasionally in contract.

[37] Cooperation Notice OJ 1993 C 39/6, 4 CMLR 12, esp. at §§ 13–16 (1993).

[38] Case 127/73 *BRT v. SABAM* [1974] ECR 51, at § 16 of the judgment (emphasis added): '[a]s the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights [. . .] which the national courts must safeguard.'

[39] For an insightful and thorough analysis of this topic, dated 1984, cf Temple Lang, 'EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law', (1984) 7 *Fordham International Law Journal* 389.

[40] '[I]t is for the domestic legal system of each Member State to [. . .] determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. . .' (*Denkavit*, Case 61/79, [1980] ECR 1205, at § 25 of the judgment).

[41] Cf Francis, 'Subsidiarity and Antitrust: The Enforcement of European Competition Law in the National Courts of Member States', (1995) 27 *Law and Policy in International Business* 247.

[42] Exceptions may occasionally be found. As early as 1964, a Belgian corporation injured by the discriminatory pricing practices of three colluding competititors was awarded monetary relief *ex* Articles 85 and 86, local doctrinal hurdles notwithstanding (*Union de Remorquage et de Sauvetage v. Schelde Sleepvaartbedrijf* [1964] CMLR 251).

[43] Should the Brussels strategy prove victorious, the national courts' option could be later pursued with much higher chances of success. For this pattern of conduct see the famous Magill saga. Cf Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of the Member States', in A. Schuster (ed), *Key Aspects of Irish Competition Law and Practice* (1994) 116 ff and especially at p 124: 'A would-be litigant in an action based on the EC competition rules would be in a much better position if he had the benefit of a Commission decision establishing that the conduct complained of was an infringement of Article 85 or 86. [. . .] The argument would be even stronger where the Commission's decision had been upheld on appeal by the Court of First Instance or the European Court of Justice.'

[44] This leads one to assume that, if national systems were more inclined to translate EU rights into national remedies, individuals would predictably opt for the domestic strategy.

proving damages, as well as the violation itself. Secondly, prospective awards are bound, by definition, to be small, for want of treble or punitive damage provisions in Member States' private laws. Thirdly, the frequent unavailability of class actions and the European contempt of contingency fees as intrinsically unethical discourage most potential plaintiffs from resorting to private actions[45].

More than in the named procedural or substantive obstacles, however, the reason for the paucity of private actions *ex* Articles 85 and 86 is to be found in some judicial pattern of resistance.

In England, for example, jurists have long debated whether an injunctive remedy only, with no damage award in favour of victorious plaintiffs, should be sufficient to address antitrust violations[46]. After all, injunctions are perfectly adequate to sanction all conduct contrary to public interest; only if a statute is meant also to protect the assets of private plaintiffs should damage claims arise thereof. Scholars have more recently agreed on the need to award monetary relief, mainly by way of analogy with claims for breach of statutory duties[47]. However, there is no precise authority on the point, and as a matter of fact, there appears to be no reported decision in which an English court has actually awarded 'competition damages'.[48]

Several features of the UK national antitrust regime may shed light on this situation[49]. Private antitrust actions resulting in damage awards are available only in narrowly defined circumstances[50]. Economic torts do exist in English common law, but none of them addresses specifically anti-competitive conduct[51]. The overly broad

[45] Temple Lang, *loc cit*, n 39.

[46] For an indicative version of this point of view, see the dissenting opinion of Lord Wilberforce in *Garden Cottage Foods v. Milk Marketing Board*, 1 [1984] AC 130, at 152, B-C.

[47] In *Garden Cottage*, the leading case on the matter, Lord Diplock – drafting the majority opinion for the House of Lords – did not really decide that damages were available as a remedy; he simply stated that, if a contravention of Article 86 gives rise to any cause of action at all, then not only an injunction, but also damages will be available as remedies. This point of view has been *obiter* endorsed in later cases: *Bourgoin SA v. MAFF*, [1985] 3 WLR 1027; and *Plessey Co. plc v. General Electric Co. plc and Siemens*, [1990] ECC 384.

[48] Beal, 'Of Giants and Pygmies: Analysis of Rights and Remedies between two Contracting Parties under Article 85 of the Treaty of Rome', in J.H.H. Weiler (ed), *Harvard Jean Monnet Working Papers,* No 8, 1995

[49] In the UK there are no general antitrust prohibitions. The UK Government is working on making up for this obvious lacuna: see the White Paper 'Opening Markets, New Policy on Restrictive Trade Practices,' Cm 727. This White Paper was submitted to the Parliament in July 1989 and recommended to replace the existing Restrictive Trade Practices Act, as well as ('probably') the Resale Prices Act, with a statute on competition based on Article 85 of the Treaty of Rome.

[50] Cf Section 35(2) of the Restrictive Trade Practices Act 1976, whereby parties to a registerable agreement who have failed to notify it in full to the Director General of Fair Trading may be sued for breach of statutory duty; but there have been no successful third party actions against infringers. A damage action may lie as well for some infringements of the Resale Prices Act 1976 (Section 23(3)); however, those who have been injured by a breach generally comply to the Office of Fair Trading rather than bringing private suits: Pratt, 'Changes in UK Competition Law: A Wasted Opportunity?', (1994) 15 *ECLRev.* (2) 89. The number of RTPA and RPA third party actions has, so far, been negligible. Some damage claims have been settled out of court.

[51] Cf Beal, *loc cit,* n 48. As early as 1974, i.e. shortly after the UK's accession to the Community, Lord Denning had said *obiter* that there were two new torts in English law: abuse of a dominant position, and undue restriction of competition within the common market (*Application des Gaz v. Falk Veritas Ltd*, [1974] Ch. 381, [1974] 3 All ER 51–CA). But UK courts have since been looking for more traditional ground for private actions: cf Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of Member States', (1994) 15 *ECLRev.* (2) 60, at 64.

cause of action for breach of statutory duty, available at English law, might prove unsuitable for at least two reasons: first, it would not allow for a sufficient screening of plaintiffs and could, therefore, 'raise the spectre of the "floodgates" argument'; second, it would provide no guidelines as to the size of damage awards[52]. This might explain, at least in part, why English courts have so far stopped short of awarding competition damages, and why scholars keep raising doctrinal obstacles to the effective enforcement of EC law in the face of clear ECJ guidelines.

Other national systems do provide a full doctrinal apparatus for the recovery of competition damages. Yet, even in this case, national courts do not attach monetary awards to private claims grounded on EC law. In such scenarios, the doctrinal difficulties encountered in fitting Articles 85 and 86 within the national schemes for damage awards and, most of all, the paucity of victorious damage actions, could be simply a signal of the courts' stubborn nationalist attitude in the adjudication of civil claims.

In Germany, as observed in an early study of the Commission, the major obstacle to the availability of damage awards for violations of EC competition law lies in the fact that private tort laws are aimed at the protection of specific individuals; they do not relate, therefore, as do Articles 85 and 86, to the protection of the public at large[53]. The *Bundesgerichtshof* stated this doctrinal hurdle by pointing at the public law nature of Article 85 and stating that this provision 'does not [. . .] confer on a person whose freedom to compete has been affected by [a prohibited agreement] the right to institute civil proceedings'.[54] It is only through the civil code that one can find a suitable path towards the protection of individual competitors: § 823(2) of the *BGB* – the general sanction of culpable infringements of statutes intended for the protection of others – allows monetary recovery only if the conduct in breach of the EC provision was 'intended to affect adversely the situation of a specific competitor'[55]. John Temple Lang's remarks on this holding are worth quoting:

> [t]his judgment appears to imply that [. . .] a breach of article 85 would not give rise to a claim for damages unless the unlawful conduct is anti-competitive and directed against a specific victim. This would suggest that exploitative (as distinct from anticompetitive) conduct contrary to article 86 might not be actionable, and that, for example, a price fixing agreement not directed at a particular victim but against consumers generally might not be actionable either. There is nothing in the Treaty which would make either of these results necessary or appropriate, so that if indeed they are the position in Germany, they are due to the rules of German law [. . .][56].

Courts maintain the same attitude when applying domestic antitrust laws. The German GWB – the oldest antitrust statute in the Union – provides for civil sanctions along with criminal and administrative penalties: Section 35 permits private damage actions

[52] Cf Hoskins, 'Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules', (1992) 13 *ECLRev.* (6) 257. According to Hoskins, the 'economic tort of unlawful interference' would provide a more appropriate cause of action; it would, in fact, replace the mechanic, factual test of causation used by courts to assess breaches of statutory duties with a more sophisticated test of legal causation. But cf. Whish, *loc cit*, n 51 at 65.

[53] As early as 1966, the Commission conducted a study on the remedies available under national laws of the (then six) Member States for breach of Articles 85 and 86: *La réparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE, série concurrence* No. 1 (1966).

[54] Judgment of 23 October 1979, Bundesgerichtshof, W. Ger., 1980 Wirtschaftsrecht 392 (excerpt reproduced in English by Temple Lang, *loc cit* n 39).

[55] *Ibid* (emphasis added).

[56] Temple Lang, *loc cit*, n 39, at 399–400.

as well as private suits for injunctive relief. However, these remedies are restricted to a very limited class of violations: by consolidated interpretation of § 823(2), a claim for compensation for injuries due to statutory breach depends upon whether the injured interests were really the target (*Schutzobjekt*) of a 'protective statute' (*Schutzgesetz*). Courts must therefore assess, preliminarily, whether the legislative intent underlying a given provision is the protection of the general interest alone, or the protection of an individual interest from violation of the prescribed norm.

The French antitrust system, at a public, regulatory level, complies with the Union's guidelines. Moreover, in assessing antitrust violations, the *Conseil de la concurrence* (the antitrust unit of the French executive) is slowly becoming familiar with the Commission's tools for market analysis, borrowed, in turn, from US law-and-economics literature[57]. By way of contrast, private claims are still forced through the hurdles of *concurrence déloyale* – a traditional source of extra-contractual liability, doctrinally dependent on the encompassing tort provision (Article 1382) of the bi-centennial *Code Napoleon*. The direct enforceability of Article 86, hailed by the ECJ and so warmly endorsed by the Commission, is never spelled out by French courts[58].

The data just gathered from the German and French experiences confirm, from different perspectives, the British model and corroborate the starting hypothesis: there is, in each of these nations, a strong reluctance to have the system of civil liability changed, at least in its form and language, by European intervention. And while both legislative and regulatory bodies engage in the necessary efforts to provide Europe with uniformly viable competition, the weight of private law tradition slows down the reception of EU law within the courts of justice[59]. Embedded in national legal cultures

[57] This brings about a more permissive attitude towards distribution practices: see e.g. the *Conseil's* decision of 18 June 1991, La Société Honda France, No. 91–D-31, 1991 Bulletin Officiel de la Concurrence, de la Consommation et de la Repression des Fraudes, also commented by Zuckerman, Note, (1992) 86 *American Journal of International Law* 561.

[58] Cf, for example, Roseren, 'The Application of Community Law by French Courts from 1982 to 1993', (1994) 31 *Common Market Law Review* 315, 362. The Author reports the holding of *Cour de Cassation*, Cass. Com. 1 March 1982, *Syndicat des expéditeurs et exportateurs en légumes et pommes de terre primeurs de la région malouine v. L'hourre et autre*, Bull. Civ. IV No 77, p 70: authorities of the Member States have exclusive jurisdiction to decide on the liability incurred by the undertakings which, in breach of Article 85(2), engage in concerted actions of a monopolistic character. The *Cour* thus approved the application by a court of appeal of the general principles of liability enshrined in French Law.

In Ireland one can also observe an analogous contrast between the regulatory and the judicial attitudes towards antitrust enforcement. The Competition Authority (new-born antitrust unit of the executive) 'pursue[s] a policy of interpretation and application of the Act based rigidly, even obsessively, upon what it believes to be the analogous position in Community Law. [. . .] By way of contrast, one can see in the approach of the Supreme Court [. . .] a tendency not to be overawed by the EC analogy.' And the latter approach meets with scholarly approval: '[T]here appears to be no reason why the Irish courts might not treat the Act as nothing more than a new piece of domestic legislation in respect of which decisions of the European Commission and judgments of the European Court were of neither binding nor persuasive authority': Cooke, 'The Competition Act: One Year On. Resolving the EC/Irish Law Dichotomy', in A. Schuster (ed), *Key Aspects of Irish Competition Law and Practice* (1994) 82, 83.

[59] As one would expect, where Member States' resistance reaches some level of consistency, Brussels abstains, at least momentarily, from intervening. In 1984, an 'insider' of EC law considered an increase in domestic private claims not only most desirable in order to achieve full implementation and enforcement of the Community's antitrust policy, but also quite likely to occur in the near future (Temple Lang, *loc cit*, n 39, 463–66). In this perspective, a Council Directive aimed at harmonising substance and procedure of private claims throughout Europe seemed both a logical and necessary step. This is not, however, the way things developed in the following decade. No directive harmonising civil adjudication of antitrust claims has ever been enacted.

is the reluctance of state courts to let European regulation add to their own armoury of private remedies.

One may attempt, at this point, a partial analysis of the above-illustrated phenomena. As is well known, relying on the fashionable rhetoric of subsidiarity, the Commission is currently pushing towards further decentralisation of antitrust enforcement[60]. Member States are obviously favouring such a development[61]. This move is evidently a sign of an ongoing transformation of European antitrust; it is antitrust in its 'third generation'[62]. As it happens, the private/public distinction may offer an analytical framework to understand and predict the patterns of such transformation.

Member States are in the course of reappropriating the private law dimension of competition. As Europe evolves, the focus of EU competition law shifts towards the public realm of regulation[63]. Member States let this happen and wilfully comply in so far as they are granted full control of private actions. Along these lines, and filling statutory blanks, national courts work on severing damage awards from the black letters of the Treaty of Rome. If decentralisation is ever to take place, and a real partition of competences is to be achieved between European and domestic fields for enforcement, this is most likely to occur along the lines of a never-dying public/private distinction.

C *Contract Law Harmonisation between Legislators' Resistance and Judicial Independence*

It is common sense in legal fields, and common knowledge in economic fields, that business people tend to favour the abolishment of market barriers. They are at times

[60] Goh, 'Enforcing EC Competition Law in Member States', (1993) 14 *ECLRev.* (3) 114.

[61] What is especially obvious is the procedural advantage that would be gained if the decision-making power on Article 85.3 were transferred from the Commission to peripheral state authorities.

[62] For a tripartite sketch of antitrust evolution in Europe cf the analysis of Gerber, 'The Transformation of European Community Competition Law?', (1994) 35 *Harvard International Law Journal* 97, who, in turn, drew inspiration from Joseph Weiler's 'Transformation of Europe'. According to Gerber's scheme, the early years of the Community were characterised by the juridification of enforcement: Europe had to prove that the prosecution of violations could take place through mere application of the rule of law; these were the years of the blooming of Regulation 17, black-letter source of a much discussed cumulation of both prosecuting and adjudicating roles in the Commission's hands. Only through the process of juridification could a politically young and weak Europe obtain the necessary legitimacy to centralise antitrust enforcement, way beyond the letter of the Treaty of Rome.

With the 1970s came the economic crisis, reified by the oil shock and culminating in a stall of the integrationist drive; it was then up to the Court of Luxembourg to keep the EEC alive. By resorting to a teleological construction of the Treaty and injecting political goals of integration into formalist legal discourse, the Court further expanded the scope of European competition law (for instance, by finding some sort of inter-state impact – an essential condition to assert EC jurisdiction – in just about every anti-competitive conduct) and, more generally, laid the basis for the mid-1980s relaunch of the European project.

And then the 1990s came, with the common market dream finally coming somewhat true, and with the Maastricht Treaty embracing the principle of subsidiarity (Article 3b). Subsidiarity, introduced almost incidentally in the Single European Act of 1986 and later turned by Maastricht into a loud criterion for the apportionment of Member States' and Union's non-exclusive competences, provides for the Community to intervene 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [. . .]'; nor may Community action exceed 'what is necessary to achieve the objectives of [the] Treaty'. In the same direction moves 'the November revolution'.

described as independent players in the game of European integration, which they promote either by lobbying national and supranational legislators or by pursuing all available judicial avenues against existing market partitions. The hypothesis has been advanced that independent actors endorse integration with particular enthusiasm when their businesses happen to be located in smaller countries, or in countries relatively more dependent on imports. The aggregate of these actors is often identified as a market force operating independently of the will of any State, and the force truly responsible for the unstoppable dynamic towards the abolition of barriers to transborder private transactions.

If one relies on the narrow definition of private law provided in Part II above, however, it appears that such players, although interested in the abolition of regulatory barriers, have no particular stake in the harmonisation of private law. A glance at contract law will illustrate this point.

Contract law has always been the main focus of transnational integration at an intergovernmental level. The underlying assumption is that differences in legal regimes may mislead the flow of commerce, slow down the Smithian progression towards a most efficient allocation of resources, and multiply transaction costs by prohibitively high factors[64]. However, a well-functioning set of conflict-of-law rules or, alternatively, a viable system of international arbitration, may be all that is needed for a private party to engage in smooth transborder transactions; the contract law of the land need not be changed to suit this purpose[65]. Individual entrepreneurs may even resist contract law integration if it means – as it often does – increased consumer protection. In other words, private market players do not necessarily endorse private law integration and may even expect their national authorities to resist it. There is no evidence of the fact that, lacking a uniform system of substantive contract rules, inter-state trade is lingering or being hampered[66].

[63] Cf Gerber, *loc cit*, n 62, at 137–38.

[64] Here is how a scholar heavily involved in the process of contract law harmonisation describes an incomplete-harmonisation scenario:

> Suppose a manager of a Dutch enterprise operating as a contractor and selling contractor's supplies as well, asks his lawyer: 'Is it from a legal point of view too risky for us to attempt to export our services and supplies to other countries in the European Community?' He may then get the following brief answer:
>
> > If you get a contract in a Member State, your employees, both white and blue collar, may go and work there. You can set up a branch of your company or form a subsidiary company. You can bring and sell your supplies there without paying import duties, and even the non-tariff barriers have been abolished, at least in theory. You can do many things which you were not able to do before the European Communities were established. However, in many respects you will still face local laws which are very different from ours, for instance, their laws of contract. Some of the Member States now have the same rules on international sales as we have got recently. In case you want to sell your supplies through an agent some of the Member States also have rules on the agency contract which are similar to ours. But their general contract rules and their rules on most of the specific contracts are different. We cannot give you sufficient information on their laws. We shall probably have to consult the local lawyers. Anyhow, you will run risks which you do not run in this country. You may limit the risks somewhat if you can manage to have your contracts governed by Dutch law, and your disputes, if they arise, settled in the Dutch courts. You may also persuade your customers to agree on the use of international contract terms [. . .] But all this is uncertain.
>
> Lando, 'Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law', (1993) 1 *European Review of Private Law* 157, 158–159 [footnotes omitted].

[65] The main harmonisation achievement of the international community in the area of contract law is still the United Nations Convention on the International Sale of Goods (1980).

[66] Boodman, 'The Myth of Harmonization of Laws', (1991) 39 *American Journal of Comparative Law* 715–716.

Yet, the Community's efforts to come up with uniform European legislation on contracts have been, and continue to be, massive. Brussels has long used the goal of harmonising consumer protection throughout the common market as a legitimising tool for its intervention in the field of contracts[67]. As a result, several areas of contract law (including the very broad category of standardised consumer contracts) have already been subject to harmonisation by means of directives. The Directive on Unfair Contract Terms[68] provides an outstanding example of this type of harmonisation[69]. No principled resistance is to be found to European interference with such an area of private law because, since the 1970s, all Member States have been committed, in one way or another, to the improvement of consumer protection against 'aggressive' sales[70]. However, in implementing the said directive, state legislators have engaged in several instances of resistance.

At times, resistance has taken the shape of formalist hysteresis. In Italy, for example, the implementing statute forced the reform within the unfit scheme of the civil code. As a result, the code now contains two different disciplines: one concerning standardised contracts, predisposed for an indefinite number of transactions, whereby judicial control pertains only to formal requirements; and one of EC origin, whereby the fairness of contract terms undergoes substantive scrutiny. The former applies independently of the subjective qualities of the parties and belongs, therefore, to general contract law. The latter only applies to consumer transactions, if and in so far as no individual negotiation occurred. The judicial administrability of the resulting system is at least questionable[71]. The reform, however, does respect in full the doctrinal architecture of the code, as it leaves intact the chapter on 'contracts in general' and only tinkers with specific provisions concerning entrepreneurial activities.

At yet another level operates the German type of resistance. An insider of the stature of Christian Joerges provides a critical account of this story[72]. 'Community law was threatening an established, well-functioning core area of German contract law; the content was inconsistent and ignored practical experience at hand.'[73] Given the

[67] EC Commission – The European Community and Consumer Protection, European File 14/90, November 1990, at pp 6–11: 'Consumers must be protected against unfair or dishonest business practices on the part of certain suppliers. For this, measures are required on a European scale [. . .].'

[68] Council Directive 93/13/EEC, OJ 95, 21/4/93, p 29.

[69] Only since November 1993, when the TEU entered into force and added new provisions to the Treaty of Rome, have EC legislators relied on an express attribution of powers concerning consumer protection. See Article 129a: '1. The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of completion of the internal market [. . .]'

[70] Germany, amongst the Member States, had the most sophisticated tradition of judicial and administrative control of unfair contract terms. EC legislators borrowed from the German experience to a large extent: the directive provides for a black list of contract terms whose content is presumed unfair. However, they filtered the German canvas through the legitimising lens of consumer protection. As a result, the directive only covers transactions occurring between professional sellers, or suppliers of services, and ordinary citizens.

[71] For insightful criticism see Pardolesi, 'Clausole abusive (nei contratti dei consumatori): una direttiva abusata?', (1994) *Il Foro Italiano* V 137. *Idem*, 'Clausole abusive, pardon vessatorie: verso l'attuazione di una direttiva abusata', (1995) *Cardozo Electronic Law Bulletin* [www.gelso.unitn.it/card-adm/Review/Review.html].

[72] Joerges, 'The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines – An Analysis of the Directive on Unfair Terms in Consumer Contracts', *EUI Working Papers in Law*, No 2, 1994/5.

[73] *Ibid*, p 17.

plethora of conceptual dilemmas behind the doctrine of unfair contracts, which allows the judiciary to alter the content of private agreements, one would have expected the directive to result in a conceptual challenge and force the national legislators to explicate the policy choices behind courts' interference with private autonomy. Instead, Joerges observes, the German debate on this Directive did not make any attempt to develop 'criteria of non-positive validity' for judicial tinkering with private agreements. As if pre-existing German law represented 'the best of all possible worlds', German jurists merely restated the basic rhetoric of German contract doctrine and showed no response to the theoretical questions posed by the Directive[74]. By doing so, they refused to undergo the necessary and painful process of rationalisation involved in private law reform.

On the different scenario of adjudication, one may find yet another mode of resistance towards harmonisation of consumer contracts.

The willingness of a number of national courts to contribute to the European cause is, by now, a well-known phenomenon. Judges have often used the leverage of EC law to denounce or even make up for the shortcomings of their own national systems. By complying with Brussels rule even beyond the mandates of their own States' legislators, courts have experienced a veritable institutional empowerment.

Is such judicial Europhilia to be found, as well, when compliance with European law requires a change in the national system of private law adjudication? So far, we have observed, in turn, the formalist resistance of national courts in the adjudication of private antitrust actions, and the French judges' unfailing independence in the handling of product liability litigation. The subject of consumer contracts illustrates another type of judicial attitude towards the Europeanisation of private law.

Which law governs a contract concluded after the adoption of an EC directive, but before its implementation into national law? The doctrine of direct effect, often restated by the ECJ, gives unimplemented directives immediate effect starting from the expiration of the deadline for their implementation, in so far as their provisions bear sufficiently clear normative content. Direct effect, however, only binds Member States as public entities. Private parties are not, by contrast, supposed to comply with a directive's norms. A State's judiciary cannot require from its citizens what competent legislative bodies have failed to translate into national norms. The doctrine may be read as a careful attempt to respect the autonomy of private law makers and to halt the harmonisation of private law one step short of direct EU intervention into national systems. Paradoxically, however, some lower courts have simply ignored the fine distinction between vertical and horizontal effect. In particular, eager to offer individual consumers a higher level of protection than the one provided for by national law, some Italian courts have given the EC directives on consumer contracts immediate effect even between private parties. As a result, cheated-upon consumers have been allowed withdrawal from contracts – resulting from 'aggressive sales' – which would have been totally valid and enforceable in light of positive Italian law[75]. The Cassazione, as court of last resort, has then reversed such decisions. The pattern of this reversal is worth noting. First, the court invokes the vertical/horizontal distinction in the doctrine of direct effect. This orthodox doctrinal move sets national

[74] *Ibid*, pp 17–18.

[75] The process of Europeanisation of the Italian national system has been defined as schizophrenic: courts help it move forward, while legislators, out of idleness or negligence, let it lag behind. Barone, Note, (1992) *Il Foro Italiano* 1 1600.

courts free from any legislative fiat stemming from unimplemented EC directives. Second, lurking in the background is national courts' obligation to interpret national law in a way as compatible as possible with EC guidelines (*Marleasing*). To get around this requirement, the *Cassazione* (Cass. 2589/95) is forced to entrench its legalese in a purely formalistic argument. The code provision that accepted proposals cannot be revoked gets promoted to the rank of 'essential principle'. The Court then reasons that an interpretation of the civil code in a *Marleasing*-like fashion cannot be pushed so far as to contrast with 'essential principles' of the internal civil code. Therefore, EC law cannot apply here.

There are no logical gaps in the reasoning. It has been noted, however, that by framing the case at hand in the different niche of cancellation or rescission of a contract, no such principle would have been found[76]. The Italian civil code might have then been more amenable to Europeanised interpretation. In light of this alternative, the attitude of the *Cassazione* sets up a veritable pattern of judicial resistance.

D Preliminary Considerations on Judicial and Legislative Resistance to Private Law Integration

The foregoing examples of judicial and legislative resistance to integration call for some explanatory attempt. The following are preliminary hypotheses, to be verified and substantiated in a sequel to this paper.

National Courts

National courts have been, so far, considered primary actors in the task of European integration, and the reasons for such intense cooperation with the European cause have been deeply investigated in both legal and socio-political terms. In a word, compliance with EC law has been, for national judges, an experience of empowerment within their own institutional arenas. In the realm of private law adjudication, however, courts do not seem to feel bound to endorse the project of harmonisation, and often take a non-deferential posture towards EU mandates. The foregoing considerations may help explain such instances of defiance.

As illustrated in Part II above, private law has traditionally been perceived as relatively neutral to choices of redistributive significance. This ideological opacity of private law has provided courts with an utmost degree of judicial independence. It comes as no surprise, then, that courts do not easily yield to the commands of supranational authorities. As a matter of fact, national courts pursue private law integration only in so far as it fosters their sense of control over civil adjudication and increases their powers *vis-à-vis* national legislators. If the trend of harmonisation (say, the trend of increasing consumer protection by means of torts and contracts reforms) is in line with some unspoken mission of the judiciary, then courts will bypass the shortcomings of internal legislation and will let unimplemented EU measures govern, silently, the outcome of private litigation. In any other case, following European guidelines might result in an experience of institutional disempowerment. It may be better for judges to then cling to the dogmas of national private law systems. After all, private law rules and doctrines, apparently rigid and impermeable to the game of policy arguments, have always allowed courts a good degree of turf control.

[76] Scannicchio, Note, (1996) *Consumer Law Journal, Current Survey* 11–12. Cf L. Antoniolli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione e circolazione dei modelli giuridici* (Università degli Studi di Trento, 1996), 352–360.

Independence takes the shape of formalist adherence to national legal doctrines – as opposed to innovative trends required by Brussels and Luxembourg – and yields some sort of passive resistance to private integration. The judicial handling of private antitrust claims, analysed above, moves exactly in this direction.

Institutional Law-makers

The ambivalent attitude of States and their often silent obstruction to the integration of private law are best observed through the practices of national law-makers.

For the sake of simplicity, we may conflate into the broad category of 'institutional law-makers' both the parliamentary assembly and the government of each State. National governments' participation in the legislative process materialises, in Brussels, through representation in the Council of Ministers, where harmonising directives are adopted in the first place. But most importantly, at a national level, government officials may be invested with direct law-making powers through the instrument of delegated legislation.

As it happens, Member State private laws are occasionally harmonised by techniques that, at least formally, do not involve the legislative bodies of the Union. Each State, within the limits of its own sovereignty and independently of any supranational fiat, may modify its private law in order to emulate that of its fellow Members. Such modifications take place, most obviously, at a legislative level: in the new Dutch civil code, for instance, the parliament of the Netherlands emulated some features of major European codifications; Austria, even before acceding to the Union, enacted a product liability law along the lines of the 1985 EC Directive.

At other times, however, state legislators obstruct the process of integration when explicitly requested to implement EC directives through national enactments, either by adopting laws that betray, rather than fulfil, the intent of Brussels' mandate, or by postponing implementation altogether, in flagrant breach of their supranational duties. Parliamentary inertia does certainly explain some instances of defiance. But inertia itself may be caused by deeper reasons for resistance. As best exemplified by the French conduct with regard to the product liability directive, law-makers endowed with – or cursed by – political accountability have nothing to gain from bringing to the surface the redistributive consequences of private law reforms. The 'painful process of rationalisation' of national private laws requires full exposure of group conflicts within law-making arenas. Resisting it, or covering it up with formalist dullness, may be politically sounder strategy.

IV Conclusions

A Reasons for Private Law Entrenchment

As illustrated throughout Part III, EC legislators have successfully argued that 'a market system is also created by the state through devices such as the law of contract'[77], or through given definitions of property and liability rules. They have, in other words, interpreted the abolition of market barriers as requiring in-depth Europeanisation of private law – torts, contracts, property – and to this purpose have made heavy use of Article 100A. Brussels appears to view private law as essentially no

[77] Tarullo, 'Beyond Normalcy in the Regulation of International Trade', (1987) 100 *Harvard Law Review* 546, 559.

different from any other item in its purview, of such little impact on the fundamental value choices of Europe's constituent nations that it may safely be entrusted to faceless technocrats.

This should come as a surprise to no one in the Member States. The very fact that civil codes – or, for that matter, common law doctrines – can survive radical changes in the social and political fabric of their respective nations permits a presumption of ideological neutrality. Why, then, resistance? Why so many instances of tension between centre and periphery when control over private law is at stake? After all, centuries of legal formalism across the entire spectrum of European jurisprudential thought have bestowed upon private law a patina of technical neutrality; as a consequence, policy choices have traditionally been kept out of the courts of justice or, at the very least, out of the realm of civil adjudication[78]. Against this backdrop, why should Member States not blithely surrender the redrafting of their private law to European decision makers, as they have the formulation of safety regulations and the harmonisation of technical standards?

The formal coherence of private law doctrines offers a partial, preliminary explanation of resistance. Doctrinal preoccupations are quite common in the literature concerning private law integration[79]. Europe's scholarly need for an internal consistency to private law is the manifestation of a spirit at least as old as Thomas Aquinas's *Summa theologica* and the commentaries of the *Glossators*. And indeed, at least in continental Europe, codes are meant to be entirely self-referential machines, finite sets of rules and doctrines capable of yielding exhaustive answers to any legal question. By contrast, directives and regulations are ad hoc by definition and, by effecting changes in the national legal regimes, disrupt the codes' intellectual wholeness.

Doctrinal discomfort, however, is just the tip of an iceberg of problems and fails to explain in depth the reasons for much of the resistance to private law harmonisation. Some authors have grounded their scepticism towards integration on arguments of tradition and identity, comparing private law rules to language and culture in their capacity to define the national character of each State[80]. In principle, however, all laws

[78] When interpreting private law in a way not completely manifested by its black letters and coloured with social implications, judges invoke pertinent constitutional rules or principles in order to provide their decisions with due formal authority. Constitutional law is the prototypical realm of value-laden, political choices and, as exemplified most forcefully by the German Constitutional Court in its Maastricht decision, stays well within the jurisdiction of individual Member States.

[79] Caveats of the following type are abundant in the literature on private law integration: 'A civil code is a highly complex and integrated whole; especially the rules on obligations and property are interdependent to such a degree that an isolated unification of rules of such central importance is not advisable.' Drobnig, 'Transfer of Property Law', in A.S. Hartkamp *et al* (eds), *Towards a European Civil Code* (1994) 345, 360.

[80] Cf de Boer, 'The Relation between Uniform Substantive Law and Private International Law', in A.S. Hartkamp *et al.* (eds), *Towards a European Civil Code* (1994) 51, 60: 'The limits of legal integration are marked by national idiosyncrasies and local circumstances. Like language, law is part of a community's cultural heritage. It is one of the factors that define a nation's identity. Unless we want to eradicate a tradition of centuries, we should be careful to retain those segments of national law that have particular value for the community in which such rules and principles developed. Unless we are ready to trade our national identity for a true cosmopolitan awareness, the unification of substantive law should be halted where it fails to acknowledge a single community's cultural values and specific needs. [. . .] The process of European integration – expected to bring economic, political, and even legal unity – need not go so far as to extinguish all the differences, including those in private law, that still mark the cultural identity of each Member-State.' (This author makes the case for dealing with legal differences with the usual tools of private international law, rather than with intensive uniformisation.)

are bound up with sovereignty. On what basis, then, should one distinguish between rules so ideologically neutral as to be easily left to supranational redefinition and laws that lie at the core of national identity, to be sheltered from integration? And, more importantly, why should private laws be counted among the latter? The national identity argument does not answer such questions and falls short of explaining States' entrenchment in their respective private law regimes.

The French product liability saga, recounted in Part III, suggests a different, rather deeper explanation for Member State resistance to private law integration. So far, Old World legislators have managed to preserve the apparent coherence of private law primarily through the technical device of shifting the burden of social choices onto the realm of public, regulatory law. As a consequence, while it is customarily accepted that a given interpretation of constitutional principles, or given regulatory statutes, have an immediate social impact and define specific schemes for wealth distribution, private law doctrines maintain the appearance of ideological neutrality and the presumption of equality of powers ('horizontality') as between any two citizens.

A regulation limiting factory emissions, for example, is perceived as embodying a definite public policy choice and effecting an allocation of rights between factory-owners and society at large. The adjudication of a dispute between neighbours over, say, boundaries or nuisances seems different. It is perceived as merely the piecemeal resolution of a specific conflict between two private parties playing on a presumptively level field. Far from reallocating rights, it purports simply to clarify the already existing rights of the respective parties[81].

Harmonisation, however, has progressively driven home to the 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. And because private law offers, by tradition, the highest degree of legal formalism, resistance may here take the convenient shape of formalist entrenchment.

B Private Law Entrenchment and Current Doctrines on European Integration

Throughout the foregoing analysis I have relied consistently on conventional partitions, not only by distinguishing private from public law, but also by focusing only on the legal discourse in isolation from the social and political context of European integration. I should like now to offer an explanation for this stylistic and substantive choice, in light of current theoretical models for the interaction of law and politics in contemporary European history.

Legal scholars and political scientists alike have often addressed the question of how much, if at all, 'the rule of law' – as opposed to politics, economics and social dynamics in general – affects the process of European integration[82]. Answers have

[81] Cf U. Mattei, La Proprietà immobiliare (Torino, 1995) 37–8.

[82] For a thorough analysis of the literature on the point cf Burley and Mattli, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organisation* 41.

been many and diverse. Pure legalists, or legal formalists, have argued that a supranational body of European law, binding Member States and reducing their sovereign control over national adjudication, is but the inexorable result of the logic of the law embodied in the Treaty of Rome, and in no way reflects the political interaction among Member State governments. At the other end of the spectrum, the realist tendency of political science has claimed that national politics, as devised and implemented by sovereign and unitary States, enjoys absolute primacy over Community law. Absent political consensus among the members, no legal glue could possibly keep the Union together, and the alleged supremacy of Brussels rule reflects nothing more than a sequence of ephemeral equilibria of conflicting national interests.

New theorisations of the integration process have offered less extreme, more sophisticated readings of the rule of law in the European context. Legal scholars have increasingly taken into account the impact of politics in the development of the current body of European laws. Along these lines, some writers have developed analytical models whereby the legal discourse, though keeping a narrative of its own and responding to its peculiar inner logic, engages in a dialectical exchange with politics and tailors its answers to the changing socio-political dynamic. On the other hand, the realist premise of the existence of unitary sovereign actors (the nation-states) has given way to game-theoretical models in which multiple players, both sub- and supranational, act upon self-interested motives. In this rationalist setting, the autonomous role of legal actors as a distinct category of players has been given increasingly fuller account. Finally, neo-functionalist models, whereby integration is promoted by economic rather than ideological factors, have been revisited in light of the many legal achievements of the Union. Law, it has been argued, may play in the process of integration the same apolitical role that neo-functionalists attributed to economics. Law may function as a mask for conflicting group interests and therefore yield results simply unattainable on the basis of political agreement[83]. The reflectivist trend amongst political scientists has pointed out, moreover, that integration occurs within shared belief systems and persistent cultural conditions[84]. As law provides a conspicuous instance of self-perpetuating socio-cultural models, its role as a conditioning frame for European integration cannot be ignored.

Throughout this paper, I have shared the intuition that law does play a role of its own in the process of integration and, while constantly interacting with politics, does not entirely overlap with the logic of 'decisional supranationalism'[85]. Recent observers have applied to the principle of law the felicitous metaphor of a mask concealing political conflict. This mask, however, does not merely hide such conflicts, it subtly alters them and works historical changes of its own[86]. Others have illustrated in insightful fashion the very significant Europeanising use which Community institutions have found for a self-referential legal discourse. It is, by now, fairly well accepted that the EC has relied on legal formalism to bring about developments unachievable through political consensus. In particular, the ECJ has portrayed veritable revolutions in the constitutional substance of the Community as demanded

[83] *Ibid.*

[84] Reflectivism is, on this point, in line with the insights of institutional economics and path-dependence theory, illustrated above in Part II. Cf North, *op cit*, n 12.

[85] The expression 'decisional supranationalism' was first used by Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1 *Yearbook of European Law* 257.

[86] Burley and Mattli, *loc cit*, n 82.

by the inexorable logic of the law embodied in the Treaty of Rome[87]. This essay, focused on the mask of private law only, has tried to add another chapter to that story and to illustrate how Eurosceptics can also rely on the opacity of the law to produce mirror-image consequences. State legal actors are now relying on the particularly formalist character of European private law. Entrenched in legal formalism, obstinate in the defence of the doctrinal coherence of their codes and unwilling to discuss the political merits of their consolidated policies, they manage to slow down, and even at times to halt, the process of private law integration.

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