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# Private Law and Public Stakes in European Integration: the Case of Property

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**Abstract:** *In European legal discourse, the old public/private divide is experiencing a revival and a transformation. Member States used to claim autonomy in private law matters. Now private law is subsumed into a functionalist logic and can presumptively be harmonised if so demanded by the goal of market integration. States or local constituencies can only resist harmonisation by highlighting the connection between their private laws and those 'public' matters still immune from Europeanisation. Property law can effectively illustrate this phenomenon. The written pledge of non-interference with States' property systems, restated both in the TEC and in the draft Constitution, cannot be taken at face value, given the plethora of supra-national inroads into this field. But it performs the essential rhetorical function of reassuring national law makers that Europe will pay special attention to sovereign choices when harmonising those areas of private law which, like property, harbour an obvious core of constitutional values.*

## I Introduction

The focal point of this essay is the changed but still active role of the private/public divide in the European Union's struggle for extended institutional competence. The old distinction still rules the process of European integration from its grave, and now takes on the following rhetorical structure: private law, at least in its 'patrimonial' core, is merely technical, and therefore easily subsumed into the functionalist logic of the market; Member States' public law, by contrast, is the realm of sovereign political choices, laden with distributive consequences, and worthy of a much higher degree of deference in the process of harmonisation.

While meant to yield the speediest possible harmonisation of 'technical' private law rules, this rhetorical structure is by contrast producing new complexities in the competence debate. It is now the case that the most persuasive arguments against the technocratic harmonisation of private law can be developed by identifying cores of constitutional values within private law rules. Once such a process of nesting is triggered, only a collective, political reflection on the constitutional implications of private law can allow, in due course, for its harmonisation. As always, the old dichotomy's utmost power lies in its self-effacing nature, and in the rhetorical

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dynamics that it generates by the very fact of surviving as an archetype in the mind of contemporary jurists.

Property law, and certain unusual features of its European itinerary, can effectively illustrate both the rhetorical structure highlighted above and its impact on current harmonisation dynamics. Property is strangely singled out and portrayed as immune from Europeanisation both in the Treaty of Rome (1957) and in the draft Constitution (2003). As illustrated in Part II, this seems somewhat at odds with the growing impact of supranational adjudication upon States' property régimes, and with the fact that European legislators are now intervening to harmonise private property rules along with the rest of private law.

Part III offers a preliminary inquiry into several plausible reasons for property's special status in the eyes of the founding fathers or of their successors: the nationalisation projects of the 1960s, the internal affairs logic, and the use/value distinction in the conventional understanding of ownership. All of these reasons fail, in one way or another, to account for property's textual exceptionalism.

Part IV moves on to our basic hypothesis—namely, that property's exceptionalism might depend on the obvious political salience of private property rules. This hypothesis is often dismissed because it conflicts with the finding by comparative law scholars that property rules have no ideological dimension—so much so that identical rules have been used on either side of the Berlin Wall, and both before and after the fall of certain totalitarian régimes. The hypothesis proves to be well founded, however, if revisited in light of the current status of European integration, and if situated within the particular rhetoric now informing the arguments for and against private law harmonisation.

Part V highlights the emergence of new connections between technical rules and norms of constitutional salience in contemporary European discourse, and concludes that, within political arenas, private property is still perceived as closely related to sovereignty. For this reason, the drafters of the Constitutional Treaty must still signal to national or sub-national constituencies that property rules will be paid deeper political respect, and that they will be set apart from other, technical private law matters in the process of legal harmonisation. Property's textual exceptionalism is a rhetorical tool at odds with the frequent supranational redefinition of property rights. But this rhetoric matters, and constitutes a promise of collective political reflection on all laws that may affect distributive outcomes, even if cast in merely technical semblances.

This insight casts light on a broader change in the rhetorics of the competence debate, discussed in Part VI. Member States used to claim autonomy in private law matters. Now private law is subsumed into the functionalist logic of the market and can presumptively be harmonised if so demanded by the goal of integration. States or local communities can only argue against the harmonisation of their private laws by highlighting the connection between private law rules and those public matters still left to states and local authorities in the logic of the Constitutional Treaty. Under a new guise, the old private/public divide continues to perform the same rhetorical function as other, more obvious dichotomies, designed to set seemingly clear limits on the Union's competences and to legitimise the process of harmonisation.

## II Property's Exceptionalism

The traditional partition between private and public law was sharp and vivid in the 1950s. Early Community law seemed to promise that the macro-economic project of integration would be about deregulation and elimination of States' protectionism. It

 

would deal with such basic, and public, state functions as custom duties and internal (discriminatory) taxation. It would involve little or no interference with the micro-management of private transactions, as adjudicated in national courts. Private law seemed uninteresting and ultimately irrelevant to the realisation of a free trade area.[1]

This promise was soon breached. The glorification of the parallel importer involved simultaneous interference with *public* state functions (most significantly with states' involvement in price-control)—and with two pillars of national *private* law: the definition of the scope of industrial property, and the outlawing of certain types of contracts.[2] Formally, States' monopoly over private law held on until the mid-1980s. However, the products liability directive, soon followed by further harmonisation enacted in the name of consumer protection, made the classic dichotomy crumble.[3]

In Brussels, private law is by now understood as an integral, inseparable part of the process of integration. Harmonising it in the name of a seamless market—within the usual limits of subsidiarity and proportionality—is fair game for the Union's legislator.[4] The Commission's aggressive policy of contract law harmonisation rests on the assumption that the Union is indeed competent to reform private law. European courts and legislators have tinkered with States' tort law in terms of both substance[5] and remedies.[6] The fact that any given norm is part and parcel of a State's private law system is no longer an obstacle to European intervention. States' resistance is more and more often a lost battle.[7]

Against this background, a quick look at the Constitutional Treaty reveals a rather striking detail. The drafters, while making it clear that *intellectual* property becomes a subject for legitimate legislative action at EU level, have restated the promise of non-interference with property in general: 'The Constitution shall in no way prejudice the rules in Member States governing the system of property ownership'.[8]

Doctrinally, setting property apart from the rest of private law is no trivial detail. Property and contract are very much intertwined in continental civil codes. More generally, absolute property rights and absolute contractual freedom are notoriously inseparable tenets in the Western legal tradition. At the dawn of the integration project, when codes seemed sheltered from the dangers of harmonisation, property and contract continued to share the same destiny. But given the current trend in matters of private law, the symbiosis is no longer guaranteed. The complete harmonisation of contract law is well on its way.[9] Meanwhile, in the draft Constitutional Treaty, property remains seg-

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[1] For further analysis of this point see D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', (1997) 3 ELJ 3.

[2] Combined Cases C-56/64 and C-58/64, *Consten and Grundig v Commission* [1966] ECR 429.

[3] Dir 85/374.

[4] On the collapse of the private/public distinction in the context of harmonisation see M. J. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe* (Kluwer, 2002), 228–230.

[5] The products liability reform of 1985 (Dir 85/374) and the post-*Francovich* developments (P. Craig and G. De Búrca, *EU Law. Text. Cases, and Materials* (Oxford University Press, 2003) 257–271) provide ample illustrations of this point.

[6] See e.g. Case C-168/00 *Simone Leitner v TUI Deutschland GmbH*, [2002] ECR I-2631.

[7] For a phenomenal debacle of the arguments for State control of tort remedies, put forth by the French, Greek, and Austrian governments intervening in the case, see Case C-183/00 *Gonzalez Sanchez v Medicina Asturiana*, [2002] ECR I-3901.

[8] Article III-331, Draft Treaty Establishing a Constitution for Europe, 18 July 2003, CONV 850/3.

[9] Besides the *Action Plan* of the European Commission ('A More Coherent European Contract Law', COM(2003) 68 final), for an extensive description of activities in this field, see <http://europa.eu.int/comm/internal_market/contractlaw/links_en.htm>.

regated and portrayed as something essentially different, somehow severable from the project of integration.

As a matter of fact, the process of legal integration has already affected property systems in both obvious and non-obvious ways. The most visible modifications of States' property laws have been happening in Brussels.[10] EU legislators have certainly intervened in property matters, and have even engaged in the creation of new properties (e.g. in personal data). The European Commission is actively exploring further possibilities for property law harmonisation.[11] In Brussels, it seems difficult to conceive of a fully integrated Europe without implicating in one way or another the essence of ownership régimes.

Not-so-obvious interferences with States' property laws take place in Luxembourg. The European Court of Justice has occasionally nibbled at the definition of property rights while adjudicating questions of private international law. For instance, in *Webb v Webb*—a case concerning the interpretation of the Brussels Convention[12]—the Court of Justice had to decide whether trust was a matter of rights *in rem* (subject to the *lex loci*) or rather a subject of promissory obligations (to be governed by the law of the parties' nation). This prompted the Court of Justice to address one of the main points of divergence between civil- and common-law conceptualisations of proprietary entitlements.[13]

Even less obvious supranational interferences with national property laws have originated in Strasbourg.[14] In striking the proper balance of private and public interests related to ownership, the European Court of Human Rights has often reshaped States' property régimes. A long line of cases concerning Italian landlords' rights demonstrates how Strasbourg's scrutiny of national enforcement mechanisms may redefine the substance of proprietary entitlements.[15] Human rights scrutiny in property disputes is also

[10] For a comprehensive discussion of the many EC activities that have affected States' property laws see G. Griffiths, 'The Bastion Falls? The European Union and the Law of Property', (2003) 8 *Conveyancing & Property Law Journal* 39.

[11] See the Commission's call for tenders to do research in this area: Study on property law and non-contractual liability law as they relate to contract law (2003/S 23-018434), posted on <http://europa.eu.int/comm/consumers/tenders/information/tenders/cont_award_notices_en.htm>.

[12] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

[13] See e.g. Case C-294/92 *Webb v Webb* [1994] ECR I-1717.

[14] In 1952, the Council of Europe added Protocol 1 to the 1950 Convention on Human Rights. Article 1 of that Protocol subsumes 'the peaceful enjoyment of [one's] possessions' into the list of fundamental rights worthy of supranational protection. The property clause of the European Convention of Human Rights (Protocol 1) subjects the owner's *entitlement* to the State's *right* 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .' On the Court of Human Rights a supranational court see L. Helfer and A. M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273.

[15] After the legislative repeal of rent-control statutes, Italian tenants faced the prospect of massive evictions. By a combination of ad-hoc regulatory intervention and delayed judicial enforcement, many tenants ended up staying in the same premises long beyond the expiration of their tenancy agreements. In Strasbourg, landlords have now obtained State compensation for loss of enjoyment of their possessions during all the time it took to evict their tenants. Formally, the European Court of Human Rights has simply brought Italian landlords' rights in line with national legislative mandates; substantively, however, it has affected the distributive impact of such mandates as applied by local courts and enforcement agencies. For a recent decision on such matters see Court of Human Rights Case 59273/00, *Picone v Italy* (March 11, 2004).

 

a most powerful tool of intervention both in national constitutional politics[16] and in international conflicts.[17] Interestingly, such dramatic inroads into national and international matters are legitimised and facilitated by a highly formalist reading of the Convention and its protocols.[18]

In light of Strasbourg's teachings, and given the promotion of the Nice Charter to the status of bill of rights in the draft Constitutional Treaty, the idea that property will not be the subject of European reshaping is even less tenable.[19] The Constitutional Treaty's pledge, if read as a promise of non-interference with property, would experience the strange fate of being abundantly breached even before being uttered. The old promise has indeed lost its pre-modern clarity.[20] Why, then, has it been carried through, with no qualifications whatsoever, in the Treaty's post-modern life? Is this a *lapsus calami*, or an accidental misrepresentation of federal boundaries?

A different and more intriguing reading is possible. For reasons soon to be analysed, the proclaimed exclusion of property from the reach of Europeanisation carries much rhetorical power and can affect significantly the ongoing negotiation of competences.

## III The Logic of Property Exceptionalism According to Conventional Accounts

### *A Nationalisation*

For the Community's founding fathers, property's exceptionalism in the context of regional integration was a firm principle, clearly embedded in Article 222 of the Treaty of Rome (now Article 295 TEC). In 1957, the pledge of non-interference with States' property systems performed the essential function of allowing the forthcoming nationalisation projects.[21] Of course, that pledge did not suffice to give States complete leeway: in *Costa v ENEL*[22] the Court of Justice soon clarified that nationalisation would be

[16] See e.g. Court of Human Rights Case 28342/95, *Brumarescu v Romania* (28 October 1999). In this case the European Court of Human Rights predictably discusses only an individual's right to reparation, following the illegal taking of his property by the government. But the Brumarescu saga involves much bigger questions, and demands that Romania assure the independence of its judiciary from the executive (Brumarescu's complaint depended on the fact that the general prosecutor had used his extraordinary powers of appeal to make the Romanian Supreme Court reverse a lower court's judgment in Brumarescu's favour).

[17] A long and consuming saga has recently allowed Ms Loizidou—owner of real estate in Northern Cyprus—to receive monetary reparation from Turkey—a fact that indisputably attributes to Turkey the illegal occupation of that territory. See *CoE welcomes successful outcome of Loizidou case*, in Athens News Agency: Daily News Bulletin in English, 3 December 2003, at <http://www.hri.org/news/greek/ana/2003/03-12-03.ana.html>. For the merits of the dispute see Court of Human Rights Case 40/1993/435/514, *Loizidou v Turkey* (18 December 1996).

[18] In Court of Human Rights Case 44306/98, *Appleby v United Kingdom* (May 6, 2003), for instance—regarding the access to private areas for the diffusion of political messages—the Court declined 'to prescribe the necessary content of domestic law by imposing some ill-defined concept of 'quasi-public' land to which a test of reasonable access would be applied.' See O. Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) ELJ ???; O. Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law', (2004) 17 *Canadian Journal of Law & Jurisprudence* 61.

[19] The Nice Charter, incorporated as a bill of rights in Part II of the Constitutional Treaty, dedicates an article to the 'right to property.' Charter of Fundamental Rights of the European Union, OJ C 364/01, 18 December 2000, Article 17.

[20] See M. Trimarchi, 'Proprietà e diritto europeo', (2002) *Europa e diritto privato* 707, 711.

[21] U. Mattei, 'La Proprietà', in R. Sacco (ed.), *Trattato di diritto civile* (UTET, 2001), 36–37.

[22] Case 6/64, [1964] ECR 585 (in English Special Edition).

subject to the Community's scrutiny of State monopolies. Today, it is absolutely clear that the Union does have a say in the States' regulation of private or public ownership of essential resources and services. Article 295 TEC is occasionally invoked to defend States' autonomy in such matters,[23] but the far-reaching application of EU competition law and free-movement principles seriously constrains the option of public ownership. The accelerated transformation of ownership régimes in Central and Eastern Europe, made necessary by the prospect of enlargement, proves beyond doubt that European integration does affect national property systems.

### *B Internal Affairs*

A second and more intuitive point is often invoked to explain property's exceptional status in the Treaty of Rome: in a project of market integration based on freedom of movement, there was no apparent need to harmonise the rules concerning property of land, which is local by definition.[24]

That property of immovables may be singled out and sheltered from federalist pressure is a time-honoured insight. Justice Story, deciding *Swift v Tyson*, wrote that 'the construction of ordinary contracts . . . and . . . questions of general commercial law' would be controlled by 'the general principles and doctrines of commercial jurisprudence', as developed by federal judges with no reference to State courts' precedents.[25] States' common law, however, would remain binding in disputes relating to 'things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character'.[26]

The case was famously overruled by *Erie R. R. v Tompkins*.[27] Deciding that '[t]here is no such thing as a federal common law', the US Supreme Court allowed property and contract to remain bedfellows under state law. The point made by Justice Story, however, retains its substantive appeal. The logic of property exceptionalism might seem unobjectionable when *land*, as opposed to *chattels*, is concerned. No matter how hard the wind of integration blows, land remains within the conventional boundaries of any given Member State. In principle, Europe's respect for national régimes concerning real estate might be a logical corollary of the internal affairs doctrine: citizens who never exercise their right to travel, work, do business, or establish themselves beyond the borders of their native state cannot invoke their European four freedoms. Land stays put by definition and is, therefore, a quintessentially internal matter.

By Roman law standards, this conceptualisation would make sense. Ownership used to coincide with physical dominion and direct control. The *dominus* was ideally connected to property in a physical way and tied to its local dimension.[28] However, in light

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[23] A glance at the website of the French railways, nationalised since 1938 (Société Nationale des Chemins de fer Français), shows how Art 295 TEC can be understood as the bulwark against privatisation. 'No European institution can [privatise the railways], quite simply because the Treaty forbids it (Article 295 on the system of property ownership)'. <http://lesfinances.sncf.com/anglais/euro_background.htm>.

[24] A. Gambaro, 'Toward a Codification of the European Law of Property', in A. Gambaro and M. Rabello (eds), *Towards a New European Jus Commune* (Hebrew University of Jerusalem, 1999) 89–90.

[25] 41 US 1, 19 (1842).

[26] *Op. cit.* note 26 *supra*, at 18.

[27] 304 US 64 (1938).

[28] For a contemporary revival of the physical element of rights *in rem*, as an essential taxonomic criterion, see A. Pretto, 'Primary Rights and Rights in Rem', in P. Birks and A. Pretto (eds), *Themes in Comparative Law* (Oxford University Press, 2002) 79–80.

 

of subsequent understandings of real property, the internal affairs doctrine is a misfit. Rights *in rem* have long been understood in their relational dimension, as a multiplicity of entitlements meant to regulate potentially conflicting interests of owners and non-owners.[29] People travel, and their relational rights and duties travel with them. While land is local, rights in land move with their owners. In line with such modern characterisations, the Union has not baulked at the idea of regulating real property rights. The time-sharing directive—phrased in terms of contracts but clearly addressing issues of ownership—is the most glaring example of this sort of legislative intervention.[30] Furthermore, more oblique forms of harmonisation are also to be found in the European Court of Justice's adjudication of private international law disputes.[31]

### C *Use versus Exchange*

In matters of movables and intangibles, it is even more difficult to explain what sets property apart from contract and tort régimes in the logic of market integration.[32] It is possible that the founding fathers did not contemplate movables and intangibles when pledging non-interference with States' property systems. Some authors read Article 222 of the Treaty of Rome and its more recent reincarnations as obviously referring only to 'real property'.[33] It is a fact, however, that Article 222 EC contained sweeping, generalising language, and that its wording made Community regulation of property other than land somewhat objectionable on formal grounds.[34] Moreover, civil codes tend to treat property in all of its forms as a coherent body of law, breakable only at its fringes into ad-hoc ownership régimes.[35]

There is a sense in which the drafters of the Treaty of Rome could have conceived of market integration as unrelated to the property régime of movable things and inventive ideas. Established continental theory teaches us that goods must exist and be defined as useful before being exchanged. Categories of proprietary enjoyment and *use* values must be identified before determining *exchange* values. In other words, according to traditional doctrinal logics, identification precedes commodification.[36] If these two events could be kept chronologically and semantically separate, then it might make

[29] See W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919), 35–64; Mattei, *op. cit.* note 21 *supra*, at 137.

[30] Dir 94/47.

[31] See *Webb v Webb, op. cit.* note 13 *supra*.

[32] It is common to lump together contracts, torts and property as patrimonial law or 'economically related fields of private law', and to set them apart from other areas of codification—mostly family law. See M. Antokolskaia, 'The Harmonization of Family Law: Old and New Dilemmas', (2003) 11 ERPL 28, 41. Approximation of States' family laws may derive rather from the need to establish an area of freedom, security and justice than from the logic of economic integration. See Council report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01.

[33] A. Gambaro, 'Perspectives on the codification of the law of property: an overview' (1997) 5 ERPL, 497.

[34] R. Myrick, 'Influences Affecting the Licensing of Rights in a Unitary European Market', (1993) 4 *Fordham Intellectual Property, Media & Entertainment Law Journal*, 81, 97.

[35] See G. Samuel, 'The Many Dimensions of Property', in J. McLean (ed.), *Property and the Constitution* (Hart, 1999) 51, showing how in Roman law, '[l]and was a *res* and the distinction between immovable and moveable property was simply one distinction among many'. That distinction is much sharper in English law, where it is expressed in terms of real versus personal property. *Ibid.* at 52.

[36] For insightful and detailed reflections on this point see A. Jannarelli, 'Beni, Interessi, Valori. Profili generali', in N. Lipari (ed.), *Diritto Privato Europeo,* Vol. I (Cedam, 1997) 377–378.

sense to use the distinction between the two as an elegantly simple formula for the allocation of competences between centre and periphery. States and local powers would be left in charge of the identification, definition, and 'packaging' of property rights. On the other hand, the central authority, being in charge of markets, would be best equipped to deal with the commodification stage. The European Court of Justice has often espoused this formula with much conviction. In a wide variety of intellectual property cases, for instance, the Court of Justice has explained that EC law will take for granted and respect whatever packages of property rights States have defined; it will only take charge at a point conceptually coinciding with the interface between property and contract, regulating the latter, while leaving the former unscathed.[37]

Alas, the formula is only deceivingly simple. The recent history of industrial property rights, securities, warranties, and so on proves to the European constituency at large that the definition of ownership rights is intrinsically connected to the dynamics of their life in the stream of commerce.[38] It is simply impossible to regulate the exchange of movable things without affecting their owners' modes of proprietary enjoyment and therefore their entire property régime.[39] In matters of intangibles, the Community's competence to re-define industrial property is no longer a subject of meaningful discussions, both within the Union and in the context of international trade—and on that front, even the drafters of the Constitutional Treaty have caught up with reality.[40]

The answer to the question of property exceptionalism is then to be found elsewhere—namely, in what remains of the relation between property law and distributive ideology, and in the rhetoric of the competence debate.

## IV Property Rules and Constitutional Traditions

The idea that property exceptionalism may depend on the interface between property law and the particular distributive ideology embraced by each national or sub-national community has historical foundations. In continental Europe, and especially in the French legal tradition, the following syllogism used to enjoy much popularity: (1) property is the true core of civil codes; (2) codes are the true constitutions of national states; (3) private property régimes lie at the heart of national constitutions. This logic certainly carried much weight in the 1950s, and might by itself explain the presence of Article 222 in the 1957 Treaty of Rome. Because it was not the business of the Community to harmonise national constitutions, it followed that property should remain outside of the purview of harmonisation.

The 'property-as-constitution' syllogism has now been discredited by highly regarded historical and comparative-law studies, characterised by a vehement anti-formalist

[37] This reassuring partition has been invoked by the Court of Justice a number of times in matters of intellectual property. See e.g. Case C-144/81 *Keurkoop v Nancy Kean Gifts* [1982] ECR 2853.

[38] See Jannarelli, *op. cit.* note 36 *supra*. Debtors' goods stand a chance of becoming securities (a major field of harmonisation today). The proprietary powers of their owners are then strictly dependent upon their transactional life. See U. Drobnig, 'Present and Future of Real and Personal Security', (2003) 11 ERPL 623.

[39] See Sjef Van Erp, 'Civil and Common Property Law: Caveat Comparator—The Value of Legal Historical-Comparative Analysis', (2003) 11 ERPL 394, 398–399.

[40] Article III-68, Draft Treaty, *op. cit.* note 8 *supra*.

 

stance and by a commitment to debunk conventional legal accounts.[41] The criticism can be summarised as follows.

*Dominium* bears very little relation to *imperium*. Civil codes mostly contain merely technical rules for property circulation and protection. These rules are oftentimes the product of historical contingencies rather than of specific ideological drives. Because they have neither constitutional status nor distributive significance, Western rules of ownership have survived with virtually no adjustment in Communist régimes, and cannot be considered politically significant.[42] Only the *outer boundaries* of proprietary entitlements possess constitutional salience. Such boundaries result from three main aspects of legislative intervention: commodification, i.e. the choice to exclude given goods from the very possibility of ownership;[43] the legislative definition of a specific balance of public, communal, and private properties; and all forms of regulatory takings (including urban planning, zoning, taxation, etc). These aspects of legislative intervention, however, are *not* to be found in the codes. Technical rules of property circulation and protection say absolutely nothing about economic constitutions and public values.[44] The Treaty's pledge of non-interference only refers to those norms that define 'property *systems*,' and no systemic choices are involved in the codes' technical rules concerning property circulation and protection.

These statements are not, *per se*, arguments in favour of private law harmonisation.[45] They do, however, sever property *rules*—to be found in private law codes next to contracts and torts provisions—from property *systems*—operating as dimensions of national governance. This leads many jurists to the conclusion that Article 295 TEC does not shelter merely technical property *rules* from the far reach of Article 95 TEC, and that such rules can be harmonised if necessary for the proper operation of the European market.[46] Economic efficiency and other technical criteria may provide reasons to let certain rules prevail over others.[47]

If it were possible to sever property *rules* from *systems* and to read the Union's pledge of non-interference as pertaining to the latter only, that pledge would carry very little significance today. While rules differ, systems tend to converge in the Union. Already in 1974, the European Court of Justice determined that in the constitutional traditions

[41] On the impact of this school of thought on contemporary legal scholarship see D. Kennedy, 'The Politics and Methods of Comparative Law', in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions And Transitions* (Cambridge University Press, 2003).

[42] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law,' (1991) 39 *American Journal of Comparative Law* 1, 14.

[43] For the insight that commodification choices define a system's worldview see M. J. Radin, *Contested Commodities* (Harvard University Press, 1996).

[44] Gambaro, *op. cit.* note 33 *supra*, at 499. For personal property, the limits (again to be found outside the codes) consist mostly of technical regulations: *ibid.*, 500.

[45] Gambaro, *op. cit.* note 24 *supra*, 89–90, argues that harmonisation is not really necessary given the marginal relevance of local property rules in a federal system (as per Justice Story's opinion). However, these rules are deeply rooted in tradition and phrased in highly technical jargon. This jargon, with its State-specific grammar rules and its plethora of untranslatable terms (such as 'trust' and 'personal property') might result in merely technical obstacles to transborder dialogue. The development of a common 'grammar of property'—a rather Herculean task—may one day avoid such difficulties (Gambaro, *op. cit.* note 33 *supra*, at 504).

[46] See e.g. Sjef Van Erp, *op. cit.* note 39 *supra*, 396–397, according to whom unification of private international law would be the 'second best' option, next to the optimal solution of harmonising property law.

[47] Gambaro, *op. cit.* note 33 *supra*, at 503.

of *all* the Member States the right to enjoy one's property could be limited by law in light of general interests. Furthermore, the Court of Justice found that national constituencies would come to more or less identical solutions in performing the necessary balancing of conflicting interests.[48] Given this convergence, property's continued exceptionalism would only matter to those new or forthcoming members still working on the interface between the private law of property and their recently revised constitutional apparatus. The pledge might be seen as a mere transitional norm, meant to signal respect and tolerance for delays in the ongoing convergence of Eastern European property laws with their Western counterparts. This narrow reading would certainly be in line with the Commission's aspirations and with the conviction of a growing number of authors that there is no textual obstacle whatsoever to the harmonisation of property rules.[49]

The problem with this reading, however, is that the rules/systems dichotomy is hard to maintain. The comparative analysis that sets property rules free from ideological undertones, while in many ways refreshing, may have gone one step too far—because it overstates the separation between technical rules and ideological systems—or perhaps halted one step too soon—by failing to bring the competence debate into the picture. On both aspects, a few more words are necessary. The following Part reconsiders the relation between technical property rules and constitutional systems, not only in terms of substance but also in light of the particular rhetoric of the competence debate. The point is to show how property exceptionalism might really depend on the interface between property law and distributive ideology.

## V Rules as Systems

### *A Integration and Revival*

The connection between private law rules and constitutional values in each national system has long been a matter of scholarly debates.[50] As observed above, comparative law scholars have discredited this connection by pointing at the fact that identical private law rules have often operated under a variety of constitutional designs. Interestingly, however, the process of legal harmonisation is causing a veritable revival of that connection.

As early as 1974, the Court of Justice began to give horizontal effect to certain Treaty provisions, making higher norms directly available in the adjudication of private disputes.[51] More recently, the jurisprudence of the European Court of Human Rights and the incorporation of a bill of rights into the draft Constitutional Treaty have prompted meaningful scholarly reflections on the unavoidable interplay between technical rules

[48] Case C-44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[49] See e.g. C. von Bar, 'The Study Group on a European Civil Code', in European Parliament, Directorate General for Research, *Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code*, Working Paper, Legal Affairs Series, JURI 103 EN (June 1999), 137.

[50] See e.g. M. Costantino, 'Il diritto di proprietà', in P. Rescigno (ed.), *Trattato di diritto privato,* Vol. VII, Proprietà (UTET, 1982) I, 209, at 210–211, explaining how technical rules of the Italian civil code (such as those prescribing mandatory distances between neighbouring buildings) define and constrain the possibilities of applying the constitutionally mandated 'social function' of property in the adjudication of private disputes.

[51] *Case* C-127/73, *Belgische Radio en Televisie v SABAM* [1974] ECR 51.

 

and higher values.[52] The threat of globalisation without governance leads a growing number of jurists to argue for the constitutionalisation of those private law rules that will regulate transborder transactions.[53] For others, globalisation is rather an *opportunity* for the development of new links between private law and fundamental rights, to be found in an ideal balance of traditional state-based scrutiny and spontaneous, deliberative forms of constitutionalism.[54]

## *B Technical Rules and Political Arguments*[55]

These developments reinforce the argument that constitutional norms only acquire actual meaning through the process of private adjudication, and that the way in which technical rules are formulated informs the discussion of higher values. To illustrate this point, simply consider one instance of divergence between the property rules developed over the centuries by the several European nations—namely, the régime of publicity of land transfers. States have struck different balances between the principle of consensualism on one hand (making the transfer of property effective immediately after the parties' consent), and the protection of creditors on the other (making publicity a constitutive moment of the transfer). Indeed, the codes' balancing of these conflicting interests may have no real distributive consequence and remain irrelevant in Coasian logic. The choice between alternative rules may have nothing to do with ideology and everything to do with historical accident or practical contingencies. It can be entirely disconnected from the type of economic constitution that each country may have espoused. However, the justifications that allow one type of interests to prevail over the other can be ideologically charged. A systemic emphasis on publicity may appeal to those concerned with the preservation of family assets: by subjecting the validity of transfers to registration, the legislator ensures that inheritance will not be depleted by secret transactions *inter vivos*. By contrast, making consent the constitutive moment of land transfers promotes velocity in the circulation of wealth and potentially sacrifices the interests of prior ownership to the cause of systemic efficiency.[56] The difference is in the rhetoric, but that is exactly where politics resides. The wall separating rules (of circulation and protection) from systems (of constitutional relevance) is permeable. Even for this reason only, the hypothesis that property exceptionalism might depend

[52] See M. Hesselink, *op. cit.* note 4 *supra*, 177–190; Gerstenberg, *op. cit.* note 18 *supra*; C. Joerges, *On the Legitimacy of Europeanising Europe's Private Law: Considerations on a Law of Justi(ce)-fication (justum facere) for the EU Multi-Level System*, EUI Working Paper Law 2003/3. For a contemporary endorsement of the Italian studies of the sixties on the constitutional meaning of property law see C. Salvi, 'Norme costituzionali e diritto privato. Attualità di un insegnamento', (2004) 22 *Rivista critica del diritto privato* 235.

[53] L. Ferrajoli, 'Per un costituzionalismo di diritto privato', (2004) 22 *Rivista critica del diritto privato* 11.

[54] G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges, I. J. Sand and G. Teubner (eds), *Constitutionalism and Transnational Governance* (Hart, 2004). For a sobering perspective on the possible outcomes of deliberative processes in the context of private law adjudication see O. Gerstenberg, ' "Integrity-Anxiety" and the European Constitutionalization of Private Law', in K. Nuotio (ed.) *Europe in Search of `Meaning and Purpose'* (Forum Iuris, forthcoming).

[55] See D. Kennedy, 'The political stakes in 'merely technical' issues of contract law', (2002) 10 ERPL 7.

[56] This example is borrowed from J. Bell, 'Property and Legal Culture in France', in Birks and Pretto, *op. cit.* note 28 *supra*, at 83. After identifying the several conflicting interests at stake, the author explains: 'Although each, in its different way, requires publicity of transactions, the justifications are different and appeal to and repel different political constituencies'.

on constitutional symbolism and rhetorical importance should not be dismissed. But there is more.

### *C The Ideology of Transplants*

In comparative law circles, the name of Alan Watson is associated with the principle that law is independent from society.[57] His theory of legal transplants is based on multiple examples of non-principled export and import of legal models from one socio-political culture to another. A conventional understanding of Watson's work could easily feed the perception that private law harmonisation is, indeed, a technical project meant to iron out all meaningless divergences between the legal systems of the Single Market. More recently, however, it has been pointed out that Watson's work does not really lead to a non-political reading of legal transplants.[58] Quite to the contrary, if the circulation of legal models and their reception in different countries is *only* the working of legal élites immune from political accountability, then the prevalence of a given technical rule over another represents the victory of given élites over others. Even when rules are entirely independent of the socio-political ethos of any given constituency, and are as technical as the choice to drive on the right or on the left side of the road, the fact remains that their prevalence over alternative rules in the process of harmonisation will produce losers and winners.[59] Some will face steep costs of transition; others will enjoy first-mover advantages, and will export both their own categories of legal discourse and their own set of justificatory principles. From the viewpoint of the élite jurists in the importing country, replacing old rules with new ones may as well be an act of political strategy. The import of the *Code Napoléon* in many parts of the world was an ideological manifesto, showing the aspiration of some importers to achieve exactly *the* kind of modernisation produced by the French bourgeoisie.[60] It is easy to see how similar phenomena may prompt the reception of Western property rules in central and Eastern Europe.[61]

As merely technical rules may possess strong associations with the political aspirations of powerful groups, the possibility of a link between rules and public society becomes more obvious.

### *D Property as Discourse*[62]

It remains to explain why the pledge of non-interference should relate specifically to property. There is nothing intrinsically more 'public' in property than, say, in contract[63] or tort law.[64] The distinction between *technical* civil-code rules and *constitutional* or

[57] A. Watson, *Society and Legal Change* (Temple University Press, 2001).

[58] P. G. Monateri, 'Critica dell'ideologia e analisi antagonista: il pensiero di Marx e le strategie giuridiche della comparazione', (2000) 18 *Rivista critica del diritto privato*, 703.

[59] See M. Hesselink, 'The Politics of a European Civil Code' (2004) 10 ELJ 675–697.

[60] Monateri, *op. cit.* note 58 *supra*, at 710.

[61] See G. Ajani, 'Imperio, prestigio e caso nella circolazione di modelli nell'Europa orientale', in P. Cendon (ed.), *Scritti in Onore di Rodolfo Sacco*, I (A Giuffré, 1994), 34–35.

[62] On the impact of discourse on policy and legal changes see V. Schmidt, *The Futures of European Capitalism* (Oxford University Press, 2002).

[63] See, e.g., H. Collins, 'Disclosure of information and welfarism', in R. Brownsword, G. Howells and T. Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth, 1994), 105–106.

[64] W. van Gerven, 'Mutual Permeation of Public and Private Law at the National and Supranational Level', (1998) 5 MJ 7, notes how tort law has evolved to produce most relevant effects in areas of public law.

 

administrative boundaries of property rights could be transferred almost *verbatim* to the realm of freedom of contract—and there again the distinction would be fragile and permeable. Nor is property any more central than contract in the structure of private law systems—after all, freedom of contract is as basic a pillar of classical legal thought as the subjective right to property. Furthermore, in terms of doctrinal coherence or self-conscious production of scholarly taxonomies, the civil law of obligations boasts a much longer pedigree than the law of property. So why would Treaty drafters still tiptoe around it in the twenty-first century?

The point is that, at the level of public discourse, property rules' implications for public regulation are more direct. It is in matters of property that each system articulates most visibly its own balance of individual liberties and collective responsibilities.[65] In conventional perceptions, a public core characterises the entire private law of property. The distinction between technical rules and constitutionally salient regulation is too subtle to survive the roughness of political arenas. While contract law is about disaggregate bilateral relations, rules of ownership apply *erga omnes* and are often visualised by symbols of possession.[66] The connection between property and authority is also immediate in international political jargon, where sovereignty coincides with the right of a government to exclusively exercise its powers within a particular territory. The 'new legal order' envisaged by the integration project—as famously articulated by the Court of Justice in *Van Gend en Loos*[67]—transforms and softens the concept of sovereignty, but it never purports to erase or re-define states' territorial boundaries.[68] Moreover, land remains the most obvious and reliable source of national fiscal revenues. Issues of urban planning, housing, and zoning may be influenced by such EU policies as CAP or structural funds, but they remain quintessential expressions of national or infra-national governance. Land, insofar as it is owned or legally controlled by municipalities, provides the necessary forum for local government.

In all the Member States, property law has been the subject of intense regulation for the sake of such politically sensitive interests as housing, demographics, rent control, taxation, and urbanisation. Adopting the jargon of the Constitutional Treaty, one might broadly define such interests as 'social inclusion' or 'social protection'—neither of which belongs in the list of fully Europeanised subjects. In European political discourse, the scholarly distinction between private rules and constitutional definition of ownership remains imperceptible; the harmonisation of *private* property is intuitively associated with a hard core of *public* values, which are not to be to be swept away as technicalities by Europeanising forces.

Property's exceptionalism in the Constitutional Treaty is due to the fact that the generation of current decision-makers still sees private property as pivotal. It is a generation intellectually fed by the political debates preceding the fall of the Berlin Wall and characterised by a sharp emphasis on the political symbolism of private property. Property law *is* exceptionally meaningful in the negotiation of competences on private law harmonisation, not only because it *is* loaded with governance implications, but also because it is *perceived* as such in political discourse. And in both bargaining and

[65] See L. Mengoni, 'Proprietà e libertà', (1988) *Rivista critica del diritto privato* 445.

[66] On visual symbols (fences, in particular) see C. Rose, *Property and Persuasion*, (Westview Press, 1994) 1–2.

[67] Case C-26/62, *Van Gend en Loos v Nederlands* [1963] ECR 1.

[68] An obvious illustration of this point is Germany's reunification. The Community had no direct institutional connection with—and accepted with no Treaty alteration—Germany's sovereign choice to redefine its borders.

politics, perceptions do matter. For the Union to signal that property rules will not be easily tinkered with is a highly symbolic gesture in the spirit of subsidiarity.

## VI Harmonisation, Legitimacy, and the Private-Public Divide

Property's textual exceptionalism casts new light on the struggle for legislative and judicial control in all matters of European governance.

With the goal of realising a truly seamless market, Brussels aspires to a potentially unlimited interference with States' laws.[69] On the other side of the fence stand various subsets of national and transnational actors. This adversarial model applies to private law as well.[70] The control over private law statutes and adjudication determines who gets to shape both form and substance of local legal discourse, and is therefore a subject of political tension between the centre and the many peripheries of Europe.[71] The state of the Union is characterised, now more than ever, by multi-actor and multi-level negotiations meant to devise acceptable divisions of competences among all the players involved.[72]

In this scenario of pervasive bargaining, over the years the Union's institutions have developed a fundamental rhetorical device: every attempt to broaden the field of EC competences is regularly accompanied by the promise that integration shall not be pervasive. Some things—the promise goes—will remain pristine, preserved in the amber of local government for sake of diversity, pluralism, and respect for peripheral choice.

This reassuring refrain has adopted a variety of slogans—such as subsidiarity, proportionality, choice of legal basis, or centre of gravity—and relied on a number of seemingly sharp distinctions: monetary versus economic policy, selling arrangements versus product requirements, market versus environment or health, and private versus public law. All of these formulae have been used, in various fashions, to give the impression of firm competence boundaries and to reinforce the legitimacy of the Europeanising project. All are controversial, subject to continuous erosion, and prone to obsolescence.

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[69] See A. Somek, 'Market Holism. Towards a Reconstruction of the ECJ's New Theory of Community Competence', at <http://www.somek.org/Lectures/Market%20Holism%20HLS.pdf>.

[70] The monopoly of private law is of utmost significance to certain national constituencies. Many States' legislators have shown a tendency to implement EC directives with a visible bias in favor of pre-existing private law rules or standards (see the Scandinavian implementation of Dir 93/13/EEC on unfair terms in consumer contracts, as discussed in Case C-478/99, *Commission v Sweden* [2002] ECR I-04147). National judiciaries often welcome EU-driven reforms only insofar as they remain capable of controlling the practical impact of such reforms in the courts. Implementation, adjudication and argumentation tend to be conducted in local legalese, according to local tradition and local sensitivities. Illustrations abound. Case C-52/00, *Commission v France* [2002] ECR I-3827 (on products liability) is a particularly revealing one, given the lucidity of the arguments voiced by the French government. For insightful accounts of such phenomena see H. Halbhuber, 'National Doctrinal Structures and European Company Law', (2001) 38 CMLR 1385.

[71] Cf. the European Parliament resolution on the approximation of the civil and commercial law of the Member States, OJ C 140 E/538, 13 June 2002: 'the discussion of large scale harmonization of Member States' core civil law is a politically charged and sensitive issue'. Denying or downplaying the adversarial nature of this process leads, at the very least, to missing an essential view of the European architecture. See Caruso, *op. cit.* note 1 *supra*.

[72] The tensions generated by private law harmonisation cannot be reduced to a linear representation. 'Centre' and 'periphery' are complex *loci* in European political discourse. The possibilities of private law harmonisation breed new transnational allegiances as well as unexpected infra-national fractures. See F. Nicola, 'Multilevel Alliances, Progressive Lawyering and Distributive Consequences in European Contract Law', in D. Danielsen (ed.), Northeastern School of Law Progressive Lawyering Project (forthcoming in 2005).

 

Paradoxically, the oldest of such formulae—the public/private dichotomy—seems to possess the longest-lasting rhetorical power. It was once used to keep private law under comprehensive State control and to shelter it from harmonisation. The same dichotomy is now cast in different semblances, and performs an opposite function in the competence debate: today, it is mostly in areas of *public* governance that national or subnational constituencies can technically resist the sweeping force of Europeanisation. While formally collapsed, and even flipped upside down, the old divide is still capable of producing discursive consequences in the law of the European Union. It is still an effective signalling device, meant to assure national constituencies that close attention will be paid to the harmonisation of politically salient matters.

This essay has focused on a most recent incarnation of that dichotomy—the property/contract distinction—to illustrate and explain this counter-intuitive phenomenon. The distinction between property (as intrinsically public) and the rest of private law performs just as meaningful a rhetorical function as other, more famous dichotomies, invented to strengthen the visual boundaries between Union and States' competences and to legitimise the process of harmonisation. The novelty is that the old dichotomies play themselves out in reverse fashion: while private law is now potentially subsumable into the competences of the Union, those of its parts that are intrinsically public, and politically sensitive, will have to be negotiated with the Member States or with subnational units of governance in terms of welfare, housing, fiscal sovereignty etc. It is also plausible that analogous negotiations will occur in matters of torts and contracts, even if the pledge of non-interference is not spelled out in such general terms. In fact, torts and contracts régimes often overlap with those 'public' regulatory functions for which the Union can only promote 'coordination' or provide 'support'.[73]

By a process of nesting, the ever-dying public/private dichotomy has found new rhetorical life within private law. A pledge of non-interference with property, or with any other aspect of private law, is quite meaningful in the multilateral struggle for control over competences and sectors of European governance. It is a promise of collective political reflection—a signal to all those involved in the process of Europeanisation that much thought will be given to all private law matters of public significance. It is a promise that the distributive implications of private law harmonisation will be made visible and discussed.[74] This promise, perhaps, will be kept.

[73] See Article 11(5), Draft Treaty, *op. cit.* note 8 *supra*. See also Article III-103, which carves out of general contract law the particular field of workers' collective bargaining, promising state diversity in such matters.

[74] See Nicola, *op. cit.* note 72 *supra*.